

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA  
TAIMAHI ŌTAUTAHI ROHE**

[2024] NZERA 321  
3236159

BETWEEN

NICOLA NABIH  
First Applicant

NUMBER 8 WORKERS UNION OF  
NEW ZEALAND INCOPORATED  
Second Applicant

AND

METHVEN AGED PERSONS  
WELFARE ASSOCIATION  
INCOPORATED  
First Respondent

MINISTRY OF HEALTH  
Second Respondent

Member of Authority: Antoinette Baker

Representatives: Erika Whittome and Liz Lambert for the Applicants  
Sarah Townsend, counsel for the First Respondent  
Emma von Veh and Hamish Kynaston counsel for the Second Respondent

Investigation Meeting: On the papers

Submissions received: 8 February 2024 from the First Applicant  
15 March 2024 from the Second Respondent  
22 March 2024 in reply from the First Applicant

Determination: 30 May 2024

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Nabih was employed as a permanent part time night carer (enrolled nurse) for the first respondent (MAPW), an incorporated society running an age-related care facility. Ms Nabih commenced work on or about 21 October 2020 working 64 hours per fortnight across

eight shifts. By agreement this was reduced to 32 hours per fortnight across four shifts in March 2021.

[2] Ms Nabih was dismissed on 28 March 2023 on the basis of medical incapacity after she had been away from work unwell since January 2022. Ms Nabih says that she was ‘coerced’ to get vaccinated for COVID-19 in December and January 2021-22 by MAPW despite her allegedly raising concerns about the vaccination and saying she did not want to be vaccinated because of this. She claims that after the second vaccination she became unwell because of it, and this continued unwellness resulted in her inability to work that led to MAPW eventually dismissing her.

[3] Ms Nabih says that the second respondent (MOH) was a ‘controlling third party’ under ss 5 and 103B of the Employment Relations Act 2000 (the Act) in relation to MAPW’s actions in ‘coercing’ her to get vaccinated or face dismissal and then this resulted in her being dismissed because of her reaction to the vaccination. This was in the context of MOH administering the then version of the COVID-19 Public Health Response (Vaccinations) Order 2021 (Vaccination Order).

[4] It has been put forward for Ms Nabih that MOH was a ‘controlling third party’ under s 5 of the Act because it ‘funds Methven House, and as such played a leading role in the decision of Methven House to implement the policy of locking out or dismissing staff who refused to be vaccinated. This third party control led to a breach of contract of the applicant’s employment as well as coercion and ultimately her employment termination.’<sup>1</sup> Ms Nabih says that the MOH caused or contributed to her personal grievance (unjustified dismissal) because ‘Methven House would not have imposed this vaccination requirement for the applicant’s employment, if the [MOH] had not had this requirement set out in the Vaccination Order which it administrated.’<sup>2</sup>

[5] Ms Nabih claims her dismissal was unjustified, that she was disadvantaged in her employment, and that she has a grievance under s 110A of the Act, as well as a grievance for discrimination. She further claims a breach of her employment agreement in that it contained nothing about having to undergo vaccination. Apart from the grievance for unjustified

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<sup>1</sup> Statement of Problem at 2A.

<sup>2</sup> As above at F(b).

dismissal it is disputed by MAPW that other grievances were raised within the time of 90 days under s 114 of the Act and it does not consent to them being raised out of time. MAPW also defends its action as justified to dismiss Ms Nabih for medical incapacity.

[6] Ms Nabih also claims breaches of the Health and Safety at Work 2015. There is a dispute regarding the ability of this jurisdiction to determine these claims.

[7] This preliminary determination only deals with Ms Nabih's application to join the MOH under s 103B of the Act as a 'controlling third party'. The parties agreed that this application could be determined 'on the papers' by way of affidavits and written submissions. I have received an affidavit from Ms Nabih and submissions on her behalf; an affidavit from Philip Blair Knipe, Chief Legal Advisor for MOH and submissions on MOH's behalf. As permitted by s 174E of the Act this determination expresses conclusions on issues necessary to dispose of this preliminary matter.

*Bringing an application to join a controlling third party*

[8] Under s 103B(1) of the Act an employee may apply to have a party joined as a 'controlling third party' but must have raised a personal grievance under s 114 of the Act, asked the Authority to resolve it and under s 103B(b) of the Act '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.'

[9] Ms Nabih has raised a grievance of unjustified dismissal based on her dismissal for medical incapacity but in that letter (arguably) raises issues relating vaccinated for COVID-19 to having to get vaccinated. Ms Nabih has asked the Authority to resolve her grievance for unjustified dismissal. I accept there remains an issue as to whether all grievances referred to above have been raised within the 90-day time frame against MAPW. I will consider the application on the basis that a grievance has at least likely been raised against MAPW for unjustified dismissal. The outcome of this determination should further explain my approach.

*Grounds for granting an application to join under s 103B of the Act*

[10] Under s 103B(3) of the Act I must grant an application to join MOH if satisfied that:

- a. The ‘controlling third party’ has been notified under s 115A of the Act; and
- b. An arguable case has been made out-
  - i. That the party to be joined is a controlling third party; and
  - ii. That the party’s actions caused or contributed to the personal grievance.

[11] The MOH agrees that Ms Nabih has fulfilled the notification requirement under s 115A of the Act. I will therefore consider whether MOH is arguably a ‘controlling third party’ and then, if I find this, whether its actions have arguably ‘caused or contributed to the personal grievance claimed of unjustified dismissal’.

*Is it arguable that MOH is a ‘controlling third party’?*

[12] I accept as correct the submission for MOH that an arguable case is not a high threshold to meet. However, in considering whether MOH is arguably a ‘controlling third party’ I accept the submission for MOH that the intent of Parliament in relation to s 103B is relevant.

[13] Section 103B was enacted in 2020 with the intent to address the situation where employees were employed by a labour hire type business but in reality worked under the control and direction of the party that was in a separate contract with the labour hire business to provide it with labour. Problems could occur when those employees faced issues they wanted to challenge due to the behaviour towards them in the workplace of the party in control and direction of their employment. In some cases, the employees had worked long term for that party with little to do with the employer entity. Before this provision was enacted employees could find themselves unable to challenge through the grievance process because the ‘controlling third party’ was not their legal employer.<sup>3</sup> The situation is referred to as ‘triangular’ employment.<sup>4</sup>

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<sup>3</sup> John Hughes and others *Mazengarb's Employment Law* (online ed, LexisNexis) at [ERA 103B.1].

<sup>4</sup> Section 103B was inserted into the Act on 27 June 2020 by Employment Relations (Triangular Employment) Amendment Act 2019 (2019 No 36, s 6).

[14] Section 5 of the Act includes a definition of ‘controlling third party’:

means 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.

*A contract or arrangement with the employer or benefit to the contracting party?*

[15] It is submitted for Ms Nabih that the MOH had an ‘arrangement’ with MAPW because it funded MAPW as a ‘certified provider’ and that it was through a ‘chain of agents’ sourced from MOH that MAPW received a subsidy to enable it to operate.<sup>5</sup> The affidavit of Mr Philip Knipe, Chief Legal Advisor for the MOH includes that, ‘[MOH] has not had a contractual relationship with [MAPW] since 2003’<sup>6</sup> when a former direct agreement was transferred to the then Canterbury District Health Board (CDHB). Mr Knipe affirms that a business unit in the MOH since that transfer happened, ‘acted as the contracting agent and payment agent for CDHB until July 2023.’ This would have included the period of time that Ms Nabih was employed by MAPW.

[16] Mr Knipe refers to Ms Nabih’s reference to a recording in MAPW reports of an ‘MOH Subsidy’. He says he does not understand how it could be called a ‘MOH Subsidy’ unless it was by way of an ‘historic’ reference. I find this arguably could be an explanation for this reference given the statutory based transfer to a contract with the CDHB.

[17] MOH further submits that the work carried out by Ms Nabih was for the residents of MAPW and not the MOH, noting again that the ‘rights, liabilities, and obligations’ in the agreement between the MOH and MAPW were transferred in 2003. I find this submission

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<sup>5</sup> Reply Submissions for Nicola (Nikki) Nabih for the Joining of the 3<sup>rd</sup> Party, 22 March 2024.

<sup>6</sup> Affidavit of Philip Blair Knipe, affirmed 23 February 2024, at paragraphs 9 and 10 and also in the Statement in Reply attached copy of the Health Sector Transfers (Provider Arrangements) Order 2003 that includes MAPW specifically at page 13 of the Schedule of entities transferred.

points away from it being arguable that this was an ‘arrangement’ envisaged where the purported ‘controlling third party’ was likely a business that got the benefit of the worker’s labour for its business activities in exchange effectively for no liabilities as an employer. I have already referred to this as the apparent mischief that s 103B was enacted to address.

[18] Considering the above, I do not find it arguable that MOH was in the category envisaged by the first limb of the test as to whether it could arguably be a ‘controlling third party’ in relation to Ms Nabih’s employment.

[19] Even if I am wrong about this, I will now also consider the second limb.

*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.*

[20] It is submitted for Ms Nabih that MOH had exercised an ‘economic influence’ over MAPW. I take from that that I need to conclude that the funding aspect through a ‘series of agents’ would have to link to influencing MAPW to make decisions about the continuation of Ms Nabih’s employment or (if a disadvantage claim) justified actions in relation to Ms Nabih’s employment. I am not satisfied it is arguable that this was the case. I accept the submission for MOH that it was not aware of Ms Nabih or MAPW until it was in relation to these proceedings as affirmed by Mr Knipe in his affirmed affidavit.

[21] I have to also consider that any exercise of control or direction over the employee was ‘substantially similar to the control or direction that an employer exercises, or is entitled to exercise.’

[22] For MOH, through Mr Knipe’s affirmed affidavit, I am told that ‘[MOH] does not employ or manage or have any day-to-day control of employees working for organisations that perform health services, including health care providers (except to the extent, in the rare occasion, that those employees are also directly employed by [MOH] – for example, clinical advisors.’<sup>7</sup> It is difficult to see how arguably there was any exercise of control or direction that occurred here that was akin to that of an employer.

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<sup>7</sup> As above at paragraph 7.

[23] Going back to the likely intent of parliament under s 103B, the aim was to address issues with businesses who had another's employees working on their site(s) who they directed in their daily work. It is submitted for Ms Nabih that applicable cases are ones where the business in 'control' excludes the employee from the workplace (by telling the contracting party they no longer wanted the workers). I do not disagree that this is the type of situation s 103B is intended to address. However, I accept MOH's submission that it had none of that control over Ms Nabih's employment and nor was it entitled to exercise it.

[24] MOH submits it cannot have been Parliament's intent that any agency administering legislation (which was what the Vaccination Order was, albeit subordinate) would be considered a 'controlling third party' to grievance claims. I agree. The outcome of joining is that the 'controlling third party' can be apportioned liability in remedies to any findings against the employer for the grievance if proven<sup>8</sup>. MOH submits the analogy of, for example, other Government agencies who are tasked with administering legislation that is regulatory. This can involve information provision such that MOH appears to have done in relation to the Vaccination Order here. For Ms Nabih it is submitted that this analogy is 'spurious' and that MOH has not provided any 'authority' to support its claim that having such agencies as 'controlling third party' would not be the intent of Parliament. I find it a useful comparison that MOH makes. I have already referred above to the intent of Parliament in relation to s 103B and the analogy is helpful and consistent with this.

[25] Considering the above I do not find it arguable that MOH was a 'controlling third party' nor that it arguably exercised control and direction over Ms Nabih's employment like an employer would. Accordingly, the application fails at this point.

### **Summary**

[26] The application to join the Ministry of Health as a 'controlling party' under s 103B of the Act is declined.

[27] The claims Ms Nabih makes against her former employer continue only against Methven Aged Persons Welfare Association, the first respondent.

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<sup>8</sup> Employment Relations Act, s123A.

[28] The continuation of the substantive matter may still include live issues about whether some grievances are raised within time and jurisdiction issues regarding the claims for breaching the Health and Safety at Work 2015 Act. These things as well as what standing the second applicant has in these proceedings, and the setting of a timetable for evidence and an investigation meeting will be discussed in a phone conference call to be organised by an Authority Officer with the parties shortly.

### **Costs**

[29] Costs are reserved for this preliminary matter. The parties are encouraged to resolve any issue of costs between themselves.

[30] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the MOH may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Nabih will have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[31] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual tariff basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>9</sup>

Antoinette Baker  
Member of the Employment Relations Authority

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<sup>9</sup> [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)