

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 150  
3176787

BETWEEN	DAMIAN HOWE Applicant
AND	DRAKE NZ LIMITED First Respondent
AND	IPLEX PIPELINES NZ LIMITED Second Respondent

Member of Authority:	Nicola Craig
Representatives:	Dave Cain, advocate for the applicant Maurice O'Brien, agent for the first respondent Susan Hornsby-Geluk, counsel for the second respondent
Investigation Meeting:	On the papers
Submissions [and further Information] Received:	20 September and 21 December 2022 from the applicant 29 September 2022 from the first respondent 4 October 2022 and 24 February 2023 for the second respondent
Date of Determination:	27 March 2023

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**DETERMINATION OF THE AUTHORITY**

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**What is the Employment Relationship Problem?**

[1] Damian Howe was appointed by Drake NZ Limited (Drake) and performed work at an Iplex Pipelines NZ Limited (Iplex) site in Palmerston North.

[2] Mr Howe asserts that he was subject to unjustified actions to his disadvantage and/or unjustifiably dismissed. Drake denies that Mr Howe has any valid personal grievance claim. Iplex denies that it was Mr Howe's employer or that the true nature of the engagement evolved beyond that of a temporary labour arrangement.

[3] This determination decides the question of whether Iplex should be joined as a controlling third party.

[4] Drake does not consider that the threshold to join Iplex has been met. Iplex opposes being joined as controlling third party on procedural and substantive grounds.

### **How did the Authority investigate?**

[5] The parties agreed that this question should be dealt with on the papers. They were given the opportunity to provide any evidence and submissions. All three parties lodged submissions. No affidavit evidence was provided.

[6] A check with Mr Howe's representative on whether Mr Howe wished to supply any evidence resulted in confirmation that he was relying on documents lodged with the statement of problem and statements in reply.

[7] Iplex objected to any consideration of the application to join it as a controlling third party as there was no evidence from the applicant Mr Howe as such, other than via the statement of problem. However, the Authority is able to take into account evidence and information which is not strictly legal evidence and this determination focuses on material which is largely undisputed.<sup>1</sup>

[8] I went ahead to consider the question. Further information was sought about whether there was a document from Drake setting out the terms or arrangements for Mr Howe's assignment to Iplex. Iplex's representative informed the Authority that there was no agreement with Iplex.

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<sup>1</sup> Employment Relations Act 2000, s 160(2).

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

### **What happened?**

[10] I set out a narrative of events based on the statement of problem, statements in reply, attached documents and submissions.

[11] Back in 2017 Drake entered into a written agreement for temporary labour services with Fletcher Building Holdings Limited on behalf of all its business units. Iplex is part of that group.

[12] On the information available, Mr Howe was employed by Drake as a field staff employee for a relatively short period. He and Drake signed an individual employment agreement on 26 November 2021.

[13] Iplex was commissioning a new piece of machinery or equipment. It refers to needing coverage for staff absence and assistance with workload requirements whilst the commissioning was undertaken.

[14] Mr Howe attended a meeting with Iplex representative/s to confirm his suitability. He started at the Iplex site on about 29 November 2021. Iplex refers to itself entering into no contractual arrangement with Mr Howe. As the site was multi-operational and considered safety sensitive, Iplex undertook Mr Howe's health and safety induction and training.

[15] The statement of problem refers to Mr Howe understanding from the outset that the Iplex work was permanent and ongoing. Drake and Iplex both assert that Mr Howe's role with Iplex was temporary/fixed term. That is not an issue for this joinder application.

[16] Mr Howe took a break during the closedown of Iplex's site over the Christmas and New Year period.

[17] In his statement of problem Mr Howe identifies that he had concerns about safety practices at Iplex. But it was Iplex who raised concerns about his performance including safety

elements, with Mr Howe at the time they occurred it says and also with Drake on 28 January 2022 via a lengthy email.

[18] Seemingly Drake did not perceive the concerns as so serious as to put Mr Howe's employment in jeopardy because a company representative phoned Mr Howe to set up an informal meeting.

[19] On 31 January 2022 Drake representatives met with Mr Howe. No Iplex personnel were present. The discussion resulted in both parties regarding the matter as resolved.

[20] One of Mr Howe's disadvantage grievances alleges that he was suspended without pay on this day. Drake's position is that he was not suspended but rather chose not to return to work after the meeting and was incorrectly not paid for that day. When the omission was pointed out payment was immediately made to correct the error.

[21] Mr Howe went back to work at Iplex from about the 1<sup>st</sup> to the 10<sup>th</sup> of February, from his perspective without incident. However, on 3 February Iplex sent a detailed feedback email to Drake outlining at least two concerning situations involving Mr Howe. Another email was sent later that day after Iplex followed up with Mr Howe on one of the incidents, which he said he was unable to recall.

[22] On 10 February Iplex emailed Drake twice about Mr Howe. In the second email Iplex advised that Mr Howe could not work at the site because he was a high risk person; to himself and others. The Iplex manager requested that Mr Howe ended his assignment with Iplex immediately.

[23] Drake called Mr Howe to let him know Iplex no longer wanted him to work there and Drake were now starting an investigation process into his actions.

[24] The next day Drake wrote advising that it had serious safety concerns about Mr Howe's adherence to basic health and safety principles when at Iplex. Drake identified that his employment was at risk and instructed him to attend a meeting.

[25] Events leading up to and including Mr Howe's departure from Iplex are identified in the statement of problem to be a disadvantage to him or a dismissal.

[26] A meeting was held between Drake and Mr Howe on 16 February. Drake subsequently met with Iplex, putting Mr Howe's responses and asking for further commentary. Iplex provided some material. Drake wrote up its investigation and sought any additional response from Mr Howe.

[27] On 10 March 2022, a letter mentioning personal grievances was sent to both companies. This is discussed in more detail below. Drake's manager in writing responded noting that it was a joint response from Drake and Iplex.

[28] Drake sent a payslip to Mr Howe for the period ending 13 March which referred to "*Manual Termination*". It sees this as being at Mr Howe's instigation whereas Mr Howe views it as Drake's initiative. Mr Howe was paid out the wages and holiday pay owing for his work at Iplex. On 26 April 2022 another dismissal grievance was raised, this time with Drake only, regarding this "*sending away from his employment with Drake*".

#### **What does Mr Howe assert?**

[29] Having received two statements in reply and associated documents, the approach for Mr Howe could be seen as having moved a little by the time of the case management conference. Drake was identified as the employer with Iplex described as having control on a daily basis. Subsequent submissions for Mr Howe acknowledged Drake as the employer with leave sought to join Iplex as a controlling third party under s 103B of the Act.

[30] As is not uncommon in situations where there were three parties in a relationship, issues can be complex. I see Mr Howe's statement of problem as identifying his pursuit of the following grievances, possibly with some overlap:

- (i) a suspension causing disadvantage in January 2022;
- (ii) a disadvantage regarding Drake's failure to "go to bat" for Mr Howe, from February 2022, possibly onwards;
- (iii) a dismissal grievance concerning events leading up to and including Iplex's 10 February 2022 removal of Mr Howe from machinery he was working on and its request that his assignment at Iplex ended effective immediately. This includes lack of proper processes – consultation, opportunity for feedback, notification that his livelihood was at risk;

- (iv) an alternative disadvantage grievance to (iii), about the actions and inactions of Iplex in relation to Mr Howe's deprivation of work at Iplex; and
- (v) a dismissal grievance against Drake focusing on events in March 2022.

[31] Grievance remedies are sought broadly - lost wages or the notice period and one amount of compensation under s 123(1)(c)(i) of the Act.

[32] I refer to grievances (i) to (iv) as the earlier grievances. Mr Howe's second dismissal grievance claim, number (v), focused on March 2022, was not notified to Iplex in the same way as the earlier claims were. Instead his representative solely emailed Drake with no reference to Iplex. That grievance is described in the statement of problem as a separate yet factually linked grievance which was raised only with Drake. Mr Howe seeks that both grievances (which I take to refer to the earlier grievances covered in the 10 March 2022 letter) and the grievance in the 26 April letter, are dealt with in one investigation meeting.

[33] I take it that Mr Howe is not seeking to have Iplex joined as a controlling third party regarding the second dismissal grievance. I move on to consider joinder regarding the earlier grievances.

### **What is required to join a controlling third party?**

[34] I am guided by the Authority's responsibility to look at the substantial merits rather than technicalities and deal with the employment relationship problem rather than how the matter is framed by the parties.<sup>2</sup>

[35] However, there are several elements in sections 5, 103B and 115A of the Act to be satisfied when an employee seeks leave to join a controlling third party.<sup>3</sup> Some elements may naturally fall to be considered together. The elements include substantive and procedural aspects, are set out in the grid below with my descriptions of the requirements added:

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<sup>2</sup> The Act, ss 157(1) and 160(3) and *FMV v TZB* [2021] NZSC 102.

<sup>3</sup> This section and the grid below focus on the situation of an employee wishing to join a controlling third party. An employer is also able to seek the joining of a controlling third party – s 103B(2) of the Act.

<b>Section</b>	<b>Description of requirement</b>	<b>Requirement</b>
103B(1)(a)	Grievance process	(i) Employee raises personal grievance (with employer) under s 114; and (ii) Applies to the Authority to resolve personal grievance with employer
103B(2) AND reg 9A Employment Relations Authority Regulations 2000	Application to join controlling third party	Employee applies using form 4
103B(1)(b)	Timeframe for controlling third party involvement	Personal grievance must relate to action alleged to have occurred while employee was working under control or direction of controlling third party
103B(3)(a)	Notification	Proposed controlling third party notified by employee as required under s 115A
115A	Timeframe for notification	Notification to controlling third party must be within 90-day employee notification period  OR third party consents  OR Authority grants leave to notify (out of time)
103B(3)(b)	Standard for leave to join application	Arguable case
103B(3)(b)(i) AND 5	Definition	Controlling third party
S103B(3)(b)(ii)	Connection with grievance	Controlling third party caused or contributed to grievance

### **Are the grievance requirements met?**

[36] It is now agreed by all that Drake was the employer. Did the letter of 10 March 2022 make, or take reasonable steps to make, Drake aware of Mr Howe’s earlier grievances?

[37] The letter begins by stating “[w]e write to file a personal grievance for an unjustified disadvantage, unjustified dismissal and recovery of wages”. It continues, setting out in four pages, events and concerns, including grievances referred to above at paragraph 30. Grievance remedies are sought. In the letter Drake and Iplex are also “given notice of being joined in a grievance as a controlling third party as per s 103B” of the Act.

[38] Drake does not argue that there was a failure to raise a grievance with it as the employer. Rather it responded to the 10 March letter in a comprehensive manner.

[39] There appears to have been a lack of certainty on the part of Mr Howe and/or his representatives about which of the two companies was the employer and which could be seen as a controlling third party. Documents about the assignment are sought. However, the letter is sufficient to indicate to Drake that Mr Howe considers he has grievances with it, detail the nature of them and outline what remedies are sought.

[40] I conclude that a grievance was raised with Drake within the s 114 90-day period and an application made to the Authority to resolve personal grievances with Drake as the employer.

### **Is the absence of a formal application fatal?**

[41] Iplex argues that Mr Howe did not comply with regulation 9A of the Employment Relations Authority Regulations 2000 which requires an applicant to lodge with the Authority a form 4 “*Application for joining controlling third party to personal grievance*”. Further, as Mr Howe has not lodged an application in form 4 Iplex has not been served with the required application.

[42] The Authority is able to validate things informally done.<sup>4</sup> No prejudice has been referred to for Iplex. I take the indication by Mr Howe’s representative at the case management

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<sup>4</sup> The Act, s 219(2).

conference and in submissions as an application on his behalf for his statement of problem, which is not in form 4, to be validated as including an application to join Iplex as a controlling third party. The application is granted.

[43] In the event that I am wrong on that, I note that the Authority has the ability, at any stage of the proceedings, of its own motion to join a controlling third party to the proceedings by order.<sup>5</sup> On the basis of the discussion below, I would have concluded that Iplex should be joined on my own motion as a controlling third party.

**Do the grievances relate to action when Mr Howe was at Iplex’s site?**

[44] The s 103B(1)(b) timeframe for involvement is met as regards the earlier grievances. They relate to actions alleged to have occurred while Mr Howe was at the site. The question of whether he was working under Iplex’s control or direction is covered below.

**Was Iplex notified?**

[45] Under s 115A of the Act an employee must notify the controlling third party of their view that the third party’s actions caused or contributed to the grievance. This must be done within the same 90 day period within which the employee must raise the grievance with their employer.

[46] The grievance letter, emailed on 10 March 2022, is addressed to both Drake and Iplex. As noted above the letter states that both Iplex and Drake “*are now given notice of being joined in a grievance as a controlling third party as per section 103B Employment Relations Act 2000*”. The letter refers to Mr Howe having a written employment agreement with Drake but having been interviewed by and performed work for Iplex.

[47] Iplex argues that it was not given notice which expressly stated that it was considered to be a controlling third party and caused or contributed to Mr Howe’s personal grievance. This wording reflects that in s 115A(1)(a).

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<sup>5</sup> The Act, s 103B(4).

[48] There are no specific prescribed words of notification or form which the notification must take.<sup>6</sup> Regarding form, in my view the raising of a grievance and the notification to the third party may be contained in the same communication to two or more different parties.

[49] In terms of content, the words in the section do not need to be quoted to satisfy the notification obligation. Here the reference to joining Iplex in a grievance as a controlling third party is sufficient to put it on notice that Mr Howe considers that company to be such a party.

[50] The fact that there may be another party, namely Drake, who is also identified does not detract from that identification. One can imagine a situation where an employee worked with several companies in a group all of whom could potentially be seen as controlling third parties.

[51] The letter goes further to identify a number of actions and inactions by Iplex which Mr Howe is concerned about. For example, that Iplex did not consult with him to clarify the concerns raised against him nor make him aware that his livelihood was at stake. This is sufficient to notify Iplex that he considered it had caused or contributed to his personal grievances.

[52] The 10 March 2022 letter was well within the 90 day notification period running from the relevant events, the earliest of which is in January 2022.

[53] I conclude that Iplex was notified as required by s 115A of the Act.

### **Is there an arguable case that Iplex was a controlling third party?**

[54] The arguable case test involves a relatively low threshold.<sup>7</sup>

[55] There are two elements to the definition of controlling third party in s 5 of the Act.

#### *Contract or arrangement*

[56] The first element of the definition is whether the person (such as a company) has a contract or arrangement under which an employee of the employer performs work for the benefit of that person.

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<sup>6</sup> *Welten v McKay Limited and OJI Fibre Solutions (NZ) Limited* [2023] NZZERA 60 at [20].

<sup>7</sup> See for example, *Western Bay of Plenty District Council v Martin* [2016] NZEmpC 36 at [9] and *Potgeiter v Bliss Beauty Limited* [2022] NZERA 275 at [8].

[57] The employment agreement between Drake and Mr Howe describes the company as “a Human Resources solutions and recruitment company, who provides recruitment service throughout locations across New Zealand, including providing Fieldstaff Employees to work on Assignments for Clients, by way of commercial arrangements with its Clients”. It therefore is a recruitment and temporary staff agency.

[58] Drake has a contract to provide temporary labour services. covering the Fletcher group of which Iplex is a part. Mr Howe worked on an Iplex site, carrying out Iplex operations. This was for Iplex’s benefit.

*Control or direction*

[59] The second element is that to be a controlling third party, the party must exercise, or be entitled to exercise, control or direction over the employee which is at least substantially similar to that which an employer exercises or is entitled to exercise with the employee.

[60] Under the contract for temporary labour services, clause 1.8 of Schedule 1 requires Drake to ensure that its terms of engagement, with the candidates it supplies, must enable Drake to withdraw any offer or terminate any engagement in its absolute discretion.

[61] Under a warranty provision Iplex is entitled to require the removal or replacement of any candidate without cost to it during the first four hours after commencement. On-going, Iplex may “*terminate*” any candidate at any time by providing four hours’ notice to Drake or paying four hours’ work in lieu of notice.<sup>8</sup>

[62] Drake and Iplex are to consult and collaborate with respect to the health and safety of Drake’s employees on Iplex’s sites.<sup>9</sup>

[63] On the material before me Drake appointed Mr Howe via an employment agreement. A little later Iplex met with Mr Howe to confirm his suitability. He then began work at the Iplex site.

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<sup>8</sup> Contract for Temporary Labour Services, General Terms, Schedule 1: Services, cl 3.3.

<sup>9</sup> As above, cl 8.

[64] Drake says that as per usual practice Iplex supervised, instructed and trained Mr Howe in the tasks to be completed including safety matters. Iplex accepts that it had control over Mr Howe's day to day activities and health and safety whilst on the premises.

[65] On the face of Mr Howe's final payslip, Drake paid him and provided payslips. A time record was provided to the Authority which appears to be from Iplex as it has Mr Howe with a different employee number than that on Drake's timesheet. It records Mr Howe's hours, noting him to be a "*Drake Temp*".

[66] Iplex says Mr Howe requested leave through Drake.

[67] Iplex was to notify any behavioural or performance concerns to Drake. It could be said that both Iplex and Drake undertook some investigation into Mr Howe's performance or conduct. However, Drake undertook the process of arranging and meeting with Mr Howe.

[68] I conclude that Iplex had at least some control and direction over Mr Howe. It is arguable that this was substantially similar to that which an employer exercises although that will need to be further explored and determined in the substantive investigation.

### *Conclusion*

[69] Submissions for Mr Howe emphasise that this is exactly the sort of triangular employment relationship for which the Employment Relations (Triangular Employment) Amendment Act 2019, was enacted. A 3 February 2022 email from Iplex to Drake giving an update on Mr Howe's situation also refers to it being a triangular relationship.

[70] Given that there was a contract for the performance of work for the benefit of Iplex and at least some control and direction by it, I conclude it is arguable that Iplex was a controlling third party regarding Mr Howe.

### **Did Iplex have sufficient connection with Mr Howe's personal grievances?**

[71] The final element is the requirement in s 103B(3)(b)(ii) of the Act of an arguable case that the controlling third party caused or contributed to the personal grievance.

[72] The reference to “*contributed*” indicates that the controlling third party’s actions need not have been the sole source or foundation of the grievance. It is sufficient that those actions played a part in the grievance.

[73] I am considering Mr Howe’s suspension claim and the alternative dismissal and disadvantage claims regarding the situation leading to and including Mr Howe’s effective exclusion from Iplex’s site. Iplex’s actions in reporting its concerns to Drake and requiring the cancellation of his assignment are a sufficiently contributing part of these grievance claims to establish an arguable case.

**What is the conclusion regarding the earlier grievances?**

[74] Having examined the elements required I conclude that Iplex should be joined as a controlling third party and order accordingly.

**Should there be further mediation?**

[75] When an application is granted under s 103B the Authority must consider whether to direct the parties to mediation with a view to resolving the personal grievance. The parties here have been to mediation. The parties have seven days from the date of this determination to inform the Authority of their views regarding further mediation.

**Costs**

[76] Costs are reserved and will be dealt with, if necessary, with costs for the remainder of the Authority’s investigation.

**Nicola Craig**  
**Member of the Employment Relations Authority**