

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Danial Strawbridge (Applicant)
AND Resene Paints Limited (Respondent)
REPRESENTATIVES Leishia Pettigrew, Advocate for Applicant
Greg Kirk, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 12 September 2002
SUBMISSIONS RECEIVED From applicant 20 September 2002 and 4 October 2002
From respondent 27 September 2002
DATE OF DETERMINATION 9 October 2002

DETERMINATION OF THE AUTHORITY

The facts in this case are in large part not at issue. At the time the problem arose the applicant, Mr Danial Strawbridge, was employed as the Store Manager of the Parnell Branch of Resene Paints Limited. On 25 March 2002 the respondent's Architectural Representative, Mr Wall, gave notice. On 27 March 2002 Mr Toni Smith, the Northern Regional Manager, offered Mr Strawbridge the position of Architectural Representative. On 28 March Mr Strawbridge said he was interested in the position and asked for some more details. On 2 April Mr Strawbridge spoke to Mr Smith who advised that matters would be finalised once Mr Smith had confirmation from Mr John Gerondis, the National Sales Manager. In the first week of April Mr Smith offered the position to Mr Strawbridge and Mr Strawbridge accepted it. A memo to staff advising of the appointment was forwarded and Mr Wall advised his clients that Mr Strawbridge would be replacing him. Mr Janssen, the Retail Development Manager, forwarded a facsimile to staff requesting expressions of interest in the shop manager's position held by Mr Strawbridge.

Unbeknown to Mr Strawbridge – and to Mr Smith – certain events had taken place in the interim. Mr Smith had previously mentioned to Mr Gerondis that he was thinking of appointing Mr Strawbridge to the position vacated by Mr Wall. Mr Gerondis had in turn mentioned it to Mr Nightingale, the General Manager. This was at some point prior to Easter. Mr Nightingale had said that that was not going to happen as he felt that a fully experienced person was needed in the role. Mr Gerondis did not convey this to Mr Smith.

Mr Nightingale became aware on 8 April that Mr Strawbridge had been appointed when he received an application from Mr Janssen to employ a replacement for Mr Strawbridge. He spoke to Mr Gerondis who had earlier been told by Mr Smith of the appointment. Although Mr Gerondis said he was aware that Mr Nightingale did not like the idea he had at no stage communicated that to Mr Smith; and, indeed, he did not even communicate it to Mr Smith on 8 April. He waited until 11 April to do so. It appears that Messrs Nightingale and Gerondis decided that Mr Strawbridge should

complete an Omnia profile to ascertain whether he was suitable for the Architectural representative's position. However, none of the purported rationale for the need to do an Omnia assessment was conveyed to Mr Strawbridge.

Had the company been straightforward with Mr Strawbridge at this stage and advised him of what had happened and accepted responsibility for it much of the subsequent distress suffered by Mr Strawbridge would have been avoided.

On 16 April 2002 Mr Strawbridge completed a Personality Profile Questionnaire provided by Omnia Group (NZ) Ltd. Mr Smith told him he had to do the questionnaire because some people had asked questions about why he had been given the job. On 18 April Mr Strawbridge was advised by Mr Smith that he had done well on the questionnaire and then asked that he meet with Dr Steve Saunders, Director of the Omnia Group. This meeting took place at the Koru Lounge at Auckland Airport on 19 April.

Mr Strawbridge was not at all clear why he was having the meeting with Dr Saunders. The company had not explained the situation to him. Mr Strawbridge said he asked Mr Smith why he was having the interview. Mr Smith told him it was to identify areas of concern and to prove to disbelievers in his ability that he was suitable. Mr Strawbridge was understandably unhappy about this turn of events. He had, after all, been offered the position and accepted it.

I am satisfied, despite Dr Saunders' assertions to the contrary, that in the course of the interview he asked Mr Strawbridge a number of personal questions about his childhood, his relationships with his family and his financial status. Dr Saunders has a doctorate in behavioural psychology. The sorts of questions that were asked in the course of the interview do not, in my estimation, relate to Mr Strawbridge's ability to do the job. They are the sorts of questions that a patient who is in a professional relationship with a psychologist might be asked but in the employment context they are not relevant and are intrusive. Mr Strawbridge's financial status is no business of the employer's nor are his relationships with his family. It may be that for certain types of positions questions of this nature are relevant; but for Mr Strawbridge's position they certainly were not. I note that documents supplied by the company relating to the engagement of staff refer to the Privacy Act and that information can be collected only if it is relevant for the purposes of employment. I think the company should re-evaluate its interview processes and ensure that they are in accordance with statute.

Mr Strawbridge said he asked Dr Saunders what the information he was asking for was being used for and did not receive a satisfactory answer. Dr Saunders told me that he had not told Mr Strawbridge that he could refuse to answer any of the questions and it was clear that he had not, at the outset of the meeting, told Mr Strawbridge the purpose of the interview. Mr Strawbridge said Dr Saunders told him that Mr Smith had told Mr Strawbridge that the position was his but that Mr Nightingale didn't want him (Mr Strawbridge) in the position. Dr Saunders denied saying that. When Mr Strawbridge returned from the interview he told Mr Smith that Dr Saunders had told him Mr Nightingale did not want him in the job; and he also referred to the questions asked by Dr Saunders. I think Mr Strawbridge's recollection of the interview with Dr Saunders is more accurate than that of Dr Saunders'.

On 22 April Mr Janssen advised Mr Strawbridge that a replacement for him had been selected and that approval for the appointment was being sought from the General Manager, Mr Nightingale. In early May the respondent advertised externally for an Architectural Representative and a person was duly appointed. Mr Strawbridge was placed back in his previous position as Shop Manager.

There was discussion during the meeting about the status of the position offered to Mr Strawbridge: was it a new position, that of Junior Architectural representative, or was it Mr Wall's previous position? On the evidence I heard I do not think the position offered by Mr Smith was a new position of Junior Architectural Representative. Certainly Mr Strawbridge did not have the experience that Mr Wall had had and Mr Smith intended to mentor Mr Strawbridge. It is my view that the position offered to Mr Strawbridge was Mr Wall's position, that of Architectural Representative. At paragraph 4 of his brief Mr Smith said that he spoke with Mr Strawbridge about the possibility of his working in the position of Architectural Representative commencing at his junior level of experience but training him into the role that Mr Wall was in.

The crux of the matter was that Mr Nightingale, without speaking to either Mr Smith or Mr Strawbridge, decided that he did not think that Mr Strawbridge had adequate experience for the Architectural Representative's position. The memorandum of 5 April in which Mr Strawbridge's appointment was notified to staff reads: "We also congratulate Danial Strawbridge on his promotion to Architectural Representative." I accept that the letter written by Ms Pettigrew to Resene on 23 April refers to a position entitled "Junior Architectural Representative". I also note that later letter dated 4 June states that in the applicant's view there was never such a position as Junior Architectural Representative. Furthermore, paragraph 1.7 of the Statement in Reply refers to the applicant "working in an Architectural Representative position, which would commence at a junior level of experience." The position was that of Architectural Representative and it was accepted by both Mr Strawbridge and Mr Smith that Mr Strawbridge needed some training before he would be fully competent in the position. The job offered was not one that would be permanently at a junior or training level. If it had been a different position the salary would have been different and there would surely have been an intention to employ a senior person. There was no evidence offered that he could not have done the job.

I have looked through Mr Strawbridge's personal file. Mr Strawbridge was initially employed as a Sales Assistant on 26 May 1995. For that appointment, which was a new position, Mr Smith filled out a Request for Approval to Employ Staff form and the position was identified as a new position. On 23 July 1996 Mr Strawbridge was transferred from Parnell Shop Sales Assistant to Shop Manager Birkenhead. This change is effected via the Advice Form and there is also a letter of appointment.

On 23 August 1999 Mr Strawbridge was transferred from a position as Shop Manager (Birkenhead) to Retail Sales (Mt Eden). There is a letter confirming the transfer. There is no Approval Form nor any of the other documents identified as being required. The resignation was notified via a form called an Advice Form. This form deals with resignations, transfers, promotions, changes of address, training courses, overtime and has a further category "other". Mr Strawbridge resigned in April 2000.

On 16 October 2000 Mr Strawbridge reapplied to Resene for employment on an oncall basis. He filled in an Application Form, an Engagement Details Form, a tax code. Mr Janssen submitted a Approval Form for a new position to Mr Nightingale. Mr Strawbridge was appointed on 18 October with a letter of appointment and had a job specification supplied.

On 23 May 2001 Mr Strawbridge was appointed as Shop Manager Parnell. There is no Approval Form for this position. It is done via an Advice Form and is described as a promotion. A job specification was supplied as was a letter of appointment.

I have gone through these documents because it appears to me that the process described by the company when making appointments applies in the event of the appointee being an external applicant. If Mr Strawbridge's appointment to the Architectural Representative's position was seen

as a promotion and there was not a new position then Mr Smith in fact did all that was required. Mr Nightingale himself at paragraph 6 of his affidavit acknowledges that all requisite steps did not take place all the time. It is arguable, therefore, that Mr Smith had actual authority to effect the promotion. However, be that as it may, for reasons I will detail later, it is evident that Mr Smith had ostensible authority and that is all that is required.

The respondent has argued that the appointment was conditional because Head Office needed to approve the appointment and Mr Strawbridge's replacement needed to be approved and that as these conditions, which were not met, were known to Mr Strawbridge there was not a concluded contract. The problem with this argument is that Mr Strawbridge did not know that his position had not been approved by Mr Nightingale. Nobody in the company had told him this. The first intimation he had was during the meeting with Dr Saunders; and that was more to do with Mr Nightingale not wanting him rather than Mr Nightingale not approving the position. Mr Smith, the Northern Regional Manager, who had authority to make appointments, offered Mr Strawbridge the position. Mr Strawbridge accepted it. I accept that the company has procedures which it follows when appointments are made. That is not the issue. The issue is that the procedures were not followed but that an appointment was still made. What Messrs Smith, Gerondis and Nightingale knew and did does not alter the legal position vis a vis Mr Strawbridge's appointment.

In his submissions Mr Kirk stated that both parties agreed that the appointment was conditional on confirmation from Mr Gerondis. He refers to the Statement of Agreed Fact. Point 9 of the Statement says that after Mr Smith and Mr Strawbridge discussed the salary that Mr Smith indicated matters would be finalised once he had confirmation from Mr Gerondis. However, the confirmation sought from Mr Gerondis relates to the salary. Point 10 goes on to say that the parties agree that in the first week of April Mr Smith advised Mr Strawbridge that he had the position. How was Mr Strawbridge to know that Mr Gerondis and Mr Nightingale had not in fact given their consent? Clearly, Mr Smith's offer was unconditional as far as Mr Strawbridge was concerned and that is what matters. Mr Strawbridge did not know what had actually happened. He knew only what he was told by Mr Smith who, as far as Mr Strawbridge knew, had authority to make appointments. There was no reason for Mr Strawbridge to question what had happened in the hierarchy of decision making.

Mr Kirk also submitted that the offer was conditional and therefore there was no concluded contract. The first condition is the approval by Head Office. I have already dealt with that. The second is that the offer was conditional upon the replacement of Mr Strawbridge. At no stage was Mr Strawbridge told that his appointment was conditional upon a replacement being found. Mr Strawbridge, after he was appointed – that is, after the contract was concluded – was told that Mr Smith's preference was for him to start as soon as possible and that would happen when a replacement manager or covering staff could be found.

Mr Kirk submitted that Mr Smith did not have actual authority to make the appointment and as that is the case Mr Strawbridge's personal grievance must be dismissed. Mr Kirk in his submissions has earlier quoted a passage from Nelson v Porirua Community Law Centre Inc [1993] 2 ERNZ 1109 where at p.1119 Goddard CJ stated

The express authority ...is a synonym for actual authority and implied authority is a synonym for ostensible authority, sometimes called apparent authority. The difference is very real as between principal and agent but non-existent as between the principal and an outsider dealing with the agent, for in law ostensible authority is treated as the equal of actual authority

Mr Kirk goes on to quote further to the effect that a principal is bound by an unauthorised transaction if the party dealing with the agent does not know the terms of the agent's authority. I have found that Mr Strawbridge did not know that Mr Smith had not in fact gained approval for his appointment. Clearly, therefore, the principal (the respondent) is bound by the actions of its agent (Mr Smith) in relation to the transaction entered into with the party dealing with the agent (Mr Strawbridge). Furthermore, Mr Strawbridge was not privy to the intricacies of the appointment process. Nor was he told that Mr Nightingale regarded the position to which he was being appointed as a new position and that approval for that had neither been sought nor given.

The position held by Mr Smith was such as to enable Mr Strawbridge – or any dispassionate observer – to conclude that he had the authority to make appointments. In Pole v Leask [1861-73] All ER Rep 535,541 Lord Cranworth LC said:

No one can become the agent of another person except by the will of that other person. His will may be manifested in writing, or orally, or simply by placing the person said to be an agent in a situation in which, according to ordinary rules of law, or, perhaps, it would be more correct to say according to the ordinary usages of mankind, that person is understood to represent and act for the person who has so placed him, [my emphasis] but in every case it is only by the will of the employer that an agency can be created.

By placing Mr Smith in the position of Northern Regional Manager the company represented that he had the authority to make appointments. In New Zealand Building Trades Union v Ebert Bros Construction Ltd [1991] 3 1004 Goddard CJ said at 1013 that:

In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question.

Very clearly Mr Smith had ostensible authority. Mr Strawbridge was entitled to rely upon that and to regard the offer as a valid offer and the acceptance as evidence of a concluded contract.

That being the case, is there any justification for what was in effect a demotion of Mr Strawbridge? Although the respondent does not accept that there was a demotion (although I note that Mr Gerondis said he made the final decision not to promote) the only factor that could be said to even resemble a claim that there was justification is the Omnia Profile. This cannot, however, constitute justification. The deception surrounding the circumstances in which this was carried out was clearly a breach of good faith. Mr Strawbridge did not know that he might be demoted as a result of it. He was initially told it was good and was not given any opportunity to make any submissions as to why he should not be demoted.

It should be evident from the above that I regard the grievance as being properly categorised as one of disadvantage. While Mr Strawbridge was “dismissed” from the position he was not dismissed from employment: he was demoted. There is no justification for the withdrawal of the promotion. The respondent decided that it did not think he could do the job and decided to revoke the promotion. This was done without first discussing this with Mr Strawbridge and giving him an opportunity to comment.

Mr Strawbridge did not seek reinstatement. He has sought lost wages and compensation for humiliation and distress. Mr Strawbridge's evidence was that his earnings in the last financial year had been \$38,947.71 which was made up of a base salary of \$28,000 plus overtime. The salary for the Architectural Representative's position was to be \$43,480. These figures were accepted by the respondent at the investigation meetings. The difference between \$38,947.71 and \$43,480:

\$4,532.29. Mr Strawbridge is seeking the sum of \$996.98 which is the income difference for five and a half months.

Mr Strawbridge has sought \$10,000 as compensation. I have no doubt that the applicant was very distressed by what occurred. However, there is an argument that Mr Strawbridge failed to take advantage of opportunities to mitigate his distress: Finau v Carter Holt Harvey Building Supplies [1993] 2 ERNZ 971. The employer did make several attempts to resolve the matter and made proposals of which the applicant did not take advantage. These included offers to help draft a memo explaining the situation to staff and clients and an offer of EAP counselling. The respondent has apologised to the applicant and offered career development counselling. With the exception of the EAP counselling the other offers were predicated upon the applicant's accepting the demotion and he was entitled to resist that. The respondent is to pay the applicant the sum of \$4000.00 pursuant to 123 (c) (i). In addition the respondent is to pay the sum of \$996.98.

I have considered the issue of contribution and find there was none.

The matter of costs is reserved. I would urge the parties to attempt to resolve the issue of costs themselves. If that is not possible leave is reserved for the applicant to file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority