

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 222
3159748
3196839

BETWEEN TIM JENNISON
 Applicant on 3159748
 Respondent on 3196839

AND ACG EDUCATION LIMITED
 First Respondent on 3159748
 Applicant on 3196839

 INSPIRED EDUCATION
 HOLDINGS LIMITED
 (Intended) Second Respondent on
 3159748

Member of Authority: Nicola Craig

Representatives: Stephen Langton, counsel for Tim Jennison
 Penny Swarbrick, counsel for ACG Education Limited
 Philip Skelton KC, counsel for Inspired Education
 Holdings Limited

Investigation Meeting: On the papers

Submissions (and Other 7 February 2023 from Mr Jennison
Information) Received: 31 January 2023 from ACG Education Limited
 No submissions received from Inspired Education
 Holdings Limited

Date of Determination: 4 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tim Jennison held the position of Chief Financial Officer ACG Schools. He was most recently employed by ACG Education Limited (ACG), a private education provider in New Zealand. ACG is a member of the Inspired Education group of companies.

[2] Inspired Education Holdings Limited (IEHL) is a company resident in the United Kingdom and the holding company of the Inspired Education group.

[3] Mr Jennison claims he was unjustifiably dismissed, ACG breached its duty of good faith and damages are owed to him for ACG's failure to pay him an incentive payment.¹ ACG accepts that it terminated Mr Jennison's employment but says that was justified for reasons of redundancy. Mr Jennison's breach of good faith and damages claims are denied.

[4] Mr Jennison also applies to have IEHL joined as a third party on the basis that it is a controlling third party, as defined in s 5 of the Employment Relations Act 2000 (the Act). ACG asserts that Mr Jennison's employment was terminated by it without the direction or control of any third party. IEHL lodged an objection to the Authority's jurisdiction to hear and determine this matter on the basis that the Authority had no personal or subject matter jurisdiction over it.

Removal application and responses

[5] ACG applied to remove Mr Jennison's application to join the intended second respondent (IEHL) to the Employment Court, relying on there being several important questions of law, outlined below.²

[6] An affidavit from Robert Rostas, a director of ACG and Group Chief Financial Officer of the Inspired Holdings Group, was lodged. Mr Rostas confirms that ACG's ultimate holding company is the United Kingdom registered company IEHL. Further, IEHL has no place of business or residence in New Zealand, does not carry on business in Aotearoa and did not employ Mr Jennison.

[7] Mr Jennison agreed that the matter should be removed. IEHL did not object to the application but chose not to add anything additional.

¹ File no 3159748.

² File no 3196839 – the removal application.

[8] As permitted by s 174E of 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.

The tests for removal

[9] There are several grounds for removal of all or part of a matter to the Court under s 178(2) of the Act. ACG relies on s 178(2)(a) which allows the Authority to remove where an important question of law is likely to arise other than incidentally.

[10] The question to be determined does not need to be complex, novel or tricky to be seen as important.³

Important questions of law asserted

[11] ACG's application specifies the following grounds for removal:

- (a) Several important questions of law arise other than incidentally, in accordance with s 178(2)(a) of the Act;
- (b) Whether the Authority has jurisdiction to hear and determine an application to join a controlling third party where the proposed party is a company incorporated in the United Kingdom and does not carry on business in New Zealand;
- (c) Whether s 103A of the Act has extraterritorial effect;
- (d) The proper scope and application of regulation 19B of the Employment Relations Authority Regulations 2000 (the Regulations);
- (e) The interpretation and application of the Supreme Court's judgment in *Brown v New Zealand Basing Limited* to the circumstances of this case:⁴
- (f) The interpretation and application of the triangular employment relationship provisions of the Act, including ss 5 and 103B; and

³ *Johnson v The Fletcher Construction Company Limited* [2017] NZEmpC 157 at [22].

⁴ *Brown v New Zealand Basing Limited* [2017] NZSC 139.

- (g) The issue of whether a parent or holding company is or can be a “controlling third party employer” of its wholly owned subsidiary companies.

[12] ACG concludes that it is in the interests of justice that the Authority exercise its discretion to remove the application to the Court for determination.

Analysis

[13] Submissions for ACG identify that it is the application to join IHEL as a controlling third party which is the subject of the removal application. Therefore Mr Jennison’s application with ACG would remain with the Authority even if removal is granted.

[14] The controlling third party provisions are relatively new law, put into effect by amendment of the Act which came into force on 27 June 2020.⁵ There are now some Authority determinations about these provisions but no Court decisions.

[15] I take into account that Mr Jennison accepts that there are important questions of law which should be decided by the Court but I must still be satisfied that grounds for removal exist.

[16] From my perspective the significant question for the removal application is whether the Authority can decide to join a proposed controlling third party which is a foreign registered company, based outside New Zealand and which does not carry on business in this country. Connected with this is the Authority’s ability to decline jurisdiction under regulation 19B of the Employment Relations Authority Regulations 2000.

[17] In this case that is an important question of law. Mr Jennison’s ability to proceed against IHEL and thus IHEL’s involvement in this case could well be determined by the answer to that question. The question of the involvement of an overseas controlling third party has yet to be considered.

[18] This question does not arise incidentally in terms of the application to join IHEL as a controlling third party.

⁵ Employment Relations Act (Triangular Employment) Amendment Act 2019.

Orders

[19] Mr Jennison's application to join IHEL as a controlling third party in file 3159748 is removed to the Employment Court for it to hear and determine. Mr Jennison's claim with ACG under the same file number remains with the Authority but is stayed until the issue regarding joinder of IHEL is resolved or the Authority otherwise directs.

Costs

[20] Costs are reserved.

Nicola Craig
Member of the Employment Relations Authority