

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2026] NZERA 47
3354383, 3354323, 3354303

BETWEEN	JOSHUA CAIN McCLUNG, EVA MIKLASOVA and SUMIT CHHABRA Applicants
AND	HR EXPERTS HORTICULTURE LIMITED First Respondent
AND	DMS PROGROWERS LIMITED Second Respondent

Member of Authority: Geoff O'Sullivan

Representatives: Joshua McClung, advocate for the Applicants and
purportedly for the first respondent.
James Hakaria & Lucy Nolan, for the second
Respondent

Investigation Meeting: On the Papers

Submissions and other information received: 27 November 2025

Determination: 28 January 2026

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sumit Chhabra, Eva Miklasova and Joshua McClung (the applicants) were all employed by HR Experts Horticulture Limited (HR). They all have lodged an application under s 103B of the Employment Relations Act 2000 (the Act) to join DMS Progrowers Limited (Progrowers) as a controlling third party to resolve personal grievances they say they have raised with HR. The application is on the basis that Progrowers caused or contributed to the personal grievances with HR because HR

would not have terminated their employment if not for the requirements of Progrowers. The second respondent denies there is any basis for joining it as a controlling third party to these proceedings. It also denies all claims against it. HR seems to be arguing Progrowers is a controlling third party but it must be noted that Mr Chhabra is the Director of HR.

[2] This determination resolves the issues of whether Progrowers should be joined as a controlling third party.

The investigation process

[3] By agreement this matter was dealt with on the basis of affidavit evidence and submissions. The Authority received affidavits from Phil Chisnall, the General Manager of Progrowers; Patrick Cooney, a Manager at Progrowers; and submissions and documentation from Mr McClung, representing himself and the other applicants, which include the Director of HR, Mr Chhabra. Mr McClung explained Mr Chhabra was bringing his action as an employee of HR but that he himself would be representing HR in the personal grievance proceedings. Mr McClung later clarified he was now representing HR although this would seem to be a clear conflict of interest.

[4] Ms Miklasova, Mr Chhabra and Mr McClung have all filed statements of problem in the Authority however no affidavits supporting their positions were filed.

Mr McClung

[5] In his statement of problem, Mr McClung states:

I do not hold HR Experts Horticulture Limited as my direct employer, responsible for the personal grievances raised here.

HR Experts Horticulture Limited Director, Mr Sumit Chhabra, has requested and supports the joining of DMS Progrowers Limited as a controlling third party, to this application and that of all other affected employees in the triangular employment relationship.

[6] That same statement appears in the statement of problem filed by Mr Chhabra and Ms Miklasova.

The issues

[7] The Authority needs to determine the following issues in this matter:

- (a) What is the legal framework for considering the application to join a controlling third party?

- (b) Applying that framework, should Progrowers be joined as a controlling third party?

The legal framework

[8] The concept of a controlling third party (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 the CTP.

Section 103B of the Act

[9] Section 103B of the Act is concerned with joining a controlling third party to the personal grievances. Section 103B(2) provides that an application to join a controlling third party can be made to the Authority if the situation is as described in s 103B(1). That is, an employee has raised a personal grievance under s 114, applied to the Authority to resolve the grievance with the employee's employer and the personal grievance relates to an action that is alleged to have occurred while the employee was working under the control or direction of a controlling third party.

[10] Section 103B(3) of the Act provides that the Authority must grant the application to join a controlling third party if the Authority is satisfied –

- (a) That the requirement to notify the controlling third party in accordance with s 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.

Section 225A

[11] Section 115A of the Act deals with notifying a third party of a personal grievance. Section 115A(1)(a) provides that an employee complies with notification for the purposes of s 103B when the employee:

- (i) Considers the actions of the controlling third party caused or contributed to the personal grievance; and
- (ii) Notifies the controlling third party of that fact within the 90-day employee notification period.

Section 5

[12] A controlling third party is defined in 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 person.

[13] 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 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.

Submissions of the parties

[14] As noted earlier, each statement of problem contains the statement the applicants “do not hold HR Experts Horticulture Limited as a direct employer, responsible for the personal grievances raised here”. Despite that statement, which would indicate that no personal grievance was raised against HR, Mr McClung has advised all applicants raised personal grievances directly with HR. It is said that these were done orally. It is submitted that verbal notice of personal grievances was given on the morning of 7 January to DMS Orchard Manager, Patrick Cooney, and HR Director, Sumit Chhabra.

[15] In his affidavit, Mr Chisnall points out that HR is a company which provides horticultural services and labour. Progrowers is a company which carries on business

¹ *Hu v Passion Fresh Ltd* [2024] NZEmpC 74 at [27].

providing orchard management and fruit packing services to orchard owners and growers. Mr Chisnall deposes that DMS owns and manages various kiwifruit orchards in the Bay of Plenty. It engages third party companies to provide horticultural services and labour to ensure that orchards are maintained throughout the year. The nature and intensity of work on a kiwifruit orchard fluctuates throughout the year due to seasonal changes and weather events which impact vine growth and the amount of maintenance required around the orchard.

[16] He deposes that Progrowers engage labour hire companies on an as needed basis and has stated that in January 2004 DMS engaged HR Experts to provide horticultural services to a few of its orchards in the Bay of Plenty. They signed a contract for services outlining those obligations. The contract between the parties was that Progrowers could request labour from HR Experts to carry out work on a particular orchard and HR Experts could provide that labour if it was able to do so. There was no exclusivity arrangement between the parties. He deposed that while such an arrangement may appear odd or loose at first glance, it was quite typical of the industry.

[17] Sometime in 2015 Mr Chisnall deposes that Zespri's good agricultural practice programmes required written agreements for all non-compliance assessment verified contractors (non CAV) who provide orchard services such as pest control, grafting, mowing, mapping and irrigation. Those agreements were known as orchard services agreements (OSA). The OSA was a simple document that recorded the orchard, the contractor and the orchard owner, the services to be provided and that the services that were to be provided would be in accordance with good agricultural practices, the relevant laws, regulations, including health and safety and biosecurity. Whilst it was a requirement for a contractor to provide the orchard owner or manager with an OSA, it wasn't a focus for Zespri at the time.

[18] This changed in August 2024 when Zespri released a guideline requiring inspectors to actively look for this document and enforce it. On the back of this, New Zealand Kiwifruit Growers Incorporated (NZKGI) produced a template document that contractors and orchard owners/managers could adopt. For the 2024 season, Progrowers and HR had signed the contract for services agreement, which was fine for that year, but the expectation was that for 2025 HR would need to provide Progrowers with an OSA. HR had an OSA to complete and return but they did not do this.

[19] On 7 January 2025, possible non-compliance issue arose when an allegation was made that HR were paying employees cash and were not paying tax. There was also a mention of possible immigration exploitation. In any event, Progrowers reached the view it was not prepared to engage with HR any further because of those issues.

Patrick Cooney

[20] Mr Cooney was a manager at Progrowers. He provided a contract for services agreement between Progrowers and HR. His affidavit reinforces the notion that Progrowers thought there was some non-compliance on behalf of HR. It was wanting information from HR in a timely manner but in the meantime it pushed pause on providing work to HR. To his surprise he says, on 9 January 2025 he received a text from Mr McClung stating:

Good morning Patrick.

I would advise you not to continue to harass Mr Chhabra with phone calls, he is not interested in hearing from you. [sic]

Any further calls to him will now be reported to investigator Sean Hatwell and NZ POLICE.

You will talk to me, or face the court case.

Na mihi

Joshua McClung

[21] Mr Cooney deposes that all he wanted from Mr Chhabra was documents and information. Most significantly he deposes that in a phone call he had with Mr McClung on 7 January 2025 no personal grievances were raised against Progrowers or HR Experts.

Should DMS Progrowers Limited be joined as a controlling third party? What personal grievances were raised with HR Experts Horticulture Limited?

[22] It is very difficult to say what grievances if any were raised with HR. It is submitted that these were raised verbally. No proper evidence was provided by HR as to when where and how personal grievances were raised against it. It was submitted that a personal grievance was raised verbally with both HR and Mr Cooney at Progrowers. Mr Cooney denies any grievance was raised with him.

[23] Mr McClung purports to act for all applicants as well as the first respondent. This creates at least the suggestion proceedings against the first respondent are a fiction designed to find a way to seek remedies against the second respondent only.

[24] I find on the balance of probabilities that HR Experts Horticulture Limited was not advised of any personal grievances. It is difficult to believe it could have been when each applicant has categorically stated they do not hold HR Experts Horticulture Limited responsible for the personal grievances. In that case the application fails at the first hurdle. The employee needs to have raised a personal grievance under s 114 of the Act to resolve the grievance with their employer. The action then needs to relate to an action that is alleged to have occurred while the employee was working under the control or direction of a controlling third party.

[25] None of the employees were working under the control of Progrowers. None of them had their employment terminated by Progrowers. Progrowers had a commercial agreement with HR Experts Horticulture Limited, and it says it was entitled to either pause, put on hold or terminate that agreement. Progrowers does not meet the definition of a controlling third party contained in s 5 of the Act. For completeness, I set this section out below:

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.

[26] I find that Progrowers does not meet the definition of a controlling third party. If I am wrong about that then, there is no evidence that the applicants have raised personal grievances prior to filing against HR. There is no evidence of employment like control exercised by Progrowers. There is no arguable case that Progrowers should be joined as a controlling third party. Nor is there an arguable case that the parties' actions caused or contributed to the personal grievances.

Conclusion

[27] I have found that DMS Progrowers Limited do not meet the definition of a controlling third party. In any event, I have found that the requirement to notify the controlling third party in accordance with s 115A has not been complied with. I have found there is no reasonable basis for an arguable case that DMS Progrowers Limited is a controlling third party as defined by s 5 of the Act. I do not consider it arguable in any event that DMS Progrowers Limited have contributed to the grievances.

[28] There is no reasonable base to conclude DMS Progrowers Limited caused or contributed to the personal grievances. All the elements set out in s 103B need to be satisfied to grant the application to join a controlling third party. They have not been. The application is declined.

Costs

[29] If the parties are unable to resolve costs, and an Authority determination on costs is needed, DMS Progrowers Limited may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the applicant's will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[30] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.²

Geoff O'Sullivan
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1