

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 35
3216639

BETWEEN	DEBORAH HANCOCK First Applicant
AND	CHRISTINE GIBSON Second Applicant
AND	HENRICA RYAN Third Applicant
AND	JONES & SANDFORD TIMBER & HARDWARE (1999) LIMITED First Respondent
AND	MITRE 10 (NEW ZEALAND) LIMITED Second Respondent

Member of Authority: Natasha Szeto

Representatives: Erika Whittome and Liz Lambert, representatives for
the Applicants
Penny Swarbrick and Karishma Zafar, counsel for the
Respondent

Investigation Meeting: 16 October 2023 by audio visual link

Submissions and
information received: 25 August, 16 October, and 20 October 2023 from the
Applicants
1 September, 16 October and 25 October 2023 from the
Respondent

Date: 23 January 2024

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Deborah Hancock, Christine Gibson and Henrica Ryan (the Applicants) were employed by Jones & Sandford Timber & Hardware (1999) Limited (Jones &

Sandford) trading as Mitre 10 New Plymouth and worked in retail.

[2] The Applicants were dismissed on 15 March 2022 for failing to follow a lawful and reasonable instruction to attend work and undertake a supervised rapid antigen test (RAT).

[3] The Applicants say they raised personal grievances on five separate occasions from 4 January 2022 to 1 April 2022 before lodging a Statement of Problem with the Authority on 4 April 2023.

[4] On 4 April 2023, the Applicants also lodged an application under s 103B of the Employment Relations Act 2000 (the Act) to join Mitre 10 (New Zealand) Limited (Mitre 10 NZ) as a controlling third party to resolve personal grievances they say were raised with their former employer, Jones & Sandford. The Applicants say Mitre 10 NZ caused or contributed to the personal grievances because Jones & Sandford would not have imposed vaccination policies and subsequent testing requirements on the Applicants' employment if this had not been required by "Mitre 10 Head Office". Further the Applicants say that "Mitre 10 Head Office" breached s 92 and s 168(4) of the Health and Safety at Work Act 2015 by requiring vaccination (including by coercing and inducing employees in relation to an incentive programme) and by requesting information about the health status of its workers.

[5] Jones & Sandford says personal grievances were not raised in time and in accordance with the Act.

[6] Both Jones & Sandford and Mitre 10 NZ oppose the application to join Mitre 10 NZ as a controlling third party. This is on the basis that the Applicants have not raised personal grievances with Jones & Sandford, that Mitre 10 NZ is not a controlling third party by definition under the Act (including that the Applicants were not under the control and direction of Mitre 10 NZ and did not work for Mitre 10 NZ's benefit) and that in any case, Mitre 10 NZ did not cause or contribute to any personal grievances.

[7] This determination is about whether the Applicants were in time to raise personal grievances with Jones & Sandford and if not, whether the Authority should grant leave for grievances to be raised out of time.

[8] It also addresses whether the Authority should grant the Applicants' application to join Mitre 10 NZ as a Controlling Third Party to any grievances.

Procedural History

[9] The Authority convened Case Management Conferences with the parties on 26 May 2023, 3 August 2023 and 16 August 2023. The parties agreed for this matter to be dealt with on the basis of affidavit evidence and submissions.

[10] I received affidavits on each issue from each of the Applicants. For the First and Second Respondents, I received affidavits from Jones & Sandford (Stuart Jones, Company Director, and Julia McDowall, Human Resources Manager) and Mitre 10 NZ (Celena Harry, Chief People Officer). I received submissions on behalf of all parties. I held an investigation meeting to hear submissions by audio visual link (AVL) on 16 October 2023, and the parties spoke to their written submissions.

[11] Just prior to the submissions hearing for this matter, the Authority issued a determination on the Controlling Third Party issue on almost identical facts.¹ As a consequence, further information and submissions relating to Mitre 10 NZ's financial statements were filed subsequent to the submissions hearing.

[12] As permitted by s 174E of the Employment Relations Act 2000 (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

[13] The issues to be investigated and determined are:

- (a) Whether the Applicants raised personal grievances in accordance with s 114 of the Act; and
- (b) Whether Mitre 10 (New Zealand) Limited should be joined to the proceedings as a controlling third party.

Issue 1 – Raising personal grievances

[14] The Applicants were employees of Jones & Sandford trading as Mitre 10 New Plymouth until their dismissal on 15 March 2022. Jones & Sandford promulgated a

¹ *Andrew McDowell and McAlpines Rangiora Limited and Mitre 10 (New Zealand) Limited* [2023] NZERA 590.

draft Covid-19 Policy for consultation on 14 December 2021, implemented the policy on 18 January 2022 and it came into effect on 1 February 2022.

[15] The Applicants' employment was terminated on 15 March 2022 for serious misconduct, for failing to comply with a lawful and reasonable instruction to undergo a RAT and provide evidence of a negative test.

[16] The Applicants say they raised personal grievances for disadvantage and discrimination on 4 January 2022, 31 January, 7 March, and 10 March and on 1 April 2022 for disadvantage, discrimination and unjustifiable dismissal.

The legal framework

Section 114 of the Act

[17] An employee must raise a personal grievance with their employer within 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.² A personal grievance can only be raised outside that time with the employer's consent, or with the leave of the Authority which can only be granted in exceptional circumstances. No action can be commenced in the Authority more than three years after the personal grievance was raised.³

[18] The case law supports that the grievance process is designed to be informal and accessible.⁴ A grievance may be raised orally or in writing and there is no particular formula of words that must be used. Each communication in a series should be examined as to whether it might raise a grievance, but the totality of communications might also constitute raising a grievance.⁵

[19] The grievance raised must be in the nature of a complaint under s 103 of the Act, and the employee must take reasonable steps to make the employer aware of the substance of the complaint to enable the employer to address it.⁶ The employer must know what it is responding to, be given sufficient information to address the grievance, and be able to respond to the complaint on its merits with a view to resolving the complaint informally and as soon as practicable. It is not necessary for the employee

² Section 114(1) and (2) of the Employment Relations Act 2000.

³ Section 114(6) of the Employment Relations Act 2000.

⁴ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at 36.

⁵ Above n4.

⁶ *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 (Emp C).

to state how they would like the matter resolved. Raising an employment relationship problem might constitute raising a personal grievance.⁷

[20] Employers and employees have a mutual good faith obligation to be active and constructive in maintaining a productive employment relationship in which the parties are communicative.⁸

Submissions

[21] The Applicants submit the grievances were well articulated to Jones & Sandford both verbally and in writing by the Applicants and their representatives. They say that the totality of the communications specified the exact issues that were raised as personal grievances.

[22] The Applicants submit that the merit of the claims is irrelevant to the issue of whether a personal grievance has in fact been raised and the two issues should not be conflated.

[23] They say there is nothing more they could have done to raise personal grievances, and they have repeatedly and consistently raised grievances “at every stage of the employment relationship problem”.

[24] They also urge the Authority not to entertain any suggestion from the Respondent that a grievance has to be accepted before it can be considered to be properly raised. The Applicants submit the Respondent has disingenuously requested individual allegations specific to each Applicant, when the employer already knew the nature of the issues that accounted for their grievances. They also say the personal grievance for unjustified dismissal followed on from the personal grievances for disadvantage and breaches of good faith and HSWA. In short, the Applicants say the nature of the various personal grievances was always clear, always known and always understood.

[25] Jones & Sandford disputes this and says personal grievances were not raised during the communications relied on by the Applicants. It says the legislation requires an employee to provide sufficient information to the employer to enable the employer to understand the issue. Jones & Sandford submits the Authority is entitled to rely on

⁷ *Clark v Nelson Marlborough Institute of Technology* [2008] 8 NZELC 99, 483 (Emp C).

⁸ Section 4(1A)(b) of the Employment Relations Act 2000.

the expertise of its HR Manager who says she did not consider personal grievances had been raised by the Applicants. Jones & Sandford says it was not trying to ‘trick’ the Applicants – it took prudent and sensible steps to respond to communications and ask for clarification. Jones & Sandford says its letter of 4 February 2022 “put the ball squarely in the Applicants’ court” and the Applicants had ample time to respond and provide further information when asked but inexplicably omitted to do so.

[26] Specifically in relation to the 1 April 2022 email, Jones & Sandford says the email was only from one Applicant, and listed a number of issues by heading, most of which were not matters that fall within the ambit of the definition of personal grievance in s 103 of the Act.

[27] Jones & Sandford also says that its actions following the Applicants’ dismissals put the Applicants on notice that they needed to provide proper information and proof of representation.

[28] On 29 November 2022 Jones & Sandford was emailed a request for mediation on behalf of Christine Gibson, Deborah Hancock and Hennie Ryan. A Statement of Problem was lodged in the Authority on 4 April 2023. That is the date Jones & Sandford says personal grievances were raised because it was only at this stage the Applicants had taken reasonable steps to make the employer aware of their grievances. Jones & Sandford says the 90 days expired on 13 June 2022 and therefore raising the grievances on 4 April 2023 means the Applicants are well out of time and it does not consent to any grievances being raised out of time.

Analysis

[29] I now apply the law and principles of raising a personal grievance to the facts of this matter.

[30] The Applicants rely on the following communications to say they raised personal grievances in time:

- (a) Feedback on 4 January 2022;
- (b) Meeting on 31 January 2022;
- (c) Meeting on 7 March 2022 and through prepared personal statements;
- (d) Correspondence from their representative to the Respondent’s representative on 10 March; and
- (e) Letter dated 1 April 2022.

[31] This matter has been categorised by some uncertainty in what the Applicants have claimed was raised and when. Along with unjustified dismissal and unlawful instruction of a RAT, the email of 1 April 2022 also referred to coercion (which could relate to s 103(1)(j)(ii) of the Act), and discrimination (which could relate to s 103(1)(c) of the Act).

[32] Jones & Sandford submit that any communications prior to 15 March 2022 could not raise personal grievances for dismissal because they pre-dated the dismissals. It is settled law that a grievance cannot be raised in anticipation of an action before its occurrence, and I do not understand the Applicants to claim that dismissal grievances were raised prior to this date. Consequently the only communication that could potentially have raised personal grievances for unjustifiable dismissal was the letter / email dated 1 April 2022.

[33] The Applicants now say their grievances fall under s 103(1)(a) (unjustifiable dismissal) and s 103 (1)(b) (unjustifiable disadvantage).⁹ To the extent that coercion and / or discrimination have been mentioned in the communications, I have addressed this in brief for the relevant communication, but the substantive personal grievances alleged by the Applicants are unjustifiable dismissal and disadvantage as per the Applicants' submissions. For the sake of completeness, I record that it is appropriate for the Applicants to focus on their core grievances particularly given the technical difficulty of establishing a grievance under s 103(1)(j) which requires an Applicant to establish their employer has contravened s 92 of the Health and Safety at Work Act 2015 (HSWA) in relation to performing or exercising a function or power under HSWA.

4 January 2022 feedback

[34] The Applicants say their personal grievances for disadvantage were first raised in the feedback on 4 January 2022¹⁰ given in response to Jones & Sandford's consultation on the development of a Covid-19 Draft Policy, which was acknowledged by Celena Harry of "Head Office" on 5 January 2022. The Applicants say the feedback raised grievances because it was clear they were concerned about aspects of the policy and they requested a meeting (which was held on 31 January 2022 with Nicole Attrill,

⁹ As per paragraph 50 of Applicants' submissions dated 25 August 2023.

¹⁰ The feedback was dated 28th December 2021, but appears to have been sent to Jones & Sandford and Mitre 10 NZ on 4 January 2022.

Phillip Rose and Julia McDowall). The Applicants also say they were disadvantaged by the fact that the opportunity to provide feedback occurred from 14 December 2021 to 7 January 2022 when the majority of professional services were closed.

[35] The 4 January 2022 feedback was an email from Ms Gibson to managers. The covering email states: “Attached is my feedback to the consult policy as suggested in the email that was sent to me”. Jones & Sandford says the feedback contained no reference to either of the other Applicants and therefore could not possibly raise grievances on their behalf. But in any case, it also specifically purported to be feedback to the draft policy and not the raising of a personal grievance.

[36] I have read the feedback document in full. I conclude it has not raised personal grievances for a number of reasons. Firstly, it does not mention the words ‘personal grievance’. That is not fatal to the claim, but having read the feedback I conclude it was consistent with the employer and employees engaging with each other in an active, responsive and communicative way as required by the good faith obligations in s 4 of the Act. My view about the purpose of the feedback document is reinforced by the following statement made in the document:

We have raised the necessary concerns in the consultation period which you offered in good faith, and anticipate as such, that these concerns will be effectively addressed.

[37] Secondly, despite the feedback document referring to ‘we’ and a ‘group’, it was sent by Ms Gibson and the other two Applicants were not mentioned by name in the feedback or copied into the correspondence. There is no information before the Authority confirming the Applicants were to be dealt with collectively as a group at this stage (this came later as confirmed by the 2 March 2022 correspondence as set out below). Even if a personal grievance had been raised in this feedback, it could only have been raised by Ms Gibson.

[38] Thirdly, there is no clear disadvantage related to the timing of the feedback. The Applicants asked for an extension of two weeks on “all notices” to enable them to get advice. It is unclear whether there was follow up on this point from either the Applicants or from Jones & Sandford, but irrespective, it did not seem to hinder the Applicants in providing very full feedback on the draft policy running to approximately 17 pages. I do not find any disadvantage in relation to the timing of the consultation being over the Christmas period.

[39] Aside from disadvantage, the Applicants also say “coercion” was raised in the feedback. It is correct that the word “coercion” was used in the letter, but it is clear the Applicants were not raising coercion as a grievance, but were providing feedback that using the word “mandate” in the policy may invoke fear of forced coercion. I find that in context the Applicants were raising the spectre of coercion in a general sense, and not specifically as a grievance ground precipitated by a contravention of s 92 of HSWA.

[40] For these reasons, I find that no personal grievances for disadvantage and / or coercion were raised in the 4 January 2022 feedback.

31 January 2022 meeting

[41] The meeting on 31 January 2022 was held between the three Applicants and their two representatives Ms Smith and Ms Lambert. For Jones & Sandford, Nicole Attrill and Phillip Rose attended. The Applicants say this meeting is how they raised their second personal grievance for disadvantage. An audio recording and a transcript containing “relevant excerpts” was produced from this meeting and provided to the Authority. The Applicants have referred to a “contemporaneous account” which – in reality – was a follow-up email sent from Ms Smith later on the same day as the meeting.

[42] In the meeting, the Applicants raised their view that the draft policy is outside their contractual arrangements. The Applicants appear to treat the meeting as a continuation of consultation on the policy and ask for parts of the policy to be ‘re-tabled’. Again the words “personal grievance” were not mentioned but the Applicants say their representatives raised the issue of coercion towards the end of the meeting.

[43] Following the meeting on 31 January, the Applicants’ representative Ms Smith sent an email to Ms Attrill and copying in Ms Hancock and Ms Lambert entitled: “Outcome of todays [sic] meeting”.

[44] Jones & Sandford says the 31 January 2022 email expresses concerns about the basis for the Covid-19 policy but there is no reference to any personal grievances. Jones & Sandford says it would have been reasonable to assume that if personal grievances had been raised in the meeting, this would have been mentioned in the follow-up email. In the meeting, the Applicants expressed their concerns about the draft policy, but did not use the words “personal grievance” or “disadvantage” and in

any case could not raise a personal grievance for unjustifiable dismissal as no dismissal had occurred at that point.

[45] I have listened to the audio recording from the meeting, and considered both the transcript provided by the Applicants containing “relevant excerpts” and the follow-up email. I conclude personal grievances were not raised at the 31 January 2022 meeting, for a number of reasons.

[46] Firstly, and to reiterate the point about the 4 January 2022 feedback, the words “personal grievance” were not mentioned. That is not fatal to the claim, but having considered the records of the meetings including the affidavit evidence of people who were present, I conclude the meeting was consistent with the employer and employees continuing consultation on the proposed Covid-19 Policy by engaging with each other in an active, responsive and communicative way as required by the good faith obligations in s 4 of the Act.

[47] To the extent that the Applicants raised concerns, these were in the nature of the Applicants’ belief that implementation of the Covid-19 Policy would be a change to the terms of their employment, over which they had the right to negotiate. Although the Applicants did say that aspects of the policy may constitute “coercion” I find this was not raised in the context of a personal grievance ground under the Act. References to HSWA made during the meeting were in relation to the potential future issuance of a s 83 Notice, and not in relation to alleged contravention of s 92 of HSWA.

[48] I am reinforced in my view that no personal grievances were raised in this meeting, because there was no mention of any personal grievances in the communication immediately following the meeting. The follow-up email from the Applicants’ representative concludes with the following statement from Ms Smith: “*To be clear, this meeting is to negotiate the proposed changes to their contract*”.

[49] This was the purpose and focus of the meeting.

[50] On 4 February 2022, Jones & Sandford sent a letter setting out its concerns and asking for confirmation from the Applicants about whether any concerns had been missed or misconstrued.

[51] If personal grievances had been raised, I would have expected this to have been recorded in the outcome email from the Applicants’ representatives and raised in

response to Jones & Sandford's letter of 4 February 2022. I find that personal grievances were not raised in the meeting on 31 January 2022.

7 March 2022 meeting and personal statements

[52] On 7 March 2022, a meeting was held between the three Applicants and their representatives, and for the company - Ms McDowall, Ms Attrill, and their representatives Mr Fussey and Ms Swarbrick. The Applicants say this is the third time they raised personal grievances for disadvantage. The Applicants read out prepared statements which they say made clear the issues they had, and the resolution they were seeking.

[53] Jones & Sandford says this meeting was to hear the Applicants' responses to the disciplinary allegations and it does not withstand scrutiny to say that the meeting made the issues and the resolution being sought, clear.

[54] Having read the Applicants' personal statements, I am not persuaded that personal grievances were raised in the meeting or through the statements.

[55] Firstly, none of the Applicants mention "personal grievance" in their personal statements.

[56] Secondly, the purpose of the meeting and the presentation of the personal statements was for the Applicants to respond to the disciplinary allegations following the events of 1 March where each of the Applicants declined RATs. The personal statements were emailed to Jones & Sandford under cover of an email entitled: "Documents from today's meeting" in which Ms Smith states: "enclosed and attached the three statements, excluding the verbal discussions surrounding the statements".

[57] Taking each of the Applicant's statements in turn:

- (a) Ms Hancock raises a range of issues including medical consent (for RATs), coercion and discrimination in relation to the disciplinary process. She also raises bullying, and says that if the Covid-19 policy proposes to replace or override the law and it violates her rights and the law, the policy is void.

- (b) Ms Gibson provides reasons that she has not had booster shots, does not have a Vaccination Passport (and has not provided dates of any vaccinations), and has declined regular RAT tests.
- (c) Ms Ryan provides a personal statement setting out the reasons that masks, vaccinations, and RAT tests are not an option for her. She says that she feels coerced and has been subjected to bullying.

[58] While Ms Hancock (in particular) did use several of the same words that were later included in the 1 April 2022 email, none of the Applicants in their statements clearly articulated a disadvantage, being an issue (or issues) under the Act that they wanted Jones & Sandford to resolve.

[59] Again, if grievances had clearly been raised, it would be expected that these would be articulated in the covering email on 8 March 2022. They were not. I conclude that personal grievances were not raised in the 7 March 2022 meeting or personal statements.

10 March 2022 email

[60] Emails were exchanged between representatives on 10 March 2022. Subsequently, the Applicants were sent preliminary termination letters. The Applicants say their reply to these letters raised their fourth personal grievance for disadvantage, by which they mean an email sent by Ms Lambert to Mr Fussey on the same date. Ms Lambert stated:

Our clients have the right to pursue the company with personal grievances on this point. They are not completely resolved on this as there may still be a way that they can return to work and be tested using cotton buds that do not contain ethylene oxide.

[61] This communication suggests the Applicants were – at this time – putting Jones & Sandford on notice of their right to raise personal grievances at a future point. Certainly the phrase “they are not completely resolved on this” suggests the Applicants were considering options and engaging with their employer as required by the good faith provisions of the Act.

[62] I find that no personal grievances were raised in the 10 March 2022 response, and this communication goes further – it confirms that no personal grievances had been raised prior.

1 April 2022 email

[63] On 1 April 2022, Ms Gibson sent an email to Ms McDowall which stated the following:

This letter is to inform you of the personal grievance we, as a collective group, are serving against Jones & Sandford Mitre 10 Mega, New Plymouth.

The causes of action are specified as follows:

- Unjustified dismissal
- Unlawful instruction of a RAT test
- Coercion
- BORA breaches
- Discrimination
- ERA breaches
- Contractual breaches
- Damages
- Human rights
- Defamation of character leading to difficulty of further employment
- Breach of privacy

We are open to mediate this matter as a precursor to legal action.

Deborah Hancock: Henrica Ryan: Christine Gibson

[64] Ms Gibson copied in two email addresses that belonged to the Applicants' representatives (but which was not necessarily obvious from the addresses) and blind copied in Ms Hancock and Ms Ryan. The Applicants say the letter (email) was written by Ms Smith, and formalised the raising of personal grievances, summarising issues which had previously been raised in prepared statements, feedback and during the two meetings with management.

[65] Following receipt of the 1 April 2022 email, Jones & Sandford's lawyer responded on 4 April 2022 to Ms Gibson and copying in the Applicants' two representatives, advising that Jones & Sandford did not accept that personal grievances had been properly raised and requiring certain information to be provided before there could be a substantive response to the email:

1. Are you the representative of all three? If so, please provide evidence of your authority to act (refer s 236 Employment Relations Act). If you are not the representative, please advise who is, and provide evidence of that person's authority to act. Without this, we will be unable to respond in relation to anyone other than you.

2. Please provide us with the basis on which each allegation in the list provided is made, in relation to each person who is making a claim.

[66] On 5 April 2022, Ms Gibson responded to Jones & Sandford's lawyer, copying in the Applicants' representatives:

We as a collective acknowledge your email. As you are aware Liz Lambert is our lawyer. We will forward your email to her and she will reply in due course.

Regards,

Christine Gibson: Debbie Hancock: Henny Ryan

[67] On 9 April 2022, Ms Gibson wrote to the Respondent's lawyer (this time not copying in the Applicants' representatives):

Our email to inform your clients of a PG was a formality following the meetings with M10, where your clients were advised verbally we would pursue the matter further. The grounds were well laid out in these meetings and have not changed.

Kind regards

Deborah Hancock, Henrica Ryan, Christine Gibson

[68] On 11 April 2022, the Respondent's lawyer responded just to Ms Gibson:

With respect, the nature and basis of the asserted personal grievance claim are not clear, and without such clarification, together with the information sought in my previous email, we are not in a position to respond.

[69] Jones & Sandford says the 1 April 2022 email was not capable of being construed as raising personal grievances on behalf of the Applicants because:

- (a) It did not provide any details of the nature and basis of the asserted personal grievance and was a list of issues by heading (most of which do not fall within the ambit of s 103).
- (b) The plain wording of the email refers to a future intention to raise a personal grievance – the subject was “Letter of Intent” and the purpose was to propose mediation as a precursor to legal action.
- (c) The email only came from the second applicant. The first and third applicants were not copied into the email. There was no reasonable basis for the respondent to understand representation arrangements had changed and that Ms Gibson had authority to act on their behalf.

[70] In particular, Ms McDowall on behalf of Jones & Sandford says she was confused by the fact the email came from Ms Gibson stating that it was on behalf of all

three Applicants, when her understanding was that they were all represented by Ms Lambert and Ms Smith and there was no indication that Ms Gibson had authority to represent the other two Applicants. Ms McDowall said that it was unclear to her what Ms Gibson wanted, but she took the 1 April 2022 email to mean that Ms Gibson wanted to go to mediation and if mediation did not work then she would take some sort of formal action after that.

[71] Ms McDowall says that she did not understand the 1 April 2022 email to be raising personal grievances because it contained a “laundry list of breaches without any detail of the basis for those”. Mr Jones says that no personal grievance has ever been raised with him or via the company’s registered office.

[72] Jones & Sandford says that if a personal grievance was properly raised in the 1 April email, that can only be in relation to Ms Gibson who sent the email because she had no authority to act on behalf of the other two Applicants and s 236 says that a person must establish their authority for representation.

[73] Having considered all the material before the Authority, I conclude the Applicants did raise personal grievances for unjustifiable dismissal on 1 April 2022. The 1 April 2022 email was ostensibly from or on behalf of all three Applicants, as all three names were at the foot of the email, and their two representatives were copied into the email.

[74] Earlier on 2 March 2022 emails were exchanged between the Applicants’ representatives and Jones & Sandford. The Applicants say these exchanges made it clear who the group of Applicants and their representative were and had requested that all meetings be conducted between management and “our group of three”. In an email on 2 March 2022, Ms Smith specifically stated:

I have confirmed with all parties they are happy as a group and waiver [sic] their privacy to allow their colleagues to be present.

[75] All three Applicants had been – at their request – treated collectively as a group since at least 2 March 2022 (including throughout the disciplinary process) and Jones & Sandford also knew the Applicants were represented by Ms Lambert and Ms Smith. Although it was entirely reasonable for Jones & Sandford to request clarification of representation (along with clarification of the substantive matters), Ms Gibson’s

response suggests she misunderstood the representation reference to s 236, as she responded: “as you are aware Liz Lambert is our lawyer”.

[76] I accept that Jones & Sandford was not aware Ms Hancock and Ms Ryan had been ‘blind carbon copied’ into the 1 April 2022 email.

[77] However, I am not persuaded that s 236 requires representation to be established in relation to raising a grievance under s 114 of the Act.¹¹ Under s 114(2), I have to be satisfied the Applicants took “reasonable steps” to make Jones & Sandford aware they were alleging a personal grievance. I find they did so in the 1 April 2022 email on a collective basis, because Ms Gibson specified the names of the Applicants raising the grievance, and referred in the letter and correspondence that followed to “we”, “our” and “collective”. While I agree with the Respondent’s submission that the 1 April 2022 email contained a ‘laundry list’ of allegations, not all of which were personal grievances under s 103 of the Act, it is also clear that among the issues being raised was an allegation of unjustifiable dismissal, which is clearly a personal grievance under s 103 of the Act. Jones & Sandford was aware, at this point, that the three Applicants had been dismissed on 15 March 2022 and was aware of the reasons and context for their dismissals.

[78] I find that the Applicants did raise personal grievances for unjustifiable dismissal in accordance with s 114 of the Act, in the 1 April 2022 email.

Did the totality of communications raise personal grievances for disadvantage?

[79] The Applicants say that the totality of communications from 4 January 2022 up to the 1 April 2022 email raised personal grievances for disadvantage for all three Applicants.

[80] Prior to 1 April 2022, I am not persuaded the totality of communications has raised personal grievances for unjustifiable disadvantage because as set out above, the communications were in the nature of feedback responses during consultation on the draft Covid-19 policy. In relation to the specific communications set out above, I have made findings that allegations of disadvantage and coercion were not raised in

¹¹ See *Flight Attendants & Related Services (NZ) Association v Pacific Blue Employment & Crewing Ltd*, ERA Auckland AA98/10, 4 March 2010 where s 236 was held not to apply to representation at meetings conducted by an employer as part of a disciplinary process as such meetings are not convened pursuant to a statutory right to “do anything or take any action”.

accordance with s 114. Looking at the communications in totality does not cure this defect.

[81] However, for the sake of completeness I note that the other allegations (whether personal grievances or not) listed in the 1 April 2022 email as being “causes of action” and raised in the Statement of Problem, may provide context for the unjustifiable dismissal grievances that are within time. I also note the Authority may find a personal grievance is of a type other than that alleged.¹²

Conclusion on 90-day issue

[82] I have found the Applicants raised personal grievances for unjustifiable dismissal within 90 days under s 114(1) of the Act, in that they took reasonable steps to make the employer aware of their grievances under s 114(2).

[83] Case law supports that valid raising of a personal grievance should not be construed too strictly or narrowly. The facts at the time need to be considered without the benefit of hindsight, and with a degree of pragmatism. It is helpful to stand back and ask: did Jones & Sandford know (or should it have known) that a grievance was being raised, and by whom?

[84] The raising of a personal grievance is a threshold issue. The parties have asked me to determine it as a preliminary matter, and consequently the substantive merits of the Applicants’ claims do not form part of my considerations. A lack of specificity or clarity about who is raising a grievance and about what, is more than a technicality – it goes to the heart of the statutory framework and requirements for raising a grievance, which is to make the employer aware of the substance of the complaint to enable the employer to resolve the complaint informally and as soon as practicable with its employee. There is obvious merit in similar concerns being dealt with collectively in the interests of pragmatism, there are also potential pitfalls which have manifested in the challenge brought by Jones & Sandford in the present case.

[85] However, while it was reasonable for Jones & Sandford to question the Applicants’ representation and to seek greater specificity about their concerns, I find that Jones & Sandford was aware on 1 April 2022 that each of the three Applicants was alleging they had been unjustifiably dismissed, and each of the three Applicants wanted

¹² Section 122 of the Employment Relations Act 2000.

Jones & Sandford to address that issue with them. Jones & Sandford was aware the three Applicants had been dismissed on 15 March 2022, as well as the reasons and background context for their dismissals, including their views on the Covid-19 policy.

[86] The Applicants raised personal grievances for unjustifiable dismissal within time and in accordance with s 114 of the Act.

Issue 2 – whether the application to join Mitre 10 NZ to the proceedings as a controlling third party, should be granted

[87] The Applicants lodged an application under s 103B of the Act to join Mitre 10 NZ (which they refer to as “Head Office”) as a controlling third party to resolve personal grievances raised with Jones & Sandford. The application is made on the basis that Mitre 10 NZ caused or contributed to the personal grievances because Jones & Sandford would not have imposed vaccination and testing requirements for the Applicants had it not been a requirement from Head Office.

[88] Mitre 10 NZ opposes the application. It says none of the elements set out in s 115A of the Act have been fulfilled. It also says it was not notified of any personal grievances until the application to join it was made, and if the Applicants have not raised personal grievances in time, the application to join Mitre 10 NZ as a controlling third party must fail on that basis alone.

[89] Having found that personal grievances for unjustifiable dismissal were raised by the Applicants within time and in accordance with s 114 of the Act, I turn to consider the application to join Mitre 10 NZ as a controlling third party.

[90] As noted above, the Authority issued a determination on the Controlling Third Party issue on almost identical facts including that the Second Respondent was also Mitre 10 (New Zealand) Limited in the earlier matter.¹³ The legal framework to be applied is the same as in the present matter. It appears that much of the evidence and submissions before the Authority in *Andrew McDowell and McAlpines Rangiora Limited and Mitre 10 (New Zealand) Limited* was identical to what is now before the Authority in the present matter. I therefore refer to and adopt aspects of the Authority’s earlier determination that are relevant to the matter before me.

¹³ Above, n1.

Legal Framework - Controlling Third Party

Section 103B of the Act

[91] Section 103B of the Act establishes the statutory framework for joining a controlling third party to proceedings to resolve a personal grievance. Section 103B(2) provides that an application to join a controlling third party can be made to the Authority if 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.

[92] 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 that the requirement to notify the controlling third party in accordance with section 115A has been complied with; and 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

[93] Section 115A of the Act sets out the statutory requirements 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.

[94] 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.

[95] 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.

Section 5 defines a controlling third party

[96] 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 NZ be joined as a controlling third party?

What personal grievances were raised with Jones & Sandford by the Applicants?

[97] The Applicants' Statement of Problem alleges the following personal grievances:

- (a) Unjustifiable dismissal
- (b) Unjustifiable disadvantage
- (c) Discrimination
- (d) Coercion

[98] Jones & Sandford deny the validity of all the alleged grievances. Jones & Sandford also say that no personal grievances were raised within the statutory time frame in relation to any of the grounds above.

[99] I have found the Applicants raised personal grievances for unjustifiable dismissal within time and in accordance with s 114 of the Act. For this reason, it is the unjustifiable dismissal grievance that is the focus of this determination.

What personal grievances are alleged to have occurred while under the control or direction of Mitre 10 NZ?

[100] The Applicants state in their affidavit evidence that Mitre 10 NZ "drafted and disseminated their vaccine policy and risk assessment which applied to all Mitre 10, Hammer Hardware and Mitre 10 Mega stores." They say these documents were not individually designed by each Mitre 10 store. Consequently, the Applicants allege that all of their personal grievances occurred while under the control or direction of Mitre 10 NZ.

[101] The Applicants say Mitre 10 NZ enforced a requirement in relation to its franchise arrangement with Jones & Sandford that enabled it to utilise its economic power to cause employees who did not comply with the policy to be the subject of disciplinary action, which ultimately resulted in their dismissals.

[102] The Applicants say Mitre 10 NZ's Support Centre shares standards for individual member franchisees, had its name on the proposed policies, and shared personnel and legal advisors. The Applicants say staff at all Mitre 10 stores were required to comply with the Covid-19 policy, and as the Controlling Third Party, Mitre 10 NZ imposed requirements which - although indirect - altered the manner in which the employment relationship was conducted. Tied into this submission is a claim of interference and undue economic influence over the Applicants' individual employment relationships by Mitre 10 NZ.

[103] The Applicants categorise the dissemination of video content¹⁴ featuring Andrea Scown the Chief Executive Officer of Mitre 10 NZ and Ms Harry as being repeated representation and confirmation of the "Official Mitre 10 approach to vaccination, masking, and testing". The Applicants also refer to the Team Member Consultation Pack as being evidence of the approach of "Mitre 10 as a whole".

[104] The Applicants summarise it this way in their affidavit evidence:

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.

[105] The Applicants say this point was further demonstrated by Mitre 10 NZ providing a cash incentive for vaccination promotional materials on 15 October 2021 and November 2021.

[106] The Applicants also say:

The effect of the collective universal top-down approach adopted by Mitre 10, was that it obviated the terms of our individual employment agreements, and meant that it was impossible to come to an understanding with individual store management.

¹⁴ The first video on the draft policy was dated 14 December 2021, and the second was 21 January 2022.

[107] The finalised Covid-19 policy came into force on 1 February 2022. Regular testing and mask wearing were required for unvaccinated employees. The Applicants say there was a nexus between the franchise arrangement and the requirement for staff to be vaccinated and/or to comply with masking and testing requirements, in order to retain employment.

[108] The personal grievances alleged to have occurred while the Applicants say they were working under the control or direction of Mitre 10 NZ are therefore the grievances arising out of the development, dissemination and implementation of the policy – namely all of the alleged grievances.

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

[109] Mitre 10 NZ (through Ms Harry's affidavit evidence) said the first it was aware that the Applicants considered its actions had contributed to personal grievances was when it received the application for joinder dated 4 April 2023. The Applicants had been dismissed from Jones & Sandford on 15 March 2022.

[110] The Application for joining a controlling third party to a personal grievance (Form 4) has a heading "Notification" which requires the applying party to answer "Yes/No" to a number of questions. In relation to the question about whether the third party was notified within the relevant 90-day notification period, the Applicants ticked "No". The form was dated 4 April 2023 and lodged with the Authority on the same date. To the extent that the Applicants now say ticking "No" on the form was an error, Mitre 10 NZ says the Authority should not accept this is genuine and says it is an attempt to cover deficiencies in the Applicants' claim. I accept Mitre 10 NZ's submission on this point. I find the Applicants ticked "No" on the form because they had not separately and specifically notified Mitre 10 NZ they were raising personal grievances.

[111] The latest date for notifying Mitre 10 NZ was in mid-June 2022, being 90 days after the date of the Applicants' dismissals and earlier for other grievances that allegedly arose while the Applicants were still employed by Jones & Sandford. 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.¹⁵

[112] The Applicants did not notify Mitre 10 NZ that they considered it had caused or contributed to their personal grievances within the 90-day employee notification period. They have therefore not met the notification requirements in accordance with s 115A of the Act.

[113] Mitre 10 NZ 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.¹⁶

[114] The Applicants have not applied for leave to notify Mitre 10 NZ out of time. Mitre 10 NZ submits that even if there had been an application, there is no basis to grant such an application.

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

[115] As noted by the Authority:¹⁷

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 NZ have a contract or other arrangement with Jones & Sandford under which the Applicants performed work for its benefit?

[116] The Applicants submit Mitre 10 NZ has a franchise contract arrangement under which employees of owner operators such as Jones & Sandford perform work for the benefit of Mitre 10 “Head Office”.

[117] Mitre 10 NZ confirms there is a commercial relationship between itself and Jones & Sandford, where Jones & Sandford is a member of a cooperative and has an ownership share in the Mitre 10 co-operative, and Mitre 10 NZ supports Jones & Sandford (among other members) by providing various services. The affidavit

¹⁵ Section 103B(1)(a)(i) and (ii) of the Act.

¹⁶ Section 103B(1)(a)(i) and (ii) of the Act. 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.

¹⁷ Above n1, at paragraph [38].

evidence from Ms Harry and Mr Jones describes the relationship between Jones & Sandford and Mitre 10.

[118] Ms Harry explains in her affidavit evidence that Mitre 10 is incorporated under the Companies Act 1993 but functions as a co-operative business and is not formally registered under the Cooperative Companies Act 1996. The role of Mitre 10 NZ is to manage and operate the co-operative to support its members including Jones & Sandford. Mitre 10 NZ is funded via a fee levy structure via a Membership Agreement and the fee levy is based on trading volume. The Membership Agreements sets out the terms under which the Mitre 10 brand is licensed to members including the terms on which they can purchase products sourced by Mitre 10 NZ.

[119] While the trading volume is generated by employees and a benefit accrues to Mitre 10 NZ in the form of levies, Mitre 10 NZ says there is nothing in the financial statement to support the Applicants' argument that there is a contract or other arrangement between the Respondent and the Third Party under which the Applicants performed work for the benefit of Mitre 10 NZ. The mere fact of commercial arrangements being in place does not support there is a sufficient nexus between the Applicants' work and any direct benefit to Mitre 10 NZ, and to submit that the financial statements demonstrate such a connection is fundamentally misconceived.

[120] In support of their submission on 'benefit', the Applicants submitted Mitre 10 (New Zealand) Limited Consolidated financial statements for the year ended 30 June 2022 to the Authority. These statements, they say, demonstrate a direct financial benefit to Mitre 10 NZ from the work of the Applicants – specifically in relation to the ownership of goods and the line items for revenue. The Applicants say the goods for sale in all Mitre 10 member stores are the property of and owned by Head Office apart from some local timber yard stock.¹⁸

[121] The Applicants also say credit risk is held by Mitre 10 NZ and because the Covid-19 policy was intended to ensure stores remain open selling goods without interruptions to revenue flow, business interruptions caused by Covid-19 would result in a loss of benefit to Mitre 10 NZ.

¹⁸ Mitre 10 (New Zealand) Limited Consolidated financial statements for the year ended 30 June 2022, at page 16.

[122] By being a member store and shareholder, the Applicants say Jones & Sandford receives dividends on shares based on the profit of selling goods. Their financial interest is in selling goods supplied and owned by Head Office and this results in dividends being obtained from the Respondent's shareholdings. This is confirmed earnings through "Sale of goods and other related income" in 2022. The Applicants say that Head Office receives payment from members for "Services to Members" in the form of a levy payment, and Jones & Sandford pays the Applicants as their employees for work covered in their individual employment agreement. In summary, the Applicants say that benefit is established because revenue generated by the employees' work ultimately flows from customers to Head Office and because Jones & Sandford pay levies to Head Office (and also pays its employees their salaries), the significant financial benefit to Head Office would not be possible without the employees, and further that exchange money exchange is the primary purpose of the work arrangement.

[123] There is no dispute between the parties that there is a commercial arrangement in place between Jones & Sandford and Mitre 10 NZ. The difference between them is the Applicants ask the Authority to conclude (on an arguable basis) that because Mitre 10 NZ has a commercial interest in Jones & Sandford, and because the workers of an organisation all work for the ultimate benefit of the commercial entities involved with the organisation, it then follows that there was a contract or other arrangement under which the Applicants were performing work for the benefit of Mitre 10 NZ. The Applicants' argument is essentially that a "benefit" does not require a direct nexus – it is sufficient to recognise that all workers perform work for the ultimate benefit of the "owners" or other upstream commercial entities in a corporate structure.

[124] I am not persuaded by the Applicants' submission which is not based on any authorities. I cannot be satisfied these types of commercial arrangements were intended to be captured by the definition of "controlling third party" in the Act. The definition of Controlling Third Party was inserted into the Act in 2020 by the Employment Relations (Triangular Employment) Amendment Act 2019. Commentary on the definition provides examples of employment relationships that may be captured by the definition, such as employees working in the controlling third party's workplace and suggests that the definition will usually encompass "labour for hire" arrangements such as temping or agency assignments and could extend to secondment arrangements where

the employee works for a close business associate or client.¹⁹ I find the Applicants' assertion that the financial records show there was a direct benefit to Mitre 10 NZ from the Applicants' work, is unfounded.

[125] I therefore conclude there is not an arguable case that there was a contract or arrangement under which any of the Applicants performed work for the benefit of Mitre 10 NZ, rather than working directly and exclusively for Jones & Sandford. I do not conclude a reasonable basis for an arguable case under this limb of s 5 of the Act. However, for the sake of completeness, I also consider the second limb of s 5 of the Act.

Did Mitre 10 NZ 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?

[126] The Applicants submit that by virtue of the Covid-19 policy, Mitre 10 NZ "interfered with" and exerted "undue economic influence" over the individual employment relationship between themselves and Jones & Sandford, supporting that there was a tripartite employment relationship. Further, the Applicants submit that Mitre 10 NZ caused employees who did not comply with its universal nationwide policy to be the subject of disciplinary action, which ultimately resulted in their dismissals.

[127] Mitre 10 NZ says there is no evidence (including in the financial statements) that supports it is either entitled to, or does in fact, exercise control or direction in relation to the Applicants. To find otherwise would contradict the sworn evidence of Ms Harry and Mr Jones as to the individualised operations of the Member stores. Mitre 10 NZ also submits this limb of the definition of "controlling third party" requires a degree of control over an identifiable employee, not a workforce in general.

[128] Mitre 10 NZ is commonly referred to as a "Support Centre". One of its primary purposes is to source products for on-sale to members, and it provides other support services to members including - relevant to these matters – developing advice for members during the Omicron outbreak in 2021. The Covid-19 advice was in response to a request from members that the support centre team assess and make

¹⁹ Westlaw commentary on the Employment Relations Act 2000 at ER5.08A.01, Thomson Reuters 2024.

recommendations based on Ministry of Health and WorkSafe advice and the approaches being taken overseas and by other New Zealand retailers.

[129] Both Mr Jones and Ms Harry in their affidavits state that Jones & Sandford is entirely responsible for all aspects of its employment relationships. Ms Harry says Mitre 10 NZ 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. Mitre 10 NZ says it had no part to play in the Applicants' employment or in the termination of their employment.

[130] Mr Jones describes Jones & Sandford as being separate and independent from Mitre 10 NZ. Members are entitled to operate under the Mitre 10 brand and have access to various advisory and support services provided by Mitre 10 NZ but Ms Harry says members are not obliged to use the advisory services. Mr Jones says he runs his business independently, but subject to any requirements of the membership agreement.

[131] Mr Jones said the Covid-19 Policy was developed in response to a request for assistance from the membership. It was decided by the Mitre 10 NZ Board that once finalised, the Policy would be a "company document" which means it would be one of the policies that would be applied in every member's business. Mr Jones stated in his affidavit that he consulted with employees about the draft policy and the results of the consultation were sent to Mitre 10 NZ and the policy finalised. The implementation and operation of the policy in each business (including monitoring protocols, employment relations, and health and safety matters) would be up to the member. This is confirmed by Ms Harry in her affidavit when she says 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.

[132] The Applicants cited 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. They submit that Mitre 10 NZ – acting as a controlling third party – effectively required vaccination and/or mask wearing and testing requirements, by way of the policy.

[133] The cases referred to predate s 103B of the Act and I agree with the reasoning of the Authority in *Andrew McDowell and McAlpines Rangiora Limited and Mitre 10 (New Zealand) Limited*²⁰ that neither case is on all fours with this matter.

²⁰ Above, n1 at paragraphs [53] – [54].

[134] Mr Jones and Ms Harry in their respective affidavits have both stated that employees were managed independently, and that at no time has Mitre 10 NZ had any involvement in any decision about the Applicants, including the disciplinary process that led to their 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 NZ. She sets out that Mitre 10 NZ has no entitlement to become involved in employment relationship issues between a member and an employee of the member. Mr Jones says that Mitre 10 NZ had no involvement with any decision about the Applicants' employment, and the disciplinary process that led to their dismissal was run by Ms McDowall and himself.

[135] The Applicants have not provided any documentation to support that a triangular relationship arrangement existed between themselves, Jones & Sandford and Mitre 10 NZ or that the Applicants were in any tangible way under the control or direction of Mitre 10 NZ. I therefore rely on the affidavit evidence of Mr Jones and Ms Harry about the extent of the degree of control or direction that Mitre 10 NZ had over the Applicants. I also find it more persuasive – given the types of employment relationships that may be captured by the definition of “controlling third party” - that the control or direction would need to be exercised over identifiable employees and not over a workforce in general.

[136] I am not persuaded there is a reasonable basis for an arguable case that Mitre 10 NZ either exercised, or was entitled to exercise, control or direction over any of the Applicants that is the same or similar to that which Jones & Sandford exercised.

Conclusion on whether Mitre 10 NZ was a controlling third party

[137] The basis of the application that Mitre 10 NZ is a controlling third party is that Mitre 10 NZ enforced a requirement on the Applicants to comply with its Covid-19 Policy by utilising its economic power and exerting undue influence over Jones & Sandford.

[138] The two limbs of the definition of controlling third party must be met at the same time - the employee must be performing work for the benefit of the controlling third party at the time that the controlling third party is exercising control or direction over the employee. I find that the allegations made by the Applicants do not reach the level of specificity required even for an arguable case.

[139] 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 the Applicants for the benefit of Mitre 10 NZ. The Authority is not satisfied Mitre 10 NZ either did exercise or was entitled to exercise, control or direction over the Applicants to a reasonably arguable standard. I do not conclude it is arguable on a reasonable basis that Mitre 10 NZ was a controlling third party as defined in section 5.

Did Mitre 10 NZ's actions cause or contribute to the grievances?

[140] The Applicants say that Mitre 10 NZ imposed a policy that caused or contributed to their personal grievances. Mitre 10 NZ says there must be a causative link in that the actions alleged to amount to a personal grievance must have occurred when the employee was performing work for the benefit of the controlling third party and when the employee was working under the control or direction of the controlling third party.

[141] In this case, I find that there is not a strong nexus between the alleged actions or omissions of Mitre 10 NZ, and the alleged grievances claimed by the Applicants. I do not accept that Mitre 10 NZ imposed the Covid-19 Policy on Jones & Sandford or the Applicants. Put simply, something more was required than drafting and/or finalising a policy. Consequently, I would have found insufficient connection between the existence of the Covid-19 Policy and the actions and decisions that may form the basis of the Applicants' personal grievances. As in *Andrew McDowell and McAlpines Rangiora Limited and Mitre 10 (New Zealand) Limited*, I find it is strongly arguable in the present case that all of the decisions relating to the Applicants' employment were made by their employer – in this case, Jones & Sandford - and not Mitre 10 NZ.²¹

[142] Contribution only needs to be for one aspect of a personal grievance but in this case, it is strongly arguable that all of the decisions relating to the Applicants' employment that may form the basis of their alleged personal grievances were made by Jones & Sandford and not Mitre 10 NZ.

Conclusions

[143] The Applicants have not notified Mitre 10 NZ in accordance with s 115A. There is no application for leave to notify out of time. I have not found a reasonable basis for an arguable case that Mitre 10 NZ is a controlling third party under the definition in s

²¹ Above n1 at paragraph [60].

5 of the Act. I have not found a reasonable basis for an arguable case that Mitre 10 NZ caused the personal grievances.

[144] The Authority must grant an application to join a controlling third party if satisfied that the requirement to notify in accordance with s 115A has been complied with, and that an arguable case has been made out that the party is a controlling third party and that its actions caused or contributed to the personal grievance. I am not satisfied that any of the elements have been met. Mitre 10 NZ should not be joined to the proceedings as a controlling third party.

Findings

[145] On the preliminary issues I find that:

- (a) The Applicants have raised personal grievances for unjustifiable dismissal in accordance with s114 of the Act.
- (b) The application to join Mitre 10 (New Zealand) Limited to the proceedings to resolve personal grievances under section 103B(3) of the Act is declined.

Orders

[146] The Applicants' personal grievance claims for unjustifiable dismissal will now be set down for a Case Management Conference to progress the matter towards an Investigation Meeting.

[147] Costs are reserved pending the hearing of the substantive matter, or on earlier application by either party.

Natasha Szeto
Member of the Employment Relations Authority