

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 590  
3181959

BETWEEN	ANDREW MCDOWELL Applicant
AND	MCALPINES RANGIORA LIMITED First Respondent
AND	MITRE 10 (NEW ZEALAND) LIMITED Second Respondent

Member of Authority: Helen Doyle

Representatives: Karen Glass and Erika Whittome, advocates for the Applicant  
Penny Swarbrick and Karishma Zafar, counsel for the Respondents

Investigation Meeting: 8 September 2023 by audio visual link

Submissions Received: On the day and 29 September 2023

Further Affidavit Received: 25 September 2023

Date of Determination: 11 October 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Andrew McDowell was employed by McAlpines Rangiora Limited (McAlpines) as a Goods Receiver in the inward goods department until his dismissal on 5 May 2022. He was dismissed for failing to follow a lawful and reasonable instruction to attend work and undertake

a supervised rapid antigen test. McAlpines own and operate a Mitre 10 MEGA store in Rangiora.

[2] Mr McDowell lodged an application under s 103B of the Employment Relations Act 2000 (the Act) to join Mitre 10 (New Zealand) Limited (Mitre 10) as a controlling third party to resolve personal grievances that he says he has raised with McAlpines. The application is on the basis that Mitre 10 caused or contributed to the personal grievance(s) with McAlpines because McAlpines would not have imposed vaccination and testing requirements for Mr McDowell's employment if this had not been a requirement of "Mitre 10 Head Office." Further, that Mitre 10 breached ss 92 and 168 of the Health and Safety at Work Act 2015.

[3] McAlpines and Mitre 10 oppose the application. They say that Mr McDowell failed to notify the controlling third party in accordance with s 115A of the Employment Relations Act 2000 (the Act) that he considered that the actions of Mitre 10 caused or contributed to any personal grievance. They do not accept that Mitre 10 is a controlling third party as defined in the Act and say that Mr McDowell has not at any time worked under the control and direction of Mitre 10. They say that the Authority does not have jurisdiction to hear and determine complaints under the Health and Safety at Work Act 2015.

[4] This determination resolves the issue of whether Mitre 10 should be joined as a controlling third party.

### **The investigation process**

[5] By agreement the matter was dealt with on the basis of affidavit evidence and submissions. The Authority received affidavits from Mr McDowell and affidavits from the General Manager of McAlpines Craig Balfour, and the Chief People Officer from Mitre 10 Celena Harry.

[6] Submissions were lodged by each party at the same time as affidavit evidence and the matter was set down for an investigation meeting by audio visual link on 8 September 2023. At the investigation meeting Ms Glass and Ms Whittome spoke to submissions lodged on behalf of Mr McDowell. Ms Swarbrick and Ms Zafar did not wish to talk to submissions

lodged on behalf of McAlpines and Mitre 10 but responded to submissions made on behalf of Mr McDowell.

[7] During submissions at the investigation meeting there was reference by Ms Glass and Ms Whittome to a letter dated 4 January 2022 from Mr McDowell and three others to various people at McAlpines and Mitre 10. This was relied on this as notification to Mitre 10 that it caused or contributed to the personal grievances. This letter had been included with documents in relation to the claim against McAlpines but was not annexed to the affidavit of Mr McDowell in support of joining Mitre 10 or referred to in the written submissions lodged in support of the application. Reliance on it therefore was not anticipated by McAlpines, Mitre 10 or the Authority.

[8] Mr McDowell lodged a second affidavit after the investigation meeting on 23 September 2023 attaching the 4 January 2022 letter. A memorandum was lodged by counsel on behalf of McAlpines and Mitre 10 on 29 September to the effect that the Authority should not admit the second affidavit into evidence. The Authority will deal with that issue at an appropriate point.

### **The Issues**

[9] The Authority needs to determine the following issues in this matter:

- (a) What is the legal framework for considering the application to join a controlling third party?
- (b) Applying that framework should Mitre 10 be joined as a controlling third party?

### **The legal framework**

#### *Section 103B of the Act*

[10] Section 103B of the Act is concerned with joining a controlling third party to the personal grievance. Section s 103B(2) provides that an application to join a controlling third party can be made to the Authority if the situation is as described in s 103B(1). That is that an employee has raised a personal grievance under s 114, applied to the Authority to resolve the grievance with the employee's employer and 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.

[11] Section 103B (3) of the Act provides that the Authority must grant the application to join a controlling third party if the Authority 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.

#### *Section 115A*

[12] Section 115A of the Act is concerned with notifying a third party of a personal grievance. Section 115A(1)(a) of the Act provides that an employee complies with notification for the purposes of s 103B when the employee:

- (i) considers 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.

[13] A 90-day employee notification period is defined in s 115A(6) as 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 the later.

[14] If notification occurs after the relevant 90-day notification period and there is no consent by the controlling third party to being notified after this period then then the employee may under s 115A (3) apply to the Authority for leave to notify the controlling third party after the expiration of that period.

#### *Section 5 defines a controlling third party*

[15] A controlling third party is defined in s 5 of the Act 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 person.

**Applying that framework should Mitre 10 be joined as a controlling third party?**

*What personal grievances were raised with McAlpines by Mr McDowell?*

[16] The second amended statement of problem sets out that Mr McDowell alleges the following personal grievances:<sup>1</sup>

- (a) That he was unjustifiably dismissed from his employment on 5 May 2022.
- (b) That he was disadvantaged in the workplace.
- (c) That he was discriminated against in his employment because he refused to be vaccinated and on the basis of mask wearing.
- (d) That McAlpines engaged in adverse conduct for a prohibited health and safety reason and contravened s 92 of the Health and Safety at Work Act 2015 which prohibit coercion or inducement.

[17] McAlpines deny the validity of all of the alleged grievances. McAlpines also say that no personal grievance was raised within the statutory time frame for the alleged unjustified dismissal, alleged adverse conduct for a prohibited health and safety reasons and discrimination on the basis of mask wearing or exemption from mask wearing.

*What personal grievances are alleged to have occurred while Mr McDowell says he was working under the control or direction of Mitre 10?*

[18] Mr McDowell states in his affidavit evidence that Mitre 10 support centre “developed and disseminated their vaccination policy and risk assessment.” He says that this was not individually designed by each Mitre 10 store and applied to all Mitre 10, Hammer Hardware

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<sup>1</sup> There are some breach claims however they are not the focus for the current application.

and Mitre 10 Mega stores. He refers to the content in videos featuring Andrea Scown the Chief Executive Officer of Mitre 10 and Ms Harry, when a consultation pack was provided, along with a draft risk assessment and COVID-19 policy to employees at McAlpines and when the policy was finalised in January 2022 after feedback was provided.

[19] His summarises it this way in his affidavit:

Throughout the two videos, and both the draft and finalized vaccination policy and risk assessment, it is apparent that Mitre 10 management, as in Mitre 10 New Zealand, are orchestrating, controlling, and implementing the vaccination policy and risk assessment with which all member stores and Mitre 10 brands were required to comply.

[20] Mr McDowell refers to this making it impossible to come to an understanding with his store management and that the policy “obviated” the terms of his employment agreement.

[21] The finalised COVID-19 policy came into force on 1 February 2022. If an existing employee was not vaccinated regular testing and mask wearing were required.

[22] Mr McDowell refers to a nexus between the policy and the grievances.

*Was Mitre 10 notified in accordance with s115A of the Act?*

[23] Ms Harry in her affidavit said that the first Mitre 10 was aware that Mr McDowell considered its actions had contributed to a personal grievance was when it received the application for joinder dated 20 March 2023. Mr McDowell had been dismissed from McAlpines on 5 May 2022.

[24] The form 4 application for joining a controlling third party to a personal grievance has a heading “Notification.” That required the lodging party answer “Yes/No” to a number of questions. “No” was the response to the question whether the third party was notified within the relevant 90-day notification period. The form was dated 20 March but lodged with the Authority on 7 June 2023.

[25] The latest date for notification for the alleged dismissal grievance would have been early August 2022 being 90 days after the date of dismissal and earlier for other alleged grievances whilst the relationship was on foot.

[26] There was a submission on behalf of Mr McDowell that a letter he wrote with three other employees providing feedback dated 4 January 2022 was notification to Mitre 10. Mr McDowell's second affidavit was then lodged annexing the letter of 4 January 2022.

[27] It is suggested in a memorandum lodged on behalf of McAlpines and Mitre 10 that the Authority not admit into evidence the second affidavit. If minded to consider the affidavit the Authority was reminded of Ms Swarbrick's material submissions at the Authority investigation and there were further comments made in the memorandum.

[28] I am minded to consider the letter in respect of the notification issue. I have Ms Swarbrick's submissions and the content of the memorandum. Principally the letter of 4 January 2022 speaks for itself.

[29] The letter was sent to five individuals - Ms Scown, Ms Harry, Mr Balfour, Peter Crighton who is McAlpines' Group Chief Executive, and Gordon Wong who is the Group's Human Resource Manager.

[30] Mr McDowell places some weight on a passage on page 11 of the letter that provides as follows:

Date and Application of the Policy

Please provide an explanation- if the document, which is a draft, takes effect on the 2 February 2022, on what grounds are you serving letters for vaccination with threats to terminate employment?; AND is this part of the Membership Agreement and not our individual employment contracts?

*Conclusion about notification*

[31] At the time of the letter of 4 January 2022 the policy was draft and feedback had been timetabled following consultation. That was the reason for the letter Mr McDowell wrote with

three others. The second amended statement of problem refers to Mr Balfour acknowledging the feedback from Mr McDowell and the three others on 6 January 2022, stating it would be considered with other responses.

[32] At the time of notification there must be a grievance raised with an employer relating to an action alleged to have occurred while an employee was working under the control or direction of a third party.<sup>2</sup> It is unclear in reading the letter of 4 January 2022 which grievance Mitre 10 were notified of that they caused or contributed to. The letter was sent well before the dismissal on 5 May 2022.

[33] The letter dated 4 January 2022 expressed concerns about the policy and asked questions within the timeframe for feedback. Ms Harry stated in her affidavit that she was “entirely unaware” that Mr McDowell considered Mitre 10 to be a controlling third party.

[34] The consultation timeline provided that the confirmed policy was to be communicated on 18 January 2022 and come into effect on 1 February 2022. A grievance cannot be raised and a controlling third party notified in anticipation of an action before its occurrence.<sup>3</sup> If a grievance is subsequently raised and there is notification within the statutory timeframe earlier communication can inform that. In this matter, what is relied on for notification is the 4 January letter and not any communication between that date and the date of the application.

[35] I am not satisfied that the letter notified Mitre 10 that it caused or contributed to a personal grievance within the 90-day employee notification period. I am not satisfied that the notification requirements in accordance with s 115A of the Act are met by the letter of 4 January 2022.

[36] Mitre 10 has not consented to late notification. If a controlling third party does not consent to being notified after the 90-day notification, period the employee may apply to the Authority for leave and the Authority may grant leave after giving the controlling third party an opportunity to be heard.<sup>4</sup>

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<sup>2</sup> Section 103B(1)(a)(i) and (ii) of the Act.

<sup>3</sup> Section 115A(6) **90-day employee notification period** beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employer, whichever is the later.

<sup>4</sup> Section 115A(3) of the Employment Relations Act 2000.

[37] As Ms Swarbrick submitted, there has been no application for leave to notify out of time. She further submits that even if there had, there is no basis to grant such an application. I will return to the matter of leave after considering whether there is an arguable case that Mitre 10 is a controlling third party.

*An arguable case that Mitre 10 is a controlling third party?*

[38] The threshold for an arguable case is relatively low. Certainty of ultimate success is not required but there does need to be some reasonable and plausible basis for concluding an arguable case. An arguable case is assessed with the definition of what a controlling third party is in s 5 of the Act.

*Does Mitre 10 have a contract or other arrangement with McAlpines under which Mr McDowell performed work for its benefit?*

[39] Ms Glass and Ms Whittome submit Mitre 10 has a contract under which employees of owner operators such as McAlpines perform work for the benefit of Mitre 10.

[40] The basis for this submission was statements about the application of the policy across the whole of the business and the exercise of “economic power” and “influence” over the employment relationship between Mr McDowell and McAlpines.

[41] The affidavit evidence from Ms Harry and Mr Balfour describes the relationship between McAlpines and Mitre 10.

[42] McAlpines is described in Mr Balfour’s affidavit as separate and independent from Mitre 10. It is part of a larger group of companies known as the McAlpine Group (the Group). Mr Balfour states in his affidavit McAlpines operates independently of other businesses in the Group but with the other companies has access to financial, administration and human resource support from the Group.

[43] He states in his affidavit that the commercial relationship with Mitre 10 is as part of a co-operative and McAlpines are a member of the co-operative. The affidavit evidence shows members are entitled to operate under the Mitre 10 brand and have access to various advisory and support services provided by Mitre 10. All the 85 Mitre 10 branded stores in New Zealand

operate the same way and are shareholders in Mitre 10. They have a say through the Board structure. As well as independent directors, the Board has several members who are selected among the other members to represent the members' views.

[44] Ms Harry explains in her affidavit evidence that Mitre 10 is incorporated under the Companies Act but functions as a co-operative business but is not formally registered under the Cooperative Companies Act 1996. One of its primary purposes is to source products for on-sale to members which they offer through their individually owned stores. Other support provided to members include marketing campaign support, e-commerce support and centralised information technology systems. Mitre 10 primarily operates from a support centre in Auckland and has about 480 employees. Mitre 10 is responsible for those employees.

[45] Both Mr Balfour and Ms Harry in their respective affidavits' state that McAlpines are entirely responsible for all employment matters about management and recruitment of employees and decisions about individual employees who work in the Rangiora store. Ms Harry states that Mitre 10 does not employ or manage or have any day to day or indirect control of any team members who work in a member's store.

[46] Mr Balfour states in his affidavit that the membership requested assistance from the Mitre 10 support centre about a COVID-19 policy. It was decided that once finalised it would be a "company document" and apply to every member's business. He stated in his affidavit that the implementation and operation of the policy was up to the member. Mr Balfour stated that he consulted with each of the employees one by one or in groups about the draft policy. The results of the consultation were sent back to Mitre 10 and the policy finalised.

[47] Ms Harry in her affidavit stated that once the COVID-19 policy was confirmed, members were solely responsible for the implementation and monitoring of the protocols including mask wearing, vaccination and record keeping.

[48] Mr Balfour states in his affidavit that McAlpines runs its business independently, but, subject to the membership agreement it has with Mitre 10 about marketing, technology and procurement. He also stated that McAlpines runs aspects such as local marketing as it see fit.

[49] There can be no dispute about what was written at draft and finalisation stage of the policy and the content of the videos. The policy was decided by the Mitre 10 Board to be a company document and apply to Mitre 10 member businesses. That, by itself, does not provide the basis for an arguable case that there was a contract or other arrangement under which Mr McDowell was performing work for the benefit of Mitre 10.

[50] The role of Mitre 10 is to manage and operate a co-operative to support its members including McAlpines. There is no basis to conclude that Mitre 10 had a commercial interest in McAlpines, a contract or other arrangement so as to benefit from the work of Mr McDowell. I cannot be satisfied that there was a contract or arrangement under which Mr McDowell performed work for the benefit of Mitre 10 rather than solely for McAlpines. I do not conclude a reasonable basis for an arguable case under this limb of s 5 of the Act.

*Did Mitre 10 exercise, or was it 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 person?*

[51] Ms Glass and Ms Whittome submit that by virtue of the policy, Mitre 10 imposed obligations and requirements on Mr McDowell and there was “exertion of undue influence” supporting a tripartite employment relationship. Further, that Mitre 10 caused employees who did not comply with its universal nationwide policy to be the subject of disciplinary action.

[52] Ms Glass and Ms Whittome refer to a number of cases where a third party has been directly connected to the actions of the employer that resulted in the ending of the employment.<sup>5</sup> They submit that the Mitre 10 acted as a controlling third party to require vaccination and/or mask wearing and testing requirements, by way of the policy.

[53] The cases referred to predate s103B of the Act. *G & H Trade Training* involved trainees and apprentices being referred by Work and Income New Zealand (WINZ).<sup>6</sup> Some trainees complained to WINZ that the employee had asked them to “score drugs for him” and acted inappropriately. WINZ said it would not make any further referrals to the course until the

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<sup>5</sup> *G & H Trade Training v Crewther* [2002] 1 ERNZ 513 and *Workforce Development Ltd v Hill* [2014] NZEmpC 174 [49].

<sup>6</sup> Above n 5.

matter was investigated and that it was their policy not to reveal the identity of the complainants. The employee complained about was subsequently dismissed. The then Chief Judge Goddard stated that WINZ was using its economic power to dictate that the employee should be dismissed.<sup>7</sup> *G & H Trade Training* is an example of pressure being exerted over the employer by a third party (WINZ) about actions it should take with an employee because of the threat not to continue to refer trainees to the course.

[54] *Workforce Development Limited v Hill* concerned a tutor who was employed to perform literacy and numeracy tuition to serving prisoners by way of a contract Workforce had with the Department of Corrections.<sup>8</sup> Access to the prison for the employee was withdrawn which directly impacted on her ability to continue to work for Workforce. Her employment was ultimately terminated by Workforce because there was no other position available for her. In that case the Department of Corrections did exercise elements of control and direction of an employee who was employed by Workforce.

[55] I do not conclude that either case is on all fours with this matter.

[56] Mr Balfour and Ms Harry in their respective affidavits state that staff were managed independently, and that Mitre 10 was not involved in any decision about Mr McDowell including the disciplinary process that led to his dismissal. Ms Harry stated in her affidavit that decisions about whether to commence a disciplinary process, how to run the process and its outcome were decisions made by the member in each case and not Mitre 10. She sets out that Mitre 10 has no entitlement to become involved in employment relationship issues between a member and an employee of the member.

[57] I cannot be satisfied that there is a reasonable basis for an arguable case that Mitre 10 exercised or was entitled to exercise control or direction over Mr McDowell, that is the same or similar to that which McAlpines exercised.

*Conclusion as to whether Mitre 10 was a controlling third party*

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<sup>7</sup> Above n 5 at [39].

<sup>8</sup> Above n 5.

[58] The basis of the application that Mitre 10 is a controlling third party is the development by it of the COVID-19 policy and its subsequent finalisation. The policy was requested by the membership of Mitre 10 including McAlpines and it was decided the policy would have company wide application.

[59] The Authority has not been satisfied there is an arguable case that there was a contract or other arrangement for the performance of work by Mr McDowell for the benefit of Mitre 10. The exercise or entitlement of Mitre 10 to exercise control and direction over Mr McDowell is not reasonably arguable. I do not conclude it is arguable on a reasonable basis that Mitre 10 was a controlling third party as defined in s 5.

*Did Mitre 10's actions cause or contribute to the grievances.*

[60] Mr McDowell says that Mitre 10 imposed a policy that caused or contributed to his personal grievances. Mr McDowell's view that the policy caused or contributed to his grievances is superficially attractive however the grievances, Mr McDowell says he has, require an action or omission beyond drafting and finalising a policy. The connection drawn between the policy and the subsequent decisions that may form the basis of personal grievances is not strongly arguable for contribution to a grievance and barely arguable for causation. Contribution only needs to be for an aspect of a personal grievance. It is strongly arguable that all of the decisions relating to Mr McDowell's employment that may form the basis of the personal grievances were made by McAlpines and not Mitre 10.

*Conclusions*

[61] I have not found that the requirement to notify the controlling third party in accordance with s 115A has been complied with. There is no application for leave to notify the controlling third party after the expiration of the 90-day notification period. I would not have been minded in the circumstances to have granted it. I have not found a reasonable basis for an arguable case that Mitre 10 is a controlling third party as defined in s 5 of the Act. It is arguable that Mitre 10's actions contributed to the grievance, but not strongly. I do not conclude a reasonable basis for an arguable case that Mitre 10 caused the personal grievance.

[62] All of the elements set out in s 103B need to be satisfied to grant the application to join a controlling third party. They have not been.

[63] I do not conclude Mitre 10 should be joined to the proceeding as a controlling third party.

[64] The application is not granted.

### **Costs**

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Swarbrick and Ms Zafar may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Ms Glass and Ms Whittome have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[66] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>9</sup>

Helen Doyle  
Member of the Employment Relations Authority

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<sup>9</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)