

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 77
3267279

BETWEEN	SHELLEY BOARDMAN Applicant
AND	KLOMP TRANSPORT LIMITED First Respondent
AND	NZ NATIONAL NETWORKS LIMITED T/A TEAM GLOBAL EXPRESS Second Respondent

Member of Authority: Rowan Anderson

Representatives: Adrian Plunket, advocate for the Applicant
Lawrence Anderson, counsel for the First Respondent
Simon Martin, counsel for the Second Respondent

Investigation Meeting: On the papers

Submissions received: Up to and including 20 November 2024

Determination: 14 February 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Boardman has lodged a statement of problem in the Authority claiming that she was unjustifiably disadvantaged in her employment, and unjustifiably dismissed from her employment, with Klomp Transport Limited (Klomp Transport).

[2] Klomp Transport contends that Ms Boardman did not raise any personal grievance, other than as to the dismissal, within the relevant 90-day statutory timeframe. It does not consent to any personal grievance claims raised out of time.

[3] Klomp Transport contract to NZ National Networks Limited which trades as Team Global Express (TGE). Ms Boardman has made application to have TGE joined to the proceedings in the Authority as a controlling third party to her personal grievances in terms of 103B of the Employment Relations Act 2000 (the Act).

[4] TGE opposes being joined as a controlling third party.

[5] This preliminary determination deals with two issues. First, whether Ms Boardman raised the claimed personal grievances with Klomp Transport in accordance with the Act. Second, to the extent any personal grievances were raised, whether TGE should be joined to the proceedings as a controlling third party.

The Authority's investigation

[6] A case management conference was held on 7 June 2024 at which the Authority's investigation and procedure were discussed. It was proposed by the Authority that the issue as to whether TGE should be joined could be dealt with as a preliminary issue 'on the papers' without the need for an in-person investigation meeting. There was no objection to that proposal and timetable directions were issued.

[7] During the investigation, it became apparent that the Authority would, at the same time as dealing with the preliminary question as to joining TGE, need to determine whether the personal grievances claimed were raised with Klomp Transport in accordance with the requirements of the Act. This arose out of Klomp Transport contending that various personal grievances had not been raised compliantly. The parties were provided an opportunity to provide affidavit evidence and submissions as to that issue.

[8] Affidavits were lodged from Ms Boardman in support of her application. TGE lodged affidavits from Bryce Tinkler, Transport Manager TGE, and Nicole Freeman, Hamilton Branch Manager for TGE. Klomp lodged an affidavit from Jonathan Klomp as to the issue of whether the personal grievances were raised compliantly.

[9] 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 evidence and submissions received.

Issues

[10] There are two issues for investigation and determination:

- (a) Did Ms Boardman validly raise the claimed personal grievances within the relevant statutory timeframe; and
- (b) Should TGE be joined to the proceedings as a controlling third party?

Further background and evidence

Services Agreement between Klomp Transport and TGE

[11] An “Agreement for Owner Driver Services” (the “Services Agreement”) was in place between TGE and Klomp Transport at the relevant time. In general terms, the Services Agreement provides that Klomp Transport would provide services as to the pickup and delivery of goods, including by use of a vehicle or vehicles to be provided by Klomp Transport for that purpose.

[12] The Services Agreement provides that Klomp Transport would nominate a primary driver and could nominate a relief driver for each vehicle. It also includes provisions relating to drivers, including that any driver must be approved by TGE in advance, must successfully complete TGE’s driver certification programme, may have their approval withdrawn by TGE if TGE ceases being satisfied as to various matters, and that if TGE establishes that the driver has not performed services under the Services Agreement, including in as to misconduct, that Klomp Transport would terminate the services of the driver (such as they relate to the services provided under the Services Agreement and subject to a ‘reasonableness’ requirement).

[13] The Services Agreement includes a number of other obligations on the part of Klomp Transport impacting on any drivers employed by it. Those include obligations to ensure the provision and use of uniforms approved by TGE and personal appearance requirements. The Services Agreement provides that Klomp Transport is to ensure that any persons involved in the provision of the services is appropriately trained, qualified, and supervised. Clause 10 of the Services Agreement provides that Klomp Transport will ensure drivers act in a manner that protects and enhances TGE’s business.

Commencement of employment and interaction with TGE

[14] Ms Boardman’s evidence is that she was interviewed by a representative of TGE and had not heard of Klomp Transport prior to being interviewed. The employment relationship with Klomp Transport was then effectively arranged by TGE informing

Klomp Transport that they had a new employee. Ms Boardman says she was provided a TGE (Toll at the time) uniform. Criminal conviction history was sought by TGE. She says she completed an induction and a driving test with TGE and that she also completed other training paid for and arranged by TGE. She says Mr Klomp showed her the delivery run so she knew where to go.

[15] Ms Boardman's evidence is that Mr Klomp drove for TGE himself, but also contracted three runs with them. The vehicles were parked in the TGE yard when not in use and the only work performed was for TGE. All the goods being delivered would be sorted at the yard by TGE employees and Ms Boardman would come in each day and load and deliver the goods. TGE customer service would be contacted if there were issues with delivery rather than Mr Klomp, who would be completing his own run. Mr Klomp would only be contacted about mechanical issues.

[16] Ms Boardman's evidence is that she attended weekly TGE meetings and that topics discussed included KPI's, health and safety, and information about new customers of TGE. She says she discussed work with Mr Klomp, but not in scheduled meetings and that they would go about their work independently.

[17] Ms Freeman says she met with Ms Boardman on recommendation from a TGE driver as a 'meet and greet' as opposed to a job interview. She says she told Ms Boardman that TGE didn't have any work available but that she told Ms Boardman that she thought Klomp Transport were looking for a driver. She arranged for Ms Boardman to meet Mr Klomp. She says she may have provided Ms Boardman with a TGE vest to wear when accessing the floor, but that the suggestion it was a uniform is absurd. She denies saying "here is your driver" to Mr Klomp and says that Klomp Transport was its own business and made its own offers of employment. She says that was the extent of her initial involvement.

[18] Ms Freeman noted TGE's health and safety obligations and says that various inductions were required of third parties in adherence to those obligations. She denied that TGE directed Ms Boardman on the day-to-day provision of services. Her evidence is that Ms Boardman had full control over how she would pack deliveries, how they were made, and in what order. She says she would see Ms Boardman at the depot and greet her but that that was just good manners.

[19] Ms Freeman says that Ms Boardman would sometimes come to the office to print a ticket or raise a query. Ms Boardman would depart for her run when she was ready and Ms Freeman says she, nor any employee of TGE, would supervise Ms Boardman. Ms Boardman would contact TGE Customer Support or a TGE dispatcher if there were delivery queries. The dispatchers also contacted Ms Boardman at times if they had received queries from customers, but no directions were given. She says customer complaints would be raised with Mr Klomp, although Ms Boardman might be contacted directly to provide an update on time-sensitive deliveries.

[20] Ms Freeman's evidence is that TGE did not get involved in Ms Boardman's employment issues and that that was a matter for Klomp Transport. While there might be employment consequences, which was a matter for Klomp Transport, Ms Freeman says TGE would contact Klomp Transport about any issues where there were concerns Klomp Transport was not meeting its obligations.

[21] Mr Tinkler is the Transport Manager for TGE and his evidence focuses on his interactions with Ms Boardman. His evidence is that his role is to ensure that goods that TGE are contracted to deliver to clients are delivered in good condition. TGE contracts out 'runs', including to Klomp Transport. He says day to day interactions with Klomp Transport were limited to Ms Boardman checking in with the dispatcher as to any specific requirements or changes to the daily runs. That might include information about urgent deliveries and Mr Tinkler says that would usually be the extent of any interaction, and that Klomp Transport and Ms Boardman are then free to do the deliveries as they see fit.

[22] Mr Tinkler referred to particular incidents where he said issues arose with Ms Boardman. This included an allegation she was not using a scanner correctly impacting tracking abilities and resulting in the dispatch team contacting her to get ETA's on urgent deliveries. He says longer term or broader issues would be discussed with Mr Klomp.

[23] Ms Freeman says that Ms Boardman raised an issue as to the way in which she was spoken to by Mr Tinkler about a delivery on one occasion. She says TGE met with Ms Boardman and Mr Klomp and an action plan was put in place, including the provision of further training to Ms Boardman by Klomp Transport and the setting of expectations. She says the matter was resolved. An email containing "agreed actions

and expectations” was addressed to Ms Boardman, forwarded to her by Mr Klomp on 14 September 2023.

The New World incident, investigation, and dismissal

[24] Ms Freeman referred to a complaint from New World Te Kuiti (New World) about Ms Boardman’s conduct, including an allegation of non-compliance with health and safety requirements relating to parking and unloading. There was an allegation that, when confronted about the issue, Ms Boardman became aggressive and had a physical altercation with a staff member. Ms Freeman says Ms Boardman was issued a trespass notice and could not deliver to New World.

[25] Ms Freeman says that TGE advised Mr Klomp of the issue given its concerns but did not in any way participate in the employment process. She says TGE wrote to Klomp Transport to “ask that [Ms Boardman] be removed from the run while it investigated matters”. She says that wasn’t a direction but rather a request in accordance with the contract with Klomp Transport. Ms Freeman says she disagrees with the suggestion that Mr Klomp was pressured by TGE to dismiss Ms Boardman and says that TGE did not require Klomp Transport to dismiss her.

[26] Mr Tinkler says he became aware of an incident at New World when he was forwarded an email on 15 September 2023 indicating the store manager had contacted TGE. He says that TGE were informed a trespass notice had been issued against Ms Boardman after issues with Ms Boardman during her deliveries. He says that TGE were concerned by Ms Boardman’s actions in relation to a key client of TGE’s and that they advised Mr Klomp of the issue so he could look into it. Mr Tinkler wrote to Mr Klomp saying that TGE did not want Ms Boardman delivering to their clients while an investigation took place. TGE provided CCTV footage and other information to Mr Klomp and TGE exercised its contractual right to request that Ms Boardman not be used on TGE runs.

[27] On 15 September 2023, Mr Tinkler wrote to Mr Klomp advising that he had received communication from New World “regarding behaviour and failure to follow instructions” as to health and safety. The letter also referred to an incident on 18 August 2023 and a police complaint made by Ms Boardman which was said to have resulted in no action being taken. The letter went on to record several issues said to have been raised by New World about Ms Boardman. These included ignoring instructions on

where to park, breaching health and safety rules regarding parking, and failing to follow the instructions of New World staff. The letter concluded:

Due to the nature of the above, we hereby advise that you are required to stand down Shelly Boardman effective immediately from driving any TGE contracted vehicle servicing any TGE customers while an investigation is undertaken.

[28] Mr Tinkler said that TGE had no other involvement, and it was for Klomp Transport to “sort out her employment”. He says he was not involved in any meetings that Mr Klomp and Klomp Transport’s HR representative had with Ms Boardman.

[29] On 26 September 2023, Mr Tinkler wrote to Mr Klomp to inform him that Ms Boardman “...must be removed from all assignments” and that, effective immediately, Ms Boardman “is not permitted to drive any vehicle contracted to TGE”. The letter referenced the ability to do so under the Services Agreement and Ms Boardman’s “persistent unacceptable behaviour”, with the reasons provided as follows:

1. Constant failure to adhere to instructions provided by customer staff.
2. Repeated breaches of site Health & Safety Policies.
3. Due to the ongoing issues, New World, Te Kuiti has issued a Trespass Notice against Ms. Boardman. This notice has been passed onto the Police for serving. As a result, she is now legally prevented from carrying out her duties at this location....

[30] On 27 September 2023, Klomp Transport wrote to Ms Boardman inviting her to a disciplinary meeting as to “potential serious misconduct”. That letter set out concerns said to have been advised by the manager of New World, generally speaking related to the parking issues and including the issuing of a trespass notice. A meeting was to be held on 29 September 2023, at the TGE depot, and the letter noted the following:

We are concerned about the seriousness of this matter and we could decide if the matter is proven, this may amount to misconduct or serious misconduct by you against TGE code of conduct specifically about ‘Agreement for Owner Driver Services’ Section 6 paragraph 2. This may lead to your dismissal.

[31] Minutes of a disciplinary meeting dated 3 October 2023 were provided to the Authority. It is not clear at this stage who the author of those notes was. However, they appear to have been made by Klomp Transport. The notes reflect that Ms Boardman had said at the meeting that she had previously approached TGE to report bullying at New World and to ask that she be removed from delivering to New World. The notes also reflect that Ms Boardman had arranged for others to make deliveries to New World over the preceding month.

[32] On 6 October 2023, Klomp Transport wrote to Ms Boardman advising that it had completed its investigation. The letter sought a further meeting with Ms Boardman on 11 October 2023 and provided information including Ms Boardman's employment agreement, correspondence from TGE to Klomp Transport as to the decisions it made, and minutes from the disciplinary meeting. Video footage of the incident on 17 August 2023 was later sent to Ms Boardman by Klomp Transport on 8 October 2023, although there appears to have been issues relating to the formatting of the video.

[33] A further meeting was held on 13 October 2023. The minutes of the meeting reflect that Mr Klomp said that he had had no further information about the alleged incident outside of what Ms Boardman provided on 11 October 2023 and the CCTV footage. According to the minutes, Mr Klomp confirmed that Ms Boardman's employment was being terminated without notice based on information in a termination letter. The minutes appear to have been written sometime later given they refer to the termination letter, which on emails on the 16 and 17 October 2023 indicates was not provided to Ms Boardman until 17 October 2023.

[34] That letter confirmed that Ms Boardman was being dismissed from her employment on the basis of serious misconduct relating to the incident at New World on 17 August 2023.

[35] Ms Boardman lodged a statement of problem on 6 December 2023. An application seeking to have TGE joined as a controlling third party was lodged with the Authority on the same day.

Did Ms Boardman validly raise the personal grievances within the relevant statutory timeframe?

Relevant principles

[36] Section 114(1) of the Act requires an employee wishing to raise a personal grievance to do so within 90 days of the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[37] What is required in terms of the raising of a personal grievance is dealt with at s 114(2) of the Act, which provides as follows:

- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the

employer or a representative of the employer aware that the employee alleges a personal grievance that the employer wants to address.

[38] There are several principles relevant to whether a personal grievance has been raised in accordance with s 114 of the Act. I summarise them as follows:¹

- (a) The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing, and there is no particular formulation of words that must be used.
- (b) Whether a grievance has been raised for the purposes of s 114(2) is to be objectively determined having regard to the facts of each case. The test is “whether to an objective observer the communication was sufficient to elicit a response from the employer”.
- (c) There is no requirement that the grievance be raised in writing, and it may be established by a “totality of communications”.
- (d) The level of detail required is not such as would be required in, for example, a statement of problem.
- (e) The substance of the grievance must be made clear, but an employee is not required to specify the type of relief sought.
- (f) Merely advising an employer that the employee has a personal grievance, or specifying the statutory type of grievance without more, will be insufficient.

[39] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, Judge Holden said:²

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

Discussion and analysis

[40] Ms Boardman claims that she was unjustifiably dismissed from, and unjustifiably disadvantaged in, her employment with Klomp Transport. Her statement of problem refers to four alleged personal grievances as follows:

- (a) unjustified dismissal;

¹ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2009] NZEmpC 35, at [36] to [38]; *Idea Services Ltd (in statutory management) v Barker* (2013) 10 NZELR 262, at [39] and [41]; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 30; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] 1 ERNZ 139; *Creedy v Commissioner of Police* [2006] 1 ERNZ 517;

² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [38].

- (b) unjustified disadvantage said to relate to an alleged failure by Klomp Transport and TGE to deal with a complaint made by Ms Boardman about alleged behaviour by Mr Tinkler;
- (c) unjustified disadvantage said to relate to Klomp Transport and TGE failing to respond appropriately to concerns raised by Ms Boardman concerning an incident at New World on 18 August 2023; and
- (d) alleged unjustified disadvantage relating to her suspension from employment.

[41] Mr Klomp's evidence is that Ms Boardman laid a complaint regarding Mr Tinkler's alleged behaviour directly with TGE and that his involvement was limited to acting as a support person for Ms Boardman. He says that he was aware of the nature of the complaint but that it was directed at TGE, and it was TGE that arranged the meetings at which the issue was discussed. He also says that TGE addressed Ms Boardman's concerns by email on 25 August 2023 and that she raised no further issues as to the alleged behaviour of Mr Tinkler. He also says that no personal grievance was raised by Ms Boardman as to an alleged assault at New World.

[42] Ms Boardman's representative wrote to Klomp Transport and TGE on 26 October 2023 raising the personal grievances. That letter asserted that Ms Boardman had been unjustifiably dismissed from her employment on 13 October 2023. The letter also referred to each of the three incidents and actions/inactions said to give rise to the claims as outlined in the statement of problem lodged. The letter explicitly noted that it was considered that TGE had caused or contributed to the personal grievances.

[43] It is uncontested that a personal grievance relating to Ms Boardman's dismissal was raised in the correspondence of 26 October 2023 and in accordance with the requirements of s 114 of the Act. The dismissal occurred on 13 October 2023 and the personal grievance was therefore raised with Klomp within the 90-day statutory timeframe.

[44] The letter of 26 October 2023 also contended that Ms Boardman had been unjustifiably disadvantaged in her employment as follows:

- (a) That a complaint said to have been raised by Ms Boardman as to the alleged conduct of Mr Tinkler was not appropriately dealt with by Klomp Transport and TGE, including having regard to the response provided by TGE on 14 September 2023.

- (b) That a complaint or concern had been raised by Ms Boardman as to an alleged assault said to have occurred on 18 August 2023, and that Klomp Transport and TGE had failed to respond appropriately.
- (c) That Ms Boardman had been unjustifiably disadvantaged by being suspended from her employment without consultation or good reason.

[45] Ms Boardman says a complaint was raised as to Mr Tinkler's alleged conduct, with both Klomp and TGE, in late July or early August 2023. An outcome of sorts relating to that complaint was provided by TGE on 25 August 2023. The relevant personal grievance claimed is that Ms Boardman was disadvantaged by a failure or inadequacy in how the complaint was dealt with. The merits of that claim are yet to be considered and for present purposes, those being the consideration of whether the personal grievance was raised, it does not matter that there is contested evidence as to whether the complaint about Mr Tinkler was made to Klomp Transport or not. The issue is whether the personal grievance was raised compliantly with Klomp Transport, and I find that clearly occurred by way of the letter of 26 October 2023. It may in due course be shown that no complaint was raised with Klomp Transport, albeit that that may not in any event be determinative of the matter. However, that is not an issue to be determined at this juncture.

[46] The same is true in relation to the unjustified disadvantage claims as to inaction relating to the alleged assault and as to the suspension from employment. The first of those grievances relates to the alleged inaction and/or mishandling of a complaint. That personal grievance was raised in the letter of 26 October 2023. Whether the initial complaint was raised with Klomp Transport as to the alleged assault itself, and whether Ms Boardman sought to have Klomp Transport deal with any such complaint, are issues likely to be relevant to the consideration of the substantive issues. The substantive aspects of that claim are yet to be considered and are not the subject of this determination. The personal grievance relating to the suspension was otherwise raised compliantly.

Conclusion as to s 114

[47] I find that each of the claimed personal grievance claims were raised compliantly with s 114 of the Act.

Should TGE be joined to the proceedings as a controlling third party?

Section 103B of the Act

[48] Section 103B of the Act sets out the relevant circumstances in which an application may be made to join a controlling third party to a personal grievance.

[49] Section 103B requires that the employee has validly raised the relevant personal grievance with their employer in compliance with s 114 of the Act, and additionally that an application be made to the Authority seeking that the grievance be resolved. The grievance must relate to an action alleged to have occurred while the employee was working under the direction and control of a controlling third party.³ Those requirements may be seen as threshold requirements that must be met for the section to have application and for Authority to consider any application.

[50] If the threshold requirements have been met, the Authority must then consider whether the controlling third party was notified of the personal grievance in compliance with the requirements of s 115A of the Act and, on the standard of there being an arguable case, whether the party to be joined is a controlling third party and whether their actions caused or contributed to the personal grievance.⁴ If the Authority is satisfied of those matters, then the application must be granted.⁵

[51] Subsection 103B(3)(a) of the Act requires consideration of whether the notification requirements provided for at s 115A, dealing with notification to controlling third party of personal grievances, have been complied with.

[52] Section 103B(3)(b) of the Act requires that an arguable case be made out that the party to be joined is a *controlling third party* and that its actions caused or contributed to the personal grievance. Consideration of whether the party to be joined is a controlling third party necessarily requires consideration of the meaning of that term provided for at s 5 of the Act. The meaning of *controlling third party* is dealt with at s 5 of the Act 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

³ Employment Relations Act, s 103B(1).

⁴ The Act, s 103B(3)(b).

⁵ The Act, s 103B(3).

that an employer exercises, or is entitled to exercise, in relation to the employee.

[53] The assessment to be undertaken as to s 103B(3)(b) is whether an arguable case has been established, it is not a conclusive or final assessment. To determine this matter, I must consider whether there is a serious question to be tried,⁶ in other words that Ms Boardman's claims are not vexatious or frivolous.⁷

Submissions

Submissions for Ms Boardman

[54] It is submitted for Ms Boardman that the relevant notification requirements in the Act have been complied with, including those as to TGE. Submissions for Ms Boardman asserted that the arguable case threshold was only low.

[55] As to whether TGE is a controlling third party, it is submitted that industry context was important. The focus of that submission was, in effect, that the real nature of the relationship between TGE and Klomp Transport was one of employment and that if so, Ms Boardman would logically also be an employee of TGE. It is also submitted that there was a triangular relationship that was extremely intimate and that it could not reasonably be argued that there was no relationship between TGE and Ms Boardman, and that TGE relied on the contract between it and Klomp Transport to directly control Ms Boardman. It is submitted that that is the case despite Ms Boardman not being named specifically in the contract.

[56] In making the above submission, the Services Agreement was referred to, including as to compliance with TGE policies, the setting of minimum hours of work, an inability to subcontract duties, the tools and equipment to be used, how duties will be performed, and control of the vehicle to be used. The submissions also referenced the letter of 26 September 2023 from TGE to Klomp Transport requiring Ms Boardman be removed from "all assignments" by reference to the terms of the Services Agreement which provide TGE a right to withdraw approval for any driver. Ms Boardman contends that reliance on the Services Agreement was made to control the relationship with Ms Boardman and that the Services Agreement gave TGE the right to control or direct Klomp Transport's employees in a substantially similar way as Klomp Transport could.

⁶ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, at [12] and [13].

⁷ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, at [12].

[57] Ms Boardman contends, in relation to whether the Services Agreement was one under which she performed work for the benefit of TGE, that there is no requirement that any benefit be monetary or financial. It was submitted that the relationship was one of mutual benefit and that TGE benefited financially from a customer service perspective and from a ‘worker welfare’ perspective. It was submitted that a financial benefit was received based on the weight of goods carried and that Ms Boardman sorted and delivered goods for the benefit of TGE’s customers.

[58] Ms Boardman, in relation to customer service, referred to the Services Agreement providing that Klomp Transport drivers would use their “best endeavours to maintain and enhance [TGE’s] relationship and business with its customers” and submitted that TGE’s complaints to Klomp Transport about Ms Boardman were related to perceived negative servicing.

[59] As to the actual exercise of control, Ms Boardman’s submissions referred to the requirement for Ms Boardman to sign TGE’s health and safety policies before commencing work, and otherwise Ms Boardman’s affidavit as to control and direction exercised. In contrast, Ms Boardman submitted that the only legal document as between her and Klomp Transport is her IEA. It was submitted that Mr Klomp did not control the engagement process relating to Ms Boardman and that it was instead TGE that did so as well as it exclusively providing training, inductions, and certification.

[60] In supplementary submissions, Ms Boardman referred to the drug, smoking and alcohol policy and requirements as to interactions with others being dictated by TGE. The submissions also referred to TGE initiating licencing checks, criminal record checks, and the placement of in-cab camera’s at TGE’s behest and monitoring by TGE for various purposes including training and instruction and for performance management and disciplinary reasons.

[61] Ms Boardman also submitted there was day to day control and direction by TGE, and that there was regular contact with TGE management and staff in relation to operational decisions. It was also submitted that control and direction extended to performance and health and safety matters and that there were regular Monday meetings attended by workers, whether contractors or employees, indicating no significant operational distinction between them.

[62] In terms of whether TGE's actions caused or contributed to the personal grievances, Ms Boardman suggests there was clear involvement in each of the personal grievances. Ms Boardman's submissions point to her having raised a concern regarding Mr Tinkler, being a TGE employee, and the arrangement of meetings seeking to resolve the issue by TGE. It is submitted that it is arguable that TGE caused or contributed to the handling of the matters raised.

[63] Ms Boardman submits that she raised a concern with TGE and Klomp Transport regarding one of TGE's customers and that TGE responded to those concerns in what is alleged to have been an unreasonable manner giving rise to an unjustified disadvantage claim. In relation to the claim concerning the suspension, Ms Boardman submitted that TGE's actions in requiring her to be stood down from driving for TGE caused or contributed to her personal grievance. It is similarly submitted that TGE caused or contributed to the unjustified dismissal grievance by requiring Klomp Transport to remove her from all assignments.

Submissions for TGE

[64] TGE conceded that the procedural requirements as to the raising of a personal grievance with both Klomp Transport and TGE were met by Ms Boardman. However, it submitted that Ms Boardman has not established that there is an arguable case that TGE was a controlling third party, nor an arguable case that TGE caused or contributed to the personal grievance.

[65] TGE submitted that while there was a contract between it and Klomp Transport at the relevant time, that contract provided that Mr Klomp was the "nominated driver" albeit that Klomp Transport were able to employ other persons to assist with the provision of delivery services to it. TGE also contends that it did not receive any benefit resulting from Ms Boardman's employment with Klomp Transport that was additional to the benefit it received under the contract in the form of delivery services. It submitted that Klomp Transport's ability to nominate other individuals to assist with the delivery services was of no direct benefit to TGE and that Ms Boardman had full control over how she would load up and the sequence of her deliveries.

[66] TGE also submitted that it did not, and was not entitled to, exercise control or direction over Ms Boardman that was similar, or substantially similar, to that of an employer. In summary terms it submitted that:

- (a) It was entirely reasonable to require individuals accessing loading spaces and driving heavy vehicles to be inducted into TGE's health and safety procedures. The requirements are consistent with TGE's legislated responsibilities and TGE exercised no greater control over Ms Boardman than it would of any other contractor.
- (b) The ability to withhold approval for an individual is commonplace and does not indicate control or direction over the work that Ms Boardman did for Klomp Transport. At the time the contract was entered, Klomp Transport had no employees but could nominate additional drivers. It contends that having the ability to approve (or withhold approval) is entirely reasonable and would simply mean Klomp Transport would need to address the issue with the employee from an employment perspective.
- (c) Any alleged inference as to the relationship between Klomp Transport and TGE being one of employment is incorrect and irrelevant, control and direction cannot be established by such an inference.
- (d) Ms Boardman's evidence as to her alleged interactions with TGE and/or its employees is overstated and incorrect. Ms Boardman had full control over how she would load up and the sequence of her deliveries. While there would sometimes be direct contact between TGE and Ms Boardman regarding delivery issues, that was limited.

[67] TGE has the ability to withhold approval for any individual employed by Klomp Transport to perform services in certain circumstances. It contends that such an ability is commonplace and that it indicates no control or direction over the work Ms Boardman did for Klomp Transport. TGE submitted that such an ability was reasonable in the context of Klomp Transport having the ability to nominate additional drivers and said that any withholding of such approval would simply mean that Klomp Transport would need to address any issues with Ms Boardman from an employment perspective.

[68] TGE also submitted that an arguable case has not been established that TGE caused or contributed to the personal grievances raised. It submitted that the alleged personal grievance relating to Ms Tinkler's alleged actions is not a personal grievance capable of being pursued as the matter was resolved with Ms Boardman's agreement. In relation to the alleged suspension, TGE submitted that that was a decision made by

Klomp Transport and that TGE's involvement was limited to passing on concerning information received and advising Klomp Transport that Ms Boardman could not operate on its runs while the matter was being investigated.

[69] In relation to the alleged unjustified dismissal, TGE submitted that nobody from TGE was involved in the disciplinary process that resulted in the dismissal, that the decision was one for Klomp Transport as the employer, and that TGE's views as to the justification for the dismissal were irrelevant. It contends there is no evidence establishing any involvement, influence or pressure by TGE in the process and that any alleged reference to Mr Klomp admitting he was pressured by TGE is not supported by any primary evidence.

Analysis and discussion

Threshold requirements

[70] Ms Boardman raised the personal grievances with her employer, Klomp Transport, in accordance with s 114 of the Act and has made application to have the Authority resolve those personal grievances. The claims made relate to actions alleged to have occurred while she was working under the control or direction of TGE.

[71] I am satisfied that the prerequisite matters at ss 103B(1) and 103B(2) of the Act are met.

Notification - did Ms Boardman notify TGE in accordance with s 115A of the Act?

[72] Section 103B(3)(a) of the Act requires consideration of whether the notification requirements provided for at s 115A, which deals with notification to a controlling third party of personal grievances, have been complied with.

[73] TGE concedes that Ms Boardman raised a personal grievance with Klomp Transport and that TGE were notified that its actions were alleged to have caused or contributed to the personal grievance.

[74] The relevant notification was made to TGE within the relevant 90-day period. I am satisfied that the requirement to notify TGE in accordance with s 115A of the Act has been complied with by Ms Boardman.

[75] Given the threshold and notification requirements have been met, the remaining question is whether the Authority can be satisfied that an arguable case has been made

out that TGE is a controlling third party and that TGE's actions caused or contributed to Ms Boardman's personal grievance.

Is there an arguable case that TGE is a controlling third party?

[76] The meaning of *controlling third party* is dealt with at s 5 of the Act 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.

[77] It is of course the case that Ms Boardman was employed by Klomp Transport as opposed to TGE. That is not a question that determines whether TGE should be joined as a controlling third party.

[78] The existence of a commercial contract that is not described as a labour hire arrangement, particularly in circumstances where there is evidence that in practice the arrangement was at least not limited to that described in the commercial contract, is not an impediment to the application made. Indeed, it has been indicated that a purpose of the relevant provisions is to prevent controlling third parties being insulated by interposing an employer between it and an employee.⁸

[79] In summary terms, the evidence currently before the Authority is that there was an arrangement between TGE and Klomp Transport under which Ms Boardman would deliver goods from TGE's premises and that TGE benefited from that work in that she delivered goods to its customers. It is at least arguable that TGE had an arrangement under which Ms Boardman performed work for its benefit.

[80] There was an arrangement under which TGE was provided services by Klomp Transport, including via 'drivers' to be appointed under the Services Agreement. It is arguable that Ms Boardman performed work for the benefit of TGE under that arrangement. It is arguable in my view that the arrangement goes further than merely being a contract for the provision of services and that it deals with arrangements relating to the performance of work by individuals engaged by Klomp Transport.

⁸ *Riddler v Meridian Energy Ltd* [2023] NZEmpC 87, at [45].

[81] Klomp Transport is paid by TGE for the provision of services to it under the commercial arrangement. However, as is likely always the case, the work performed by an employee will result in some benefit to their employer. The fact that there is an intermediary in the form of Klomp Transport providing services, or that Klomp Transport received some benefit, is not an impediment to a conclusion that Ms Boardman was performing work for the benefit of TGE.

[82] Here, it is at least arguable that the work being performed by Ms Boardman was for the benefit of TGE. While it was making payment to Klomp Transport, it received income from the work performed by Ms Boardman from its clients. There are also arguably reputational and good will benefits derived from Ms Boardman's work that were of benefit to TGE.

[83] There is an arguable case that there was a contract or other arrangement under which Ms Boardman performed work for the benefit of TGE.

[84] I now turn to consider the issue of control and direction.

[85] The controlling third party provisions apply despite the absence of a direct employment relationship with the proposed controlling third party. They are designed to deal with situations where in practical terms an individual is working under the direction and control of a person not being their employer, notwithstanding that they are not the legal employer, and in circumstances where there is unlikely to be documentary evidence consistent with there being a direct employment relationship. In essence, the issue arises where other formal indications of employment are likely not present, but where the third-party exercises control and direction over the employee.

[86] The type of control and direction that an employer may exercise is wide in scope. Control and direction is not in my view synonymous with the control and integration test as used in assessing whether an individual is engaged in a contract of service. However, aspects of that assessment are relevant and helpful in terms of the test under s 103B. Control is something that may be differ in practice than in any documented agreement or contract.

[87] A controlling third party would seldom if ever have control and direction such that it would be formally and directly making decisions as to the employment of employees. They will often however be in a position such that they are in effect making

such decisions or otherwise have such a degree of influence that the results, and implications for employees, flow from their decision making and influence. There is an arguable case that that was the case in relation to Ms Boardman, including in relation to her suspension from duties, being prohibited from performing work related to TGE, and ultimately the dismissal.

[88] I do not consider the reasonableness or otherwise of the arrangements, nor the degree to which arrangements may be commonplace, to be relevant to the assessment required by s 103B(3) of the Act as was submitted for TGE. The withholding or withdrawal of approval relating to an individual goes in my view to the issue of control. It is not of course determinative, but does, especially where there is otherwise evidence of control and direction as to the performance of work, go to the ability of TGE to control and direct whether, and in what circumstances, Ms Boardman could perform work.

[89] While I do not consider the health and safety induction materials or processes to be determinative as to whether TGE exercised, or was entitled to exercise, control or direction, I do consider it relevant. Statutory health and safety obligations apply to persons other than employers and as is commonly the case inductions and site specific requirements may well be put in place directly by the relevant obligation holder with application to individuals other than those that over which they have control and direction similar to that an employer would have. However, the health and safety requirements were not necessarily limited to actions occurring at TGE's depot and included, for example, in-cab monitoring. I consider this indicative but not determinative. It is an issue to be considered in conjunction with the other evidence available as to control and direction.

[90] Ms Boardman also reports communication with TGE as to the work she was performing in terms of where, what and how her work was to be carried out, including being directed by TGE to undertake deliveries that its direct employees could not. Additionally, she says that TGE employees directly raised performance issues with her, including being reprimanded by Mr Tinkler in circumstances that led to one of per unjustified disadvantaged claims. While that evidence is yet to be tested, it is at least arguable that Ms Boardman was, on a practical level, subject to the direction and control of TGE as to the manner in which her work was performed.

[91] I also consider Ms Boardman's evidence as to the absence of engagement with Klomp Transport relevant. Her evidence goes to attendance at TGE meetings at which KPI's were discussed and to training being delivered by TGE, and that no such similar arrangements were in place with Klomp Transport. Further, it goes to an alleged absence of there being a practical distinction in how TGE treated its direct employees, contractors, and those technically employed by Klomp Transport.

[92] An arguable case has been made out that TGE exercised control and direction over Ms Boardman that is substantially similar to the control and direction that an employer exercises or is entitled to exercise in relation to Ms Boardman.

[93] There is an arguable that TGE was a controlling third party.

Is there an arguable case that TGE's actions caused or contributed to the personal grievance?

[94] It is clear is that TGE played an active role in the complaint made by Ms Boardman as to the alleged conduct of Mr Tinkler. Indeed, TGE submit that the matter was resolved based on terms agreed following meetings it arranged and on terms documented by it. Ms Boardman contends that the relevant letter glossed over the issues and contributed to inaction or a failure to appropriately deal with the complaint made. I consider it at least arguable that TGE caused or contributed to the personal grievance in that it is contended that it took insufficient steps to address the matter.

[95] TGE contends that Ms Boardman's claims relating to Mr Tinkler were resolved and therefore that there is no personal grievance capable of being pursued. That is not the case. Whether the matter was resolved on the basis asserted by TGE may be relevant to the substantive investigation of Ms Boardman's claim. In effect, what is contended is that Ms Boardman's complaint to TGE was resolved. However, the consideration here is whether there is an arguable case that TGE caused or contributed to the personal grievance. The claimed personal grievance is, in effect, that appropriate action was not taken. It is at least arguable that TGE caused or contributed to that.

[96] In terms of Klomp Transport's suspension of Ms Boardman, it is arguable that TGE caused or contributed to the personal grievance. The suspension came about following TGE's advice to Klomp Transport that Ms Boardman could not perform work related to its business. While not a direction to suspend Ms Boardman from her employment, it is at least arguable that that instruction contributed to the suspension.

That is especially so where it appears to be uncontroversial that Ms Boardman's work related exclusively to TGE.

[97] The issue of cause and contribution in relation to Ms Boardman's unjustified dismissal claim is of a similar nature. Mr Tinkler recorded in his affidavit that TGE exercised a contractual right to 'request' that Ms Boardman not be used on any of TGE's runs. Correspondence from Mr Tinkler to Mr Klomp on 26 September 2023 puts the matter in stronger, mandatory, terms. On either approach, it is arguable that TGE caused or contributed to the dismissal.

[98] Further, while, as submitted by TGE, there is no current primary evidence from Mr Klomp as to any pressure from TGE to dismiss, the threshold of an arguable case is relatively low. A recording of the meeting between Ms Boardman and Klomp Transport on 13 October 2023 has been provided to the Authority. While Mr Klomp has not given any relevant direct evidence, the recording evidences an acknowledgement that Mr Klomp felt he had been pressured by individuals from TGE to relieve Ms Boardman of her position. While yet to be considered in any full way, there is at least an arguable case that TGE caused or contributed to the dismissal.

[99] An arguable case has been made out that TGE is a controlling third party and that its actions caused or contributed to each of the personal grievances raised by Ms Boardman.

Conclusion

[100] Ms Boardman raised each of the claimed grievances compliantly with the Act and within the statutorily provided timeframe. Those personal grievances are to be the subject of substantive investigation by the Authority.

[101] Ms Boardman's application to have TGE joined to the proceedings as a controlling third party is successful. TGE is joined to the proceedings as a controlling third party.

[102] The findings in this determination as to the evidence are provisional in nature and all relevant evidence will be tested during the Authority's substantive investigation.

Direction to mediation

[103] I have considered for the purposes of s 103B(5) of the Act whether the parties should be directed to attend mediation and I conclude that is appropriate. The parties, including TGE, are directed to attend mediation within 20 working days.

[104] A further case management conference will be convened should the matter be unresolved following mediation.

Costs

[105] Costs are reserved pending consideration of Ms Boardman's substantive claims.

Rowan Anderson
Member of the Employment Relations Authority