

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2025] NZERA 355
3323120

BETWEEN	KIMBERLEY JONES Applicant
AND	AUCKLAND LABOUR HIRE LIMITED First Respondent
AND	SMART ENVIRONMENTAL LIMITED Second Respondent

Member of Authority:	Jeremy Lynch
Representatives:	Kara Orviss, advocate for the Applicant Alastair Espie and Gene Park, counsel for the Respondent Gretchen Stone and Jack Stone, counsel for the Second Respondent
Investigation Meeting:	On the papers
Submissions and other information received:	10 March 2025 from the Applicant 12 February and 26 March 2025 from the First Respondent 26 March and 13 June 2025 from the Second Respondent
Date:	19 June 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination resolves an application to join a controlling third party to a personal grievance.

[2] Auckland Labour Hire Limited (ALH) operates a labour hire agency.

[3] Smart Environmental Limited (Smart) provides domestic and commercial waste collection services.

[4] A written agreement is in place between ALH and Smart, which provides for the supply of temporary labour by ALH to Smart.

[5] Kimberley Jones was employed by ALH in 2023. The employment agreement (unsigned By Ms Jones) describes the nature of the employment as casual.

[6] Smart says that in June 2023, it had a shortfall in drivers due to sickness and other absences. Smart engaged ALH to provide temporary labour (temporary worker).

[7] ALH says that it offered Ms Jones a “casual engagement” performing work for Smart (temporary assignment). Ms Jones accepted the placement. ALH says it was made clear to Ms Jones that “the engagement would only be for as long as [Smart] required her services, and no commitment was made as to the term or duration of the engagement”.

[8] Smart carried out an investigation following an incident in January 2024, which found that Ms Jones had failed to follow its standard operating procedures and relevant health and safety protocols. Smart subsequently terminated Ms Jones’ temporary assignment.

[9] Ms Jones brings personal grievances for unjustified disadvantage, and unjustified dismissal. In addition, she seeks to join Smart to her personal grievance as a controlling third party.

[10] Although ALH denies that Ms Jones has any valid personal grievance claims, it does not oppose Ms Jones’ application to join Smart to her personal grievance claims as a controlling third party.

[11] Despite Smart’s statement in reply setting out that it does not oppose Ms Jones’ application to join it as a controlling third party, its submissions and subsequent further information confirm that it does oppose being joined to Ms Jones’ personal grievance.

[12] This determination resolves the question of whether Smart should be joined to Ms Jones’s personal grievance, as a controlling third party (the preliminary issue).

The Authority's investigation

[13] The parties agreed that the preliminary issue could be dealt with on the papers.

[14] Affidavit evidence was lodged by Ms Jones.

[15] ALH elected not to lodge any affidavit evidence or submissions in respect of the preliminary issue, instead preferring to rely on the contents of its statement in reply.

[16] For Smart, a comprehensive sworn affidavit was lodged by its operations manager, Gregory Burke.

[17] Written submissions were lodged by the representatives for Ms Jones and Smart.

[18] As Permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made. It has not recorded all the evidence and submissions received. In determining this matter, the Authority has carefully considered all the material before it, including the information provided by the parties and their submissions.

Issues

[19] The issues identified for investigation and determination are:

- (a) whether Smart should be joined as a controlling third party to Kimberley Jones' personal grievance under the provisions of s 103B of the Act?
- (b) Should any party be required to contribute to another party's costs?

Background

[20] The following background information is relevant.

[21] The parties accept that Ms Jones was employed by ALH in 2023. The unsigned employment agreement provided by ALH sets out the following:

- 2.1 The Employee is employed as a casual employee with no expectation of ongoing employment.
- 2.2 The Employer is a labour hire agency which provides services to a third party (Client). The Employer employs the Employee on a casual basis to work on placements for the Client(s) (Placement).

...

2.4 Each individual occasion on which the Employee works for the Employer will be a fixed term agreement for the duration of the Placement which the employee is to do, based on the terms of this agreement.

...

2.6 The Employee acknowledges that the Employer is unable to offer on-going permanent employment and has no obligation to re-employ the Employee at any time after the end of a Placement. No situation of redundancy or dismissal will arise if the Employer does not offer the Employee any further work after a Placement and no compensation of any sort will be payable to the Employee at the end of a Placement.

...

3.2 The Employer and/or Client may establish rules and procedures relating to the operation of the Employer's and/or Client's business and the Employee's conduct from time to time. Those rules and procedures form part of the Employee's employment obligations and must be complied with. The Employer and/or Client may vary those rules and procedures as the situation requires.

3.3 The Employee must also comply with any rules of any worksites at which you carry out your Placement, as well as lawful instructions as directed by us, or our Clients, while you are carrying out a Placement at a Client's work site.

...

4.2 The Employer and/or Client reserves the right to alter the Employee's days and hours of work during the course of any Placement with the demands of the Employer's and/or Client's business so require.

[22] ALH and Smart have in place between them a written agreement entitled ALH Limited Labour Supply Terms (terms of business). The following clauses from the terms of business are relevant:

1.1

...

Temporary Assignment means the deployment of any Temporary Worker by us to provide services to you.

...

Temporary Worker means the individual contracted or employed by us who is deployed to provide services to you.

...

9.1 If you reasonably consider that the services of a Temporary Worker are unsatisfactory, you may terminate the Temporary Assignment by instructing the Temporary Worker to leave your premises or by directing us to remove such Temporary Worker, time being of the essence. If you notify us of the termination within five hours of the Temporary Assignment commencing, we may (in our sole discretion) reduce or cancel the rates payable for the hours worked by the unsatisfactory Temporary Worker. Where practicable, we will replace the Temporary Worker within a 24 hour period.

...

18.1 You acknowledge and agree that you are a controlling third party for the purposes of the employment relations (triangular employment) Amendment act 2019, and the provisions of that act shall extend to you to the extent applicable.

...

18.5 This agreement may only be amended by mutual agreement of the Parties in writing.

Ms Jones' assignment is terminated by Smart

[23] Ms Jones says that in January 2024, the truck she was driving was struck by a front-end loader, at Smart's premises. She says that:

...the collision damaged the hoist, which typically prevents the truck from moving until lowered. Because this safety mechanism was not functioning, [I] inadvertently drove with the hoist up, resulting in [me] hitting power lines.

[24] Smart says that following this incident, it carried out an investigation. The investigation found that Ms Jones:

... had driven with the hoist up and hit overhanging powerlines because she had not followed the standard operating procedures and relevant health and safety protocols.

[25] Smart says that Ms Jones' temporary assignment was terminated in accordance with cl 9.1 of the terms of business.

Ms Jones' personal grievances

[26] Ms Jones says that Smart's termination of her temporary assignment was an unjustified dismissal, and brings a personal grievance claim in respect of this.

[27] In addition, Ms Jones says that ALH "had a duty to go into bat for [her], yet they failed to do so", and that this unjustifiably disadvantaged her employment. She brings an additional personal grievance in respect of this.

[28] On 20 February 2024 Ms Jones raised a personal grievance with ALH, and notified Smart of her intention to join it as a controlling third party in her personal grievance with ALH.

[29] ALH says that as Ms Jones' unjustified dismissal personal grievance has been brought against Smart and not ALH as her employer, the Authority has no jurisdiction to consider this claim. However, the Authority is not required to consider this

jurisdictional issue in this determination. This determination solely considers whether Smart should be joined to Ms Jones's personal grievance, as a controlling third party.

The test for joining a controlling third party

[30] Under s 103B(3) of the Act, an application to join Smart as a proposed controlling third party must be granted if:

- (a) Smart has been notified in accordance with s 115A of the Act; and
- (b) an arguable case has been made out that Smart is a controlling third party, and its actions caused or contributed to Ms Jones' personal grievance.

[31] A *controlling third party* is defined under 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 employee.

Discussion

Notification to the proposed controlling third party

[32] Section 115A provides that an employee must notify a proposed controlling third party that the employee considers their actions have caused or contributed to the personal grievance, in the same statutory 90-day period within which the affected employee must raise their personal grievance with their employer.¹

[33] Ms Jones's personal grievance letter of 20 February 2024 was sent to ALH and Smart within the statutory 90-day time period required under s 114(1) of the Act. There is no dispute that Ms Jones' personal grievance letter complies with the requirements of s 115A of the Act for notifying Smart (as the controlling third party) of the fact that she believes its actions caused or contributed to her personal grievance.

[34] Neither ALH nor Smart dispute that the notification requirements under s 115A have been met.

¹ Employment Relations Act 2000, s 115A(1)(a).

[35] The Authority finds that Ms Jones's 20 February 2024 personal grievance letter meets the notification requirements of s115A of the Act. It puts Smart on notice of Ms Jones's personal grievance with ALH, and Smart's alleged part in that personal grievance.

The threshold for an arguable case

[36] To join Smart as a controlling third party, the Authority must find to a sufficiently plausible basis that the two limbs of the definition of *controlling third party* provided for under s 5 of the Act are met.

[37] In an interim reinstatement setting, an *arguable case* means a case with some serious or arguable, but not necessarily certain prospects of success.² This definition provides useful guidance in an assessment under s 103B. An *arguable case* is a relatively low threshold assessment.

[38] It is not disputed that there is a written agreement between ALH and Smart, for ALH to provide temporary labour to Smart. This is recorded in the terms of business.

[39] The terms of business require (before any temporary worker is deployed) ALH and Smart to agree on the following:

- (a) the commencement date and duration of the temporary assignment;
- (b) the services the temporary worker will be required to perform;
- (c) any specific qualifications, authorisations or licences required for the temporary worker to perform the services;
- (d) any non-standard PPE requirements (which shall be at Smart's cost);
- (e) the site or location where the temporary worker's services are to be performed; and
- (f) the number of temporary workers required by Smart.

[40] The terms of business also require Smart to acknowledge that it manages, controls and influences each site where a temporary worker performs services. Similarly, the terms of business require Smart to provide all necessary training and induction so that the temporary worker can carry out the services in a safe manner.

² *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[41] In addition, under the terms of business the parties agree that temporary workers provided by ALH are under the supervision, direction and control of Smart.

[42] Under the terms of business, the parties also agree that Smart is:

...fully responsible for ensuring each temporary worker has the skills and qualifications necessary to provide the services you instruct the temporary worker to perform;

... Fully responsible for all acts, errors and omissions of the temporary worker during the temporary assignment with a wilful, negligent or otherwise

[43] As set out above, under the terms of business, Smart has the right to terminate the temporary assignment of any temporary worker, or to direct ALH to remove any temporary worker from its premises, if it is not satisfied with the performance of a temporary worker.

[44] There is no dispute that Ms Jones was employed under a written employment agreement with ALH, and placed as a temporary worker on temporary assignment to Smart in Napier.

[45] Smart derives a benefit from this arrangement. Temporary workers carrying out refuse collection and related work for Smart, are employees of ALH. ALH bears the responsibilities of the employer which would otherwise fall to Smart, if it directly employed staff to carry out these duties.

[46] The first limb of the s 5 definition of *controlling third party* is met to the arguable case standard.

Smart's ability to exercise control

[47] However, Smart does not appear to accept that it does, or is entitled to, exercise control or direction over ALH's employees that is similar or substantially similar to the control or direction exercised by an employer.

[48] Smart points to the fact that Ms Jones was paid by ALH, and reported weekly to one of ALH's account managers (for welfare checks on her placement and wellbeing), and that Ms Jones reported to ALH in terms of the employment relationship. Presumably this is to suggest that it lacked the requisite control or direction over Ms Jones, similar or substantially similar to the control or direction exercised by an employer .

[49] In addition, Smart submits that it has no role in the employment arrangements between ALH and its candidates. Smart submits that it has no control over which individual employees attend its premises to carry out the required work, because this is determined by ALH. In addition, Smart submits that because ALH completes all employment related checks, and has regular contact with the temporary worker, and manages leave arrangements for its employees, that this further supports that in respect of Ms Jones, it lacked the ability to exercise control or direction over Ms Jones, similar or substantially similar to that of an employer.

[50] Ms Jones disputes this and says that she was at all times under the control and direction of Smart. She says that Smart provided her with “direct supervision and direction, and [she] reported to them rather than ALH... and she was fully integrated into the [Smart] team”.

[51] In *Prasad v LSG Sky Chefs New Zealand Limited* the Court, having analysed the features of control and integration in the triangular employment relationship present in that matter, held:³

... that neither plaintiff [employees] operated with any degree of autonomy. Rather LSG exercised a significant degree of direction and control over the plaintiffs’ day-to-day work – what, when, where, how and by whom.

...

While we accept that it was necessary for LSG to keep a close eye on what was being done by those working on site to ensure that appropriate standards were reached in terms of its deliverables and that applicable safety and security concerns were being met, we consider that the high levels of direction and control, coupled with the extent to which the plaintiffs were integrated into LSG’s business, points firmly towards an employment relationship.

[52] In *Head v Chief Executive of the Inland Revenue Department*, a full bench of the Employment Court (quoting from *Prasad*) reiterated:⁴

In assessing where on the spectrum a case sits the Court will closely scrutinise the way in which arrangements are structured, particularly where there is a deficit of bargaining power, and how such arrangements have operated in practice, to determine what the real nature of the relationship is.

[53] In assessing where this matter sits on the spectrum, I observe that it is arguable that Ms Jones was operating without the degree of autonomy (to use the language of

³ *Prasad v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 835 at [80].

⁴ *Head v Chief Executive of the Inland Revenue Department & Anor* [2021] NZEmpC 69.

Prasad) that might reasonably be expected of a worker who was not one over whom Smart exercised control and direction similar or substantially similar to that which an employer may exercise. In other words, it is at least arguable to the requisite low threshold, that Smart did have a degree of control over Ms Jones's work.

[54] Mr Burke's affidavit sets out that Smart "... as the client of ALH directed [Ms Jones] as to her hours of work and daily tasks in accordance with Smart's business requirements".

[55] This is arguably an incidence of control and direction similar to that which an employer could undertake.

[56] That Ms Jones appears to have been subject to day-to-day control and direction by Smart is consistent with concerns around her performance being raised directly with Ms Jones by Smart, rather than with Ms Jones by ALH.

[57] In addition, it is clear from the terms of business that temporary workers such as Ms Jones are under the control and direction of Smart.

[58] An arguable case is made out that Ms Jones's day-to-day work – the 'what, when, where, how and by whom' (to use the language of the Court in *Prasad*), was under the control and direction of Smart and ALH. Although Smart says that Ms Jones was employed by ALH and did not enter into any form of written employment agreement with Smart, it does seem on the evidence before the Authority (at least to the *arguable case* threshold) that in practice Smart could (and in fact did) exercise the requisite control over Ms Jones.

The terms of business

[59] No party referred the Authority to cl 18.1 of the terms of business, in which Smart agrees that it is a controlling third party for the purposes of the Employment Relations (Triangular Employment) Amendment Act 2019.

[60] Clause 18.5 provides that the terms of business may only be amended by mutual agreement of the parties, in writing. There is no evidence before the Authority of the parties entering into a variation to cl 18.1.

[61] The Employment Relations (Triangular Employment) Amendment Act 2019 came into force on 27 June 2020, and so was in operation at the time Smart signed the

terms of business (in February 2022). The Authority infers from this, that under cl 18.1, at all relevant times, Smart acknowledges and agrees that it is a controlling third party. This is directly relevant to the Authority's determination of the preliminary issue.

Did Smart contribute to the circumstances of Ms Jones's personal grievance?

[62] Ms Jones says that she was dismissed by Smart, and that this is the basis for one of her personal grievances.

[63] I note that on an untested basis, the evidence before the Authority that the actions of Smart contributed to Ms Jones's personal grievance(s), is not strong, and jurisdictional issues appear to arise. However, at this stage of the process, this is not the test. The Authority is not assessing the strength of Ms Jones's evidence. All Ms Jones is required to do is to meet the *arguable case* threshold.

[64] Mr Burke's evidence is that Smart's "...concerns about [Ms Jones] and any performance issues with her were taken up with ALH as required under the ALH Limited Labour Supply Terms". I am satisfied that Ms Jones has established to the necessary threshold that it is arguable that it was Smart's dissatisfaction with her performance and conduct which resulted in the cessation of her assignment to Smart (to describe this in neutral terms).

Outcome

[65] The joinder of a controlling third party is not the exercise of a discretion. Rather, the Authority must grant the application if it is satisfied as to the matters set out under s 103B(3)(a) and (b).

[66] For the reasons set out above, Ms Jones' application to join Smart as a controlling third party is granted.

Mediation

Upon the grant of an application under S103B, the authority must consider whether to direct the parties to mediation with a view to resolving the personal grievance. I note the parties have already attended mediation. The parties have 14 days from the date of

this determination within which they are to inform the Authority of their views regarding further mediation.

Costs

[67] Costs are reserved and will be dealt with, if necessary, when costs are determined following the conclusion of the authority's investigation.

Jeremy Lynch
Member of the Employment Relations Authority