

[3] Mr Heperi's remuneration has been prescribed in a schedule (Schedule B) of the relevant employment agreements. Up until the 2006/2008 agreement, which has expired, the remuneration was expressed as an annualised salary with an hourly rate. The annualised salary was removed from this agreement, upon renewal.

[4] Lynette Blackburn, the Employee Relations Manager, says that the removal of the reference to the yearly salary in the 2006/2008 collective agreement, which has now expired, occurred as a result of the terms of settlement reached with TIG during the negotiations for the previous 2005-2006 agreement, but the reference remained in that agreement as an oversight when it was up dated. It was then corrected in the 2006-2008 agreement.

[5] Mr Heperi discovered that the annualised salary had been removed from the expired 2006-2008 collective agreement and he has challenged that. First he took the matter up with the union and then with Wattie's. Not being satisfied with the answers from the union and Wattie's he escalated the matter by making a number of claims through raising a personal grievance and the enforcement of what he believes are his rights. He is not proceeding with a personal grievance in this application but he has raised a dispute for compliance over what he considers is his right to an annualised salary.

Mr Heperi's claim

[6] Mr Heperi claimed that from January 1998 until March 2007 he was paid by Wattie's at a minimum (or the equivalent) of 45 hours per week irrespective of the actual number of hours worked.

[7] Mr Heperi says that when he discovered that the reference to annual remuneration had been removed from the 2006/2008 agreement he had no knowledge of the change beforehand. He says that he was never given a copy of the terms of settlement prepared in December 2006 to ratify the agreement, and in particular for the changes that were made by the union's organiser Kerry Single, and Ms Blackburn. Mr Heperi claimed that the reason why he was not given a copy of the terms of settlement for 2006 and 2008 was to prevent him finding out that there had been agreement to mirror another site union's (Bay Union Group's) terms for a collective employment agreement. Wattie's and Mr Single absolutely denied this allegation.

[8] Furthermore, Mr Heperi claimed that the removal of the annualised payment from the remuneration rates has, in addition to the introduction of the alternative hours of work, meant that his earnings could possibly be reduced. The company accepted that it was possible in Mr Heperi's case for his earnings to be reduced but that has not happened because he has worked overtime. Mr Heperi accepted he has not lost any remuneration because he has worked overtime.

[9] He is seeking a compliance order for the annualised earnings to be returned to the matrix for remuneration rates in the appropriate schedule of the agreement and he wants his terms for a 45 hour week restored. He is requesting a declaration to give effect to the proper hours of work he claimed apply.

[10] Mr Heperi has estimated that the reduction in his hours will possibly reduce his pay and he has claimed his loss would theoretically amount to \$4,810.10. He claimed that a notional reduction in his income is not in accordance with the objectives of the collective agreement. He referred particularly to the objective that says:

“To grow and maintain the prosperity of the Company and its Employees, and to recognise that all Employees at all levels have a valued contribution to make towards the success of the company.”

[11] Mr Heperi during the investigation meeting made the claim that he was not covered by the employment agreement.

[12] Also, Mr Heperi has claimed that his union's and Wattie's actions amount to a misrepresentation. He has sought damages under the Contractual Remedies Act for a misrepresentation.

The respondent's defence

[13] Wattie's entirely rejected Mr Heperi's claims.

[14] Wattie's says that Mr Heperi was a permanent full-time employee. Mr Single supported that. Watties' has relied on the definition of permanent full-time in the agreement as follows:

Shall mean Employees who are employed under the terms of this agreement and have an ongoing entitlement to continuous employment based on a minimum of 45 hours per week (or 40 hours

per week where working the 40 hour per week alternative work pattern as per clause 18).

[15] Mr Single supported the above.

[16] Wattie's says Mr Heperi has lost nothing, and his pay has exceeded the amount that he would have ordinarily earned if he was working on a 45 hour shift pattern because he has worked in excess of 40 hours per week. The company also claimed that the agreement made provision, subject to consultation with employees, to alter the shift arrangement. It introduced a changed pattern of hours, after consulting Mr Heperi. Also the terms of settlement were based on mirroring another union's agreement with the company, i. e the Bay Union Group (BUG).

[17] Wattie's claimed that the 2006-2008 signed employment agreement was completed in good faith. Ms Blackburn says that Wattie's relied on the terms of settlement and the notification from Mr Single that the terms of settlement had been ratified to make the change to the agreement and delete the reference to annualised salary as a matter of consistency and consequential changes. In particular, the terms of settlement they rely upon stated that:

"Amend to incorporate a further pattern and make any other consequential changes as follows (Emphasis added):

4 x 12 hours per week Tuesday to Friday to apply to all areas.

5 x 9 hours per week Tuesday to Saturday (Engineers only)

5 x 9 hours per week Sunday to Thursday (Engineers only)

5 x 8 hours per week Monday to Friday applies to all areas (excluding Engineers)"

[18] Wattie's disputed Mr Heperi's claim that there was no proper consultation over the changed work pattern when it was only required to consult Mr Heperi, and was not required to consult the union. Mr Single supported that.

Collective agreements that apply and terms of settlement

[19] Mr Heperi has relied on clauses 5 and 6 of the 2006/2008 employment agreement that the company failed to consult properly. These clauses make provision for the objectives and consultation as follows:

5 Joint Objectives:

- *To grow and maintain the prosperity of the Company and its Employees, and to recognise that all Employees at all levels have a valued contribution to make towards the success of the company.*
- *To develop more effective communication between Managers, the Union and Employees, and to maintain harmonious industrial relations through mutual co-operation.*
- *To develop and grow co-operation, consultation, shared information, mutual respect and team work.*
- *To improve the quality of products, processes and people within the business.*
- *To create a clear focus on customer satisfaction both internally and externally.*
- *To develop excessive absenteeism the productivity of the company by a process of continuous improvement.*
- *To develop the highly skilled workforce who have access to relevant training, career paths, appropriate remuneration and job security.*

a. Consultation

The parties agree that their relationship should be founded on the basis of “no surprises” and to this end agree to consult over matters listed (below) which may significantly impact on the Employee’s employment to ensure the relationship meets this objective. The parties agree to consult over,

- *Changing skill requirements, work patterns and working practices.*
- *Other changes affecting the welfare and employment of staff.*
- *Improvements to the working environment, including job design, training and career paths, with the aim of enhancing job satisfaction, to the benefit of all the Company’s Employees.*
- *The maintenance and growth of the company; or*
- *When the Company plans to introduce technological change which is likely to:*
 - *Call for substantial changes in the nature/degree of skills of the Employees concerned; or*
 - *Substantially alter the hours of work; or*
 - *Reduce the number of people employed:*

The Company shall notify the Employees concerned and the Union of the introduction of such change and shall consult with the Employees concerned through their Union on the manner of introduction of such change.

[20] For completeness the other agreements referred to by both parties are as follows:

- Heinz Wattie’s Limited Tomoana Collective Employment Agreement: The Independent Group 1 August 2004 to 1 August 2005.
- Heinz Wattie’s Limited and The Independent Group Tomoana Collective Employment Agreement 2 August 2005 to 12 November 2006.
- Heinz Wattie’s Limited and The Independent Group Tomoana Collective Employment Agreement 13 November 2008 to 16 November 2010.

[21] The terms I have quoted above are broadly the same in the *Heinz Wattie’s Limited and The Independent Group Tomoana Collective Employment Agreement 13 November 2008 to 16 November 2010*. The terms of settlement for the 2008-2010 collective agreement were purportedly ratified by an exchange of email, which was agreed to by the union members at a ratification meeting. After a show of hands ballot Mr Single says it was agreed that ratification would be conditional on him getting further concessions from the company. Such concessions did not happen but Mr Single says he conveyed the ratification to the company after emailing members, but excluded Mr Heperi from the count because he did not reply.

[22] For completeness, the expired 2006/2008 collective employment agreement made provision for the following:

Section 3 – Hours of Work and Wages

11. Hours of Work

Each full-time Employee bound by this Agreement will work and expected 2,347 hours per year, based on 9 hours per day and 45 hours per week, which shall constitute the ordinary week’s work. Alternative ordinary hours of work may be as specified under the “Alternative Patterns of Ordinary Hours of Work” clauses, or as agreed by variation.

14. Alternative Patters of Ordinary Hours of Work

The following alternative ordinary hours of work patterns apply:

4 days – 4 days off: applies to: recipe, trades

4 x 12 hours Monday-Thursday: applies to: recipe, pet food

4 x 12 hours Tuesday-Friday: applies to all areas

4 x 12 hours Friday-Monday: applies to: fresh offal

5 x 8 hours Monday-Friday: applies to all areas, except Trades (refer to Clause 18) (the emphasis has been added)

5 x 9 hours Tuesday-Saturday: applies to Engineers only

5 x 9 hours Sunday to Thursday: applies to Engineers only

16. *Alternative Patterns – Start-Finish Times*

Agreements on the daily start and finish times for each alternative work pattern shall be agreed between the Company and a majority of Employees in each Department or work area. Consideration will be given to the impact of any change, including Employees with childcare responsibilities balanced with the production and business requirements of the company.

17. *Changes to Alternative Patterns of Work*

After consultation with the Employees directly affected, the Company shall provide a minimum of three weeks notice to initiate one of the specified alternative patterns (14 above), and a minimum of three weeks notice to terminate one of the alternative patterns.

Where termination occurs under this clause, an alternative pattern may be initiated or the base ordinary hours of work specified in clause 11 shall apply. Alternative work patterns other than those specified above may be agreed. The consultation provisions in clause 6 of this agreement shall apply in such circumstances, and any new work patterns shall be agreed under the variation procedures in this agreement.

18. *Alternative Patterns – 40 hour provisions*

Additional hours for Employees working under the 40 hour alternative work pattern shall be paid at T1.25. Employees working under the 40 hour alternative work pattern and working the Night Shift will be paid a shift allowance of \$4 per shift.

[23] Again these are broadly the same terms in the *Heinz Wattie's Limited and The Independent Group Tomoana Collective Employment Agreement 13 November 2008 to 16 November 2010*.

The issues

[24] There are three broad issues that emerge from my investigation and Mr Heperi's claims: Firstly, was there an agreement to remove the annualised salary from the 2006/2008 agreement? Secondly, has the company breached the provisions

of the agreement in implementing the 40 hour work pattern arrangement? Thirdly has there been proper consultation in introducing the 40 hour work pattern arrangement?

[25] Also, there are three other matters that came about during the investigation meeting. Was the 2006/2008 terms of settlement disclosed, and if not was there any ulterior motive for not disclosing them?

[26] Has there been a misrepresentation?

[27] Is Mr Heperi entitled to \$4,810.10 damages?

[28] Should any penalty be applied for any breach?

Findings

[29] I am satisfied that Mr Heperi was a member of TIG and is employed by Wattie's.

[30] Mr Heperi's coverage under the Wattie's TIG collective employment agreement in force at the relevant time has become an issue. The coverage clause certainly covers his position and work at Wattie's. However, the validity of the collective employment agreements may be questionable because of the ratification process and I will deal with that first.

[31] I have discovered that whilst Wattie's relied in good faith on Mr Single and the TIG union members ratifying the terms of settlement for a collective employment agreement, there is a very real question over whether the ratification was done in strict accordance with the statutory requirements now laid down by the Employment Court. To be fair nobody knew until the Court's judgement on the matter, what was required, in the ratification process: *Waikato District Health Board & Ors v NZ Public Service Association In* [2008] ERNZ 80.

[32] It would appear that the TIG terms of settlement (not the collective agreements) were ratified in a ballot on the show of hands, and that Mr Single signed off the collective employment agreement in good faith in accordance with the process agreement and bargaining protocols. It does not appear that the terms of the actual collective employment agreement as finalised were ratified, thus the status of the collective would become questionable under the law. However, the most recent collective employment agreement was ratified when they were typed up by Watties to

reflect the full necessary changes to the entire agreement and all clauses contained therein for ratification. Wattie's was entitled to rely on the information that the collective agreement had been ratified and is valid and enforceable. If the relevant collective employment agreements are not valid then Wattie's and Mr Heperi will have to fall back on individual terms and conditions based on the expired collective for any other enforcement action.

[33] Where the 2005/2006 and 2006/2008 collective agreements were arguably not properly ratified, the terms and conditions of employment will inevitably be individual terms and conditions of employment.

Other Claims

[34] Mr Heperi's claims have no basis for success for the following reasons.

- Wattie's says Mr Heperi agreed to work the 40 hour alternative arrangement. I accept this because Wattie's was acting in good faith by accepting that the collective agreement from the terms of settlement had been ratified at the time. I find that Wattie's was entitled to rely on Mr Heperi's actions of working the 40 hour arrangement to defend the application of the term that Mr Heperi has sought a declaration over.
- Mr Heperi signed off the variation earlier and has worked a 40 hour work pattern. The variation made in 2005, which started the change, and a change that Mr Heperi agreed with and signed off, says in clause 3 for employees to work: *"... 40 ordinary hours of 8 hours per day of five consecutive days per week Monday to Friday applying to the Employees of the Tomoana Recipe Jam/Jam line only. The variation to be known as the 40 hour pattern."*
- Clause 11 in the 2006/2008 agreement makes provision for *Alternative Patterns of Ordinary Hours of Work* on the hours of work arrangement. That provision on the plain meaning of the words provided for the alternative arrangement to apply, even on an individual basis at that time, I find.

- *17 Changes to Alternative Patterns of Work*. In other words the agreement made provision for changes to the hours of work and the pattern of work provided there was consultation with the employees (emphasis added); i e “*4 x 12 hours Tuesday-Friday: applies to all areas*”. Mr Heperi was consulted. There was no issue over the start and finishing times, consistent with the application of that arrangement, which Mr Heperi worked.
- The 2008/2010 collective agreement superseded the 2006/2008 collective agreement with terms that apply to Mr Heperi.

[35] If at the time any terms of the collectives were not enforceable as collective employment agreements, because of a failure by Mr Single and the TIG union members to properly ratify the relevant collective agreement and what had been agreed, leaves an implication for Mr Heperi. That is if the collective terms applied to Mr Heperi as individual terms this would mean I certainly could not enforce any requirement for consultation with the union, as he has claimed needed to occur. As such Wattie’s had to consult him, and it did so (also in accordance with the terms of the said agreement, I commented on above).

[36] During the course of the Authority’s investigation meeting Mr Heperi alleged that one of the reasons why the terms of settlement in 2006/2008 were not provided to him was because Mr Single did not want to disclose to the TIG members that agreement had been reached for the terms to mirror the BUG (Bay Union Group) CEA. This was an allegation that was adamantly denied by Wattie’s witnesses, and Mr Single. The company relied on the information it received that the terms of settlement, as presented, had been ratified. In that respect I have relied on Wattie’s evidence and cannot conclude that if the terms of settlement were not provided to Mr Heperi it was because there was something to hide. He had no other evidence to support this claim. It has not assisted him that the claim was raised during the Authority’s investigation meeting for the first time. There was no adequate explanation about whether or not Mr Heperi received the terms of settlement and collective agreement for ratification, and it was not challenged that he was not present for the ratification meeting.

[37] If there was any issue over the manner in which the ratification procedure has been followed by Mr Single under the union rules for a ballot on the show of hands and using an email arrangement, even with the agreement of members, that is another matter, and cannot be dealt with against Wattie's.

[38] If there has been any failure to properly ratify the 2005/2006 and 2006/2008 agreements this would cast some doubt on the validity of the collectives and the impact would be that the terms and conditions of employment would be individual terms that went uncontested until Mr Heperi raised his employment relationship problem. The issues relied upon by Mr Heperi relate to terms in the earlier agreements that are now superseded by another ratified collective employment agreement (2008/2010). The validity of that 2008/2010 agreement has not been tested here because Mr Heperi has based his claims on the alleged improper removal of the annualised salary in the 2006/2008 agreement. I am satisfied that Mr Heperi is a party to the terms now under the 2008/2010 agreement because he has been working under them and agreed to work the 40 hour work pattern, and has not incurred the possible loss he claimed.

[39] Mr Heperi's claim for misrepresentation and use of the Contractual Remedies Act are misconceived. This is because:

- (1) There is no proof of any misrepresentation by Wattie's. Wattie's genuinely relied on Mr Single providing information that the terms of settlement had been ratified.
- (2) The problem, if there was one, may have more to do with Mr Heperi's relationship within TIG and the application of the union rules.
- (3) Watties has acted in good faith and in reliance on the union's actions where there was a genuine attempt to ratify.
- (4) The current collective employment agreement covers Mr Heperi and the terms of that agreement apply. Therefore there is no basis upon which I can make a declaration as sought by Mr Heperi to change any term, particularly going back on a provision that cannot be retrospectively changed when it was renewed and he has worked under the term. Indeed the Authority is not able to make in respect of any collective agreement an order cancelling or varying

the agreement or any term of the agreement under s 163 of the Employment Relations Act.

Conclusion

[40] Mr Heperi's claims are dismissed.

[41] Costs are reserved.

P R Stapp
Member of the Authority