

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 54  
3143881

BETWEEN	YANFANG HU Applicant
AND	PASSION FRESH LIMITED First Respondent
	WHVER HUB LIMITED Second Respondent

Member of Authority: Peter Fuiava

Representatives: May Moncur, advocate for the Applicant  
Joydeep Kaur, counsel for the First Respondent

Investigation Meeting: On the papers

Submissions received: 4 October 2022 from the Applicant  
4 November 2022 from the First Respondent

Determination: 3 February 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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- A. The application for leave to join Passion Fresh Limited (Passion Fresh or the company) as a controlling third party to Yanfang Hu's personal grievance is declined.**
- B. Costs are reserved.**

**Employment Relationship Problem**

[1] Yanfang Hu is a work visa holder from China. She has applied for leave to join Passion Fresh as a controlling third party to her personal grievance. The company objects on the basis that Ms Hu failed to join it as a controlling third party within the

90-day employee notification period as stipulated under s 115(A)(1) and 115(A)(6) of the Employment Relations Act 2000 (the Act).

[2] Ms Hu acknowledges that she did not comply with the 90-day notification requirement but submits that when she originally lodged her Statement of Problem with the Authority on 20 June 2021 she was self-represented. She has recently instructed Ms Moncur to assist with her submissions for leave. Briefly stated, it was submitted that as a migrant worker with limited resources and legal knowledge, Ms Hu was unable to correctly identify Passion Fresh's legal status in the present proceedings and that from her perspective the company was her employer.

### **What are the relevant facts?**

[3] Passion Fresh is a fresh produce grower and supplier in Pukekohe and at the material time had a contractual relationship with Whver Hub Ltd (Whver). Whver provided the company with labour hire services. Ms Hu was a casual employee of Whver who was subcontracted to work for Passion Fresh in April 2021. However, her time there was short-lived.

[4] On 11 April 2021, Ms Hu emailed an administrator within Passion Fresh about her wages being incorrectly calculated for the pay weeks from 7 February to 4 April in that there was an alleged shortfall of some 3.52 hours. Ms Hu further alleged that her manager at Passion Fresh was responsible and that he was racist towards the Chinese staff who were required to do the hard work while the Indian staff were given easier jobs. Ms Hu raised health and safety concerns against the manager who she says failed to give her adequate health and safety instructions concerning the spray machine and the wearing of cut-resistant gloves when using knives or scissors. It seemed to Ms Hu that the manager was more concerned about speed rather than the quality of the job or the health and safety of the workers. Finally, Ms Hu mentioned that the company had failed to provide her with rest and meal breaks as required by law.

[5] On 12 April 2021, the Passion Fresh administrator responded to Ms Hu's email stating that she would look into her questions about her pay. However, after reviewing her timecard information, the administrator emailed Ms Hu to advise that she had not been paid incorrectly and that she was happy to take her through matters. The email records no other response.

[6] On 13 April 2021, Ms Hu emailed the administrator expressing her disappointment in the way Passion Fresh had dealt with her employment relationship issues. It appears that Ms Hu attended a meeting with one of the directors of the company and a senior member of staff (not the manager) and that she had been fired without notice because she was a subcontractor and not a member of the company's staff. Ms Hu stated that this was wrong, that everyone was equal and protected under the law, that staff were not slaves, and that she would seek legal support through the Ministry of Business, Innovation and Employment (MBIE).

[7] On 18 April 2021, Ms Hu emailed her employer at Whver stating that she had been dismissed by PFL. It appears that her employment at Whver came to an end around the same time for reasons that are not known. However, it is noted that Ms Hu was a casual employee of Whver. Apart from querying her final pay with her employer, Ms Hu raised no other issues and was told that someone from accounts would look into her query.

[8] At some point, Ms Hu approached Dispute Resolution Services at MBIE and was emailed by a dispute resolution co-ordinator in May 2021 that Passion Fresh was not willing to attend mediation and that Whver had not responded. As attendance at mediation was voluntary, the co-ordinator advised that her file would be closed.

[9] On 20 June 2021, Ms Hu lodged her Statement of Problem with the Authority which named Passion Fresh and Whver as first and second respondents respectively. The 90-day period for notifying Passion Fresh as a controlling third party ended on 12 July 2021. However, she did not lodge an application for joinder as a controlling third party. Some 14 months after the filing of the Statement of Problem (not taking into account the period that Auckland was in COVID-19 Alert Level lockdown in 2021), Ms Hu seeks leave to join Passion Fresh as a controlling third party.

### **How has the Authority investigated matters?**

[10] In April 2022, I held a case management conference with the parties and encouraged Ms Hu (who was self-represented at the time) to seek legal advice from her nearest Community Law centre or Citizens Advice Bureau because it was apparent that she had not joined Passion Fresh to her application as a controlling third party.

[11] Despite that shortcoming and in the hope that a resolution could nevertheless be found, I directed all parties to mediation but the matter did not resolve there. On 19 September 2022, I held a case management conference by which time Ms Hu had engaged Ms Moncur's services. Directions were subsequently made for the filing of submissions regarding the question of leave. Given the nature of the application, there was no requirement for Whver to file submissions. In an effort to keep costs down for all parties, Ms Moncur and Ms Kaur both agreed that I could determine this preliminary issue on the papers.

## **Discussion**

[12] The relevant sections are 103B and 115A of the Act which state:

### **103B Joining controlling third party to personal grievance**

- (1) This section applies if—
  - (a) an employee has—
    - (i) raised a personal grievance in accordance with section 114; and
    - (ii) applied to the Authority to resolve a personal grievance with the employee's employer; and
  - (b) the personal grievance relates to an action that is alleged to have occurred while the employee was working under the control or direction of a controlling third party.
- (2) The employee or the employer, or both, may apply to the Authority or the court to join the controlling third party to the proceedings to resolve the personal grievance.
- (3) The Authority or the court must grant the application to join a controlling third party if the Authority or the court is satisfied—
  - (a) that the requirement to notify the controlling third party in accordance with section 115A has been complied with; and
  - (b) that an arguable case has been made out—
    - (i) that the party to be joined to the proceedings is a controlling third party; and
    - (ii) that the party's actions caused or contributed to the personal grievance.
- (4) The Authority or the court may, at any stage of the proceedings, of its own motion join a controlling third party to the proceedings by order.

...

### **115A Notifying controlling third party of personal grievance**

- (1) For the purposes of section 103B, this section is **complied with**—
  - (a) when an employee—
    - (i) considers that the actions of a controlling third party caused or contributed to the personal grievance; and

- (ii) notifies the controlling third party of that fact within the 90-day employee notification period; or
  - (b) when an employer—
    - (i) considers that the actions of a controlling third party caused or contributed to the personal grievance; and
    - (ii) notifies the controlling third party of that fact within the 90-day employer notification period; or
  - (c) if the controlling third party has consented to being notified under subsection (2); or
  - (d) if the Authority has granted leave to notify the controlling third party under subsection (4).
- (2) Subsection (1)(a) or (b) does not apply if the controlling third party consents to being notified after the expiration of the relevant 90-day notification period.
- (3) If the controlling third party does not consent to being notified after the relevant 90-day notification period, the employee or the employer may apply to the Authority for leave to notify the controlling third party after the expiration of that period.
- (4) On an application under subsection (3), the Authority, after giving the controlling third party an opportunity to be heard, may grant leave accordingly, subject to any conditions that it thinks fit, if the Authority considers it just to do so.
- ...
- (5) In this section,—
- 90-day employee notification period** means the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later

[13] Section 103B has been described as a straightforward process for joining a controlling third party to an existing proceeding—being the personal grievance against the employer.<sup>1</sup> The difficulty for Ms Hu is that she has known from the outset that Passion Fresh was not her employer. This is clear from her individual employment with Whver and her email of 13 April 2021 to Passion Fresh where Ms Hu stated that she had been dismissed because she was a “subcontractor” and not a member of its staff.

[14] Although Ms Hu’s email of 11 April 2021 to Passion Fresh is in the form of a complaint, her employer Whver is never mentioned and was not copied in. It has not been established that Ms Hu raised a personal grievance claim with her employer and

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<sup>1</sup> *Riddler v Meridian Energy Limited* [2022] NZERA 474 at [24].

in the absence of a personal grievance, there is no basis for joining Passion Fresh as a controlling third party.

[15] Section 103B, 115A and 123A comprise a suite of amendments to the Act in June 2020 concerning work arrangements where three distinct parties are in a triangular employment relationship with each other. While Whver is a second respondent to the proceedings, there is no personal grievance against it and it has not sought to join Passion Fresh as a controlling third party under s 115A. Its involvement in these proceedings is like a pillion passenger to a motorcycle—passive. The primary respondent is Passion Fresh who is in the box seat of Ms Hu’s claim. However, there is no contract privity between them and without a personal grievance against Whver, there can be no joinder either.

[16] The proper course would have been for Ms Hu to have raised a personal grievance with her employer and to have filed the appropriate forms with her Statement of Problem in order to join Passion Fresh as a controlling third party.<sup>2</sup> I acknowledge that Ms Hu is a work visa holder but she is not uneducated. Her complaint email to Passion Fresh is articulate and well composed. Her visa status and limited resources have not deprived her of appreciating the fact that Passion Fresh was never her employer.

[17] I acknowledge that in its investigatory role, the Authority is required to establish the facts and determine matters based on the substantial merits of the case without regard to technicalities.<sup>3</sup> However, the Authority is a creature of statute and discretion is to be exercised on a principled basis. While Ms Hu makes serious allegations against Passion Fresh, it denies these just as strongly.

[18] Section 115A of the Act requires an employee or an employer wanting to join a controlling third party to a proceeding to give notice. Notification is expressly a precondition of granting joinder.<sup>4</sup> Notification has not occurred here and Passion Fresh does not consent to being notified out of time. While I have a discretion to grant leave,

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<sup>2</sup> Employment Relations Authority Regulations 2000, Schedule 1, Forms 4 and 5.

<sup>3</sup> Employment Relations Act 2000, s 157(1).

<sup>4</sup> *Potgeiter v Bliss Beauty NZ Ltd & ors* [2022] NZERA 275 at [60].

given the inordinate delay here in order of several months, I do not consider it just to join Passion Fresh now.

[19] For the reasons given above, the application for leave is declined. Pursuant to s 221 of the Act, in order to more effectively dispose this matter, Passion Fruit Limited is removed from these proceedings as a first respondent. I acknowledge that without its involvement this may result in the present proceedings coming to an end as Ms Hu has not raised a personal grievance against Whver Hub Limited. However, even so, this is a natural consequence of non-compliance with the rules.

### **Costs**

[20] Costs are reserved. Given the outcome which potentially brings the proceedings to an earlier end before the setting down of an investigation meeting and the preparation of witness statements, there is perhaps scope for costs to simply lie where they fall in my view. However, if counsel for Passion Fresh wish to be further heard on the matter of costs, they may file submissions with the Authority within 21 days of this preliminary determination. From there, Ms Hu may respond within 14 days of service of the same.

[21] I thank Ms Moncur and Ms Kaur for their assistance.

Peter Fuiava  
Member of the Employment Relations Authority