

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 60  
3146663

	BETWEEN	JOHN WELTEN Applicant
	AND	MCKAY LIMITED First Respondent
	AND	OJI FIBRE SOLUTIONS (NZ) LIMITED Second respondent
Member of Authority:	Marija Urlich	
Representatives:	Lou Yukich, advocate for the Applicant Anthony Drake and Rosie Judd, counsel for the First Respondent David France, counsel for the Second Respondent	
Investigation Meeting:	16 November 2022 (by audio visual link)	
Submissions and further information received:	At the investigation meeting and 17 November 2022, from the Applicant At the investigation meeting, from the Second Respondent	
Determination:	9 February 2023	

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Oji Fibre Solutions (NZ) Limited (OjiFS) operates the Kinleith Mill. Mr Welten worked at that site as an employee of McKay Limited (McKay). This determination deals with an application Mr Welten brings to join OjiFS as a controlling third party to a personal grievance he has raised with McKay for unjustified disadvantage.<sup>1</sup>

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<sup>1</sup> Employment Relations Act 2000 s 103B.

[2] OjiFS opposes the application. It says Mr Welten failed to notify that he considered it to be a controlling third party in his personal grievance claim against McKay and he has not met the required threshold that there is an arguable case OjiFS is a controlling third party and its actions caused or contributed to the personal grievance.

[3] McKay has advised it will abide the decision of the Authority in respect of the application.

### **The Authority's investigation**

[4] In determining this matter affidavits of Mr Welten and Desmond Beckett, who was also an employee of McKay working at the Kinleith site, as well as affirmed witness statements of Grant Fausett, OjiFS's chief financial officer, pulp and paper and Jonathan Norman, OjiFS maintenance manager at Kinleith Mill have been considered. The initiating and responding documents filed by the parties and the attached documents have also been considered as have submissions made on behalf of the parties. The investigation meeting, with the agreement of the parties, was held by audio visual link.

### **Background**

[5] Mr Welten was employed by McKay as an instrument technician from 4 March 2019. His terms of employment were set out in an individual employment agreement which was superseded by a collective employment agreement on 20 August 2020.<sup>2</sup> At all times he carried out his duties at the Kinleith site operated by OjiFS.

[6] McKay and OjiFS are party to a services agreement which includes at clause 5:

OjiFS reserves the right to request that Workers provided by the Contractor be replaced if the Worker is performing poorly, as follows:

- (a) OjiFS must inform the Contractor in writing of the basis for its assessment that a Worker is performing badly.
- (b) the Contractor has 15 business days to address the deficiency and to demonstrate improvement to a level reasonably acceptable to OjiFS.

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<sup>2</sup> Collective Employment Agreement McKay Limited and Independent Electrical Workers Union 1995 Inc and Eastern Bay Independent Industrial Workers Union Inc 1 April 2020 – 31 March 2023.

(c) if no acceptable improvement is reasonably demonstrated, then the Contractor will, at OjiFS's request, replace the Worker with another suitable Worker as soon as practicable.

OjiFS reserves the right to request that if a Worker provided by the contractor breaches a significant safety rule/standard/instruction or policy and/or is involved in a significant and/or notifiable safety incident that the Worker is removed immediately and is replaced.

[7] On 7 August 2020 McKay raised with Mr Welten concerns OjiFS had raised with it about his performance. By email dated 11 August he asked for the details of "the incompetence accusations". Mr Welten continued to work at the site.

[8] On 12 August Mr Norman wrote to Todd Rex, McKay's Kinleith site manager invoking clause 5:

I have been approached by two of the Area Maintenance Managers, regarding the competence of a McKay employee (particularly instrument work). The gentleman's name is John Welten.

I would suggest that this employee is not suitable to back fill in areas at Kinleith site.

[9] On 19 August Mr Rex wrote to five OjiFS managers asking their view on essential knowledge and experience for "a back fill/variable labour". The final email is understood to refer to Mr Welten's situation:

We are currently performance managing a situation and your help would be greatly appreciated in assisting us to ensure we are providing the correct person and also to enable us to assist in the training required to get a person up to the task so they are an acceptable back fill in each of your areas.

[10] On 20 August one of the managers provided a response with a list of expectations.

[11] Next in the timeline, on 8 September Mr Norman wrote to Mr Rex regarding Mr Welten:

As a follow up to the previous email I have spoken to the Area Managers and their in (sic) no intention having John Welten cover in their areas, as such and as per Appendix 1 point 5b of the contract I suggest that his last at the Kinleith site is Friday 11<sup>th</sup> September.

There will be no approval for signing his timesheets beyond Friday.

[12] On 9 September Mr Rex wrote to Mr Norman:

We agree with your email, we do need to do this properly as John will go straight to the union and we need to avoid a PG coming.

Can we please get specific items from your Area Managers of the issues he is causing ie, Attitude, speed, competency, so that we can inform John exactly of the issues at hand, At this stage we have been told competency but can we please have more information around this as we need to specifically tell him the items around his competency that isn't up to spec.

[13] Mr Norman replied that day providing a document to Mr Rex which provided more detail of the concerns. The covering email provides:

Attached detail that was previously sent from Marc and Mike. This was raised on 12<sup>th</sup> of August and Friday will be the 11<sup>th</sup> September, that is 23 days working days from notification to release from site. The contract details 15 days.

Additionally I am being told that further comments regarding competency, are coming from the Trade people he is working with in these areas. Maybe you should be taking to your Supervisors.

As I said previously, there will be no approval for signing his timesheets beyond Friday.

If you need further information then talk to [two first names].

[14] In a letter dated 10 September McKay invited Mr Welten to a meeting the following day to discuss OjiFS's concerns because "...they no longer want you working on the Kinleith site due to level of performance and competency" and "...you are very slow to carry out work and that your quality of work does not meet expectations". The letter went on to explain to Mr Welten that he would be given a full opportunity to comment on these matters and provide an explanation before any decision was made which could include a proposal to disestablish his position given the seriousness of OjiFS's "instruction" that he would not be accepted on site. Mr Welten attended the meeting on 11 September. He did not attend work at the Kinleith site after that date.

### **The Law – the test for joining a controlling third party**

[15] Section 103B(3) of the Act provides the application to join the proposed controlling third party must be granted if:

- (i) OjiFS has been notified in accordance with s 115A of the Act; and
- (ii) an arguable case has been made that OjiFS is a controlling third party and its actions caused or contributed to Mr Welten's personal grievance.

[16] Section 5 of the Act defines 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.

## **Discussion**

### *Notification to the controlling third party?*

[17] Section 115A provides an employee has complied with the requirement to notify a controlling third party that they consider their actions have caused or contributed to their personal grievance if the notification occurs within the same statutory 90-day period in which the effected employee must raise their personal grievance with their employer.

[18] The following email dated 15 September 2020 which was sent on Mr Welten's behalf to Mr Rex and copied in three McKay managers, an employment relations consultant engaged by McKay and five OjiFS managers is the subject communication:

**Subject:** personal grievance of John Welten and controlling third party

Todd

do you know what a "**controlling third party**" is

if not or you haven't already done so we suggest that you ask Sonya and or Paul Diver or seek independent advice

on the basis of the erroneous information provided to date we believe that John Welten may have been subject to unlawful unjustified disadvantage by way of unlawful lockout due to the unjustified action of a controlling third party/s

we are instructed to raise a personal grievance on John Welten's behalf with John Welten's employer McKay Limited and the controlling third party OjiFS and OjiFS managers...

the named individuals are advised to seek legal advice as due to recent changes in Employment Relations Act they are liable for penalties...

can we please now have copies of all correspondence that you have referred to and relied upon in the unlawful lock out of John Welten

John Welten is an exceptionally good highly qualified specialist industrial instrument technician with international experience and across the pulp and paper industry in New Zealand including on...

...

Can you please immediately reinstate John Welten and give favourable consideration to his appointment in the role of CST, albeit a historical misnomer, being the role he was originally offered by McKay Limited when they originally secured the maintenance contract on the Kinleith site.

[19] OjiFS says Mr Welten cannot establish the s 115A notification requirements have been met because:

- (i) it doesn't raise a personal grievance with McKay;
- (ii) he cannot raise a personal grievance with OjiFS; and
- (iii) it follows OjiFS cannot have caused or contributed to the personal grievance.

[20] The notification requirements of s 115A to the controlling third party are straightforward – notification to the controlling third party of the fact the employee believes it has caused or contributed to the personal grievance within the statutory 90-day timeframe. There are no prescribed words of notification or form it must take. Notification is different to raising. This makes sense given the personal grievance is not raised with the putative controlling third party rather they are put on notice of the personal grievance and their alleged part in it as an ancillary party. A personal grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance the employee wants the employer to address.<sup>3</sup> The employer must know what it is responding to.<sup>4</sup>

[21] If the notification requirements are not met, then there is provision for leave to notify after expiration of the timeframe.<sup>5</sup> Leave to notify does not involve the high test of exceptional circumstances which is required for leave to be granted to raise a personal grievance out of time.

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<sup>3</sup> Employment Relations Act 2000, s 114(2).

<sup>4</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [38].

<sup>5</sup> Employment Relations Act 2000, s 115A(3).

[22] The 15 September email meets the s 115A requirements – it puts OjiFS on notice of Mr Welten’s personal grievance with McKay and its alleged part in that personal grievance:

- (i) the email is addressed to a McKay manager and copied to a number of people including OjiFS managers;
- (ii) it notifies OjiFS that Mr Welten is raising a personal grievance with McKay Limited for which he seeks resolution by way of reinstatement “...we are instructed to raise a personal grievance on John Welten’s behalf with John Welten’s employer McKay Limited...Can you please immediately reinstate John Welten...”;
- (iii) read as a whole the concern Mr Welten wishes McKay to respond to is his removal from the workplace and McKay’s role in that – he would likely not otherwise have asked for the correspondence McKay referred to and relied upon ‘...in the unlawful lockout...’;
- (iv) it is notification to OjiFS by copying in a number of OjiFS managers to the email; and
- (v) makes plain Mr Welten believes the actions of OjiFS have caused or contributed to the personal grievance by the reference to the “...unlawful unjustified disadvantage by way of unlawful lockout due to the unjustified action of a controlling third party/s.”

*An arguable case OjiFS is a controlling third party and its actions have caused or contributed to Mr Welten’s personal grievance?*

[23] In an interim reinstatement setting an arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.<sup>6</sup> This definition provides useful guidance in an s 103B assessment - an arguable case is a relatively low threshold assessment.

[24] To join OjiFS as a controlling third party the Authority must find to a sufficiently plausible basis that the two limbs of the s 5 definition of controlling third party are met.

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<sup>6</sup> *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[25] There is a contract between OjiFS and McKay for McKay to provide maintenance services at the Kinereth mill which is an OjiFS controlled premises ('the services agreement'). The services agreement includes the number of workers McKay will supply to undertake the maintenance services, the hours of coverage the workers will provide and that outside that McKay will determine who performs the services and the allocation and supervision of those services.<sup>7</sup> Mr Welten is an employee of McKay. During his employment with McKay, he carried out his work at the OjiFS Kinleith Mill site under the terms of the services agreement.

[26] OjiFS derives a benefit from this contract – staff carrying out maintenance work are employees of McKay and McKay bears the responsibilities of an employer which otherwise may fall to OjiFS if it employed those staff to carry out those duties.

[27] The first limb of the s 5 definition of controlling third party is met to the arguable case standard.

[28] The second limb of the s 5 definition requires a consideration of whether OjiFS exercised control or direction over Mr Welten similar or substantially similar to an employer. OjiFS says this is not the case. It says the McKay staff, including Mr Welten work at its site and fall within its control for the purposes of health and safety but are otherwise McKay employees. They wear McKay uniforms and their work is allocated, directed and supervised by McKay staff. OjiFS says any disciplinary or performance matters are McKay's responsibility and the circumstances of Mr Welten's removal from the site was dealt with under the terms of the services agreement. Consistent with this it says is its identification to McKay of issues with Mr Welten's competency and that it had no authority or ability to address this directly with him because its role was limited to informing McKay of the concerns and requiring it to address the performance issues with Mr Welten within the agreed contractual timeframe.

[29] Mr Welten says that he was at all times under the control and direction of OjiFS supervisors. He says, day to day, his work was allocated, directed and supervised by OjiFS staff. He points to the daily OjiFS toolbox meetings he attended where an OjiFS supervisor allocated his work for the day. He says no one spoke to him about concerns with his performance and no issues about poor work execution were raised directly with

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<sup>7</sup> Witness statements Jonathon Norman dated 30 August 2022 at [12].

him. He says OjiFS has formed a view about his skills and competency, McKay did not raise any issues with him and OjiFS then instructed McKay that he not return to work at the site.

[30] In *Prasad v LSG Sky Chefs New Zealand Limited* the court, having analysed the features of control and integration in the triangular employment relationship present in that matter found:<sup>8</sup>

...that neither plaintiff [employee] operated with any degree of autonomy. Rather LSG exercised a significant degree of direction and control over the plaintiffs' day-to-day work – what, when, where, how and by whom.

...

While we accept that it was necessary for LSG to keep a close eye on what was being done by those working on site to ensure that appropriate standards were reached in terms of its deliverables and that applicable safety and security concerns were being met, we consider that the high levels of direction and control, coupled with the extent to which the plaintiffs were integrated into LSG's business, points firmly towards an employment relationship.

[31] In *Head v Chief Executive of the Inland Review Department*,<sup>9</sup> a case referred to in submissions made on behalf of OjiFS as relevant to the application of the control and integration test, a full bench of the Employment Court found apt the observations made in *Prasad*:<sup>10</sup>

In assessing where on the spectrum a case sits the Court will closely scrutinise the way in which arrangements are structured, particularly where there is a deficit of bargaining power, and how such arrangements have operated in practise, to determine what the real nature of the relationship is.

[32] Where then does this matter sit on the spectrum? This is not a situation where OjiFS in law employed Mr Welten. It is arguable though that this is a situation where Mr Welten was operating without the degree of autonomy, to use the language of *Prasad*, that might reasonably be expected of a worker who was not one over whom OjiFS exercised control and direction similar or substantially similar to that which an employer may exercise.

[33] An arguable case is made out that Mr Welten's day-to-day work – the what, when, where, how and by whom – was under the control and direction of OjiFS and McKay. While Mr Norman and Mr Faucett's evidence was this was not supposed to be

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<sup>8</sup> *Prasad v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 835 at [80].

<sup>9</sup> *Head v Chief Executive of the Inland Review Department & Anor* [2021] NZEmpC 69.

<sup>10</sup> *Prasad*, above n. 9, at [93].

how the relationship operated, this seems, arguably on the evidence before the Authority to be how it did in practice. In their affidavits Mr Welten and Mr Beckett have detailed the day-to-day involvement of OjiFS managers and supervisors in the allocation of daily tasks and direction as to how those tasks were to be fulfilled. That Mr Welten appears to have been subject to day-to-day control and direction by OjiFS is consistent with performance concerns being raised first by OjiFS with McKay. There is no indication on the evidence that these were concerns McKay held about Mr Welten's performance prior to the issues being raised by OjiFS or that the basis of the concerns including the inspection of tasks performed by Mr Welten were reviewed simultaneously by OjiFS and McKay staff or that McKay was provided an opportunity to conduct its own review of the subject work. This seems to be a matter entirely within the control of OjiFS and is arguably an incidence of control and direction similar to that an employer would undertake.

[34] A further apparent instance of this is the focus of OjiFS's concerns about Mr Welten which appear to be mostly matters which arguably could be described as attributes personal to him such as timeliness, application to the job at hand and the manner of his interaction with other staff along with matters which are arguably training matters such as familiarity with the site and machinery on he was tasked to work. This strikes as a different focus to fulfilment of an arm's length commercial arrangement where dissatisfaction with the completion of tasks might be expected to be expressed as a focus on the consequences of a task undertaken, for example by renegotiation of expected labour hours for a contracted job or a discussion between the contracting parties as to the nature and circumstances of a fault with a technical aspect. Again, this focus on Mr Welten's personal performance is arguably an incidence of control and direction similar to that which an employer would undertake.

[35] It is also arguable that the mechanism McKay and OjiFS put in place in the service agreement to deal with "poorly performing" employees in an arms-length manner was not complied with. Clause 5 of the agreement anticipates a process where McKay has an opportunity within 15 business days to address the deficiency and demonstrate improvement to OjiFS. On the information before the Authority the substantive basis for OjiFS's concerns about Mr Welten's performance were first provided to McKay on 9 September two days before McKay implemented OjiFS's

“instruction” to remove Mr Welten from the Kinleith site. The evidence does not suggest the improvement assessment process anticipated by clause 5 occurred.

*Did OjiFS contribute to the circumstances of Mr Welten’s personal grievance?*

[36] It is established to the necessary threshold that it was OjiFS’s dissatisfaction with Mr Welten’s performance which resulted in his removal from the site. As the timeline shows, OjiFS’s instruction to McKay to exclude Mr Welten from the site was the prime motivator for his removal from the site.

### **Outcome**

[37] Mr Welten’s application to join OjiFS as a controlling third party is granted.

### **Mediation**

[38] Upon grant of a s 103A application the Authority must consider whether to direct the parties to mediation with a view to resolving the personal grievance. Though the parties have engaged in a range of dispute resolution processes in relation to Mr Welten’s personal grievance, including mediation, they have indicated they would be willing to attend further mediation.

[39] Accordingly, the parties are directed to attend mediation within 40 days of the date of this determination. Mr Welten is to advise the Authority of the outcome of mediation and if he wishes the investigation of his personal grievance to proceed. Timetabling orders for can then be made to progress the investigation.

### **Costs**

[40] Costs are reserved.