

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 369
3256919

BETWEEN	ROD WRIGHT Applicant
AND	LYNX RECRUITMENT LIMITED Respondent
AND	FULTON HOGAN LIMITED Third Party

Member of Authority: Peter van Keulen

Representatives: Tim Vogel, advocate for the Applicant
Rebecca Scott and Meredith Karlsen, counsel for the
Respondent
Gwen Drewitt, counsel for the Third Party

Investigation Meeting: On the papers

Submissions Received: 25 January, 6 March and 22 March 2024 from the Applicant
16 February and 18 March 2024 from the Respondent
16 February and 15 March 2024 from the Third Party

Date of Determination: 24 June 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Rod Wright was employed by Lynx Recruitment Limited from 14 May 2023.

[2] Lynx is a recruitment agent that facilitates placement of workers with its clients when required.

[3] Mr Wright was employed on a casual basis and was placed with Fulton Hogan Limited to work at Wanaka Airport.

[4] Mr Wright worked at Wanaka Airport with Fulton Hogan on 31 May, 1 June, 2 June, 6 June and 7 June 2023. On 8 June 2023 Fulton Hogan told Mr Wright it no longer needed him to work at Wanaka Airport.

[5] Mr Wright claimed that the effect of Fulton Hogan terminating his assignment was that he was dismissed from his employment with Lynx.

[6] On 15 August 2023 Mr Wright raised a personal grievance for unjustified dismissal with Lynx. On 28 August 2023 Mr Wright notified Fulton Hogan that they were a controlling third party and their actions had contributed to his unjustified dismissal.

[7] On 12 October 2023 Mr Wright lodged a statement of problem and an application to join Fulton Hogan as a controlling third party in the Authority. The statement of problem had claims for two personal grievances: unjustified dismissal and unjustified action causing disadvantage relating to health and safety issues.

The Authority's investigation

[8] The representatives for the parties agreed that the application by Mr Wright to join Fulton Hogan as a controlling third party should be dealt with as a preliminary matter and that it could be done on the papers. So, I received written statements of fact and submissions from the parties' representatives and these were the basis for my determination.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

The issues

[10] An application to join a controlling third party is governed by s 103B of the Act.

[11] As a starting point, s 103B of the Act applies if an employee:

- (a) Has raised a personal grievance in accordance with s 114 of the Act;
- (b) Has applied to the Authority to resolve the personal grievance; and
- (c) The personal grievance alleges that when the action that gave rise to the personal grievance occurred the employee was working under the direction or control of a controlling third party.

[12] If these threshold requirements are met then an employee or an employer may apply to the Authority to join a controlling third party to the claim.

[13] The next step, if an application is made, is set out in s 103B(3) of the Act. This section requires the Authority to grant an application to join a controlling third party if it is satisfied that:

- (a) The requirement to notify the controlling third party in accordance with s 115A has been complied with; and
- (b) An arguable case has been made out that:
 - i. The party to be joined to the proceedings is a controlling third party; and
 - ii. The party's actions have caused or contributed to the grievance.

[14] In assessing these two parts:

- (a) Section 115A of the Act sets out the notification requirements associated with pursuing a personal grievance claim against a controlling third party.
- (b) Section 5 sets out the definition of controlling third party.

[15] So, stepping through all of this indicates that the following issues apply to Mr Wright's application to join Fulton Hogan as a controlling third party.

[16] Does s 103B of the Act apply? This is resolved by answering the following:

- (a) Has Mr Wright raised personal grievances with Lynx within 90-days of the events occurring that give rise to the grievance, this being the requirement of s 114 of the Act.
- (b) Has Mr Wright applied to the Authority to resolve the personal grievances; and
- (c) Do Mr Wright's personal grievances allege that when the actions that gave rise to the personal grievances occurred he was working under the direction or control of a controlling third party?

[17] Has Mr Wright notified Fulton Hogan in accordance with s 115A of the act?

[18] Has an arguable case been made out that:

- (a) Fulton Hogan was a controlling third party; and
- (b) Fulton Hogan's actions contributed to his personal grievance?

[19] I will consider each of these sets of issues.

Does section 103B of the Act apply?

Section 103b(1)(a)(i) of the Act - was a personal grievance raised in accordance with s 114 of the Act?

[20] On 15 August 2023 Mr Wright's advocate wrote to Lynx and advised it that the termination of Mr Wright's assignment at Fulton Hogan was an unjustified dismissal. This letter was within 90 days of the termination of Mr Wright's assignment at Fulton Hogan so Mr Wright has raised a personal grievance for unjustified dismissal with Lynx within the requisite 90 days.

[21] In this letter Mr Wright's advocate also stated that Mr Wright had raised health and safety issues relating to unsafe work practices at Fulton Hogan and that Mr Wright was

assaulted in the workplace. After describing these two health and safety aspects the advocate stated that all employees have the right to be safe in the workplace and not to be assaulted. But the letter did not identify these complaints as giving rise to an unjustified action causing disadvantage personal grievance.

[22] Lynx and Fulton Hogan both say the 15 August 2023 letter raised a personal grievance for unjustified dismissal but did not raise a personal grievance for unjustified action causing disadvantage in connection with the health and safety allegations.

[23] So I must decide if the 15 August 2023 letter raised a personal grievance for unjustified action causing disadvantage relating to health and safety allegations.

[24] The key principles for determining whether a communication raises a personal grievance are set out in various decisions of the Employment Court.¹ The relevant principles for my assessment include:

- (a) The personal grievance process is informal and accessible.
- (b) The communications, in whatever form, must allege a complaint that is in the nature of a personal grievance - the type of personal grievance is not required to be specified nor does the complaint even need to be labelled a personal grievance.
- (c) The communications must convey the substance of the complaint with sufficient information so that the employer knows what it is that the employee expects it to respond to. The employer must be able to respond by addressing the merits of the complaint with a view to resolving it.

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139; *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]; *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112; *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132; and *Disabilities Resource Centre v Sonia Moana Maxwell* [2021] NZEmpC 14 at [21].

[25] Based on this I find that the letter of 15 August 2023 sets out sufficient information in relation to the health and safety allegations raised by Mr Wright that Lynx would have known what was being alleged, that it needed to respond to the allegations and that the allegations informed a personal grievance.

[26] The failure to identify and label a separate personal grievance in connection with the health and safety allegations is not determinative of this issue. A finding that no grievance for unjustified action had been raised in these circumstances would be inconsistent with s 122 of the Act which enables the Authority to find that a grievance is of a type other than that alleged. Such a finding would also be inconsistent with the Supreme Court's approach to employment relationship problems and there not being a necessity to specify a particular cause of action or legal category.²

[27] Overall I am satisfied that Mr Wright did raise a personal grievance for unjustified action in connection with health and safety issues within the 90 day period.

Section 103B(1)(a)(ii) of the Act - has Mr Wright applied to the Authority to resolve his personal grievance?

[28] Mr Wright has applied to the Authority to resolve his personal grievances. His statement of problem was lodged on 12 October 2023 and alleges that he was unjustifiably dismissed and that there were unjustified actions that caused disadvantage to him relating to health and safety issues.

² *FMV v TZB* [2021] NZSC 102.

Section 103b(1)(b) of the Act - does Mr Wright's personal grievance allege that he was working under the control or direction of a controlling third party at the time that the actions giving rise to the grievance, occurred?

[29] Mr Wright's personal grievances concern allegations of actions by Fulton Hogan whilst Mr Wright was working on assignment at Fulton Hogan i.e., whilst Fulton Hogan was directing or controlling the work he did.

Conclusion on s 103B of the Act

[30] Section 103B of the Act applies to Mr Wright's claim and he can apply to join Fulton Hogan as a controlling third party.

Section 103B(3)(a) of the Act – notifying the controlling third party of personal grievance pursuant to s 115A of the Act

[31] Section 115A of the Act requires Mr Wright to have:

- (a) notified Fulton Hogan that he believes its actions contributed or caused his personal grievances; and
- (b) made that notification within 90 days of the actions that are alleged to have caused or contributed to his personal grievances, occurring.

Section 115A(1)(a)(i) of the Act - notification to Fulton Hogan

[32] On 28 August 2023, Mr Wright's advocate wrote to Fulton Hogan. In this letter the advocate advised Fulton Hogan that it was a controlling third party in respect of Mr Wright. He went on to state that Fulton Hogan's action of terminating Mr Wright's assignment was an unjustified dismissal; Mr Wright asserting that Fulton Hogan relied on reasons for terminating the assignment that it had not investigated and which he had not been given an opportunity to address.

[33] In this letter the advocate also stated that Mr Wright had raised health and safety issues with Fulton Hogan relating to unsafe work practices and Mr Wright being assaulted in the workplace by another employee.

[34] The advocate then stated that all of these actions caused or contributed to Mr Wright's dismissal and the dismissal was unjustified. So, for the personal grievance of unjustified dismissal Mr Wright has met the first limb of the notification requirements at s 115A of the Act.

[35] In terms of Mr Wright's personal grievance for unjustifiable action Fulton Hogan says he has failed to meet the notification requirements in s 115A of the Act as he has not specified that Fulton Hogan contributed to his personal grievance for unjustified action causing disadvantage arising out of the health and safety issues.

[36] For the same reasons outlined in respect of a personal grievance for unjustified action being raised with Lynx, I find that Mr Wright did notify Fulton Hogan that he considered that it had contributed to his personal grievance of unjustified action causing disadvantage related to the health and safety issues.

Section 115A(1)(a)(ii) of the Act - notification to Fulton Hogan within 90 days

[37] The actions Mr Wright complained of as giving rise to his unjustified dismissal happened during his placement with Fulton Hogan, so between 31 May 2023 and 8 June 2023. This means that the letter of 28 August 2023 was sent within 90-days of the actions occurring and Mr Wright has met the second limb of s 115A of the Act for his personal grievances.

Conclusion on notification of personal grievance to Fulton Hogan

[38] I find that Mr Wright has met the notification requirements of s 115A of the Act.

Section 103B(3)(b) of the Act - an arguable case

[39] Pursuant to s 103B(3)(b) of the Act I must determine if there is an arguable case that:

- (a) Fulton Hogan was a controlling third party; and
- (b) Fulton Hogan's actions contributed to his personal grievance?

Was Fulton Hogan a controlling third party?

[40] Section 5 of the Act defines "a controlling third party" as a person:

- (a) Who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
- (b) Who exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee.

[41] Fulton Hogan had a Labour Hire Agreement with Lynx dated 16 February 2023. Under this agreement employees of Lynx were placed with Fulton Hogan and they undertook work for Fulton Hogan's benefit; Mr Wright was such an employee. So, the first part of the definition of controlling third party is met.

[42] For the second limb of the definition, Fulton Hogan says it did not have the control or direction over Mr Wright that an employer would have. It says that the primary obligations owed to Mr Wright fell to Lynx. This included amongst other things recruitment, pre-employment checks, ensuring timesheets were completed, ensuring he was aware of his health and safety obligations and complied with them, ensuring that he complied with Fulton Hogan's directions and instructions in relation to work and ensuring that he cooperated fully with Fulton Hogan employees, customers and suppliers.

[43] It is the last two points that are particularly important. Fulton Hogan acknowledges that it that it could direct Mr Wright in terms of where, when and what work to do but this

was primarily to ensure that health and safety obligations were met. And this means it did not have the control over Mr Wright that an employer would have.

[44] I simply do not accept this argument. The relationship between Fulton Hogan and Lynx was a labour hire arrangement. Lynx provided Mr Wright as a source of labour pursuant to that arrangement; Lynx had employed Mr Wright, and other workers, so that they could do work for Fulton Hogan. The work done by Mr Wright was for Fulton Hogan's benefit. Fulton Hogan had the direct supervision and management of the Mr Wright's performance and it could direct, supervise and instruct the performance of the work by Mr Wright. Mr Wright was obliged to follow those directions, instructions, and supervision.

[45] On the face of it, this is exactly the type of three-way relationship that the controlling third party provisions were formulated to cover.

[46] I conclude that there is an arguable case that Fulton Hogan was a controlling third party in relation to Mr Wright.

Did Fulton Hogan's actions contribute to Mr Wright's personal grievances?

[47] Mr Wright's personal grievances allege two things:

- (a) That Fulton Hogan terminated his assignment with them and this resulted in Lynx dismissing him, with that dismissal being unjustified.
- (b) That Fulton Hogan failed to protect his safety on the work site through unsafe work practices and an assault by a Fulton Hogan employee.

[48] Given these allegations and the events set out in the statement of problem, statement in reply, application to join a controlling third party, statement in reply to that application and the parties' statement of facts, I accept that there is at least an arguable case for each personal grievance. And the action that give rise to those grievances are actions of Fulton Hogan so there is also an arguable case that Fulton Hogan caused or contributed to Mr Wright's personal grievances.

[49] I am satisfied that an arguable case has been established that Fulton Hogan was a controlling third party and it contributed to or caused Mr Wright's personal grievances.

Conclusion

[50] All the requirements of s 103B of the Act have been met for Mr Wright's application to join Fulton Hogan as a controlling third party.

[51] Therefore, I grant Mr Wright's application and Fulton Hogan is joined to the employment relationship problem lodged with the Authority.

Costs

[52] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority