

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 439
3352420

BETWEEN	YOSUKE TANAKA Applicant
AND	ALH LIMITED First Respondent
AND	MOTUS HYDRAULICS LIMITED Second Respondent

Member of Authority: Shane Kinley

Representatives: Claudia Serra, advocate for the applicant
Gene Park and Alastair Espie, counsel for the first
respondent
Simon Taylor, for the second respondent

Investigation Meeting: On the papers

Submissions and further
information: Up to 30 June 2025

Determination: 22 July 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Yosuke Tanaka was employed by ALH Limited (ALH) under a casual employment agreement in January 2024. ALH is a labour hire firm and placed Mr Tanaka to work at Motus Hydraulics Limited (MHL) under a “Casual Employment Engagement Form (COTA Form)” from 29 January 2024.

[2] This preliminary determination addresses only the issue of whether MHL should be joined as a controlling third party (CTP) within the meaning given to that term in s 5 of the Employment Relations Act 2000 (the Act) to Mr Tanaka’s personal

grievances against ALH. This determination refers to aspects of Mr Tanaka's substantive personal grievances against ALH, which claim he was unjustifiably dismissed, and that ALH breached its duty of good faith to him. Those claims will be the subject of later investigation.

[3] ALH advised it takes no position and will abide the Authority's determination in relation to whether MHL should be joined as a CTP.

[4] MHL opposes the application that it be joined as a CTP.

The Authority's investigation

[5] A case management conference was held for this matter on 10 April 2025, where the preliminary issues identified at paragraph [8] below were scheduled to be investigated on the papers.

[6] For the Authority's investigation of the preliminary issues, affidavit evidence was lodged by Mr Tanaka and Simon Taylor, Operations Manager of MHL. Submissions were received on behalf of Mr Tanaka and from MHL. ALH had advised it did not intend to provide evidence or submissions, consistent with its position that it would abide the decision of the Authority.

[7] As permitted by s 174E of 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 evidence and submissions received.

The preliminary issues

[8] The preliminary issues identified as requiring investigation and determination were:

- (a) Whether MHL is a CTP within the meaning given to that term in s 5 of the Act?
- (b) If MHL is found to be a CTP, should it be joined to Mr Tanaka's unjustified dismissal personal grievance under s 103B of the Act?

[9] During the case management conference I indicated once the preliminary issues had been determined, a follow-up case management conference would be scheduled to timetable the investigation of Mr Tanaka's substantive claims, including confirming the

issues to be investigated and determined. MHL would only need to participate in the subsequent investigation process if I grant Mr Tanaka's application to join it as a CTP.

[10] Mr Tanaka withdrew a claim he had been unjustifiably disadvantaged at the case management conference. Mr Tanaka also claimed breaches of the duty of good faith under s 4 of the Act, which appear to be connected to his unjustified disadvantage claim. The application to join MHL as a CTP referred only to Mr Tanaka's unjustified dismissal claim. I do not consider MHL could be joined to Mr Tanaka's breach of good faith claim, if it is proceeding, as it is not a personal grievance claim which a CTP can be joined to.

Is MHL a CTP and should it be joined to Mr Tanaka's personal grievance?

Relevant law

[11] The concept of a CTP was introduced into the Act on 27 June 2020 by the Employment Relations (Triangular Employment) Amendment Act 2019. The reason for this concept being introduced was to allow for a CTP to be joined to a personal grievance where an employee or employer considers the actions of a CTP caused or contributed to a personal grievance, which allows for remedies to be sought against a CTP.

[12] Section 103B(3) of the Act provides:

- 3) The Authority or the court must grant the application to join a controlling third party if the Authority or the court is satisfied—
 - (a) that the requirement to notify the controlling third party in accordance with section 115A has been complied with; and
 - (b) 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.

[13] The definition of CTP in s 5 of the Act reads as follows:

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.

[14] The Court in *Hu v Passion Fresh Ltd* described the requirements in relation to considering an application to join a CTP as follows:¹

An application to join a controlling third party **must be granted** if two things are satisfied. First, that **notice** to the controlling third party under s 115A **has been given**. Second, that there is an **arguable case** the party to be joined is a controlling third party and that **the party's actions caused or contributed to the personal grievance**.

[15] The assessment to be undertaken under s 103B(3)(b) of the Act is whether an arguable case has been established, it is not a conclusive or final assessment. The arguable case threshold is generally accepted to be a relatively low bar to clear, which involves considering whether “there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous”.²

[16] Mr Tanaka raised grievances with ALH and MHL on 27 March 2024. No issue was raised by MHL in relation to whether Mr Tanaka had properly given notice to MHL of his application to join it to these proceedings. I proceed on the basis that it is not contested that notice has been given in accordance with s 115A of the Act. For completeness, I find the requirement under s 103B(3)(a) is met.

Submissions of the parties

[17] Mr Tanaka says his employment agreement with ALH was clear that he was employed on a casual basis to work on placements for clients. AHL had placed Mr Tanaka to work at MHL, who are said to have “unilaterally determined [Mr Tanaka’s] terms of engagement, being an “ongoing” arrangement from Monday to Friday, 6.00am to 4.30pm”. Mr Tanaka says he reported directly to MHL, with MHL’s managers supervising, instructing and training him, and directing him in relation to which tasks he was expected to undertake. He says MHL made the decision to prevent him from returning to his usual place of work, meaning leave should be granted to join MHL as a CTP.

[18] Mr Tanaka says he wore a MHL uniform, was supervised by Mr Taylor as well as two other individuals, who he identified as a supervisor and a team leader. Mr Tanaka referred to having been trained by the team leader in how to do a task, but alleged he was not trained correctly and made a mistake, which led to him being told Mr Taylor did not want him to work at MHL anymore.

¹ *Hu v Passion Fresh Ltd* [2024] NZEmpC 74 at [27] (footnotes omitted, emphasis added in bold).

² *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [12].

[19] MHL submitted its actions in relation to Mr Tanaka's employment or duties performed at MHL were consistent with its obligations as a person conducting a business or undertaking, as defined under s 17 of the Health and Safety at Work Act 2015. MHL said the requirements of s 103B(3)(b) of the Act had not been demonstrated by Mr Tanaka.

[20] MHL's statement of reply asserted it did not employ Mr Tanaka directly, but engaged ALH as a labour supplier, with ALH retaining full employment responsibility for Mr Tanaka. While MHL acknowledged providing feedback on performance to ALH, MHL said the final employment decision rested with ALH. MHL said it used ALH to "manage varying work flow / demands", with Mr Tanaka working at MHL to cover a period of extra workload. MHL said ALH requested Mr Tanaka remain employed after that period but MHL "determined that his performance and skill set was not sufficient to justify creating unnecessary or additional work to continue his engagement".

[21] Mr Taylor disputed Mr Tanaka was issued MHL uniform, although said:

A high-visibility fire resistant shirt was issued by [MHL] only after Mr Tanaka initially arrived on site without appropriate [personal protective equipment]. This was done purely for health and safety compliance, and not as any indication of employment or integration into [MHL's] workforce.

[22] Mr Taylor also said:

The daily work, task instructions, and process familiarisation described by Mr Tanaka are standard operational requirements within a high-volume, repetitive production environment. These are not unique to Mr Tanaka but are consistently applied to all workers – both staff and labour hire staff and work we outsource to 3rd party manufacturers – to ensure product quality and safety compliance. The activities he refers to are governed by our documented **Standard Operating Procedures** ... and do not involve individualised instruction, coaching, or oversight of the kind typically associated with a direct employment relationship. ...

The operational interactions described by Mr Tanaka are consistent with the standard direction provided to labour-hire workers engaged in production settings, non operational contractors and staff they are not individualised interactions that would be associated with employer / employee relationships.

Analysis and finding

[23] Stepping through the two elements of the definition of a CTP in s 5 of the Act:

- a. MHL's evidence described the contract or arrangement it has with ALH under which Mr Tanaka performed work for the benefit of MHL. This satisfies element (a) of the definition of a CTP in s 5 of the Act; and

- b. I consider the extent of control MHL had over Mr Tanaka is sufficient to meet the requirements of element (b) of the definition of a CTP in s 5 of the Act. I do not accept the premise underpinning MHL's submission that the operational interactions it had with Mr Tanaka are not similar or substantially similar to the control or direction that an employer exercises. MHL accepted it set standard operating procedures, which it required Mr Tanaka to follow, as it did with all workers. Mr Taylor's evidence also referred to direction being provided to labour-hire workers, such as Mr Tanaka.

[24] MHL's submissions and Mr Taylor's evidence were focussed on Mr Tanaka not being in an employment relationship. I accept MHL did not want to be in an employment relationship with Mr Tanaka, but that is neither his claim nor what the concept of a CTP entails. It also is not the test under element (b) of the definition of a CTP in s 5 of the Act. While MHL's statement in reply says it did not exercise control or direction similar to that of an employer over Mr Tanaka, it has not provided any evidence which supports this assertion and I consider the evidence it provided is consistent with it exercising such control.

[25] I find there is an arguable case MHL was a CTP in relation to Mr Tanaka.

[26] I also find there is an arguable case MHL's actions caused or contributed to Mr Tanaka's unjustified dismissal grievance, based on text messages from Daniel Whyte at ALH to Mr Tanaka. Those text messages advised that Mr Taylor had "told me there is no more work for you at [MHL]". MHL say this was because of "volume and work load" requirements, which would appear to be a legitimate business decision on MHL's part. I consider this is sufficient to meet the arguable case threshold.

[27] There are three matters I consider likely need to be examined further in a substantive hearing, which may be relevant to whether MHL's actions caused or contributed to Mr Tanaka's unjustified dismissal personal grievance. Firstly, what the real nature of Mr Tanaka's employment was, given the casual employment agreement provided states his employment ended at the end of each placement. The COTA Form for Mr Tanaka's placement at MHL indicated it was for an ongoing period with no specified end date, working Monday to Friday from 6:00am to 4:30pm, however, it also said he was engaged as a casual employee.

[28] Secondly, Mr Tanaka was offered and commenced a subsequent placement with ALH at a different workplace, after his placement at MHL had concluded. Whether he was dismissed or resigned has not been tested. Finally, while Mr Tanaka asserted his employment was ended following him making a mistake at MHL, this also has not been tested at this preliminary stage.

MHL are joined as a CTP

[29] All the requirements of s 103B of the Employment Relations Act 2000 (the Act) have been met for Yosuke Tanaka's application to join Motus Hydraulics Limited (MHL) as a controlling third party within the meaning given to that term in s 5 of the Act.

[30] Therefore, I grant Mr Tanaka's application to join MHL to the proceedings for his unjustified dismissal personal grievance claim.

Next steps

[31] An Authority Officer will contact counsel to arrange a case management conference to discuss next steps in relation to the investigation of Mr Tanaka's substantive personal grievances of unjustified dismissal and claim of breach of the duty of good faith, if that claim is proceeding.

[32] While the parties have previously attended mediation, they may wish to agree to voluntarily attend mediation again. If this occurs, the case management conference will be scheduled following attendance at mediation. If it does not, then consideration of whether a direction to mediation is appropriate is required under s 103B(5) of the Act will be addressed at the case management conference.

Costs

[33] Costs are reserved.

Shane Kinley
Member of the Employment Relations Authority