

**Note: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 733
3281039

BETWEEN	JOHN YOUNG Applicant
AND	PROGRAMMED SKILLED WORKFORCE NEW ZEALAND LIMITED First Respondent
AND	HEINZ WATTIES LIMITED Proposed Second Respondent

Member of Authority:	Rowan Anderson
Representatives:	Hayley Johnson, advocate for the Applicant Kate Calder for the First Respondent Jane Taylor, counsel for the Proposed Second Respondent
Investigation Meeting:	On the papers
Submissions received:	Up to and including 11 September 2024
Determination:	11 December 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] John Young applied for employment with Programmed Skilled Workforce New Zealand Limited (Programmed) and sought a role as a seasonal forklift driver, through Programmed, working for Heinz Watties Limited (Heinz Watties). Programmed

provide labour hire services to Heinz Watties during its peak season pursuant to a commercial agreement.

[2] Mr Young contends that he was employed by Programmed and that his employment was terminated based on a unilateral decision by Heinz Watties prior to his commencing work. Mr Young claims that he had accepted an offer of employment and was an employee on the basis that he was a 'person intending to work'.

[3] Mr Young raised a personal grievance with Programmed and has lodged a statement of problem in the Authority seeking remedies for unjustified dismissal. He has also made application seeking Heinz Watties be joined to the proceedings as a controlling third party.

[4] Heinz Watties opposes the application to be joined and contends that while Mr Young applied for a position with Programmed to work at a Heinz Watties site, that the proposed engagement required Programmed to obtain approval from Heinz Watties, that approval was not obtained, and that Heinz Watties informed Programmed that they were not willing to have Mr Young employed on their site. It objects to being joined to the proceedings and says that Mr Young never worked under its control or direction.

[5] This determination deals only with the preliminary question as to whether Heinz Watties should be joined to the proceedings.

The Authority's investigation

[6] The preliminary matters subject to consideration in this determination have been, with the agreement of the parties, dealt with 'on the papers' without the need for an investigation meeting.

[7] Submissions as to the preliminary issue were received from Mr Young and Heinz Watties. While submissions were received, no witness evidence was initially provided. Having received the submissions, I considered it appropriate that written witness evidence be filed and the parties were provided an opportunity to do so. A written witness statement was received from Mr Young and an affidavit from Mariëlle Veraa, Senior HR Business Partner at Heinz Watties, was also received.

[8] The preliminary issue to be determined by the Authority is whether Heinz Watties should be joined to the proceedings as a controlling third party having regard

to the requirements of s 103B of the Employment Relations Act 2000 (the Act). There is an additional issue as to whether any non-publication order should be made as to what is said to be commercially sensitive content in a labour hire services agreement between Heinz Watties and Programmed.

[9] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Non-publication

[10] On 9 August 2024, I made interim non-publication orders as to certain information contained in the labour hire services agreement between Programmed and Heinz Watties. That followed a direction being made requiring the production of documents on the basis that they would likely be relevant to the Authority's investigation.

[11] Ultimately the documents were provided in redacted form, with at least much of the information sought to be covered by non-publication orders being redacted. However, I am satisfied that it is appropriate, having regard to the commercially sensitive nature of the information, to make permanent the interim orders that were issued.

[12] I order a prohibition on the publication of:

- (a) Any sums contained in the labour hire services agreement (including any amendments) between Heinz Watties and Programmed; and
- (b) Any information as to the pricing models, key performance indicators, obligations in respect of services provided, insurance, and indemnities contained in the labour hire services agreement (including any amendments) between Heinz Watties and Programmed.

[13] These orders are made pursuant to clause 10 of schedule 2 of the Act.

Additional background and evidence

[14] Mr Young says that he undertook and passed a pre-employment drug test on 16 January 2024 with Programmed and was then advised by Programmed's Resourcing Specialist that he could start work on 25 of January 2024 doing the plums at Heinz Watties.

[15] Mr Young entered into a casual individual employment agreement with Programmed on 16 January 2024. The individual agreement provides that there is no obligation on Programmed to offer, or on Mr Young to accept, any assignment, and that each offer and acceptance will constitute a separate and distinct period of employment.

[16] Ms Veraa says that she, and Heinz's Production Manager Seasonal (Production Manager) received an email from the Operational Delivery Manager at Programmed on 16 January 2024 noting that Mr Young had applied to work at Heinz Watties and checking whether his being placed with Heinz Watties was ok. That email noted Mr Young's union background and also recorded "[t]he only risk with him is that he will probably get involved bit [sic] too much around workers and their rights etc."

[17] A response was provided by the Production Manager the same day advising that they were not comfortable having Mr Young in the seasonal department given his 'background'. The Operational Delivery Manager then responded the following day advising that they had told Mr Young that they could not offer him work with Heinz Watties.

[18] An email from Programmed to Mr Young on 17 January 2024 provided as follows:

Hi John,

Thank you for completing your application with us.

Unfortunately we will not be able to place you in a role at Kraft Heinz Watties due to a conflict of interest.

We have work available with our other clients and I am more that happy to forward your name to out Napier office and they can try and source suitable work for you as a forklift driver.

Please let me know if you have any questions....

[19] Mr Young responded by email the following day which included him stating that he "was informed by [Programmed's Resourcing Specialist] that [he] would be starting next Thursday with Plums".

[20] On 29 January 2024, Mr Young's representative sent a letter to both Programmed and Heinz Watties in which a personal grievance for unjustified dismissal was raised. The notification of the personal grievance sought to include Heinz Watties

as a controlling third party and asserted that Heinz Watties caused or contributed to the personal grievance by instructing that he be 'sent away'.

[21] Programmed accepts that Mr Young became a causal employee of Programmed, says that it would consider placement of Mr Young for any future work assignments, but that while pre-employment checks were completed for the role at Heinz Watties Mr Young was not guaranteed a placement at the Heinz Watties site.

[22] Ms Veraa's evidence is that Programmed are responsible for the employment of relevant candidates and that Heinz has nothing to do with the recruitment and pre-employment checks. Programmed are only required to check with Heinz Watties if Programmed are aware of any matters that might be of concern to Heinz Watties. Heinz Watties maintains a 'Do Not Rehire' list of former employees. She also said that Heinz Watties does not have anything to do with Programmed's generic onboarding and that if a placement is accepted then site-specific onboarding is conducted.

[23] Ms Veraa's evidence went into some detail as to Mr Young's union activities and issues that Heinz Watties say they have with him, including allegations about his conduct. Ms Veraa also made various references to what was said to be the conflict of interest, seeking to differentiate Mr Young's role in the union from that of, for example, a delegate. Some of the assertions made raise significant questions. However, while those issues may be relevant to other substantive claims, I need not deal with those matters here.

[24] Ms Veraa says that she had no reason to think that Programmed had already offered work to Mr Young at Heinz Watties. She said the communication had been about why work had not been offered and that any offer that might have been made by Programmed would have been contrary to the agreement between them and Heinz Watties.

The requirements for joining a controlling third party

[25] Section 103B of the Act governs the joining of controlling third parties. The section requires that the employee has validly raised the relevant personal grievance with their employer in compliance with s 114 of the Act, and additionally that an application be made to the Authority seeking that the grievance be resolved. The grievance must relate to an action alleged to have occurred while the employee was working under the direction and control of a controlling third party. Those requirements

may be seen as threshold requirements that must be met for the section to have application and for Authority to consider any application to join a controlling third party.

[26] If the threshold requirements have been met, the Authority must then consider whether the controlling third party was notified of the personal grievance in compliance with the requirements of s 115A¹ and, on the standard of there being an arguable case, whether the party to be joined is a controlling third party and whether their actions caused or contributed to the personal grievance.² Consideration of whether the party to be joined is a controlling third party necessarily requires consideration of the meaning of that term provided for at s 5 of the Act. If the Authority is satisfied of those matters, then the application must be granted.³ The assessment of the matters at s 103B(3)(b) is to be undertaken is whether an arguable case has been established in relation to those two matters, it is not a conclusive or final assessment.

Was the personal grievance raised in accordance with s 114?

[27] For s 103B of the Act to apply, Mr Young must have raised a personal grievance with Programmed in accordance with s 114 and must have made application to the Authority to have it resolve that personal grievance. I am satisfied that both of those requirements have been met.

[28] Mr Young submits that a personal grievance was compliantly raised with Programmed, his employer, by way of a letter dated 29 January 2024. The relevant correspondence was provided to the Authority. The personal grievance raised by Mr Young, detailed in the letter of 29 January 2024 and the statement of problem lodged in the Authority, concerns his alleged unjustified dismissal.

Does the personal grievance relate to an action that is alleged to have occurred while Mr Young was working under the control or direction of Heinz Watties?

[29] Mr Young says that he completed all pre-employment checks, accepted an employment agreement, and that he was a person intending to work on the basis that there had been an offer and acceptance as to the relevant assignment. Mr Young further contends that the assignment was to take place from 25 January 2024, that he would

¹ Employment Relations Act 2000 (the Act), s 103B(3)(a).

² The Act, s 103B(3)(b).

³ The Act, s 103B(3).

have typically reported to Heinz Watties, and that he would have been subject to its supervision, instruction, training, and direction.

[30] Mr Young submits that he was employed by Programmed to work at a Heinz Watties site and that Heinz Watties took action resulting in the termination of his employment. In terms of the relevant action alleged against Heinz Watties, Mr Young's position is that he was informed on 17 January 2024 that he could no longer work at the Heinz Watties site on account of a conflict of interest. He submits that Heinz Watties could not simply rescind an offer of employment once it had been accepted.

[31] Heinz Watties submitted that it should not be joined to the proceedings, relying on s 103B(1)(b) of the Act providing that the personal grievance must relate to an action that is alleged to have occurred while the employee was working under the control or direction of a controlling third party. Heinz Watties contends emphasis is to be placed on the words "while the employee was working".

[32] Heinz Watties also contends that the requirement in s 103B(1)(b) of the Act is a separate question from that as to whether Mr Young was an employee of Programmed on the basis that he was a person intending to work. Heinz Watties submits that Mr Young applied for a role with Programmed to work as a forklift driver at Heinz Watties' site, but that he never commenced work in that role and that any relevant action is not alleged to have occurred in circumstances where Mr Young was under its control or direction. It submits that because s103B(1)(b) of the Act has not been satisfied, Heinz Watties cannot be joined to the proceedings.

[33] Section 103B(1)(b) of the Act is not a high bar in that it merely requires that an action is alleged to have occurred while the employee was working under the direction and control of the controlling third party. The issue of whether the person to be joined exercised, or was entitled to exercise, control or direction, is a matter that is to be considered on the standard of there being an arguable case in terms of the assessment at s 103B(3)(b)(i) of the Act by reference to the meaning of 'controlling third party' in s 5 of the Act. Section 103B(1)(b) requires less than that in that those matters merely need to be alleged.

[34] I consider that what is required is that there be an allegation that the employee was working under the direction and control of the controlling third party.

[35] On one view, it may not have been necessary for Mr Young to have actually been physically undertaking work at the time of the alleged action. For example, if the circumstances were such that he was not at work but an action occurred during the currency of an assignment then that may have been sufficient. However, I find that s 103B(1)(b) of the Act does require the alleged action to have occurred in circumstances where the employee is alleged to have been under the control or direction of the controlling third party.

[36] That is not the case here where the actions of Heinz Watties are not alleged to have occurred while Mr Young was working under the control or direction of Heinz Watties. Instead, they are alleged to have occurred in the context of Mr Young being a 'person intending to work' for Heinz Watties. Mr Young in effect alleges that he would have been, at a future time when commencing the assignment and after the action alleged to have been taken, working under the control and direction of Heinz Watties.

[37] This case does not involve an assessment of whether Mr Young was a person intending to work, and therefore an employee, of Heinz Watties for the purposes of s 6 of the Act. Nor does it involve any assessment of whether Mr Young was a person intending to work, and therefore an employee, of Programmed. It is uncontentious that Mr Young was a casual employee of Programmed.

[38] I find the personal grievance does not relate to an action alleged to have occurred while Mr Young was working under the control and direction of Heinz Watties. Section 103B of the Act has no application in the circumstances and the application to join Heinz Watties as a controlling third party is declined.

Did Mr Young notify Heinz Watties in accordance with s 115A of the Act?

[39] Notwithstanding my findings above, I consider it appropriate to deal with the remaining requirements of s 103B.

[40] Section 103B(3)(a) of the Act requires consideration of whether the notification requirements provided for at s 115A, which deals with notification to a controlling third party of personal grievances, have been complied with.

[41] Mr Young notified Heinz Watties that he had a personal grievance that he considered it caused or contributed to within the 90-day statutory period. I am satisfied

based on the correspondence sent to Heinz Watties by Mr Young's representative on 29 January 2024 that the notification was compliant.

Is there an arguable case that Heinz Watties is a controlling third party?

[42] The relevant assessment, being only on the basis that an arguable case need be established, in turn requires consideration of the meaning of 'controlling third party'.

The meaning of *controlling third party* is dealt with at s 5 of the Act as follows:

controlling third party means a person—

- (a) who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
- (b) who exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee.

[43] In terms of the meaning provided at s 5 of the Act, I am not satisfied that it is arguable that Heinz Watties had a contract or arrangement with Programmed under which Mr Young performed work for the benefit of Heinz Watties. The issue here is that there is no evidence at all that could be said to confirm that there was any concluded arrangement for Mr Young to perform work for Heinz Watties. The labour hire services agreement provided to the Authority would no doubt have applied if Heinz Watties had agreed to have Mr Young perform work. However, that did not occur, Mr Young did not perform any work under that contract or arrangement, and nor was he at any time subject to control or direction of Heinz Watties.

[44] While Mr Young was a casual employee of Programmed, I do not consider it arguable that there was a triangular employment relationship involving Mr Young, Programmed, and Heinz Watties. There is no evidence that any arrangement that may have been explored was confirmed or agreed to by Heinz Watties. At best, there was a prospective triangular employment relationship that did not eventuate.

[45] Mr Young alleges that he was employed to work at Heinz Watties' site at the time of the alleged dismissal on the basis that he was a person intending to work. However, there is no evidence that Heinz Watties accepted such an arrangement and then cancelled it. Instead, the email communications between Programmed and Heinz Watties clearly indicates a refusal by Heinz Watties to have Mr Young work under their control or direction, rather than it taking action alleged to have occurred while Mr Young was doing so.

[46] I conclude that even on an arguable case standard, it has not been established that Heinz Watties was entitled to exercise any control over Mr Young.

Is there an arguable case that Heinz Watties' actions caused or contributed to the personal grievance?

[47] It is alleged that Heinz Watties initiated or contributed to the alleged dismissal by its actions in declining to permit Mr Young to work on its site. Heinz Watties do not dispute that it declined to allow him to work at their site and in one sense they go further by seemingly accepting that it did so on account of conduct related to Mr Young's union role when attending the site and/or in relation to what it asserts was a conflict of interest.

[48] Ultimately, I may have found that there was an arguable case that Heinz Watties actions caused or contributed to the personal grievance. However, given the other findings made it is inconsequential.

Conclusion

[49] The application to joint Heinz Watties as a controlling third party is unsuccessful.

[50] A case management conference will be scheduled in relation to discuss the procedural arrangements relating to the Authority's investigation of Mr Young's claims against Programmed.

Costs

[51] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[52] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Heinz Watties may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Young will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[53] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" using a starting point of not more than a half day. That would

be subject to any circumstances or factors, requiring an adjustment upwards or downwards.⁴

Rowan Anderson
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1