

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 133
3257019

BETWEEN MARK ANTHONY
BROOKES
Applicant

AND FLETCHER CONCRETE AND
INFRASTRUCTURE
LIMITED T/A FIRTH
INDUSTRIES
Respondent

Member of Authority: Natasha Szeto

Representatives: Applicant in person
Rebecca Rendle and Josh Nyika, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions and
information received: Nil from the Applicant
20 December 2023 from the Respondent

Date: 6 March 2024

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Mark Brookes was employed by Equip Worldwide Limited trading as Equip Recruitment (Equip Recruitment) on 3 August 2022. Mr Brookes says his employment was terminated on 7 September 2023 after he sent an email outlining his concerns about issues occurring at his workplace, Firth Industries (the trading name of Fletcher Concrete and Infrastructure Limited, the Respondent in this matter).

[2] On 11 September 2023, Mr Brookes sent Firth Industries a letter entitled: “Personal Grievance – Mark Brookes”.

[3] Firth Industries responded that Mr Brookes' employment relationship was with Equip Recruitment, and Firth was not his employer. Firth Industries told Mr Brookes he was not able to raise a personal grievance solely with Firth.

[4] On 21 October 2023, Mr Brookes lodged a Statement of Problem with the Authority raising a number of claims against Firth Industries including unjustifiable dismissal, cutting back his working hours, unjustifiable disadvantage, lack of good faith, that he was not given breaks, and that he was given unsafe vehicles to drive.

[5] On 8 November 2023, Firth Industries applied for Mr Brookes' claim to be dismissed on the basis that there has never been an employment relationship between Mr Brookes and Firth Industries. Further, Firth Industries says that because Mr Brookes has not raised a personal grievance against Equip Recruitment, he has not met the requirements of s103B of the Employment Relations Act 2000 (the Act) for joining a controlling third party to a personal grievance, and there is no jurisdiction for the Authority to hear the claim under s 161(1)(ea) of the Act.

[6] This determination resolves a preliminary jurisdictional matter about whether Mr Brookes' claims can proceed against Firth Industries.

Authority's Investigation

[7] On 5 December 2023, the Authority held a Case Management Conference (CMC) with the parties.

[8] At the CMC, Mr Brookes confirmed that his employer was Equip Worldwide Limited. He also confirmed that he has not raised a personal grievance with Equip Recruitment. Mr Brookes' claim is made on the basis of Firth Industries being a controlling third party.

[9] Firth Industries asked the Authority to determine the jurisdictional issue on a preliminary basis and I agreed that would be appropriate in the circumstances. Mr Brookes was unwilling to engage in ways to progress this matter. I therefore proposed that I proceed to make a determination on the preliminary jurisdictional matter on the papers. I made timetabling directions accordingly.

[10] Following the CMC, Mr Brookes advised that he would be challenging the determination of the Authority in the Employment Court and had already filed the papers.

[11] The parties were to advise of any objection to the preliminary jurisdictional matter being determined on the papers by 8 December 2023. No objection was received.

[12] Mr Brookes had until 15 December 2023 to lodge and serve any evidence or submissions he wanted considered. On 18 December 2023, Mr Brookes advised the Authority that he had: “No further evidence to submit at this point in time”. Firth Industries lodged and served its submissions on 20 December 2023.

[13] In the Notice of Directions dated 5 December 2023, the parties were advised that if a party did not respond to the timetabling directions, the Authority would proceed to make a determination on the papers and on the information before it. It was specifically noted:

This will include Mr Brookes’ statement to the Authority that he has not raised a personal grievance with his employer.

[14] As permitted by s 174E of the Act, this determination does not record all evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. All material provided by the parties has been considered.

The Issues

[15] The preliminary jurisdictional matter to be investigated and determined is:

- (a) Whether Mr Brookes’ claims can proceed against Firth Industries.

Relevant Background

[16] Mr Brookes was employed by Equip Recruitment under a Temporary Multiple Assignment Employment Agreement which was signed by both parties on 3 August 2022. Clause three of the agreement states that Mr Brookes is employed on an “as and when required” basis. Clause 23 sets out the procedure for raising a personal grievance or other problem which includes that the employee “must raise the grievance with us by making us aware of the personal grievance that you want to have addressed”.

[17] Mr Brookes wrote to Firth Industries on 11 September 2023, stating:

My employment was terminated on the basis that the third-party company Equip recruitment have an “As when needed basis” policy, and no other resolutions could have been concluded.

While I appreciate that I am not employed by this company, it has had the impact of interfering with the employment relationship.

Is Mr Brookes able to raise a personal grievance or claim for breach of good faith directly with Firth Industries?

[18] Section 114(1) of the Act requires an employee to raise a personal grievance with their employer. Mr Brookes’ employer was Equip Recruitment. Based on the information before the Authority, Firth Industries was not, and has never been, Mr Brookes’ employer. Mr Brookes acknowledged this in his correspondence to Firth Industries on 11 September 2023. Mr Brookes is not able to raise a personal grievance directly with Firth Industries.

[19] Section 4 of the Act (relating to the obligation to deal with each other in good faith) applies to parties to an employment relationship as defined in s 4(2) of the Act. Employment relationships include those between an employer and employee. There was no employment relationship between Mr Brookes and Firth Industries. Mr Brookes is not able to claim a breach of the duty of good faith against Firth Industries.

[20] I find that Mr Brookes is not able to raise a personal grievance with, or a breach of the duty of good faith claim against, Firth Industries.

Is Mr Brookes able to join Firth Industries to a personal grievance as a Controlling Third Party?

Legal Framework

[21] 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.

[22] Section 103B of the Act establishes the statutory framework for joining a controlling third party to proceedings to resolve a personal grievance. It provides:

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.
- (5) If the Authority or the court joins the controlling third party to the proceedings, the Authority or the court must consider whether to direct the employer, the employee, and the controlling third party to use mediation services to seek to resolve the personal grievance.

[23] Section 103B(3) references the statutory requirement in s 115A of the Act for notifying a controlling 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.

[24] 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.

[25] 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 apply to the Authority for leave to notify the controlling third party after the expiration of that period under s 115A(3) of the Act.

[26] Finally, regulation 9A of the Employment Relations Authority Regulations 2000 (the Regulations) provides the mechanism by which a controlling third party can be joined to a personal grievance:

9A Joining controlling third party to personal grievance

Every application under section 103B of the Act for joining a controlling third party to proceedings to resolve a personal grievance must—

- (a) be lodged with an officer of the Authority; and
- (b) be in form 4.

Firth Industries' submissions

[27] Firth Industries says that Mr Brookes has not met the essential prerequisites to join a controlling third party to the proceeding. Those are:

- (a) He has not raised a personal grievance with his employer in accordance with s 114 of the Act; and
- (b) He has not applied to the Authority to resolve the personal grievance with his employer; and
- (c) He has not lodged an “Application to join third party to proceedings to resolve the personal grievance” in accordance with regulation 9 of the Regulations and in any case is now out of time to raise a personal grievance with his employer.

[28] In reliance on *Riddler v Meridian Energy Limited*¹ Firth Industries says that s 103B of the Act does not create a new separate personal grievance between an employee and controlling third party, and the Act does not provide a mechanism for an Applicant to apply to join a third party in the absence of a substantive personal grievance proceeding against the employer.

[29] Accordingly, Firth Industries says that the Authority does not have jurisdiction to progress Mr Brookes' matter under s 161(1)(ea) of the Act, which gives the Authority

¹ [2023] NZEmpC 87 at [40].

exclusive jurisdiction to make determinations about employment relationship problems generally including joining a controlling third party to a personal grievance.

Analysis

[30] The plain wording of the provision requires that before the Authority can join a third party to a personal grievance, there must be a personal grievance between an employer and employee to which it can be joined. The personal grievance must have been raised in accordance with s 114(1) of the Act which requires an employee to raise the grievance with their employer.

[31] A personal grievance between the employee and employer is an essential prerequisite to joining. As the Court found in *Riddler*:²

The existence of the personal grievance is necessary and must have resulted in the employee applying to the Authority to resolve it. The section supports a conclusion that there must be litigation between an employer and employee, not that a separate cause of action arises as between the employee and the controlling third party.

[32] And at [35]:

The text of s 103B supports the conclusion that there is no ability for an employee to pursue the alleged controlling third party without also pursuing a personal grievance claim against the employer.

[33] Based on the information before the Authority, Mr Brookes has not raised a personal grievance with his employer Equip Recruitment. He has not lodged a Statement of Problem against Equip Recruitment. There is no personal grievance between Mr Brookes and his employer to which Firth Industries could be joined as a controlling third party.

[34] Accordingly, the Authority does not have jurisdiction to consider Mr Brookes' claims under s 161(ea) of the Act.

Findings

[35] There is no employment relationship between Mr Brookes and Firth Industries. Mr Brookes is not able to raise a personal grievance with, or a breach of the duty of good faith claim against, Firth Industries.

² At para [33].

[36] The Authority does not have jurisdiction to progress Mr Brookes' claims against Firth Industries as a controlling third party.

Costs

[37] The power of the Authority to award costs is set out in Schedule 2, clause 15 of the Act.

[38] Firth Industries wishes to be heard on the issue of costs. 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 of costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party will then 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.

[39] The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

Natasha Szeto
Member of the Employment Relations Authority

³ Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi (February 2024) at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>