IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 507
3203559

	BETWEEN	PENNY JACKSON & OTHERS Applicants
	AND	FLETCHER DISTRIBUTION LIMITED Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Victor Corbett, counsel for the Applicant Rebecca Rendle and Matthew Austin, counsel for the Respondent	
Investigation:	On the papers	
Submissions and further information received:	12 June 2023 and 29 August 2023 from the Applicants 11, 22, and 29 August 2023 and 1 September 2023 from the Respondent	
Date of Determination:	7 September 2023	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a determination of an application to join a controlling third party.

[2] The nine Applicants in this matter are Penny Jackson, Nicholas Rumore, Lucy Smith, Aaron Burns, Louis Godinet, Linda Burroughs, Romel de Guzman, Travis Wernimont and Muslim Badami.

[3] The Applicants were employed by the Respondent, Fletcher Distribution Limited ("FDL"). PlaceMakers is one of FDL's trading names. All but one of the Applicants worked at five of the various PlaceMakers stores FDL operates throughout New Zealand. The other Applicant worked for FDL remotely.

[4] The Applicants have claimed that FDL breached its good faith obligations and that they were all unjustifiably dismissed because they were unvaccinated.

[5] Fletcher Building Limited ("FBL") is listed on the New Zealand and Australian stock exchanges. FBL is an entity within the wider Fletcher Building Group ("the Group"), which operates in the construction, manufacturing and distribution industry across Australia, New Zealand and the South Pacific.

[6] FBL put in place a group wide "*New Zealand Covid-19 Procedure*" ("the Procedure") that applied to all entities in the Group. The Procedure had been issued by FBL to its group of companies after consultation within the Group, including with senior leaders and health and safety members of FDL.

[7] The Procedure required all employees across the Group to be fully vaccinated against Covid-19 by 15 February 2022. Implementation of the Procedure and associated processes was left to subsidiaries (such as FDL) to manage in their respective businesses. FDL implemented the Procedure in its business on 20 December 2021.

[8] The Applicants sought to join FBL to these proceedings pursuant to s 103B of the Employment Relations Act 2000 ("the Act"), as a controlling third party ("the joinder application").

[9] The joinder application was opposed by FDL, and it took sole responsibility (as the Applicants' employer) for the decision to dismiss each of them.

[10] FBL also opposed the joinder application, on the basis it did not meet the definition of a "*controlling third party*" in s 5 of the Act. FBL further said it did not arguably "*cause or contribute to*" any of the Applicants' alleged dismissal grievances as required by s 103B of the Act, because it had nothing to do with any of the Applicants' individual employment processes or dismissals.

The Authority's investigation

[11] By agreement with the parties, the joinder application was determined 'on the papers'.

[12] The joinder application was discussed during a Case Management Conference ("CMC") held on 26 April 2023, during which the Authority identified the evidence it wanted to see from the parties.

[13] The Applicants were given time to reconsider whether they wanted to pursue the joinder application, in light of FDL's acceptance of legal responsibility for their dismissals and its obvious ability to pay any remedies and/or penalties that could potentially be awarded if any of the Applicants' claims succeeded.

[14] On 28 April 2023 the Applicants confirmed they wanted to pursue the joinder application because "*it was FBL that created the vaccine policy which had the effect of dismissing them*."

[15] Directions of the Authority ("DoA") dated 4 May 2023 were then issued that (among other things) timetabled the lodging of affidavit evidence and submissions on the joinder application.

[16] The DoA recorded that each Applicant was directed to specifically address in their affidavits:

(a) What contract or other arrangement FDL had with FBL;

(b) Whether that contract or arrangement related to:

(i) The work or type of work the Applicant did; or

(ii) The employees or type of employee the Applicant was.

(c) Who exercised, or was entitled to exercise, control or direction over each Applicant with reference to specific examples of the control/direction that they alleged was in fact exercised by FBL over each Applicant;

(d) Why the control, or ability to exercise control or direction, FBL had over each Applicant was similar or substantially similar to the control or direction that FDL had over them, as their employer.

[17] Each Applicant lodged an affidavit.

[18] FDL and FBL lodged affidavits from Mr Bruce McEwen, Ms Claire Carroll and Ms Helen Ottaway.

[19] Mr McEwen is FBL's Chief Executive for its Distribution Division. He has been employed by FBL for approximately nine years, and has held various senior roles over that time. His role involved setting the strategic direction for New Zealand Distribution and high-

level oversight of the operations of the PlaceMakers, Mico, Tumu, Manufacturing and Neu, and Raylight businesses.

[20] Ms Carroll is employed by FBL as the Chief People and Communications Officer. She has been employed by FBL for approximately ten years and has been in her current position since November 2017. Ms Carroll is responsible for setting and overseeing the Group people strategy and targets.

[21] Ms Ottaway is the General Manager – People and Performance for PlaceMakers, which is a trading name of FDL. She started in her current role in November 2021.

[22] Both parties provided written submissions after all the affidavits had been lodged.

[23] In determining this joinder application, the Authority has also had regard to the information in the Statement of Problem, the Statement in Reply, the Joinder Application, the Notice of Opposition to the Joinder Application, various memorandums filed by the parties as well to as to the information discussed with the parties' representatives during the CMC.

The Law

[24] The Employment Relations (Triangular Employment) Amendment Act 2019 ("the TEA") which was given royal assent on 27 June 2019 inserted sections into the Act that dealt with "*a controlling third party*" situation.

[25] These changes aimed to provide a mechanism for employees to pursue a personal grievance claim against a third party they had been working for, rather than just their own employer. Although widely understood to be targeting 'labour-hire' arrangements or 'recruitment agency' type placements, the TEA is not necessarily limited to those situations.

[26] Section 5 of the Act defines "*a controlling third party*" as a person:

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

[27] Section 103B of the Act applies if the employee:

(a) Has raised a grievance in accordance with s 114 of the Act;

(b) Has applied to the Authority to resolve the grievance; and

(c) Was "*working under the direction or control of a controlling third party*" when the action that allegedly gave rise to the personal grievance occurred.[1]

[28] Section 103B (3) of the Act requires the Authority to grant an application to join a controlling third party if it is satisfied that:

(a) The requirement to notify the controlling third party in accordance with s 115A was complied with; and

(b) An arguable case has been made out that:

(i) The party to be joined to the proceedings is a controlling third party; and

(ii) The party's actions have caused or contributed to the grievance.

[29] Section 115A of the Act sets out the notification requirements associated with pursuing a personal grievance claim against a controlling third party.

The issues

[30] The issues to be determined are:

(a) Factual findings on material facts;

(b) Did FBL have a contract or other arrangement with FDL under which any/all of the Applicants employed by FDL were to perform work for the benefit of FBL?

(c) Did FBL exercise, or was it entitled to exercise, control or direction over any/all of the Applicants that was similar or substantially similar to the control or direction FDL exercised, or was entitled to exercise, over any of the Applicants?

(d) Is there arguable case that FBL is a controlling third party?

(e) Is there an arguable case that FBL's actions caused or contributed to any of the Applicants' dismissal grievances?

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1 Section 103A(1)(b) of the Act.

Factual findings on material facts

[31] FBL accepted the Applicants had met the notification requirements under s 115A of the Act for their dismissal grievance claims, so that was not an issue in this case. However, FBL and FDL disputed that any of the Applicants had satisfied the other 'arguable case' requirements in s 103B (3)(b) of the Act.

[32] Whether or not they had satisfied the requirements of establishing an arguable case involved a factual inquiry into the circumstances of each Applicants' employment and dismissal.

Applicants' roles

[33] FDL has 150 branches and sites across the country and its core business is the supply of building material and other hardware to customers in New Zealand. The Applicants were each employed by FDL on individual employment agreements.

[34] With the exception of Mr Badami, Applicants worked at various PlaceMakers sites throughout New Zealand, assisting FDL in its provision of goods and services to customers. Although Mr Badami did not work from a PlaceMakers site, he worked on projects related to FDL's operations, which were for FDL's benefit.

[35] *Muslim Badami* was employed by FDL as a Category Analyst. His role involved supporting the FDL merchandising team with the execution of category strategies. He reported to, and was managed by, Jane Reid (Merchandise Manager), who is employed by FDL.

[36] *Aaron Burns* was employed by FDL as a Delivery Services Driver at PlaceMakers Porirua. He reported to, and was managed by, Mr Ross Whelan (Christchurch Delivery Services Manager), who is employed by FDL.

[37] *Romel de Guzman* was employed by FDL as Showroom Customer Services Representative in PlaceMakers Waiheke. Mr de Guzman reported to, and was managed by, Mr Rob Brown (Operations Manager), who is employed by FDL.

[38] *Louis Godinet* was employed by FDL as a Yard and "*Drive-thru Customer Service Representative*" at PlaceMakers Kerikeri. He reported to, and was managed by, Mr Mike Zeylemaker (Branch Operator), who was engaged by FDL.

[39] *Penny Jackson* was employed by FDL as an Administrator at PlaceMakers Waiheke Island. In her role, she reported to, and was managed by, Mr Daryn Banks (Branch Operator) of PlaceMakers Waiheke.

[40] *Lucy Smith* was employed by FDL as Garden Centre Customer Service Representative at PlaceMakers Waiheke Island. She reported to, and was managed by, Ms Linda Burroughs (Customer Services Team Leader) who was employed by FDL.

[41] *Travis Wernimont* was employed by FDL as a Trade Support team member at PlaceMakers Motueka. He reported to, and was managed by, Mr James Lash (Hub Operations Manager), who is employed by FDL.

[42] *Linda Burroughs* was employed by FDL as a Customer Service Team Leader – Garden Centre at PlaceMakers Waiheke. She reported to, and was managed by, Mr Daryn Banks (Branch Operator) of PlaceMakers Waiheke.

[43] *Nicholas Rumore* was employed by FDL as Yard and "*Drive-thru Customer Service Representative*" at PlaceMakers Wanaka. He reported to, and was managed by, Mr Mark Gould (Operations Manager), who is employed by FDL.

Applicants' evidence

[44] The evidence the Applicants relied on can be briefly summarised as follows:

(a) An FBL employee was seen walking through a PlaceMakers store (although the Applicant who said that did not have any contact with that person);

(b) FBL employees attended meetings at PlaceMakers Head Office (the Applicant who said that was not involved in any of these meetings);

(c) Payslips were emailed from "*fbu.com*";

(d) Applicants could participate in various Group benefits and were entitled to purchase FBL shares;

(e) The FBL logo was on store signage, policies, a leave application template, and an email sign off banner had an "*FBuSay*" logo on it;[2]

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[2] FBuSay is the Group's employee and engagement survey, that can be completed by permanent employees in any of the Group's entities.

(f) Mr Ross Taylor, CEO of FBL, sent Covid-19 related communications to Group employees, including these Applicants;

(g) Hearsay evidence that Mr Taylor allegedly responded to a query about the need for staff to be vaccinated by saying "*most employees*" wanted that to occur (which was alleged to show FBL believed it employed the Applicants);

(h) An Applicant was given preferential treatment in terms of queuing and loading his truck (as a member of the Group) when attending Group work sites;

(i) FDL was mentioned in FBL's annual report;

(j) One Applicant provided triple hearsay evidence that an unidentified person from "*Fletcher Head Office*" allegedly told her Branch Operator that she (the Applicant) could not have a 50-hour work week recorded in her individual employment agreement, so a 45-hour work week was recorded instead (the date of that was not provided);

(k) An Applicant said she was trained on Debtor Control software that was managed by "*Fletcher Head Office and the accounting division of Fletcher Building*";

(l) FBL instigated policies that FDL followed;

(m) FDL director Mr Bruce McEwen is also Chief Executive of FBL's Distribution Division;

(n) FBL influenced PlaceMakers' changes to its operating and delivery systems (the date or details of that were not provided);

(o) Health and safety alerts regarding incidents/accidents were sent through the Group network and were notified to all divisions;

(p) FBL as the parent company controlled FDL; and

(q) An Applicant spoke to FBL employees when he (as a FDL employee) was advising FDL on a proposed business purchase FDL intended to make.

Observations regarding the Applicants' evidence

[45] None of the Applicants gave evidence of:

(a) Any work they had done for FBL;

(b) Any work FBL had instructed them to do;

(c) Any work they had done on FBL premises;

(d) Any work they had done that FBL had managed or overseen;

(e) Any FBL manager or employee being involved in their individual employment processes; or

(f) Any work they had performed for FDL that benefited FBL.

[46] The matters relied on by the Applicants are features of FDL being part of wider a group of related companies, so are not indicative of the type of control or direction that a controlling third party has over an employee.

[47] The fact that FBL signage is visible is part of an overall branding exercise. The use of group software, policies, procedures or templates is pragmatic and practical. Allowing employees within a group of companies to access group wide benefits is not unusual and does not in itself create a controlling third party situation.

Differences between FDL and FBL

[48] FDL is a separate corporate legal entity and operates a different business to FBL.

[49] FDL and FBL have different senior management teams, different measures for financial performance and financial objectives and are engaged in different areas of the business, with their own respective focus. Each entity engages and manages its own employees.

Fletcher Distribution Limited

[50] FDL is a retail and distribution trading arm of the Group's Distribution Division.

[51] FDL is a subsidiary of FBL. As is typical within a wider group of companies, there are interactions between FDL and FBL, particularly in respect of governance and strategy because both entities are part of the Group.

[52] FBL's business has a much broader focus on the entire building and construction supply chain, from raw materials through to projects of a significant scale, and corporate aspects relating to the Group's operations. FDL's business involves the supply of building materials and hardware at a retail level with both trading entities, and the general public.

[53] FDL's locations within New Zealand include 150 stores, and eight manufacturing plants and it operates under various trading names such as PlaceMakers, Tumu Building Supplies and Mico.

[54] FDL has approximately 2,700 staff working at its retail trade locations and manufacturing sites. FDL also has approximately 200 administrative office-based staff whose work services, and provides support for, the retail trade and manufacturing components of its business.

FDL's HR functions

[55] FDL has its own in-house Human Resources support. FDL is therefore responsible for:

(a) The recruitment of prospective employees;

(b) The preparation of employment agreements to enter into with successful candidates, on terms and conditions which are specific to FDL's business;

(c) The allocation of tasks and provision of work to its employees;

(d) Responding to the employees' leave requests;

(e) Determining whether to operate during the Christmas and New Year periods, and making operational decisions regarding skeleton staffing models for these periods;

(f) Consulting and making decisions on proposed restructures of its organisational structure and staffing numbers;

(g) Dealing with performance and disciplinary concerns that arise relating to employees during their employment (including taking disciplinary action against employees); and

(h) Dealing with any other matters that may result in the termination of an employee's employment.

[56] In addition to policies which were applicable across the Group, FDL has its own company policies, which specifically apply to its employees, and which are enforced by it.

The Distribution Division

[57] FDL forms part of FBL's Distribution Division. Within the Distribution Division, there are 10 senior executives, (mostly occupying General Manager roles), who are responsible for overseeing the operations and functions. That includes the General Manager for PlaceMakers, who is employed by FDL.

[58] Although as Chief Executive of the Distribution Division, Mr McEwen is responsible for its strategic direction and for overseeing, at a high level, all of the businesses that fall within the Distribution Division including FDL, he has limited involvement with FDL's day to day operations, because FDL has its own General Manager and leadership structure.

Day to day management

[59] Within FDL, the day-to-day control, oversight and management of employees falls to the employee's immediate manager, or one-over-one manager. FBL therefore did not exercise, and had no need to exercise, and had no mechanism in place for exercising the same or a substantially similar level of control FDL has over its own employees.

People and performance practitioners

[60] Ms Ottaway oversees the Distribution Division People and Performance team. This is made up of 28 People and Performance practitioners, the majority of whom are employed by FDL to support its business.

Fletcher Building Limited

[61] The Group employs over 14,500 people at its various subsidiary entities, 9,500 of whom are located in New Zealand.

[62] The Group's business is split across seven divisions, with the Group's Distribution Division consists of building, plumbing, and pipeline distribution functions in New Zealand.

[63] FBL is the shareholder of Fletcher Building Holdings Limited ("FBHL"), the entity that has an 80 percent shareholding in Fletcher Building Holdings New Zealand Limited ("FBHNZL"), which is the shareholder of FDL. The other 20 percent shareholding in FBHNZL is held by Fletcher Building Industries Limited.

FBL's Annual Report

[64] FBL has certain statutory obligations under the Companies Act 1993 to prepare an annual report, as part of its accounting and compliance obligations, and disclosure obligations to shareholders.

[65] It is common for large corporate entities like FBL to provide descriptions of the areas of business within which a company and its subsidiaries operate, as part of its annual report, consistent with its reporting obligations under the Companies Act and the Financial Reporting Act 2013.

[66] The inclusion of, and references made to, the Group's Distribution Division (of which FDL is a part) in FBL's annual report are a direct consequence of FBL choosing to provide Group financial statements, for the purposes of meeting the Companies Act requirements.

[67] The Authority accepted FBL's submission that it would be remiss of it, as the beneficial owner of FDL and in light of FBL's obligations towards its shareholders, to have no oversight over FDL's business.

[68] However, financial or strategic oversight by a parent company of a subsidiary is not the same as the right to "*exercise control or direction*" over the subsidiaries' own employees. FDL being named in FBL's annual report therefore did not automatically make FBL a controlling third party, as defined in s 5 of the Act.

Logos and signage

[69] The existence of FBL branding on signs and documents did not in itself create a controlling third party relationship. The "*FBuSay*" logo on documents the Applicants relied on referred to the Group employee engagement survey, which was anonymous and voluntary and available to be completed by permanent employees across the Group.

Group payroll system

[70] The payroll system for the Group is a centralised, shared service which is made up of 12 different databases.

[71] FDL has its own payroll database which is used to process the pay of FDL's employees. The Applicants' claim that FBL was paying their wages because they received payroll information or payslips from "*fbu.com*" was not accepted.

[72] FDL paid its employees' wages and salaries, and these were expenses of FDL, not FBL. FDL also has its own dedicated internal payroll team which managed FDL's payroll system, given FDL's unique requirements and terms and conditions of employment.

Group benefits

[73] There are a number of benefits which are available to employees across the Group. These benefits include insurance, staff discounts, access to the Fletcher Building Employee Educational Fund and the Employee Assistance Programme, and an Employee Share Scheme.

[74] A number of these benefits are administered by entities other than FBL. The existence of group benefits, including the ability of employees within the group to purchase FBL shares, did not create a controlling third party relationship between FBL and its subsidiaries, in terms of the s 5 definition in the Act.

Group policies

[75] FBL sets some Group policies as a strategic matter, in order to provide the framework for consistent expectations or standards of behaviour across the Group. It is then up to the subsidiaries within the Group to refer to the policies in the context of day-to-day operational matters, and if necessary to enforce them.

[76] Examples of Group policies subsidiaries enforce in their own businesses include:

(a) Bullying and Harassment Policy;

(b) Credit Card Policy;

(c) Social Media and Communications Policy; and

(d) Covid-19 Procedure.

Groupwide Covid-19 Procedure

[77] The Group set a Covid-19 Procedure in December 2021 that required all of the Group's employees to be vaccinated against Covid-19 by 15 February 2022. The Group's subsidiaries implemented the Procedure in their individual businesses and with their own employees.

[78] The mere setting of a group wide policy by a parent company did not automatically make it a controlling third party, as defined in s 5 of the Act.

Implementation of the Covid-19 Procedure

[79] It was FDL managers who dealt with each Applicant regarding the implementation and enforcement of the Covid-19 Procedure. In particular, it was FDL managers/employees who:

(a) Ascertained the vaccination status of each Applicant;

(b) Consulted with each Applicant individually regarding the impact their non-compliance with the Covid-19 Procedure would have on them and FDL;

(c) Considered the feedback each individual Applicant provided;

(d) Provided individual notices of termination to each of the Applicants; and

(e) Confirmed the termination of each individual Applicant's employment relationship, following the ending of their notice period.

[80] There was no evidence that any FBL manager or employee participated in the individual employment processes for any FDL employees, including for these Applicants, or had anything to do with the decisions that FDL made to dismiss each Applicant.

Did FBL have a contract or other arrangement with FDL under which the Applicant performed work for the benefit of FBL?

[81] The Applicants' evidence under this ground was speculative. It was also contradicted by direct evidence from FBL witnesses with personal knowledge of the situation.

[82] None of the Applicants produced a contract between FDL and FBL requiring FDL employees to work for FBL, under which any of them had been required to perform work for FBL.

[83] Nor did any of the Applicants provide credible evidence about any "*other arrangement*" under which they were required to perform work for FBL. No Applicant claimed they had been seconded to, or placed to work on a special project in or for, FBL.

[84] The Authority accepted the uncontested evidence of Mr McEwen, Ms Carroll and Ms Ottaway that there was no contract or other arrangement under which FDL's employees (including these Applicants) performed work for the benefit of FBL.

[85] The Applicants' view that because FDL is a subsidiary of FBL then they are necessarily performing work for the benefit of FBL, in terms of the definition of controlling third party in s 5 of the Act, was not accepted.

[86] If the TEA had been intended to turn a parent company into a controlling third party simply because of its corporate structure or because the parent company of a group of related companies had set group wide policies or procedures then that would have been expressly stated and reflected in the legislation, and it was not.

[87] Accordingly, something more than just a group corporate structure or a group wide policy/procedure that has been set by the parent company is required to bring a non-employer person or entity within the definition of a controlling third party in s 5 of the Act.

[88] All of the Applicants were employed by FDL on individual employment agreements. They worked in, and for, FDL's business distributing building and hardware materials at a retail level across New Zealand. The roles that each Applicant performed while employed by FDL were also clearly for the sole benefit of FDL.

[89] The Applicants were therefore unable to meet the first element of the s 5 definition in the Act of a controlling third party.

Did FBL exercise, or was it entitled to exercise, control or direction over any of the Applicants that was similar or substantially similar to the control or direction that FDL exercised over the Applicants as its employees?

[90] There was no credible evidence that any of the Applicants were directed or controlled by FBL. Nor was there credible evidence that FBL was entitled to exercise any direction or control over any of the Applicants, in a manner similar to the direction and control that FDL as their employer could exercise over them.

[91] FBL is far removed from FDL's operations and from the day-to-day activities of FDL's employees, so it is FDL (not FBL) which had the sole oversight of, and therefore exercised control and direction over, the Applicants.

[92] FDL, as a standalone business entity in its own right, is sufficiently well resourced to ensure that it could operate its business effectively as an employer. FDL had the resources and

experience within its management team to be able to exercise all aspects of the employment relationship regarding its employees, and the evidence established that it dd so.

[93] The mere fact that Group policies were created by FBL that applied to all of the subsidiaries within the group (including FDL) did not give FBL the legal right to control or direct FDL's employees in the same or a substantially similar way that FDL could.

[94] The Authority accepted Mr McEwen's and Ms Carroll's evidence that it was up to individual subsidiaries, such as FDL, to enforce or refer to the Group policies, in the context of its day-to-day operational matters, not FBL.

[95] The Applicants' view that because the Procedure FDL was enforcing regarding its own employees was also a group wide policy, then FBL was exercising control or direction over the Applicants was not accepted by the Authority.

Did FBL arguably fall within the s 5 definition of "a controlling third party"?

[96] FBL did not arguably fall within the s 5 definition of "*a controlling third party*" because:

(a) There was no contract or other arrangement under which FDL employees (and in particular these Applicants) were required to perform work for FBL's benefit; and

(b) FBL did not exercise, and was not entitled to exercise, any control or direction over FDL's employees (including each of these Applicants) that was similar or substantially similar to the control or direction that FDL as their employer was entitled to exercise over them.

Has an arguable case been made out that FBL is a controlling third party?

[97] None of the Applicants have been able to meet the low threshold of establishing an arguable case that FBL was a controlling third party regarding their own individual employment.

[98] Accordingly, none of the Applicants were able to establish that they had met the test in s 103B(3)(b)(i) of the Act.

Have any of the Applicants established an arguable case that FBL's actions caused or contributed to their dismissal grievances?

[99] None of the Applicants provided evidence about how FBL "*caused or contributed to*" their dismissal grievances as required by s 103B of the Act, other than by creating the group wide Covid-19 Procedure.

[100] Once the Procedure was implemented following consultation across the group, then it was FDL managers, under the guidance of FDL's team of Human Resource Managers, who were responsible for:

(a) Reaching out to FDL employees to obtain information regarding their vaccination status; and

(b) Running employment processes with employees who were not vaccinated or who refused to disclose their vaccination status.

[101] None of the Applicants have identified any FBL employee who engaged with them regarding their own individual employment processes, or who were involved in the decision to dismiss them.

[102] It was not the creation of the Procedure which caused the termination of the Applicants' employment, but rather their failure to comply with the requirements of the Procedure, after it had been implemented by FDL, and subsequent to an appropriate consultation process having been conducted by FDL with each Applicant.

[103] The personal grievances raised by each of the Applicants in this matter relate to their employment being terminated by FDL, because they were unable to meet the requirements of the Covid-19 Procedure that FDL had adopted and was enforcing.

[104] FDL's submission that the mere creation of group policy cannot be said to have caused or contributed to any of the Applicants' dismissal grievances was accepted, as the required causal connection was evidentially too remote. FBL cannot arguably be said to have caused or contributed to the Applicants' dismissal grievances.

[105] Accordingly, none of the Applicants were able to establish that they had met the test in s 103B(3)(b)(ii) of the Act.

Outcome

[106] Although the establishment of "*an arguable case*" is a low bar to clear, none of the Applicants have been able to meet that required threshold.

[107] The reason they were unable to do so is that there was no credible evidence that FBL met any of the requirements of the s 5 definition of a controlling third party. None of the Applicants gave evidence of actually performing any work for FBL. The mere fact they worked for one of FBL's subsidiary entities was far too remote in itself to fall within the s 5 definition of a controlling third party.

[108] There was also no evidence of a "*contract or other arrangement*" between FBL and FDL, under which FDL's employees performed work for the benefit of FBL.

[109] Likewise, there was no credible evidence of FBL having ever exercised control or direction, or of being entitled to exercise control or direction, over any of the Applicants in any aspect of their work that was similar or substantially similar to the control that FDL had over them as their employer.

[110] All of the actions and decisions the Applicants said made their dismissals unjustified were undertaken by FDL managers, who were employed by FDL. FDL has accepted responsibility for employing each of the Applicants, for conducting the individual consultation processes with each individual Applicant, and for making the decision to terminate each Applicants' employment and for giving them the required notice when doing so.

[111] The Applicants' dismissal grievances therefore involved FDL as their employer, and not FBL as a controlling third party.

[112] Accordingly, the Applicants' application to join FBL as a controlling third party to these proceedings did not succeed.

What costs should be awarded?

[113] FDL as the successful party is entitled to a contribution towards its actual legal costs. Costs will be awarded in accordance with the Authority's usual notional daily-tariff based approach to assessing costs.

[114] This matter should be treated as a half day investigation meeting, so the notional starting tariff will be $2,250 (being half of the $4,500 notional daily tariff for the first day of an investigation meeting). Consideration will then need to be given to whether or not that notional starting tariff should be adjusted to reflect the particular circumstances of this case.

[115] FDL asked to be heard on costs, so it is appropriate for costs to be determined 'on the papers' after an exchange of costs submissions. Accordingly, FDL has 14 days from the date of this determination within which to lodge its costs submissions. The Applicants will then have 14 days from receipt of FDL's costs submissions within which to file their costs submissions.

[116] No submissions will be accepted outside of this timetable, except with the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority