Determination Number: WA 67/06
File Number: 5031697

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON OFFICE**

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| **BETWEEN** | The Service and Food Workers' Union Nga Ringa Tota<br>NZ Amalgamated Engineering Printing and Manufacturing Union<br>National Distribution Union |
| **AND** | Heinz Wattie's Limited |
| **REPRESENTATIVES** | Peter Cranney for the Unions<br>Tim Cleary for the Company |
| **MEMBER OF AUTHORITY** | P R Stapp |
| **INVESTIGATION MEETING** | Napier, 27 March 2006 |
| **CONFERENCE CALL** | 10 and 18 April 2006 |
| **SUBMISSIONS** | 27 March 2006 and 3, 10, 13 April 2006 |
| **DATE OF DETERMINATION** | 24 April 2006 |

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

[1] This is an employment relationship problem about the ratification of a collective employment agreement involving the company's advocate's authority to sign the terms of settlement reached in bargaining, and a question about whether or not the terms of settlement are binding?

**The facts**

[2] The facts can be briefly summarised as follows.

[3] The respondent is a food processing company and has four manufacturing plants. Only three of these are relevant in this dispute, namely:

- The King Street, Hastings plant. This plant processes receipt products that do not rely on fresh crops. However, from around January to April each year the plant undertakes

crop based production and at those times the work force increases from approximately 600 to 1,200 people.

- The Frederick Street, Hastings plant. This plant involves 120 employees engaged in packaging bulk frozen food for retail.

- Frozen product is processed at Christchurch. This plant processes vegetables for bulk freezing and then the vegetables are used at the Frederick Street, Hastings plant.

[4] There is a Heinz Wattie's plant at Tomoana in the Hawkes Bay. It has its own collective employment agreement and is not relevant in this dispute.

[5] There are two collective employment agreements. The first is called the Principal Collective Employment Agreement ("PCEA") and is not directly relevant. Permanent employees are covered by the PCEA. It also covers seasonal employees other than the crop based seasonal employees.

[6] The other collective is called the Seasonal Collective Employment Agreement ("SCEA") and is at the centre of the current problem. This has nominally expired, and its extended enforcement date expires on 30 April 2006 pursuant to section 53 of the Act. The SCEA covers crop based fresh produce seasonal employees at Hastings, and also frozen food employees at Christchurch and Hastings.

[7] In late January, early February 2005, Mr David Robb, the employee's New Zealand Employee Relations Manager prepared an "in house" document (called the employment agreement renewal "mandate document") for the company's executive team to review and ensure its interests would be reflected in the anticipated forthcoming bargaining process (Robb 3). That document included a statement: *"is there a company ratification process"*: *"Yes. This mandate and sign off by the executive upon reaching terms of settlement"*. The document was approved as a bargaining mandate by the executive team[1].

[1] The "mandate document" is subject to a non-publication order and conditions placed on its use. Another document produced by Heinz Wattie's called 'Overviews' has been prohibited from publication and conditions put on its use.

[8] Bargaining was initiated by the unions on 20 March 2005 with notice and the proposed coverage clause ("BOD 4"). Under s.43 of the Employment Relations Act Mr Robb drafted and posted the required notice to all employees. Although there were various delays before the bargaining commenced, the bargaining process agreement (BPA) was settled between the parties. Although it was not signed by the unions, it was accepted by them and their acceptance was conveyed in an email. The relevant provisions are as follows.

> "***Authority to reach agreement***
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> *The parties to the negotiations have the authority to reach agreement, which will be subject only to the applicable ratification process for both the union(s) and for the Company. Any limitations on authority in respect of ratification processes will be outlined immediately prior to the initial commencement of negotiations."* (Emphasis added)
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> and
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> *"**Record of negotiations***
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> *Each party will be responsible for keeping its own record of claims, responses and positions taken and negotiations. They will also keep a common record of matters agreed upon. Any record of matters arising during negotiations including 'Terms of Settlement' shall not be taken as an agreed record until signed off by both/all parties."* (Emphasis added)
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> and
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> "***Terms of Settlement***
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> *Upon reaching a settlement, the terms of that settlement will be recorded in full in writing and will be signed off by the authorised advocates before the negotiations are concluded.* (Emphasis added)
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> *The parties will provide representation immediately after the formal negotiation process is concluded to draft a Terms of Settlement document."*
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> and
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> "***Agreement Document***
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> *The company will be responsible for the drafting of an agreement incorporating the ratified terms of settlement. The draft document will then be thoroughly checked by each party to ensure that it accurately records the agreement between them. Any apparent discrepancy shall be notified to the other party and resolved before the agreement is signed …".* (Emphasis added)

[9] Bargaining commenced on 7 July 2005. Mr Robb says that he opened the negotiations by raising ratification. He says he asked Mr Garth Malpas, from the Engineers Union, and the advocate for the unions in the negotiations to outline the unions' ratification process. Mr Malpas indicated that the union ratification was 50% plus one for the combined unions group. Mr Robb

says that in reply he advised that the company's ratification process was that the terms of settlement would need to go to the executive for approval (Robb 15). The union participants deny or could not recall that he raised this.

[10] There were further negotiations on 8, 14, 15 and 27 July 2005. Another meeting occurred on 16 August 2005, and settlement occurred on 16 August 2005, three days before Mr Robb was promoted to a new position on the executive.

[11] On 22 August 2005 Mr Robb sent draft terms of settlement to Mr Malpas. He referred to saying at the time that the draft terms of settlement were: "*Work in progress*". In an email he stated that Mr Malpas should: *"Have a look through it and get back to him before we sign off and you take it to ratification"*. Mr Malpas replied on 24 August 2005 with a comment: *"many changes"*. However, Mr Robb replied that same day stating that *"he had a lot of things on his mind and he had sent completely the wrong file to review"*.

[12] Another draft was received by Mr Malpas on 30 August 2005. On 31 August 2005 Kerri Johnstone, the Payroll Manger received the "final draft" of the terms of settlement for the SCEA from Dave Robb. She proceeded to update payroll information in the event that the terms of settlement were ratified. She asked him to let her know when it would be actioned. She went on leave from 29 September until 22 October 2005. An email produced dated 31 August confirms that the new agreement was subject to ratification and Ms Johnstone waiting for the green light to action the matter (Robb and Johnstone dated 31 August 2005).

[13] Mr Malpas and Mr Robb met again on 2 September 2005. It was agreed that Mr Robb did indicate that the company was considering not running the crop based production because the settlement reached was too expensive.

[14] During this time Mr Robb kept Mr Neville Cameron, the executive member with the responsibility for the crop based production, updated on the developments in the negotiations. Mr Cameron says that he reported to the managing director who, he says, decided to leave the decision

on approving the settlement or not with Mr Cameron. Mr Cameron decided that he would not approve the settlement for the crop based production and told Mr Robb of his decision. The decision was not directly conveyed to Mr Malpas by Mr Robb and Mr Malpas did not know of the decision (Cameron 7).

[15] On 8 September 2005 the final version of the terms of settlement was presented to Mr Malpas. In the meantime ratification had been sought from the unions' members. The terms of settlement were signed on 12 September 2005. Mr Robb did make some comment upon the signing the terms of settlement about the company's unhappiness on the deal for the King Street site and that he told Mr Malpas: *"We are going to have a problem"*.

[16] Mr Malpas says that Mr Robb said: *"That the company would be placed in difficulty by applying the settlement to the King Street site"*. Mr Malpas says that Mr Robb made no suggestion the deal would not be honoured, which is consistent with Mr Robb's evidence that: *"I signed the terms of settlement because I hoped that there could be an agreement". (Robb 24)* He already knew, however, that Mr Cameron had not approved the settlement.

[17] Steps were then taken by the company to put into place the increases to all employees except the crop based King Street employees. When Ms Johstone returned from leave she asked Mr Robb about the ratification and he sent her Mr Malpas's email. Mr Malpas telephoned her about when the rates would be loaded and effective from. She told him that she would follow it up with Mr Robb. The decision was made that rates would be effective from 12 September and she sent out the new rates to the Payroll and HR team. At that point Ms Blackburn contacted her that the increase would only apply for the frozen sites because the company had not approved the increase for the King Street site. She informed Mr Malpas the increase to the frozen site employees would be from 12 September.

[18] On or around 27 or 28 September 2005 Mr Malpas raised the issue with Mr Robb about the payment to the King Street employees and when the increase would be processed. He says Mr Robb replied with a complaint, namely that he had not yet been: *"formally informed"* of the unions'

ratification. Mr Malpas formally notified the company of the unions' ratification on 28 September 2005. Nothing further will turn on this. There was no other response from Mr Robb, however. Mr Malpas sent another email on 12 October 2005 asking when the wages adjustments would be made. Again the company did not respond with any suggestion that the terms of settlement did not bind the company. Instead there was no response.

[19] During this time problems with the coverage of the King Street employees started to emerge and the initiative was taken by the Service and Food Workers Union Nga Ringa Tota to seek some clarification that involved the local official Thomas O'Neill and the Union's legal officer Luci Highfield on an issue of outsourcing. Mr O'Neill reported on the matter to Mr Malpas. In a reply to a letter from Ms Highfield on 1 November 2005, Mr Robb replied referring to what he called: *Significant commission operational issue"* in relation to the crop based King Street plant only. Even at this point this letter did not assert or claim that there was no settlement of the SCEA or that the terms of settlement had not been approved.

[20] Mr O'Neill wrote to the company on 11 November 2005 and asked what the hold up was in signing the SCEA, and Ms Blackburn, Heinz Wattie's human resources manager, responded that the hold up was a delay in drafting the agreement. The issue was taken up again on 6 December 2005 where the parties discussed the SCEA. Still there was no suggestion that the settlement had not been reached or that it did not apply to King Street.

[21] On 3 February 2006 Heinz Wattie's told the unions its position that there was no agreement and it had not ratified the agreement.

**The parties' submissions**

[22] I must say the submissions received by me from the parties' representatives are extremely good, covering each other's points of difference, the law and clarifying the issues. Their points of relevant difference can be summarised as follows.

**The Unions' case**

[23] The unions claim that only one issue exists. They say it is a factual one that relates to Mr Robb's authority to sign terms of settlement and that at no stage prior to and upon signing the terms of settlement were the unions made aware that the company's ratification process involved the approval needing to be gained from the executive and the managing director for the terms of settlement to apply. In other words the company was bound by Mr Robb's signature on the terms of settlement reached in collective bargaining for a collective agreement giving rise to an enforcement action and determination on a dispute about back pay. Mr Robb says that at the commencement of the negotiations he did point out that the company's ratification process required the executive's approval. This is denied by the unions' witnesses. The applicants say that they never really had any knowledge of the authority for the company but understood that it was Mr Robb who held the authority (mandate) to sign binding terms of settlement for a collective agreement.

**The Company's position**

[24] Heinz Wattie's submitted that Mr Robb had no actual authority to commit Heinz Wattie's to a collective employment agreement without approval (BPA and "mandate document" and Robb's evidence and his job role). It relies on the law as it relates to the law of apparent authority or ostensible authority. It relies not on Mr Robb's conduct but Heinz Wattie's being the principal involved in the collective bargaining.

[25] It has been submitted that the Authority should consider that Dave Robb could only bind the company to a collective agreement if he had the authority to do so, and that authority rested on the ratification process involving approval being needed from the executive team. The terms of settlement were no more than a record of negotiations to the stage that Mr Robb signed them. Mr Robb always had authorisation to sign the company's terms of settlement.

[26] It is therefore critical to consider the question as to the extent to which the company held out Mr Robb at the time of the bargaining, not anything he did at that time or thereafter.

[27] The company's position is that it did nothing expressly or impliedly to authorise Dave Robb to bind it to a collective agreement and it denies Mr Robb had any such authority, which as he says: *"would be more than his life was worth"*.

[28] Furthermore, the following points were made:

- That the settlement is not a collective employment agreement to enforce compliance. The Authority has no power on the basis of the terms of settlement to impose terms not embodied in a collective employment agreement. This is not about that but more to do with the enforcement of agreed terms if Mr Robb has bound the company to the terms of settlement for an agreement, I hold.
- The BPA permits the Terms of Settlement to be conditional requiring approval (alongside the unions' ratification) and that it was always known at least by the unions' advocate that this was required. This is supported by the "mandate document".
- Mr Robb did not deliberately set about to mislead or deceive the unions when he hoped there could be agreement. I accept that he understood approval was required. I accept that he genuinely signed the terms of settlement believing they were a record of the negotiations upon reaching an agreement that needed ratification.

[29] The unions have rejected the company's argument. They contend that fundamentally the bargaining agreement applied, the terms of settlement are binding and that it could reasonably rely on Mr Robb's authority to bind the company to the terms of settlement reached in the collective bargaining.

**Findings and determination of the employment relationship problem**

[30] Some urgency has existed in this matter because the current SCEA's nominal enforcement period of one year expires on 30 April 2006 and a new collective agreement has not been signed

off. Notwithstanding that, the matter was not filed in the Authority until 22 February, with the statement in reply being filed on 10 March 2006.

[31] The Heinz Wattie's submissions rely on Mr Robb acting to sign terms of settlement that could only bind the parties upon the completion of the required ratification processes. The unions are required to meet the statutory requirement to have a ratification process for the collective agreement. This has not been challenged once the outcome of the ratification had been conveyed to Mr Robb. By contrast, Heinz Wattie's ability to have a ratification procedure existed under the terms of the BPA.

[32] The BPA makes provision for ratification of the terms of settlement by the unions and the company. It is a statutory requirement for the unions but not so for the employer. There is nothing, however, to prevent parties agreeing to a procedure that binds an employer to complete ratification in a BPA. Without some explanation of what was meant by the company's ratification process the unions would be left to reasonably assume that the advocate had the authority to sign terms of settlement that would be embodied into a collective agreement. In that situation ostensible authority would apply. One of the parties' requirements under the BPA was to outline their ratification procedure at the commencement of the negotiations. This certainly happened for the unions. There is a dispute about it happening for the company. What happened is unsettled and affected by denials and equivocal evidence. When the settlement was reached the unions embarked on their ratification and Mr Robb learnt that Mr Cameron and the chairman had effectively declined to approve the settlement for the company. Mr Robb remarkably did not disclose this detail when he signed the terms of settlement later.

[33] The employer party was Heinz Wattie's not Mr Robb. As such Mr Robb required approval for the settlement to be embodied as a collective employment agreement under the Act in terms of the "mandate document" and the requirements of his role. There is sufficient evidence of a company ratification being required under the BPA and involving company approval in the "mandate document", notwithstanding the credibility differences that emerged during the

Authority's investigation. Mr Robb's role gave him no more responsibility than to advocate on behalf of the company with the approval resting at another level. Also Mr Cameron gave evidence of his knowledge of the internal procedure existing.

[34] The approval of the terms of settlement was formally declined by the company on 16 September 2005 at an executive team meeting, and conveyed to the unions on 3 February 2006, which is an extraordinary delay. For two weeks in November Mr Robb was away on sick leave and then had to deal with another union on the outsourcing issue. That explains some of the time. Mr Robb's failure to tell the unions that the company had not approved the terms of settlement, and requiring the unions to ratify in a timeframe before 9 September 2005 and then to leave it until 3 February 2006 to inform them of the company's decision, and even pointing out that there was a problem, is nothing short of remarkable.

[35] The company has submitted the point of view that changes in the market could necessitate approval being declined in the time it took the unions to ratify. If this was so it would be remarkable that there would not have been some earlier intervention and change in the mandate for negotiations by the company before the negotiators reached an agreement and at the very least Mr Robb being informed. This line of argument has not been of any assistance. It is extraordinary if the company thought it had some unlimited time to reply or delay its position, even if Mr Robb thought there could be some agreement, which he did not explain.

[36] Mr Robb probably genuinely hoped there could be an agreement. This is supported by his evidence that *"I signed the terms of settlement because I hoped that there could be an agreement" (Robb 24)*. Mr Malpas had informed him of the unions' ratification so the only outstanding variable was the company's approval that was required. Remarkably Mr Robb did not disclose the detail that Mr Cameron had declined to approve the terms of settlement to Mr Malpas even although the terms had been reached <u>within the mandate</u> and Mr Robb had kept Mr Cameron up to date with progress during the negotiations. In addition the internal communication between Mr Robb and Ms Johnstone was not that clear either, until Ms Blackburn intervened and Ms Johnstone formed the

view that she would wait for the green light to proceed. Her action of explaining to the union officials that the delay was being caused in drafting the agreement has not assisted either. There was evidence that Mr Robb needed prompting on another occasion to run through the company's ratification procedure that was explained by Ms Blackburn and I was asked to regard this as a backup for him making the explanation required. I have not given this any weight.

[37] Mr Robb relies upon Mr Malpas picking up from his comments that there was a problem, significant enough, to mean that the company would not approve the settlement. Mr Malpas signed the terms of settlement but did not know that the terms of settlement had not been approved by the company and was only alerted to a problem existing. Normally the unions would be entitled to rely on the company's advocate to have ostensible authority to sign the terms of settlement but in this case the BPA clearly provides for the company's ratification that the unions, and at the very least their advocate, should have been aware of. This is supported by the "mandate document" that was only produced for the Authority's proceedings. Mr Malpas understood approval would be obtained at some point, and in his opinion, ideally this should have happened before the terms of settlement were signed. As it happened Mr Robb signed the terms of settlement hoping a deal could be reached, and he says, to record the negotiations. As I say this was extraordinary. Perhaps it was a legacy of previous bargaining conduct and arrangements about which there was some discussion before me and is completely lacking in good practice. Ideally any arrangements need to be put in writing properly for the record, especially to avoid this sort of conflict. Ideally a BPA should be specific and detailed and unambiguous (applying s 32 of the Act).

[38] The arrangement for the management team process of approval has left the company exposed and came close to being bound by Mr Robb's conduct because Mr Robb was the company's advocate acting upon the approved mandate and BPA under which the unions reasonably believed he had the authority to reach a settlement. Such authority could be reasonably inferred by him signing the terms of settlement without him making any reference to ratification, and the terms of settlement not referring to it either. His authority, however, fell short of ensuring a collective

agreement where the BPA alluded to ratification by the company qualifying the terms of settlement. Mr Robb's signing of the terms of settlement was not therefore an unequivocal acceptance.

[39] I was referred to *NZ Engineering Union v Shell Todd Oil Services Ltd* [1994] 2 ERNZ 536, but this case can be distinguished. This case was decided in regard to section 16 of the Employment Contracts Act that no longer exists. The new section 51 of the Employment Relations Act 2000 is very different in its substance and does not make provision for employers to follow a ratification requirement and be bound in the same way to terms of settlement as was required under s 16 of the Employment Contracts Act.

[40] Also, for completeness I have looked at the Terms of Settlement document signed by both parties. The document clearly conveys an agreement on the ***"Terms of Settlement Heinz Wattie's Ltd Seasonal Collective Employment Agreement August 2005."*** There was no mention of any company ratification required in this document. However, viewing it with the BPA that applied to both parties the company does have a case that Mr Robb required approval to embody the terms of settlement in a collective agreement, but the company's conduct was far from ideal and lacking in best practice, and support for Mr Robb.

[41] The equivocal nature of the evidence from the unions' witnesses and a scrutiny of the words they relied upon used, and the notes produced from both parties on balance has not established that Mr Robb did not say something about the company's ratification at the commencement of the negotiations. This means that I cannot make the orders for compliance as sought in regard to the terms of settlement. Furthermore s 51 of the Employment Relations Act is quite different to s 16 of the Employment Contracts Act. This means that Heinz Wattie's cannot be bound to the terms of settlement unless the terms of settlement are *rectified*, which in this case, the threshold has not been reached for me to make such a finding, I hold. Although Mr Robb signed the terms of settlement, knowing that approval had not been given, and that the terms as agreed were within the company's mandate the provisions of the BPA requiring approval from the executive does not support Mr Robb having ostensible authority to bind the company to a collective employment agreement. In

this regard the BPA provisions are important: *'Terms of Settlement' shall not be taken as an agreed record until signed off by both/all parties."* (Emphasis added) and "*The parties to the negotiations have the authority to reach agreement, which will be subject only to the applicable ratification process for both the union(s) and for the Company. Any limitations on authority in respect of ratification processes will be outlined immediately prior to the initial commencement of negotiations."* (Emphasis added) and "*Upon reaching a settlement, the terms of that settlement will be recorded in full in writing and will be signed off by the authorised advocates before the negotiations are concluded."* (Emphasis added), and reach an agreement document: "*The company will be responsible for the drafting of an agreement incorporating the ratified terms of settlement"* (Emphasis added).

[42] The approval Mr Robb was required to obtain, although he signed the terms of settlement knowing that approval from the company would be declined, means that the terms of settlement cannot bind the company for a collective agreement that has not been signed off (no differently than for unions waiting on an outcome from their ratification process, the result of which cannot be taken for granted either), given the BPA and "mandate document" and Mr Robb's role as the company's advocate that did not involve him as part of the executive team to approve the terms of settlement.

[43] The application is dismissed and therefore I am not required to determine the issue on the backdating of wages in the terms of settlement.

[44] The parties have made submissions on each other's conduct in regard to these proceedings particularly about the production of some documents and good faith. It is not necessary to address them in this determination.

[45] Costs are reserved.

P R Stapp
Member of Employment Relations Authority