

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 470/09
5151564

BETWEEN BEVERLY STOCKMAN
 Applicant

AND PROTECTIVE PAINTS
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Kathy Hughes, Advocate for Applicant
 Richard Harrison, Counsel for Respondent

Investigation Meeting: 23 September 2009 at Auckland

Submissions Received 8 October 2009 from Applicant
 19 October 2009 from Respondent

Determination: 23 December 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] There are two issues for consideration:
- (a) Was Ms Stockman an employee of Protective Paints Limited;
 - (b) If she was, was she constructively dismissed by Protective Paints Limited?

Agreement for Sale and Purchase

[2] On 29 October 2008 Paint and Décor Limited (“Paint and Décor”) entered an agreement for sale and purchase of the business of Benjamin Moore Pacific Limited (“BM Pacific” or “BMP”), at that stage Ms Stockman’s employer. Settlement was scheduled for 31 October 2008. The owners of BMP were Mr Anthony McCarthy

and Mr Barry Whalley. A term of the sale and purchase agreement, at clause 15, was that BM Pacific would pay all staff wages and salaries and other entitlements up to the possession date and Paint and Décor would not be liable for these payments. The sale and purchase agreement provides:

It is acknowledged that staff presently employed by the vendor (including, but not limited to, those persons named as key employees in schedule 3) may be offered employment at the option of the purchaser, subject to the purchaser entering into employment contracts with such employees and the vendor authorises the purchaser to approach such employees accordingly with effect from the date of this agreement.

[3] The agreement for sale and purchase was originally intended to settle on 31 October and the terms of sale included an undertaking that BM Pacific would pay all staff up to the date of possession and that the name Benjamin Moore was to be transferred for use by Pacific and Décor.

[4] On 29 October 2008, Mr Bryce Woods, the Managing Director of Paint and Decor and director of Protective Paints Ltd, the sole shareholder of Paint and Decor, attended a meeting at BM Pacific where the sale and purchase of BM Pacific to Paint and Décor was announced and that this would take effect on 31 October 2008.

[5] On 29 October 2008, a memorandum was sent by Mr Woods to Benjamin Moore shop staff. This read:

Important

*Takeover is set for Friday the 31st of October
Thursday will be your last day with B.M Pacific Ltd.*

There will be changeover of eftpos and bank accounts on Thursday night/Friday morning.

You will be faxed a copy of your computer stock record, again either Thursday after closing on Friday morning.

Immediately on opening the shop count all stock and verify that the stock record supplied is accurate.

This needs to be done as soon as possible and confirmation of stock should be faxed to 09 274 0940.

We thank you in advance for your co-operation.

[6] This memo was tabled at a meeting on 29 October. The meeting was of management staff, the accountant, the national sales manager, Mr Woods,

Mr Whalley, Mr Peter Guise and Mr Colin Theyers, a Chartered Accountant. It was distributed to shop staff and faxed to the other staff on 30 and 31 October.

[7] Also on 29 October a memo to all BMP staff was tabled. This stated, inter alia:

The business of BM Pacific Limited has been purchased by Paint and Décor Ltd effective 31st October 2008. It is intended to continue to trade the business as Benjamin Moore Paints.

...

The intention is to transfer most of the staff, in the immediate term, to the new company. However, as is the case in these circumstances, not all staff will be employed by the new company. The current terms and conditions, in the main will be carried over in the short term. The new company will negotiate individual employment contracts, which inevitably have some changes, as soon as possible.

These arrangements are subject to and without prejudice to the rights of Paint and Décor Limited to decline to complete settlement of the purchase of the business of BM Pacific Limited and Paint and Décor Limited assumes no liability to you until settlement of the purchase is finally completed. [My emphasis]

We will be talking to all employees in person in the very near future.

...

We wish to welcome you aboard as part of Paint and Décor Limited and look forward to working with you for the betterment of all concerned.

Paint and Décor Limited

*Bryce Woods
Managing Director*

[8] Staff would have seen this about 1.30pm on 30 October.

[9] Prior to this, also on 30 October 2008, a notice was given to BM Pacific employees by Mr Whalley. It was headed *Sale of Business*. It reads:

This is to advise that all BMP staff that agreement has been entered into with Paint and Décor Ltd for the sale of the assets of BM Pacific Ltd effective 31st October 2008.

Paint and Décor Limited is a wholly owned subsidiary of Protective Paints Ltd.

The new owner's intention is to develop and grow the existing paint business.

BM Pacific has been unable to survive financially in the current market and the sale of the business is, unfortunately, unavoidable.

At the close of business today all employment agreements between BM Pacific Limited and its employees will terminate. Wages to the end of today, all holiday pay owing as well as notice in lieu will be paid out by BMP next week.

Paint and Décor Limited have indicated that they wish to retain the majority of staff and will consult with each employee individually with regard to ongoing employment opportunities. The new owner will assume payment of all salaries and wages from 31st October.

More information will be forthcoming from Paint and Décor Limited today.

Yours sincerely,

Barry Whalley

[10] However, for a variety of reasons, settlement did not take place on 31 October 2008.

Payroll and Payment

[11] Despite Mr Whalley's statement that staff would be paid out the following week and that the new owner would take over the payments from 31 October that did not in fact happen.

[12] Between 31 October and final settlement on 21 November 2008, Mr Woods arranged funding for BM Pacific's salaries and wages as well as payments to suppliers. BM Pacific did not have the cash reserves to make these payments and without them would have gone into receivership or liquidation, preventing the possibility of settlement resulting in the consequential loss of employment for all BM Pacific staff.

[13] The payments of monies for wages and salaries were made by Paint and Decor to BMP's account. Ms Stockman was responsible for the BM Pacific payroll and its set up. Paint and Décor had no involvement with that. Ms Stockman made the payments in the name of Paint and Decor and used Paint and Decor's IRD number but this had not been discussed with Paint and Decor. It was a unilateral decision made by Ms Stockman.

[14] BM Pacific did not need to pay out notice and holiday pay as settlement had not taken place, staff were continuing in the employment of BM Pacific and the earlier advice and notification had been premature.

[15] When it appeared that settlement would be able to take place, Fleming Foster & Co (Paint and Decor's solicitors) wrote to Whaley & Garnett (BMP's solicitors) asking for relevant records confirming payments to all staff. A schedule was duly supplied, an undertaking to pay was received on 18 November and payment was finalised on 20 November.

Was Ms Stockman Employed by Paint and Decor?

[16] Ms Stockman was part of the BM Pacific management team that was assisting with the transition and Mr Woods liaised with her on that basis. He said it was the intention that Paint and Decor would continue to trade the business as Benjamin Moore Paints and that Paint and Décor Limited would take over responsibility for employment of staff as at settlement. That would be on a fixed term basis while they reviewed staffing requirements and negotiated new individual employment agreements.

[17] [26] Ms Stockman says that she was an employee of Paint and Decor and that this occurred on 1 November. She says that she reported to Mr Woods and took instructions from him.

[18] [27] I have considered whether despite the absence of formal offer and acceptance the conduct of the parties meant that Ms Stockman did become an employee of Paint and Decor. In *Baker v Armourgard Security Limited* [1998] 1 ERNZ 424 at 432 the Court said:

The employment contract can be and often is formed in an informal way by conduct or words of agreement and conduct.

[19] There were some interchanges between Ms Stockman and Mr Woods. These related to distribution of employment agreements and the provision of information regarding the business. Ms Stockman said she knew that the settlement had not gone ahead. In support of her position that she was employee of Paint and Decor she referred to a letter sent by her to a Miss Price terminating her casual employment agreement contract on 5 November. She said from her perspective, she had an instruction from Mr Woods to carry out human resources work. However, the letter

refers to a termination of casual employment with BM Pacific. Ms Stockman did not consult Mr Woods about this; she notified him in a general email on 18 November.

[20] Ms Stockman reported to Mr Tony McCarthy who was not part of Paint and Décor but part owner of BM Pacific. She had email exchanges regarding payroll with Mr McCarthy, she discussed her resignation with him and gave it to him, not Mr Woods, she discussed leave with him and there was email evidence on Ms Stockman's computer showing work that she was undertaking for BM Pacific without any reference to Mr Woods.

[21] Ms Stockman rang Mr McCarthy on 11 November to say that she was resigning her position as HR Manager. She did not ring or email Mr Woods. Mr McCarthy then rang Mr Theyers who was at that stage engaged by BM Pacific. Mr Theyers was told that Ms Stockman had just resigned from BM Pacific, having referred to a breakdown in the relationship with Mr Woods, and that Mr McCarthy was very concerned with Ms Stockman's resignation, together with that of another staff member, because there would be no one to operate the BM Pacific payroll system and pay staff. Mr McCarthy's concern was with maintaining the BM Pacific payroll and keeping his business operational until settlement. He asked Ms Stockman to hold on for another two weeks.

[22] Mr Theyers was also concerned because, until the transaction was completed, he would have a logistical problem paying BM Pacific staff. Even at that stage, Mr McCarthy did not contact Mr Woods or anyone in Paint and Décor but rather the BM Pacific agents. This again points to them working on the basis that BM Pacific was the employer and that Ms Stockman saw Mr McCarthy as the person to whom she would report on these issues.

[23] Mr Theyers then rang Mr Kahn to advise of Ms Stockman's resignation. Mr Kahn was also not an employee or agent of Paint and Décor but also had concerns about the consequential effect Ms Stockman's resignation would have on the BM Pacific operation. He therefore informed Mr Woods, the financier.

[24] During the Authority's hearing, Mr McCarthy accepted he had talked Ms Stockman into staying on for a further period in order to help BM Pacific through the transfer process, not to continue her employment with Paint and Décor and Mr Woods.

[25] Mr McCarthy said Ms Stockman kept asking when the company could pay the staff and he told her that the settlement kept being deferred.

[26] There was no formal offer of employment made to Ms Stockman nor was there an acceptance of employment. Ms Stockman was aware that offers of employment had been prepared and that one had not been provided to her.

[27] The 30 October notice from Mr Woods makes it clear that Paint and Décor reserved its position not to complete settlement and therefore not to proceed with making offers of employment to staff. Ms Stockman acknowledged that she was aware of that part of the notice.

[28] In an email dated 11 November 2008 to Mr Theyers Ms Stockman raised the following issues:

Who is the current employer for the 46 staff terminated by BM Pacific on 30 October. We have conflicting information with regard to this.

[29] On 11 November, Mr Theyers emailed Ms Stockman:

Dear Bev,

As previously advised the sale of the BMP business to Protective Paints has still to be finalised. We are attempting to complete the purchase later this week/early next week.

We will be in a position to update staff as soon as this process has been completed. In the meantime we appreciate your patience.

*Regards,
Colin Theyers*

[30] On 17 November 2008 Ms Stockman emailed Mr McCarthy stating: *To my knowledge no staff have been offered continuing employment.*

[31] Employment agreements were not offered until after settlement.

[32] In his evidence Mr McCarthy claimed that Mr Woods took over the business of BM Pacific effective 31 October 2008. However, that is at odds with his position at the time. It is evident that during that period Mr McCarthy was concerned about a continuing liability for notice payments and other entitlements. In an email dated 9 November 2009 and attached to the evidence of Mr Kahn (a former consultant to

BMP who also provided services to Lock Finance Ltd) Mr McCarthy wrote the following:

In view of last week's developments, Bryce may well be working on an offer that is substantially different in form to his last offer.

How does that leave us with staff?

He may not be taking over some stores, and according to US he shouldn't even be running the business without their prior approval.

A notice to staff now appears to have been premature and all staff may well in effect still be on BMP's payroll (at least the payroll records still show this, as all staff have been paid to date by BMP, with Bryce making a reimbursement payment). [My emphasis]

If this is the case the holiday pay will not yet be payable either.

It may well be that we will be giving staff notice of actual termination while we sell off stock not being purchased now.

We are in an extremely difficult situation, not only with staff, but also with customers and creditors.

We don't want to be left in the position of having paid all staff payments in lieu and then have to pay them to stay on while we sell off stock (and maybe plant). That would be extremely expensive, as it appears that the gross cost of the payments in lieu is \$130k on top of \$130k holiday pay. I have asked Bev for the gross payments in each category, as they are significantly higher than initial indications.

Your thoughts please. Also on my next email re Bryce's position and BM & Co's licence.

Tony

[33] The interaction between Mr Woods and Ms Stockman was reasonably limited and what did occur was related to Pacific and Décor's intended purchase and putting together offers of employment to BM Pacific as well as notifying those who would not get offers of employment. These are matters that are reasonably standard prior to any purchase, and are consistent with the terms of the sale and purchase agreement where the purchaser would expect to receive cooperation from the vendor with respect to offers of employment to staff and transfer issues.

[34] The BM Pacific payroll was being funded by Paint and Décor but employment had not been transferred to Pacific and Décor. Ms Stockman acknowledged that no

offers of continuity of employment had been made by Paint and Décor during that period.

[35] Ms Stockman did not become an employee of Paint and Décor. Settlement did not take place on 31 October nor was there offer and acceptance. I have taken into consideration that termination of employment was given on 31 October but the provision in the Sale and Purchase Agreement overrode this.

Constructive Dismissal

[36] Having found that Ms Stockman remained an employee of BM Pacific and was not an employee of Pacific and Décor I do not need to deal with the issue of a constructive dismissal. I will, however, say that had I done so, I would have found that Ms Stockman had not been constructively dismissed. This is on the basis that the nature of the allegations that she made regarding Mr Woods' behaviour were insufficient to found a constructive dismissal. She had about two hours' dealings with Mr Woods, and that she did not give him an opportunity to rectify his behaviour before she handed in her resignation to Mr McCarthy.

Costs

[37] If the parties are unable to agree on the matter of costs leave is reserved for the respondent to file a memorandum within 42 days of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority