

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2022] NZERA275  
3134416

BETWEEN	SONJA POTGEITER Applicant
AND	BLISS BEAUTY NZ LIMITED First Respondent
AND	RONALD AJIT NARAYAN Second Respondent
AND	VERONICA DEVI Third Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Geoff Martin and Louise Smith, advocates for Applicant Rajendra Chaudhry, counsel for Respondents
Investigation Meeting:	22 and 23 March and 9 May 2022
Submissions received	25 May and 8 June 2022
Determination:	27 June 2022

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**DETERMINATION OF THE AUTHORITY**

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**A. Veronica Devi is joined as a controlling third party to Sonja Potgeiter's personal grievance proceedings.**

**B. Costs are reserved.**

### **Application to join controlling third party**

[1] The applicant Ms Sonja Potgeiter has asked the Authority to investigate and resolve personal grievance and other claims arising out of her employment by the first respondent Bliss Beauty NZ Ltd (BBL).

[2] She has applied to join Veronica (Ronika) Devi to the personal grievance proceedings as a controlling third party.

### **Employee may have personal grievance against controlling third party**

[3] When an employee is determined by the Authority to have a personal grievance, the legal responsibility to remedy the grievance may be extended beyond the employer to include other persons who have been found to be a controlling third party, as that term is defined by the Employment Relations Act 2000 (the ER Act).

[4] A controlling third party may be ordered by the Authority to share responsibility with the employer for rectifying the grievance, if it was caused or contributed to by the third party's actions.

[5] An employee may apply to the Authority under s 103B of the ER Act to join a controlling third party to proceedings brought by the employee to resolve the personal grievance.

[6] This determination considers whether the application of Ms Potgeiter to join Ms Devi to her personal grievance claims, should be granted.

### **Test for joining**

[7] Under s 103B(3) of the ER Act the application to join must be granted if;

a) Ms Devi has been notified in accordance with s 115A of the Act,

and

b) an arguable case has been made out that Ms Devi's is a controlling third party and her actions caused or contributed to Ms Potgieter's grievance.

[8] An 'arguable case' is a relatively low threshold to be reached. Before joining Ms Devi, the Authority must be able to find there is a sufficiently plausible basis for concluding that she was closely involved in Ms Potgieter's employment, as if she were the employer herself, and also that she was involved in a personal grievance arising from the employment. Ms Potgieter need not have a *prima facie* case but must show she has the better argument than Ms Devi, regarding the capacity Ms Devi acted in and the nature or character of her actions in relation to alleged grievances.

[9] If Ms Devi is joined, her legal capacity and responsibility will be determined substantively on a balance of probabilities.

[10] At an investigation meeting the Authority received and examined evidence from Ms Potgieter, the second respondent Mr Ronald Narayan, Ms Devi and other witnesses. Submissions on the joinder application have been made by the advocates and counsel.

### **The employment relationship of Ms Potgieter and Bliss Beauty NZ Ltd**

[11] Under an oral contract of service entered into with BBL, Ms Potgieter worked as a nail technician in BBL's Bliss hair and beauty salon in South Auckland.

[12] She commenced work, resigned, and then agreed to continue, all on the same day, 8 October 2020. Only 13 days later, on 21 October 2020 in the early evening, Mr Narayan, the sole director and owner of BBL, sent her the following text message;

Due to not enough wrk in company for nails  
we closing nail side hope  
u understand thanx for  
your service

[13] Earlier on 21 October at the salon, Ms Potgieter had been given for the first time, and nearly two weeks after commencing work, a written employment agreement. Before signing it as requested, she took it home to consider but had not yet read it when

she received Mr Narayan's text. Ms Potgeiter immediately concluded she had been dismissed by that message and by a phone call shortly after from the salon manager, Ms Riyah Tofilau, in which she was told not to return to her job. She sent a text to Mr Narayan pointing out that she had just received her employment contract, and in another text to him the following day she described what had happened as an 'instant dismissal without any explanation'.

[14] No reason was offered for her abrupt termination apart from closure of the nail side of the salon. She did not work again for BBL.

### **Personal grievance letter of 6 November 2020**

[15] About a fortnight later, on 6 November 2020, a letter was sent to BBL by Ms Potgeiter's representative. It was addressed to the company at its Kimpton Rd salon, for the attention of Mr Narayan. The letter was sent to his personal email address.

[16] The letter gave notice of a personal grievance with reference to the employment relationship between Ms Potgeiter and BBL. It referred to the termination of the employment by text from Mr Narayan and asserted that Ms Potgeiter had been dismissed without justification or due process. All of the complaints raised in the letter were expressly or by clear implication made against BBL as the employer. There was no complaint against the second respondent Mr Narayan personally whose actions, the letter implied, had been carried out on behalf of BBL.

[17] Ms Devi, the third respondent, was mentioned in the letter at paragraph 13, as follows;

13. Throughout her few weeks of employment, Mrs Potgeiter reports she was continually harassed by text and email to late at night from Mr Narayan's partner "Veronica". Veronica is reported to reside overseas and would monitor the staff by video camera all day. She is then reported to have frequently contacted Mrs Potgeiter outside her hours of work via text or email, haranguing her about how long it would take her to do nails and comparing her to other (cheaper) nail bars in the area. Mrs Potgeiter is a qualified nail technician of at least 14 years' experience in the profession.

[18] The only reference to any particular capacity in which Ms Devi harassed and harangued Ms Potgeiter, or surveilled her, as complained of, was as the partner of Mr Narayan. Nothing was said in the letter about any legal responsibility of Ms Devi personally for her actions, whether in relation to a personal grievance or any other relief available under the ER Act.

[19] The letter outlined several personal grievances of Ms Potgeiter, including unjustified dismissal, and an action for breach of the ER Act.

### **Notification has to be given under s 115A of the ER Act**

[20] As the applicant has asked the Authority to join Ms Devi as a controlling third party, a key issue is whether she was notified as required under s 115A of the ER Act. Under s 115A(1)(a), Ms Potgeiter as an employee, was required to give notice to Ms Devi that;

- Ms Devi was considered to be a controlling third party in relation to Ms Potgeiter, and
- Ms Devi was considered to have caused or contributed by her actions to a personal grievance of Ms Potgeiter.

[21] Ms Potgeiter was required to give that notice within 90 days of the date on which the action alleged to amount to a personal grievance occurred or came to her notice, whichever is later.

[22] In relation to the termination of Ms Potgeiter's employment, the 90 day period expired on 19 January 2021. It expired on dates between 6 and 19 January in relation to any unjustified actions alleged to have occurred between the beginning and the end of the employment.

[23] For Ms Potgeiter it was contended that the letter of 6 November 2020 was a notice which satisfied the requirements of s 115A(1)(a) of the Act.

[24] The Authority finds that the letter did not satisfy those requirements, for the simple reason that it was not directed to Ms Devi at all. Also, it did not give notice that

she was considered to be a controlling third party or that she was considered to have caused or contributed to a personal grievance of Ms Potgeiter.

[25] While the letter was a communication within the 90-day period of s 115A(1)(a) in relation to any unjustified actions occurring during the employment, the matters communicated were not in substance those required of a notice to be given to a controlling third party under s 115A(1)(a) of the ER Act.

[26] The letter is more closely akin to a communication raising a grievance with an employer and imparted in compliance with the requirements of s 114 of the Act.

### **Was Ms Devi joined by the Authority when it issued a Direction in September 2021**

[27] In the course of the investigation of Ms Potgeiter's claims against BBL and her application to join Ms Devi as a controlling third party, the Authority issued a Minute on 17 September 2021.

[28] At the beginning of it the Authority member recorded that during a case management conference she had directed the parties to mediation, ... *in accordance with s 115A(5) of the Employment Relations Act 2000.*

[29] The provision referred to in the Minute requires the Authority to direct parties to mediation where it has granted an application for leave to notify a controlling third party out of time.

[30] It is clear that no application had been made for such leave, presumably because the applicant considered notification had been given in time. The applicant had asserted in a statement of problem and a regulatory Form 4 application, that Ms Devi had been notified by letter of 6 November 2000, a date well inside the 90 day period.

[31] The issue of the timeliness of notification had not been raised by the parties before the Minute of 17 September 2021 was given to them, and it was not raised until the Authority questioned the position during the investigation meeting on 9 May 2022.

[32] The requirements as to notification are part of a statutory scheme intended to be strictly applied. The Authority's inadvertent reference to s 115A(5) of the Act when directing mediation, was not able to create an exemption or exception regarding those requirements. Either notification was given in time, which the Authority has found was

not the case, or an application needed to be made for leave to notify out of time. No such application has been made and the Authority cannot be regarded as having determined such an application, notwithstanding the reference to s 115A(5) in its Minute.

[33] The Authority finds that the applicant cannot rely on that reference in support of its submission that Ms Devi had been joined as a controlling third party on or before 17 September 2021.

**Did Ms Devi consent to being notified after the expiry of the 90 day period?**

[34] Under s 115A(2) of the ER Act a controlling third party may consent to being notified after the 90 day period has expired.

[35] There is no dispute that Ms Devi has not expressly consented to out of time notice.

[36] The Authority has considered whether, by her conduct, she at any time consented impliedly.

[37] The Employment Court, following Court of Appeal authority, has held in the context of raising personal grievance claims out of time, that where consent has not been expressly given, it can be implied from conduct. In *Ale v Kids at Home Ltd*<sup>1</sup> the Court examined the conduct of the employer and found that he could reasonably be taken to have consented to an extension of time for the employee to raise a grievance. Such consent was implied by his conduct in the circumstances.

[38] The Court held, at [41] of its judgment, that when viewed objectively and in context, the employer so conducted itself that he could reasonably be taken to have consented to a personal grievance being raised out of time.

[39] Included in the conduct considered by the Court was the filing of a statement in reply by the employer in which no objection was made that the alleged grievances had been raised out of time.

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<sup>1</sup> [2015] NZEmpC 209

[40] Section 114 and s 115A and the substantive law they enact are not so closely comparable that the principles applied in *Ale* (above) ought to be applied unquestioningly to s 115A cases arising from reliance on the substantive law of s 103B. Section 103B created a new line of legal responsibility extending to third persons previously outside the ties of an employment relationship. By contrast, a personal grievance claim between an employee and an employer remains within an established direct link within the relationship. Section 103B was a significant development enacted some 20 years after the ER Act and s 114 came into force.

[41] Although *Ale* (above) was a case about the requirements of s 114 of the ER Act for raising a grievance, the general principles applied by the Court seem applicable to s 115A of the Act, the time limits of that provision and the ability of a party to consent to being notified outside a limitation period.

[42] The differences may indicate that the requirements for giving notice were intended to be more strictly complied with, or more in accordance with the letter of s 115A, but after considering the way consent can be constructed from manifest behaviour, there seems to the Authority to be no reason why implied consent cannot be given under 115A, just as it can be under s 114.

[43] The particular consenting conduct of Ms Devi to be considered is the drafting and service of a standard Authority Form 3 statement in reply, the drafting and service of a special Form 5 statement in reply, participation in mediation and participation in an investigation meeting of the Authority.

### **Ms Devi's Form 3 statement in reply**

[44] About two months after the expiry of the 90-day period (measured from the date the employment ended), on 22 March 2021 a statement of problem (SOP) was lodged in the Authority by Ms Potgeiter. The SOP identified the respondent parties to an employment relationship problem as BBL, Mr Narayan and Ms Devi. It described Mr Narayan as the owner of the Bliss business and Ms Devi as his business partner. Ms Devi was also described in the SOP as Ms Potgeiter's employer or a controlling third party.

[45] The SOP requested the Authority to;

.....accept joining of Ms Devi to the proceedings as a controlling third party ..... and (*accept*) that her actions in large part caused and/or contributed to the personal grievance.

[46] The SOP alleged three grievances including the unjustified dismissal of Ms Potgeiter.

[47] The SOP also stated that the personal grievance letter dated 6 November 2020 sent to BBL, had given the respondents; .... *notice within the 90-day employee-notification period that Ms Devi was a primary cause of the grievances.*

[48] In providing that advice the SOP expressly referred to s 115A(1)(a) of the ER Act, which requires an employee to notify a person considered to be a controlling third party that the person's actions are considered to have caused or contributed to the personal grievance.

[49] It was not correct for the SOP at 1.12 to assert that in accordance with s 115A(1), within the 90-day period, notice had been given to Ms Devi that she was primary cause of the grievances. The Authority has found in this determination that the letter of 6 November 2020 was not a notice addressed to Ms Devi at all. It was unmistakably a notification to BBL of personal grievances of an employee, and it was sent on behalf of Ms Potgeiter to her employer, BBL.

[50] The letter is plainly a notice intended for BBL alone, in its capacity as the employer of Ms Potgeiter. Although it is addressed to the attention of Mr Narayan, he had ostensibly acted in the capacity of an agent of BBL his company.

[51] Even by implication, the letter does not describe Ms Devi as a "primary" cause of the grievances, as asserted in the SOP. It makes no reference to any involvement she may have had in the dismissal of Ms Potgeiter on 21 October, or to the failure of BBL to provide an employment agreement to Ms Potgeiter at the commencement of her employment, which omission was potentially the foundation for a disadvantage grievance. How Ms Devi may have been implicated in any grievance, is not stated apart

from the allegation of nocturnal harassment, and of haranguing and surveilling Ms Potgeiter.

[52] The legal capacity in which Ms Devi is alleged to have acted unjustifiably towards Ms Potgeiter is not stated, except that she is described as Mr Narayan's partner.

[53] The SOP did allege that notice had been given, leaving it open to Ms Devi, who was legally represented, to inspect the 6 November letter and satisfy herself that it was a conforming s 115A notice.

[54] Ms Devi was served with the SOP. In that way the matters alleged and asserted in the SOP were communicated to her, as well as BBL and Mr Narayan. Through counsel, Ms Devi lodged a standard Form 3 statement in reply (SIR) which was served by the Authority on Ms Potgeiter.

[55] In her SIR, Ms Devi did not take issue with the letter as providing notice to her. Instead, she disputed the merits of the claims that she was a controlling third party and had caused or contributed to the grievances of Ms Potgeiter. Viewed objectively, this conduct gave a reasonable indication that the notice point was not contested by her. The SIR clearly showed that she disputed the claims about the capacity she had acted in and disputed the claims about the nature of her actions themselves, but not the timing of notice.

#### **The Form 5 statement in reply**

[56] After the SOP was lodged the Authority directed the attention of the applicant's representatives to requirements of the Employment Relations Authority Regulations 2000, for joinder applications regarding controlling third parties to be made in Form 4 as prescribed.

[57] A Form 4 SOP was lodged in the Authority on 16 April 2021 and was responded to with a Form 5 SIR from Ms Devi on 3 May 2021.

[58] The design of Form 4 in the Regulations includes a section about notification. In that part the applicant expressly alleged that Ms Devi had been notified ... *on 6 November 2020 by way of Notice of Personal Grievance*. The applicant answered *Yes*

to the question whether the third party, Ms Devi, was notified within the relevant 90 - day notification period provided at s 115A of the Act.

[59] The question of notice was clearly regarded as a matter of significance to the scheme of the Act, because the regulatory Form was specially designed to require applicants to give specific and precise information about that. Although the information given in Form 4 in this case was wrong the Authority finds, there was nevertheless a clear assertion made to Ms Devi about the notice requirement. Her silence about that in her Form 5 reply could objectively be viewed as an indication that no issue was being taken about notice.

[60] Notification is expressly a pre-condition of granting joinder. The issue raised by the Authority at the investigation meeting has been addressed in submissions by the parties. That issue must now be determined in the course of considering the joinder application.

[61] It may seem a strange result that without knowing it, Ms Devi consented to an application being made out of time by Ms Potgeiter, who made that application without herself realising that is what she had done. But the test is an objective one and is not dependent on the subjective intentions of Ms Potgeiter or Ms Devi, or on what their knowledge was about the notice assertion.

[62] It may be that Form 5 could be improved by including a notification section to align Form 5 with Form 4. A simple 'yes' or 'no' required from Ms Devi in relation to the question of whether notification had been given, is likely to have avoided the problem that has arisen in this case and may have led to an application for leave to notify Ms Devi out of time being made under s 115A(3) of the ER Act.

### **Ms Devi has consented to being notified out of time**

[63] The Authority finds that Ms Devi by her conduct, viewed objectively, did consent out of time to being notified as required under s 115A of the Act. Her consent can reasonably be implied from the absence of an objection made by her to the application being out of time.

## **Attendance at mediation and an investigation meeting**

[64] For completeness the Authority has considered Ms Devi's conduct in attending mediation, and also in taking part in the Authority's investigation meeting without raising an objection to her notification being out of time.

[65] Mediation will usually be regarded by the parties undertaking that process to be a confidential, without-prejudice and often mandatory occasion.

[66] The Court in *Ale* (above) at [34] expressed reservations about reaching conclusions from the fact alone that a party attended mediation, observing that the mandatory nature of the process makes it difficult to conclude with any confidence that consent has been given simply by the conduct of a person who attended mediation without expressly stating that their participation in the process was not to be viewed as a waiver.

[67] In the circumstances of this case the Authority finds that the conclusion cannot be drawn that Ms Devi, by attending mediation on two occasions, consented to being notified out of time.

[68] Her first attendance was on 2 March 2021. No proceedings of any kind had by then been commenced by Ms Potgeiter in the Authority. A letter raising a grievance had been sent to BBL on behalf of Ms Potgeiter, but it made no mention of controlling third party liability or of any legal proceedings.

[69] The advocates for Ms Potgeiter have indicated in their submissions, at para 1.4, it was only through attendance at mediation that they become aware of the possibility that Ms Devi might be a controlling third party. It may seem an unexpected outcome that just by showing up Ms Devi consented to something neither she nor Ms Potgeiter were aware was a liability issue, or even a potential issue, when the mediation commenced.

[70] The second attendance was compelled by the Authority's direction issued on 17 September 2021, requiring the parties to attend mediation. Ms Devi could reasonably assume the direction had been correctly given and she was therefore legally obliged to comply with it. As the Court observed in *Ale*, not too much should be read into the presence of a person at mediation in those circumstances.

[71] Ms Devi has maintained that there was no contract or arrangement between herself and Mr Narayan or BBL, and that she had simply been helping him as a friend when directing or instructing Ms Potgeiter in her work. It is clear that such help would have been useful to him because, as Ms Devi said in one of her messages (number 651) to Ms Potgeiter, .... *Ron .... doesn't know about nail stuff*.... Mr Narayan was a motor mechanic by trade. For the same reason Ms Devi may have attended mediation, to assist Mr Narayan with her knowledge and experience of nail technical matters. Her presence to assist Mr Narayan cannot be taken by itself to be an admission that she was a controlling third party, or taken as consent to being notified under s 115A out of time.

[72] Generally, the Authority will have no knowledge of what happened in mediation without investigating to some degree. Intrusion into mediation in that way seems contrary to an object of the ER Act at s 3, to promote mediation as the primary problem-solving mechanism, an object the Authority is required by s 157(2) to generally further.

[73] The Authority should respect the key role mediation plays, the confidentiality of the parties' and mediator's discussions, and the without prejudice basis on which parties usually attend mediation. The operation and objectives of mediation should not be undermined by the investigation of mediation meetings or conferences, unless there is a public interest element in examining the behaviour of participants in mediation, such as when there may have been a breach or threatened breach of law, a situation that will usually take the parties outside the scope and purpose of mediation and open up their actions to outside scrutiny.

[74] Investigating the capacity in which persons attended mediation and how they conducted themselves while present, may have a chilling effect on the process and the candour of the participants, to the detriment of both this pivotal institution and also the Authority itself.

### **Investigation meeting**

[75] The Authority's investigation meeting was in part the hearing of an application to join Ms Devi to the claims against BBL and Mr Narayan. To effectively oppose the application, Ms Devi had to put herself before the Authority and take up the opportunity offered to be heard.

[76] I agree with counsel Mr Chaudhary that nothing can be read into Ms Devi's participation in the investigation meeting. She had not invited Ms Potgeiter to apply to join her, and staying away would simply have made it easier for the application to succeed, against her wishes.

### **Is there an arguable case for joining Ms Devi?**

[77] Having found that Ms Devi did consent to notification by her conduct, the Authority must consider the merits of the joinder application.

[78] No issue has been raised that Ms Devi's location at all times beyond the shores of Aotearoa - New Zealand, put her outside the reach of the ER Act. Ms Devi's actions were for the purpose of sending instructions and directions to a person contractually employed in New Zealand and who was performing the employment in New Zealand. The communications may have emanated from Fiji, but they were intended to be received and acted upon in New Zealand by Ms Potgeiter.

### **The statutory test of a controlling third party**

[79] The definition of a controlling third party at s 5 of the ER Act requires the Authority to be satisfied, to the requisite standard, that.

- (a) Ms Devi had a contract or other arrangement with BBL under which Ms Potgeiter performed work for the benefit of Ms Devi, and
- (b) Ms Devi exercised control or direction over Ms Potgeiter similar to the control or direction that an employer exercises.

[80] The fact that Ms Devi was far away when sending the messages did not prevent her from exercising control and direction effectively, through the medium of text messages and surveillance by television camera of Ms Potgeiter at work in the salon.

[81] It is clear from the evidence that Ms Devi's control and direction of Ms Potgeiter was exercised with the knowledge and approval of Mr Narayan, the controlling mind of BBL.

[82] The Authority has viewed nearly 1900 messages between Ms Devi and Ms Potgeiter, which record their conversations between 29 September 2020, over a week before the latter started work at the salon, and 21 October 2020, the last day of work.

[83] The numerous messages and their contents Ms Devi sent to Ms Potgeiter about her work, provide ample evidence that Ms Devi controlled and directed Ms Potgeiter throughout her employment. That evidence takes this aspect of the application for joinder well above the standard of an arguable case. Ms Devi clearly acted as if she was the employer or an agent of the employer such as a manager or supervisor.

[84] An employee or other agent of the employer is excluded from the definition of a controlling third party. This is because the actions of the employee or agent are ultimately those of the employer or principal, and any *benefit* obtained by the employee or agent would be a benefit to which the employer or principal was entitled. A controlling third party will usually be a separate and independent entity from the employer, one who receives any *benefit* in its own name, in its own right, and for its own use.

[85] Much weaker was the evidence of a contract or other arrangement between BBL and Ms Devi. Mr Narayan and Ms Devi denied the existence of a contract or other arrangement. She told Ms Potgeiter that while in New Zealand on a previous visit she had renovated or redecorated the salon, with support from Mr Narayan. It might be supposed she had some financial interest in carrying out those improvements. Lease documents produced on request, showed that Ms Devi did not lease the salon premises at material times. That interest was held in Mr Narayan's name.

[86] Even then, the existence of a lease in the name of Ms Devi by itself would not establish a triangular employment relationship or the receipt of a benefit from such a arrangement.

[87] Mr Narayan and Ms Devi had at times described themselves to Ms Potgeiter as partners, although that may have simply been an embellishment of the real nature of

their relationship. If they were business partners, the question would remain whether the terms of that partnership allowed for Ms Devi to benefit from the work performed by Ms Potgeiter.

[88] The Authority accepts the evidence of Mr Narayan and Ms Devi that the latter was not an employee of the former or BBL. Neither was there a principal-agent relationship. The presence of either relationship would have excluded Ms Devi from falling within the definition of a controlling third party and, if it existed, is a circumstance likely to have been raised by her in opposition to being joined.

[89] Ms Devi portrayed herself as having been a volunteer. In principle, a volunteer is also outside the definition of a controlling third party, because there is usually no tangible benefit taken from the performance of voluntary work.

[90] The Authority finds that to the relatively low standard of an arguable case it is reasonable to infer the existence of an arrangement of some kind to explain Ms Devi's intensive participation in the Bliss business, particularly the close control she continuously exercised throughout the brief employment of Ms Potgeiter and the commercial focus Ms Devi maintained throughout when instructing Ms Potgeiter.

[91] It is reasonable to suppose Ms Devi acted for a benefit or reward of some valuable kind, beyond the satisfaction derived from just helping a friend. This view has the edge on the alternative of regarding Ms Devi as merely a volunteer.

[92] The overall impression gained by the Authority from the evidence is that although BBL was a small business and perhaps for that reason not typical of a party to a triangular employment relationship, Ms Devi did have that sort of arrangement with BBL or Mr Narayan.

### **Ms Devi's involvement in a personal grievance of Ms Potgeiter**

[93] Also, to the standard of an arguable case, it must be shown that Ms Devi caused or contributed to the personal grievance claims of Ms Potgeiter. Those claims broadly appear to include.

- (i) the unjustified disadvantage to Ms Potgeiter in not being given a written employment agreement at the commencement of employment, or at any other time until the end of the employment,
- (ii) the alleged harassing and haranguing behaviour and surveillance, by Ms Devi,
- (iii) the unjustified dismissal of Ms Potgeiter.

### **Authority's oral indication of dismissal grievance**

[94] During the investigation meeting the Authority gave an oral indication of its preliminary finding that Ms Potgeiter was unjustifiably dismissed by BBL. The Authority considered that to justify the dismissal, BBL had tried to rely upon an invalid and therefore ineffective 90-day trial period clause contained in the employment agreement. Ms Potgeiter was not given a written agreement containing the clause until well after her employment had commenced and therefore, under the ER Act, the trial provision could not be applied by the employer.

[95] In his oral evidence Mr Narayan said that Ms Potgeiter was not dismissed by the text message he sent to her on 21 October 2020 but was suspended. He could not say how long the suspension was to be for or what the purpose of it was. He said that Ms Potgeiter's employment had ended on 6 November 2020, when her representatives raised a grievance in their letter to BBL.

[96] This evidence was hopelessly contradicted by his affidavit evidence affirmed on 21 February 2022.

42. I was forced to let go of the applicant on 21 October 2020 and asked her not to return to work on 22 October 2020.

and,

57. In the final analysis I had the legislative authority to terminate the applicant's employment within the 90 day trial period and did so

[97] The Authority's tentative view was also that BBL could not justify the dismissal on the grounds of performance. The recognised steps that must usually precede a justified performance dismissal, did not appear to have been taken in this case.

[98] There is no evidence showing that Ms Devi was involved in BBL's failure to provide a written agreement. Ms Devi, who was located in Fiji, was not her employer and had no legal obligation to Ms Potgeiter in that regard.

[99] The messages show that when Ms Potgeiter asked where her employment contract was, Ms Devi told her (message 1145) to check with Ms Narayan about that. It seems likely that for convenience the production and handling of the contract document occurred in Auckland where BBL and Ms Potgeiter were both based, and not in Fiji where Ms Devi was then living.

[100] In his evidence Ms Narayan implicated himself and an Auckland based staff member in the failure to provide a written agreement at engagement or by the time the employment commenced on 8 October 2020. The Authority accepts his evidence in that regard.

[101] The Authority does conclude there is an arguable case Ms Devi caused or at least contributed to the unjustified dismissal of Ms Potgeiter, which was an action Mr Narayan carried out. The sudden deterioration of the relationship between Ms Potgeiter and Ms Devi on 21 October, as is evident from the messages between them, and the dismissal only a few hours later, make it arguable that Ms Devi instigated the dismissal or incited or encouraged Mr Narayan to carry out that action.

[102] In this regard an arguable case can be built on Ms Devi's supervisory role and the brief period of time between Ms Devi expressing dissatisfaction with Ms Potgeiter's speed with clients and Mr Narayan's dismissal text sent on the evening of 21 October.

[103] It is unlikely Mr Narayan, who was unskilled in beauty, made an assessment of Ms Potgeiter's performance independently of Ms Devi, who was a practiced professional and who had been closely guiding and directing Ms Potgeiter throughout her employment.

[104] The messages between the two on the final day of employment show an increasingly terse discussion developing about Ms Potgeiter's rate of work. Ms Devi

said it was Ms Potgeiter's choice 'to stay or leave', that she would not put pressure on her but needed work to be done and needed cooperation from her. Ms Potgeiter retorted, 'Wow ok' and described herself as being attacked on a personal level by Ms Devi.

[105] Ms Devi sent her last message to Ms Potgeiter at about 3pm. Just before 7 pm Mr Narayan sent his text dismissing Ms Potgeiter. It seems highly probable given their respective roles and proficiencies in the business that Ms Devi had spoken to Mr Narayan and told him she was dissatisfied with Ms Potgeiter and her performance, which she had been continuously monitoring closely. Speed was vital to BBL's profitability and competitive edge, and the messages confirm these goals were a constant focus of Ms Devi.

[106] It is a matter of strong inference that because Mr Narayan was not himself an experienced beauty practitioner, he must have relied on the advice or opinion of Ms Devi in deciding to end the employment of Ms Potgeiter for performance reasons.

[107] Standing back and looking at the way events unfolded, the Authority finds there is an arguable case that Ms Devi was instrumental in the unjustified dismissal of Ms Potgeiter, particularly given the abruptness of the dismissal without notice, lack of any disciplinary warning and lack of any attempt to follow a fair procedure where performance appears to have been the issue rather than misconduct of any kind.

[108] The reliance of BBL on the defective 90 day trial provision, does not seem to have been the responsibility of Ms Devi, even to an arguable case level. The employment agreement, its provisions and its operation cannot readily be seen as matters Ms Devi concerned herself with from her base in Fiji.

[109] The Authority finds there is no arguable case that Ms Devi caused or contributed to any disadvantage grievance arising out of BBL's failure to provide Ms Potgeiter a written employment agreement. BBL and Mr Narayan were responsible for that breach of the ER Act.

[110] The Authority finds also there is not an arguable case in relation to the alleged harassing and haranguing and surveilling. This pattern of communication had been set even before the employment began, and it continued until almost the last day of

employment. More than half of the 1834 messages shown to the Authority were sent and received before performance of the employment began on 8 October. The tone of Ms Devi does not indicate that the communications were unreasonable in their content. Ms Potgeiter's views about them were more likely the result of the pressure Ms Devi placed on her to work speedily and profitably, rather than on her manner and the frequency of communications, or the time of night a few were sent. Ms Potgeiter had been aware from the time she was interviewed that Ms Devi was going to play a key role in her employment and because of her location would need to rely on the TV camera mounted in the salon and messaging, to monitor the work and communicate about it.

[111] Except on her last day of employment, Ms Potgeiter gave no indication in her messages that she was intimidated by the frequent messages from Ms Devi or the tone of them, or that she found Ms Devi's actions oppressive or unreasonable in this regard.

### **The joinder application is granted by the Authority**

[112] For the above reasons the Authority finds an arguable case has been made out that Ms Devi was a controlling third party and that her actions caused or contributed to Ms Potgeiter's grievance of unjustified dismissal.

[113] The Authority is therefore satisfied that Ms Devi should be joined to the unjustified dismissal grievance claim brought by Ms Potgeiter.

### **Mediation**

[114] Section 103B(5) of the ER Act requires the Authority, upon joining a controlling third party, to consider whether to direct the parties to mediation to resolve the personal grievance. As the parties including Ms Devi have twice previously been to mediation, it is unlikely to serve any practical purpose to direct them again. No direction is made.

### **A further determination**

[115] In the way the investigation meeting proceeded, the Authority has now heard the full evidence of all material witnesses, which has been tested by the advocates, counsel and the Authority. In a determination to follow this one, with the aid of that

evidence the Authority will decide the substantive claims brought against Ms Devi, Mr Narayan and BBL.

[116] The Authority will determine finally whether Ms Devi was a controlling third party and if so whether she caused or contributed to a personal grievance of Ms Potgeiter. Her legal capacity and liability for her conduct must be substantively determined to the standard of the balance of probabilities, which level is not displaced by the order of the Authority joining her to these proceedings.

[117] The Authority will determine BBL's responsibility for the grievance and for breaches of the ER Act and the employment agreement, and whether Mr Narayan, as an active director of BBL, was a party to any breach of the employment agreement and liable to a penalty under s 134(2) of the ER Act.

[118] The Authority will quantify the remedies of compensation and lost wages that Ms Potgeiter is entitled to from BBL for unjustified dismissal or any other grievance. It will also assess whether Ms Devi, if confirmed to be a controlling third party, had any responsibility for the unjustified dismissal of Ms Potgeiter and, if so, how her liability is to be shared with BBL in providing those remedies.

### **Section 142W of the ER Act – liability for breach of employment standards**

[119] In submissions for Ms Potgeiter, reference was made to s 142W of the ER Act and the liability of Mr Narayan as a person alleged to have been involved in a breach of employment standards. Liability would arise if Ms Potgeiter is found to have been underpaid the statutory minimum wage while working for BBL, or if she was underpaid holiday pay, or if any other employment standard as defined in s 5 of the ER Act was breached.

[120] Under s 142X of the ER Act a penalty can be sought for any breach of employment standards, but only by a Labour Inspector. An Inspector is not a party to these proceedings.

[121] A person found by the Authority to have been involved in a breach of employment standards may also be made personally liable if the employer is unable to pay any amounts of minimum wages and holiday pay awarded against it. Section

142Y(2) of the ER Act requires the prior leave of the Authority to be obtained. Leave has not been given in this case.

[122] Accordingly, wage recovery and penalty proceedings under s 142X and s 142Y against Mr Narayan personally, require no further consideration by the Authority.

[123] Even with leave given, it would be premature to make orders under s 142Y, because no orders have yet been made against the employer BBL, the company is not in liquidation and there is nothing to show that BBL is, or will be, unable to pay in the event orders are made against it.

[124] Any future default by BBL must also be shown to be due to a breach of an *employment standard*. Arguably, a failure to meet monetary orders to remedy a personal grievance by reimbursing lost wages, even if payable at the minimum wage, is not a default due to a breach of an employment standard such as the requirement to pay the minimum wage. It is not a standard that is breach but an order of the Authority.

### **Further submissions**

[125] The controlling third party liability under the ER Act is the subject of statutory provisions which must be read closely and followed carefully. Given the twists and turns this case has taken, leave is given to the parties to make any final submissions on the outstanding issues to be decided in the next determination, as referred to above by the Authority.

[126] Any further submissions are to be lodged simultaneously, within 14 days of the date of this determination.

### **Costs**

[127] Costs are reserved for the parties to address once a final determination has been given.

Alastair Dumbleton  
Member of the Employment Relations Authority