

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2025] NZERA 339
3291639

BETWEEN PETER CAHILL
Applicant

AND ADVANCED PERSONNEL
SERVICES LIMITED
First Respondent

AND HEALTH NEW ZEALAND
Second Respondent

Member of Authority: Antoinette Baker

Representatives: Kevin McLaughlan, advocate for the Applicant
Katherine McDonald, counsel for the First
Respondent
Sianatu Lotoaso, counsel for the Second Respondent

Investigation Meeting: On the papers

Final submissions received: 28 April 2025

Determination: 16 June 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Cahill was employed by the first respondent (APSL) from December 2022. He began working in the role of a ‘trades assistant’ at a hospital operated by the second respondent (HNZ). APSL is a labour hire company. APSL assigned Mr Cahill to work at the hospital from the start date to ‘six months plus’, Monday to Friday 7.30 to 4.00pm as a ‘trades assistant’. In November 2023, just under a year after Mr Cahill started working in the hospital assignment, HNZ asked APSL to cease the assignment of Mr Cahill. APSL then terminated Mr Cahill’s employment. His last day of employment was 1 December 2023 having been paid out for one weeks’ notice period after his last date physically working at the hospital on Thursday 23 November 2023.

[2] Mr Cahill raised personal grievances on 7 December 2023 for unjustified dismissal and disadvantage in employment all based directly or indirectly on matters relating to things that occurred in the workplace itself and in part relating to HNZ's alleged knowledge or views about these things. Mr Cahill further claimed a breach of good faith which was all addressed in his grievance letter to both APSL and HNZ indicating an intention to have the latter joined as a 'controlling third party' under s 103B of the Employment Relations Act 2000 (the Act) and to claim grievance remedies from both relying on s 123A of the Act to do so from HNZ.

[3] On 18 April 2024 Mr Cahill lodged the current proceedings against APSL and HNZ. He seeks remedies of compensation and lost wages for the grievances, 'compensation' for breach of good faith, costs and the filing fee. He has applied to join HNZ as a 'controlling third party' under s 103B of the Act and to claim grievance remedies from both respondents relying on s 123A of the Act to do so from HNZ.

[4] This determination only deals with the preliminary issue of whether to grant Mr Cahill's application to join HNZ as a 'controlling third party' under s 103B of the Act. As recorded by the Authority¹ the parties have agreed to have this matter heard on the papers. I have received documentation including affidavits and submissions from all parties against a timetable set. Having received the same I remain of the view that the matter is suitably dealt with on the papers and do so now.

[5] As permitted by s 174E of the Act this determination expresses conclusions on issues necessary to dispose of this preliminary matter.

Background to a 'controlling third party'

[6] 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

¹ Directions of the Authority, Member Vincent, dated 13 February 2025.

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.² The situation is referred to as ‘triangular’ employment.³

Bringing an application to join a controlling third party

[7] Under s 103B(1) of the Act an employee may apply to have a party joined as a ‘controlling third party’ defined in s 5 of the Act, but must have raised a personal grievance under s 114 of the Act and asked the Authority to resolve it. I am satisfied that Mr Cahill has done the latter.

[8] 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.

... 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

[9] It is surprising that a large public entity (what is now called HNZ) and an established labour hire company would not have their commercial contract in writing.⁴ However I accept that APSL and HNZ had a commercial arrangement between them in which APSL provided the labour of Mr Cahill. Mr Cahill was employed by APSL.

² John Hughes and others Mazengarb's Employment Law (online ed, LexisNexis) at [ERA 103B.1].

³ Section 103B was inserted into the Act on 27 June 2020 by Employment Relations (Triangular Employment) Amendment Act 2019 (2019 No 36, s 6).

⁴ Affidavit of Terrence Walker dated 24 March 2025 (undated date of swearing by JP) , Manager HNZ since 2007 at Clause 5.

Supporting this is a written employment agreement (IEA) with a documented indefinite duration of employment in Schedule 1 stated to be ‘from 12/12/2022 for six months plus⁵’. I accept Mr Cahill’s leave and pay was all managed by APSL. HNZ provided time sheets to APSL, and when invoiced by APSL, paid APSL. This administration is not unexpected for a labour hire type arrangement.

[10] Mr Cahill’s work was also for the benefit of HNZ. His working hours were every weekday completing tasks at an HNZ operated hospital. His duties are recorded in the page called ‘Schedule 1’ of the IEA as: “General engineer-T/A duties as directed, assisting Trades people with mechanical tasks which will be varied from general tasks such as repairing facilities such as pumps, motors, guttering, pipes etc and other duties as required. Finish for xmas and back on Wed 04/01/23’.

[11] I find that the first limb of the section 5 definition of ‘controlling third party’ is met.

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.

[12] It is submitted for Mr Cahill that he worked under the control of HNZ and that this was substantially similar to that of an employer. I accept there is sufficient to show me that Mr Cahill took day to day directions from HNZ, their subcontractors or through their task allocation procedures and that his day to day performance and interactions were observed by HNZ managers. I have nothing to show me that APSL took any active role in Mr Cahill’s day to day direction of work. Performance and behaviour observations were fed back to Mr Cahill by an HNZ manager on at least 23 December 2023 apparently in response to Mr Cahill by then being told just prior by APSL that HNZ did not want him working at the hospital anymore.

[13] While I accept the submissions that HNZ was not the employer, I am satisfied that it was arguable that it was exercising employer type control and direction of Mr

⁵ Descriptor under the end date for ‘duration’ of the ‘temporary’ term of employment in Schedule 1 of the employment agreement between Peter Cahill and APSL provided with the Statement of Problem dated 18 April 2024.

Cahill's day to day employment sufficient to satisfy the second limb of the definition of controlling third party.

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

[14] Under s 103B(3) of the Act I must grant an application to join HNZ 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.

[15] I am satisfied that Mr Cahill has fulfilled the notification requirement under s 115A of the Act. Based on the above I find it arguable HNZ was a 'controlling third party'.

Did HNZ's actions arguably cause or contribute to the personal grievances raised?

[16] I accept the actions alleged in relation to Mr Cahill's grievances of disadvantage occurred while he was working when under the control and direction of HNZ at the hospital assignment. The extent to which they may or may not have been raised within time for grievances may become a matter for the substantive proceeding.

[17] I accept that the actions that led to HNZ to tell APSL that it no longer wanted Mr Cahill working at the hospital were related to alleged performance issues from HNZ's oversight. I do not accept HNZ's submission that the connection is remote or that I have to find a form of coercion by HNZ. The case HNZ referred to was based on a different set of circumstances to the present.⁶

[18] Based on what is before me it is arguable HNZ management and APSL discussed Mr Cahill's performance as early as October 2023 when APSL started

⁶ *Potgeiter v Bliss Beauty NZ Limited and ors* [2022] NZERA 275.

looking for a replacement at HNZ's request. Two different HNZ managers asked for Mr Cahill to be replaced according to affidavit evidence before me.

[19] While it is submitted for HNZ that I should note Mr Russell's evidence that he did not realise that Mr Cahill would be dismissed by APSL when asking for him to be replaced, I have already noted above that there was no written contract between HNZ and APSL about how an assignee's work would end. I am asked to consider through Mr Walker's evidence a template of a 'client services agreement' for APSL's clients which is detailed. Have nothing to show this was signed or agreed to.

[20] Standing back from the above, I find it is arguable that HNZ contributed to Mr Cahill being dismissed by APSL after which the latter arguably carried out no process other than to say Mr Cahill's employment had come to an end. This in the context of a less than formal commercial arrangement and with employment that had no end date recorded in the IEA in relation to Mr Cahill's nominated 'temporary' status.

Summary of outcome

[21] Based on the above, the application to join HNZ as a 'controlling party' under s 103B of the Act is allowed.

[22] An Authority Officer will shortly contact the parties to arrange a phone conference call to discuss continuance of the substantive matters.

[23] Costs are reserved until the resolution of the substantive matter.

Antoinette Baker
Member of the Employment Relations Authority