

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 684  
3219720

BETWEEN                      MATTHEW JOHN JENSEN  
   Applicant  
  
AND                                BRAVE MILK LIMITED  
   First Respondent  
  
AND                                ST ANDREWS DAIRY LIMITED /  
   RATHGEN FARMS LIMITED  
   Proposed Second Respondent

Member of Authority:        Helen Doyle  
  
Representatives:              Ashleigh Fechney for the Applicant  
   Phillip de Wattignar for the First Respondent  
   Sara Jamieson and Bailey McIntosh for the Proposed  
   Second Respondent  
  
Investigation Meeting:        On the papers  
  
Submissions Received:        12 September and 3 October 2023 from the First Respondent  
   27 September 2023 from the Applicant  
   27 September 2023 from the Second Respondent  
  
Determination:                 20 November 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Brave Milk Limited (Brave Milk) has lodged an application to join St Andrews Dairy Limited and Rathgen Farms Limited as a controlling third party to this matter to resolve a

personal grievance. For ease of reading I shall refer to the proposed second respondent as St Andrews. That reference at this stage includes Rathgen Farms Limited.

[2] A personal grievance was raised by Matthew Jensen on 28 November 2022. He was employed by Brave Milk as a farm assistant from on or about 16 June 2022.

[3] Mr Jensen and St Andrews oppose the application to join St Andrews as a controlling third party.

[4] If St Andrews is joined as a controlling third party then its proper identity will be an issue for determination following the substantive investigation. A search of the company register shows both companies have the same two directors and any impact on costs in proceeding in that manner will be confined.

[5] This determination resolves the issue whether St Andrews should be joined as a controlling third party.

### **The investigation process**

[6] It was agreed that evidence could be lodged by way of affidavits or, if required, the Authority could hold an investigation meeting. The Authority received affidavits from Navdeep Singh Brar who is a director of Brave Milk and Ross Rathgen who is a director of St Andrews. The Authority received submissions on behalf of Brave Milk, Mr Jensen, and St Andrews.

[7] The Authority advised the parties that it would proceed to determine the application before a scheduled case management conference on 27 November 2023. Dates for an investigation meeting have been tentatively set for 20 and 21 February 2024 in Oamaru.

### **The issues**

[8] 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 St Andrews be joined as a controlling third party.

### **The legal framework**

#### *Section 103B*

[9] Section 103B of the Employment Relations Act 2000 (“the Act”) is concerned with joining a third party to the personal grievance.

[10] Section 103B(2) of the Act 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(2) of the Act provides that the employee or the employer or both may apply to the Authority to join the controlling third party to the proceedings to resolve the personal grievance.

[12] 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 s 115A is being complied with; and
- (b) that an arguable case has been made out—
  - (i) that the party to be joined to the proceeding is a controlling third party; and
  - (ii) that the party’s actions caused or contributed to the personal grievance.

#### *Section 115A*

[13] Section 115A of the Act is concerned with notifying a third party of a personal grievance.

[14] Section 115A(1)(b) of the Act provides that an employer complies with notification for the purposes of s 103B when the 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.

[15] A 90-day employer notification period is defined in s 115A(6) as the period of 90 days, beginning with the date on which the employer's employee raised the personal grievance with the employer.

[16] 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 the employee may under s 115A(3) apply to the Authority for leave to join the controlling third party after the expiration of that period.

#### *Section 5*

[17] Section 5 defines a controlling third party.

[18] 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 St Andrews be joined as a controlling third party?**

##### *What personal grievances were raised with Brave Milk by Mr Jensen*

[19] Mr Jensen lodged a statement of problem with the Authority on 24 March 2023. He asked the Authority to resolve employment relationship problems with Brave Milk whether he was unjustifiably disadvantaged and unjustifiably dismissed. He said that there was no proper

consultation with him in respect of the termination of his employment, he was not paid four weeks pay in lieu of notice, unauthorised deductions were made from his final pay and he did not receive his full bond. The statement of problem set out that St Andrews offered him employment on 30 August 2022 however the offer was different to his current employment and he declined the offer.

[20] Brave Milk denied in its statement in reply lodged on 13 April 2023 that Mr Jensen was unjustifiably dismissed or disadvantaged in his employment.

*What personal grievances are alleged to have occurred while Mr Jensen was working under the control or direction of St Andrews?*

[21] Brave Milk were engaged under a sharemilking contract to St Andrews. On 16 August 2022 St Andrews notified Brave Milk of an intention to terminate the sharemilking contract with 14 days' notice. The application to join St Andrews does not rely on control or direction from the sharemilking contract but from the subsequent settlement agreement Brave Milk and St Andrews entered into.

[22] Brave Milk invoked the dispute procedure in the sharemilking contract and following mediation a settlement agreement was entered into with St Andrews and signed by both parties on 27 August 2022 (the settlement agreement).

[23] The material aspects of the settlement agreement are set out below:

- (a) The Contract terminates by mutual agreement as of 2 September 2022. All obligations of the Contractor to the farm cease as of 2 September 2022.
- (b) The Contractor will allow the Farm Owner to take over the day to day management of the farm operation as of the signing of the Settlement Agreement.
- (c) The Farm Owner will offer ongoing employment to all the Contractors employees excluding the Contractor.
- (d) The Farm Owner & Contractor will meet with the Contractors staff and work together to ensure ongoing employment is offered.

[24] The parties agreed in the settlement agreement that its existence and terms would remain confidential with an exception for the purpose of raising it as a defence to any proceeding.

[25] A staff meeting took place on 29 August 2022 at which Mr Brar told Brave Milk employees, including Mr Jensen, that Brave Milk would leave the farm as of 2 September 2022 and employees would be offered employment by St Andrews on their same terms of employment. Representatives for St Andrews were present at the meeting.

[26] Brave Milk say St Andrews was a controlling third party from the date of signing of the settlement agreement on 27 August 2022.

[27] Mr Jensen in his statement of problem says about the offer of employment:

- (f) The applicant believed he would be able to transfer to similar employment with Rathgen Farms Limited, however the situation of being offered similar employment transpired to be largely untrue.
- (g) Rathgen Farms Limited did offer employment to the applicant on 30 August 2022, however the offer of employment substantially differed from his current employment with the respondent, the pay rate was significantly less, there was no overtime compensation, and a requirement to be relocated to a different location if the applicant finished his duties at the farm. The applicant declined the offer of employment by Rathgen Farms Limited.

[28] The ending of the employment relationship with Brave Milk was seemingly inevitable but Brave Milk says that it anticipated the facilitation of transfer of Mr Jensen from Brave Milk to St Andrews. It was not accepted by Brave Milk as set out in the statement of problem that it was a redundancy situation. Brave Milk say that the personal grievance alleged to have occurred while Mr Jensen was working under the control of St Andrews was the offering of different terms and conditions of employment contrary to what was understood at the meeting on 29 August 2022.

*Was St Andrews notified in accordance with s 115 A of the Act?*

[29] St Andrews was not notified within the 90-day employer notification period in s 115A (6) of the Act that Brave Milk considered it caused or contributed to the personal grievance. The 90-day notification period runs from the date on which Mr Jensen raised his personal grievance.

[30] Mr Jensen raised his grievance on 28 November 2022 and the date for notification of the controlling third party by was 26 February 2023. St Andrews was notified by letter dated 31 May 2023. St Andrews has not consented to late notification.

[31] 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>1</sup>

[32] I will return to the matter of leave after consideration of the other elements set out in s 103B of the Act.

*An arguable case that St Andrews is a controlling third party?*

[33] An Authority determination refers to the definition of an arguable case in an interim injunction setting as useful guidance for an assessment under s103B of the Act. That is a case with some serious or arguable, but not necessarily certain, prospects for success.<sup>2</sup>

[34] The threshold for an arguable case is relatively low. 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.

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<sup>1</sup> Section 115A (3) and (4) of the Employment Relations Act 2000.

<sup>2</sup> *Welten v McKay Limited and OJI Fibre Solutions (NZ) Limited* [2023] NZERA 60.

*Did St Andrews have a contract or other arrangement with Brave Milk under which Mr Jensen performed work for St Andrews benefit?*

[35] The first and second bullet points of clause 3 of the settlement agreement between Brave Milk and St Andrews provide:

- (a) The Contract terminates by mutual agreement as of 2 September 2022. All obligations of the Contractor to the farm cease as of 2 September 2022.
- (b) The Contractor will allow the Farm Owner to take over the day to day management of the farm operation as of the signing of the Settlement Agreement

[36] There was no specific reference in the affidavit evidence to any particular financial benefit to St Andrews in taking over the day-to-day management of the farm operation from Brave Milk while it transitioned to the end of the contract.

[37] It could be arguable that there was some benefit in St Andrews being able to immediately take over the day-to-day management of the farm otherwise it is difficult to see why this would have been included in the settlement agreement.

[38] With the threshold for an arguable case in mind there was an arrangement between St Andrews and Brave Milk under which Mr Jensen arguably performed work for the benefit of St Andrews.

*Did St Andrews exercise control or direction over Mr Jensen similar or substantially similar to an employer?*

[39] Mr de Wattignar submits that St Andrews exercised control or direction over Mr Jensen similar or substantially similar to that of Brave Milk.

[40] Ms Fechny submits that St Andrews did not exercise control over Mr Jensen.

[41] Ms Jamieson and Ms McIntosh submit that St Andrews was only entitled to manage on-farm operations in relation to the employees of Brave Milk and only for the transitional week leading to the end of the sharemilking contract. It is submitted that the actual involvement was quite limited. Beyond the limited management of on-farm operations it is submitted that St

Andrews was not entitled to exercise control over Brave Milk's management of its employees including how Brave Milk undertook termination of employment with Mr Jensen and payments.

[42] There was mention of payments in the affidavit evidence. Mr Brar in his affidavit states that he spoke to Mr Rathgen on 30 August 2022 about the end of the payroll period for Brave Milk being 31 August 2022 and that Mr Rathgen agreed to pay the staff from 1 September 2022.

[43] Mr Rathgen in his affidavit says that the payroll information was obtained from Brave Milk to arrange a smooth transition for the former Brave Milk employees who had taken up employment with St Andrews. A copy of the individual employment agreement offered to Mr Jensen was attached to St Andrews statement in reply and it has a commencement date of 1 September 2022.

[44] There is nothing to support that St Andrews paid or agreed to pay Mr Jensen for the work he carried out whilst he was still an employee of Brave Milk. The commencement date for employment with St Andrews in the employment agreement offered to Mr Jensen is consistent with the discussion Mr Brar had with Mr Rathgen about paying staff from 1 September 2022. That supports the taking over of the payments was not on the basis that employees were still employed by Brave Milk but that some had or would have commenced employment with St Andrews.

[45] This matter brings into focus the level of control that the Authority should be satisfied about to conclude there is an arguable case it is similar or substantially similar to that of Brave Milk.

[46] In *Welton* the Authority considered the Employment Court analysis of features of control and integration in a triangular employment relationship in *Prasad v LSG Sky Chefs New Zealand Limited*.<sup>3</sup> The Court found as follows:

In summary it can fairly be said that neither plaintiff 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 standards were reached in terms of its deliverables and that applicable safety and security concerns were being met, we consider 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.

[47] Mr Rathgen in his affidavit says that whilst farm manager Chris Rathgen attended daily meetings with Brave Milk staff starting on 29 August 2022 it was only to assist with the transition to management by St Andrews at the end of that week.

[48] The affidavit evidence from Mr Brar and Mr Rathgen indicated there was instruction at the start of the day about tasks to be undertaken but no detail beyond that.

[49] The ability to assess the extent of control and whether it is similar or substantially similar to that of an employer is limited. Mr Jensen was under the day-to-day management of St Andrews for farm operations for a period of no more than five days following the signing of the settlement agreement on Saturday 27 August 2022. On 29 August 2022 there was a staff meeting. On 30 August 2022 Mr Jensen was offered employment by St Andrews. Mr Brar in his affidavit says that he received a text message from Mr Jensen the evening of 31 August requesting sick leave. He says in his affidavit that he asked Mr Jensen to report to Chris Rathgen on 1 September 2022 and Mr Jensen forwarded to him a copy of Chris Rathgen's text message

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<sup>3</sup> Above n 2 at [30] with reference to *Prasad v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 150 at [80] and [84].

accepting his sick leave. Mr Brar stated in his affidavit that Mr Jensen sent him a text message that he was sick again on the morning of 2 September 2022 and Mr Brar advised Chris Rathgen about this and that he was not happy.

[50] This can be contrasted with the aspects of control in *Welton* the Authority concluded were consistent with the employee being subject to day-to-day control and direction similar to that an employer would undertake. These included raising personal performance concerns rather than dissatisfaction with task completion about the employee and the concerns being raised initially by the controlling third party and not the employer.<sup>4</sup>

[51] In another Authority determination several factors in concluding an arguable case under this second limb of the definition in s 5 were considered. These included the ability of the controlling third party to terminate, collaborate with the employer on health and safety, supervise, instruct and train the employee, provide time records to the employer for payment, confirm the suitability of the employee for work, control over the employee's day to day activities and safety.<sup>5</sup>

[52] The only aspect of the settlement agreement where St Andrews was able to exercise some control or direction over Mr Jensen was the day-to-day management of the farm for a transitional period of a few days. All other aspects of the employment relationship remained with Brave Milk.

[53] The control or direction able to be exercised over Mr Jensen from the settlement agreement was limited and largely in practice appeared to amount to instructions at the start of the day. The second limb of the definition of a controlling third party in s 5 needs to be satisfied to an arguable level that St Andrews exercised control or direction over Mr Jensen similar or substantially similar to that of an employer.

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<sup>4</sup> Above n 4 at [33] to [35].

<sup>5</sup> *Howe v Drake NZ Ltd* [2023] NZERA 150 at [60] – [65].

[54] A reasonable basis for concluding an arguable case that the level of control or direction exercised was similar or substantively similar to that which Brave Milk exercised as an employer is not made out.

[55] Both the limbs in s 5 needs to be made out to an arguable standard to conclude under s 103B(3)(b) an arguable case that the party to be joined to the proceedings is a controlling third party. The second limb is not.

*Did St Andrews actions cause or contribute to the grievances?*

[56] If employment had been offered on the same terms and conditions by St Andrews Mr Jensen may have accepted the offer of employment but was not required to. If he did not accept employment with St Andrews then the employee protection clause in his employment agreement with Brave Milk would apply to that circumstance. Even if he had accepted an offer Mr Jensen could have pursued an unjustified dismissal claim. Acceptance or not of a subsequent offer of employment may impact on remedies available if a grievance is established.

[57] The potential impact on, and makeup of, remedies does not arguably equate to a proposed controlling third party contributing to the personal grievance. I do not conclude a reasonable basis for an arguable case that St Andrews caused or contributed to the personal grievance alleged.

*Conclusion*

[58] All of the elements set out in s 103B of the Act need to be satisfied to grant the application to join a controlling third party. They have not been. In light of that I am not minded to grant leave to notify the controlling third party after the expiration of the 90-day notification period.

[59] The application by Brave Milk to join St Andrews as a controlling third party is not granted.

[60] Mr de Wattignar submits that for the Authority to properly determine what occurred between 30 August and 2 September 2022 it would be necessary for the Authority to hear

evidence from St Andrews. The Authority will still be able to consider and investigate what occurred during the period 30 August to 2 September as part of its substantive investigation. This can if required involve the Authority calling for evidence or other information.<sup>6</sup>

### **Costs**

[61] Costs are reserved.

[62] 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 Jamieson and Ms McIntosh and Ms Fechney may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination.

[63] From the date of service of that memorandum Mr de Wattignar has 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.

[64] 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>7</sup>

Helen Doyle  
Member of the Employment Relations Authority

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<sup>6</sup> Section 160(1)(a) and (b) of the Act.

<sup>7</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costsremedies/#awardin](http://www.era.govt.nz/determinations/awarding-costsremedies/#awardin) For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs](http://www.era.govt.nz/determinations/awarding-costs).