

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 851
3354883

BETWEEN	SHARMAN MATENGA Applicant
AND	QSL (NZ) PTY LIMITED First Respondent
AND	FEDEX LOGISTICS (NEW ZEALAND) LIMITED Proposed Controlling Third Party

Member of Authority: Marija Urlich

Representatives: Isabel Dixon, advocate for the Applicant
Richard Harrison, counsel for the First Respondent
Aaron Lloyd and Nicola Whiteman, counsel for the
Proposed Controlling Third Party

Investigation Meeting: 29 September 2025

Determination: 23 December 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] QSL (NZ) Pty Limited (QSL) employed Mr Matenga to work at a site owned by Fedex Logistics (New Zealand) Limited (FedEx). This determination deals with an application Mr Matenga brings to join FedEx as a controlling third party to personal grievances he has raised with QSL for unjustified constructive dismissal and unjustified disadvantage.¹

¹ Employment Relations Act 2000 s 103B.

[2] FedEx opposes the application. It says Mr Matenga has not met the required threshold that there is an arguable case that it is a controlling third party or that that its actions caused or contributed to his personal grievance for unjustified dismissal. It says other personal grievances for unjustified disadvantage have not been sufficiently particularised to be validly raised in time.

[3] QSL has advised it will abide the decision of the Authority in respect of the application.

The Authority's investigation

[4] In determining this matter affidavits of Mr Matenga in support of the application and affidavits opposing of Benjamin Hagan, QSL's supply chain operator for Australia and New Zealand, Jocelyn Baclor, people operations manager FedEx Australia and New Zealand and Chelsea Turner, who is employed by FedEx as a supply chain operations specialist. The initiating and responding documents filed by the parties and the attached documents have also been considered as have their submissions. After affidavits and submissions were filed an investigation meeting was convened at party request to hear submissions.

Background

[5] Mr Matenga was employed by QSL as a team leader from 25 July 2024. His terms of employment are set out in an individual employment agreement. At all times he carried out his duties at a warehouse site where FedEx employees also worked. He reported to Nitin Kataria who was not located at the warehouse.

[6] QSL and FedEx are party to a master service agreement (the services agreement) for the provision of "warehousing and transportation services in Australia and New Zealand for FedEx's customer inventory". Section 5 of the agreement details the relationship between QSL and FedEx is one of independent contractor, subclause 5 of which deals with performance and provides:

In relation to the performance of the Services by the Employees, if any Employee causes damages to FedEx or third parties by wilful misconduct or negligence or similar conduct; if an Employee fails to comply with the Service Standards, FedEx's facility rules, or other rules and procedures; or if FedEx reasonably determines that any Employee is not suitable to perform the Services because his/her efficiency of processing the work is notably low and does not achieve the intent of the Services, then FedEx may request, by giving

the Contractor an explanation of reasons, that the Contractor take appropriate measures, such as instruction, improvement, or personnel changes, in order to ensure that the Services are performed timely and properly. Contractor shall not unreasonably withhold its consent to such request.

[7] Section 12 describes QSL's warranties as to compliance with laws. Section 19 deals with health and safety.

[8] From September 2024 onwards Mr Matenga says he experienced discriminatory remarks, retaliatory behaviour and interference from FedEx. He says QSL failed to take reasonable steps to protect him from this conduct breaching the obligation to provide a safe workplace and ongoing hostile treatment contributed to his constructive dismissal by way of resignation on 12 December 2024.

[9] On 4 September 2024 at a toolbox meeting with Mr Matenga, his team and another FedEx employee, Ms Turner used a racial slur to describe untidy matters in the workplace. Ms Turner is one of two FedEx employees who perform work at the warehouse. They work in specialist supply chain operations roles in which they were required to maintain regular contact with Mr Kataria and Mr Matenga. FedEx says its employees did not exercise day-to-day supervision or control over Mr Matenga or his work and their role was to support Mr Matenga and his team to perform warehousing operations. In particular, FedEx says their employees' communications with Mr Matenga were strictly operational including highlighting operational issues for resolution requesting feedback from QSL on operational and personnel matters and requests for QSL to ensure its employees were using correct packing and packing processes.

[10] On 9 September Mr Matenga wrote to Ms Turner expressing his concern and disappointment at her use of the phrase, outlined why it was an inappropriate and offensive, including in the workplace and ended the email:

Although you are our customer and I respect that, I do not want any repercussions or backlash toward me in my daily interactions with you, or for my job to be in jeopardy because I raised this issue with you.

[11] On 10 September Mr Matenga forwarded the email to his manager, Nitin Kataria.

[12] On 7 October QSL received a complaint about Mr Matenga's conduct towards a member of his team at a toolbox meeting held that day.

[13] On 9 October Mr Matenga wrote to Mr Kataria by text message:

I am feeling very isolated and stressed due to how I am being treated over the incident on Monday and I am considering taking medical stress leave from today unless I can get some certainty from you that my role as team leader has not changed. Not once has my employer followed up the incident with [Ms Turner] making the racist comment, yet she has been able to interfere with my role, speak to me in a condescending manner and nit pick everything I and the team do. I also understand that you have asked all staff for statements despite telling me that [QSL HR] said it was [Ms Turner] who escalated it. I feel like I have been thrown under the bus and hung out to dry by Nitin and it's unacceptable. Although I will be in this morning, if it does not improve and she is allowed to continue to undermine me, then I will go to my doctor as I have been doing for the past 4 weeks due to work related stress. I am the only employee at Highbrook who has not been sick and I stay there working long hours to get things done and I have to wear the mistakes of everyone else and put up with [Ms Turner] interfering. This in my view is disadvantaging me in my employment.

[14] Mr Matenga was subsequently certified medically unfit to attend work due to work related stress from 17 October to 1 November. During this period, he attended jury service with QSL's knowledge.

[15] Mr Matenga raised a complaint with QSL about Ms Turner's conduct which was forwarded to FedEx to investigate. FedEx undertook an investigation into Mr Turner's actions.

[16] On 4 November QSL held an investigation meeting with Mr Matenga to discuss and review information and responses regarding the 7 October complaint.

[17] On 6 November Mr Matenga returned to work. His probationary period was extended, and he was issued with a written warning.

[18] On 12 November Mr Matenga was advised of the outcome of the FedEx investigation into the complaint he had made about Ms Turner.

[19] On 25 November QSL held a further probationary review meeting with Mr Matenga.

[20] On 4 December Ms Turner raised concerns about Mr Matenga's performance with her manager who referred them to QSL under clause 5 of the service agreement. The complaint was made known to Mr Matenga and a meeting set up. In addition, and as a consequence of the complaint it is understood Mr Kataria told Mr Matenga to focus on shop floor duties and his team leader responsibilities were removed. On 12 December Mr Matenga resigned from his employment with QSL.

The Law – the test for joining a controlling third party

[21] Section 103B(3) of the Act provides an application to join a controlling third party must be granted if:

- (i) FedEx has been notified in accordance with s 115A of the Act; and
- (ii) an arguable case has been made that FedEx is a controlling third party and its actions caused or contributed to Mr Matenga's personal grievance.

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

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

Discussion

- (i) *Notification to the controlling third party?*

[23] Section 115A provides an employee has complied with the requirement to notify a controlling third party that they consider their actions have caused or contributed to their personal grievance if the notification occurs within the same statutory 90-day period in which the effected employee must raise their personal grievance with their employer. Mr Matenga lodged an application in the Authority on 31 January 2025 following his employment ending with QSL on 12 December 2024. He has met the notification requirements under s 115A of the Act for the matters arising within 90-days of that date and as described in the statement of problem.

- (ii) *An arguable case FedEx is a controlling third party which has caused or contributed to the personal grievance?*

[24] 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 a s 115A assessment - an arguable case is a relatively low threshold assessment.

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

[25] To join FedEx as a controlling third party the Authority must find to a sufficiently plausible basis that the two arms of the s 5 definition of controlling third party are met.³

(a) Does FedEx derive a benefit from a contract with QSL?

[26] FedEx and QSL perform services to support the operations of another business, Arthrex New Zealand Limited at a warehouse leased by QSL for that purpose (the QSL warehouse). This is an ongoing commercial arrangement between these businesses.

[27] FedEx contracts out certain warehousing operations for the Arthrex operations to QSL. A master services agreement and supplementary agreement (the services agreement) govern the commercial arrangement between FedEx and QSL. The services agreement states QSL shall provide warehousing services for the benefit of Arthrex.⁴ Mr Matenga is an employee of QSL. During his employment he carried out his work at the QSL warehouse.

[28] FedEx derives a benefit from this contract – staff carrying out warehousing work are employees of QSL and QSL bears the responsibilities of an employer which otherwise may fall to FedEx if it employed those staff to carry out those duties.

[29] The first limb of the section 5 definition of controlling third party is met.

(b) Did FedEx exercise control or direction of Mr Matenga similar or substantially similar to an employer?

[30] FedEx says this is not the case. It says QSL is solely responsible for the warehousing services it is contracted to perform under the services agreement and that this includes determining how it runs its warehousing operations, preparing its own labour plan based on volume expectation as communicated by FedEx and managing its employees in the QSL warehouse. It says as the QSL team leader Mr Matenga was responsible for managing QSL's operations and ensuring QSL met its contractual obligations to FedEx and that with the support of his manager, also an employee of QSL, he:

³ Employment Relations Act 2000, s 5.

⁴ Witness statements Jonathon Norman dated 30 August 2022 at [12].

- (i) ran the warehouse operations on a day-to-day basis;
- (ii) allocated tasks to QSL employees and supervised their performance of warehousing services; and
- (iii) managed QSL's daily work capacity plan, ensured site maintenance and operational standards were met and managed administrative tasks including responding to FedEx's communications.

[31] FedEx says engagement and collaboration between FedEx and Mr Matenga was necessary for the services agreement to be properly performed as well as the discharge of obligations between FedEx and Arthrex. It says this engagement was operational only. In contrast it says QSL at all times exercised direction and control over Mr Matenga and points to the following:

- (i) QSL determined the terms and conditions of Mr Matenga's employment which FedEx had no ability to determine or vary;
- (ii) Mr Matenga reported directly to a QSL manager and had no reporting line to any FedEx employee;
- (iii) Mr Kataria provided day-to-day support for Mr Matenga in the performance of his role including monitoring, assessment and management;
- (iv) the probationary period to which Mr Matenga was subject and the detailed performance framework it operated for him within that period;
- (v) when Mr Matenga had concerns about his employment and work he raised them with Mr Kataria;
- (vi) QSL addressed these concerns with Mr Matenga and raised issues with him about his conduct when raised by other personnel about Mr Matenga; and
- (vii) QSL commenced and led a disciplinary process against Mr Matenga.

[32] FedEx says as QSL's customer it was entitled to raised concerns with it about Mr Matenga's conduct where it was impacting on Arthrex's operations which in turn impacted its ability to meet its obligations to Arthrex.

[33] FedEx submits Chelsea Turner and Ben Hagan did not exercise direction or control over Mr Matenga and their engagement with him was operational.

[34] Mr Matenga says FedEx had a contractual right to control Mr Matenga's work and did in fact control it in a manner substantially similar to that of an employer. He says this control contributed to or caused his constructive dismissal:

- (i) clause 5 of the service agreement gives FedEx a contractual right to direct the staff of QSL including Mr Matenga;
- (ii) the clause includes FedEx has a right to request the contractor take appropriate measures such as instruction, improvement or personnel changes;
- (iii) Mr Hagan relied on this clause to require Mr Matenga be removed from the planning and team lead function on 4 December 2024; and
- (iv) Ms Turner exercised regular and direct control over Mr Matenga in a manner substantially similar to that of an employer.

[35] In *Prasad v LSG Sky Chefs New Zealand Limited* the Court analysed the features of control and integration in the triangular employment relationship present in that matter and found:⁵

...that neither plaintiff [employee] 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.

[36] In *Head v Chief Executive of the Inland Review Department*,⁶ a case relevant to the application of the control and integration test, a full bench of the Employment Court found apt the observations made in *Prasad*:⁷

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 practise, to determine what the real nature of the relationship is.

⁵ *Prasad v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 835 at [80].

⁶ *Head v Chief Executive of the Inland Review Department & Anor* [2021] NZEmpC 69.

⁷ *Prasad*, above n. 9, at [93].

[37] The task of the Authority then is to assess where on the “spectrum” of control and direction this case sits to determine if FedEx meets the second limb of s 5. Where then does this case sit on the spectrum? This is not a situation where FedEx in law employed Mr Matenga. Further, this does not appear to be a situation where Mr Matenga was operating without the degree of autonomy, to use the language of *Prasad*, that might reasonably be expected of a worker who was not one over whom FedEx exercised control and direction similar or substantially similar to that which an employer may exercise.

[38] An arguable case is made out that Mr Matenga’s day-to-day work – the what, when, where, how and by whom – was under the control and direction of FedEx. The evidence before the Authority as detailed in Ms Turner’s affidavit of 4 July 2025 is she intervened in the direction and management of Mr Matenga’s team when she felt it was necessary and that the QSL team deferred to this involvement. This correlates with Mr Matenga’s affidavit evidence. While I accept the overarching motive for Ms Turner’s actions was the fulfilment of operational matters this has, to an arguable standard blurred matters of control and direction between the FedEx, QSL and Mr Matenga and impacted his ability to discharge his duties.

[39] While I accept QSL was engaged in a probationary process with Mr Matenga the genesis of his dissatisfaction with work appears to arise from Ms Turner’s use of a racial slur during a toolbox meeting and his growing concerns about her intervention in the day-to-day discharge of his duties. These issues appear to have catalysed an escalation of matters concerning Mr Matenga - the management of his team, the ongoing probationary process and his engagement with such, Mr Matenga’s period of work related sick leave and FedEx’s raising of performance concerns with QSL about Mr Matenga’s conduct and subsequent actions taken by QSL including removal of duties. The bookend events appear to be matters entirely within the control of FedEx being the actions of their staff and are likely an incidence of control and direction similar to that an employer would undertake.

(iii) *Did FedEx contribute to the circumstances of Mr Matenga’s personal grievance?*

[40] It is established to the necessary threshold that the actions of FedEx staff in respect of Mr Matenga’s day-to-day discharge of his duties and FedEx’s dissatisfaction

with Mr Matenga's performance which contributed to the circumstances of his personal grievance.

Outcome

[41] Mr Matenga's application to join FedEx as a controlling third party is successful.

Costs

[42] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority