



[2] On 2 November 2020, Meridian wrote to Fujitsu requesting that it remove Mr Riddler from handling its account or any activity relating to the provision of services for it. The same day Fujitsu informed him about Meridian's request.

[3] Mr Riddler was instructed not to attend Meridian's premises. His employment with Fujitsu ended on 24 November 2020 when he was dismissed on notice.

### **Personal grievance and settlement**

[4] Mr Riddler raised a personal grievance with Fujitsu following his dismissal. On 22 February 2021, they entered into a settlement agreement endorsed by a mediator under s 149 of the Employment Relations Act 2000 (the Act). Its terms were comprehensive and expressed as being a full and final settlement of "all and any outstanding issues or matters between the parties".

[5] When Mr Riddler raised his personal grievance with Fujitsu he also wrote to Meridian putting that company on notice of its existence. That action was taken because he considered Meridian was a controlling third party within the meaning of that term in the Act. Mr Riddler informed Meridian that he was seeking redress both from it and Fujitsu.

[6] Meridian did not settle with Mr Riddler. The company denied being a controlling third party and having any liability to him for the circumstances which led to the dismissal.

### **The Employment Relations Authority**

[7] Mr Riddler lodged a claim against Meridian in the Employment Relations Authority seeking compensation.

[8] The statement of problem filed in the Authority gave as the problem or matter to be resolved the hurt and humiliation suffered by Mr Riddler arising from an alleged unjustified action by Meridian in writing to Fujitsu demanding his removal. He did not make a claim against Fujitsu because of the settlement agreement.

[9] The relief claimed from Meridian was recognition that it was a controlling third party and that its actions in requiring his removal were unjustified. Compensation was sought under s 123A of the Act and costs.

[10] On 20 September 2022, the Authority struck out Mr Riddler's claim.<sup>1</sup> The Authority was satisfied that it did not have jurisdiction and there was no basis for him to be able to take action against Meridian.<sup>2</sup>

[11] Mr Riddler challenged the determination.

### **The challenge**

[12] Mr Riddler's challenge elected to have the whole of the Authority's determination heard again.

[13] The relief sought was:

- (a) a finding that Meridian, as at 1 November 2020, was a controlling third party as defined in the Act;
- (b) compensation for humiliation, loss of dignity and injury to his feelings arising from Meridian's allegedly unjustified action to his disadvantage in writing to Fujitsu on 2 November 2020;
- (c) that the Authority's costs award against him be reconsidered;<sup>3</sup> and
- (d) costs of the challenge.

### **Strike out application**

[14] Meridian applied to strike out Mr Riddler's challenge on the basis that the Court has no jurisdiction to entertain it. Initially the company sought to strike out the

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<sup>1</sup> *Riddler v Meridian Energy Ltd* [2022] NZERA 474 (Member van Keulen).

<sup>2</sup> At [30] and [31].

<sup>3</sup> *Riddler v Meridian Energy Ltd* [2022] NZERA 568 (Member van Keulen).

whole of the claim, but at the hearing amended its application to exclude the challenge to the costs awarded by the Authority.

[15] Meridian's case was that the existence of a personal grievance in the Authority between Mr Riddler and Fujitsu was a necessary precursor to him being able to take action against it in that jurisdiction. The settlement meant there was no claim to which Meridian could be joined and what Mr Riddler sought was not contemplated by the Act.

[16] Mr Riddler does not accept that his claim is frail in the way alleged and has opposed the application to strike out.

### **Strike out principles**

[17] There is no dispute by the parties as to the principles applying to the application.

[18] The Court may strike out all or part of a pleading if it:<sup>4</sup>

- (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
- (b) is likely to cause prejudice or delay; or
- (c) is frivolous or vexatious; or
- (d) is otherwise an abuse of the process of the Court.

[19] The criteria to apply are:<sup>5</sup>

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<sup>4</sup> High Court Rules 2016, r 15.1; applied via Employment Court Regulations 2000, reg 6.

<sup>5</sup> *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and as endorsed in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [31]–[33].

- (a) The pleaded facts, whether admitted or not, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.
- (b) To strike out a proceeding the cause of action or defence must be clearly untenable. It is inappropriate to strike out a claim unless the Court can be certain that it cannot succeed.
- (c) The jurisdiction is to be exercised sparingly, and only in clear cases, reflecting the Court's reluctance to terminate a claim or defence short of trial.
- (d) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.
- (e) The Court should be slow to strike out a claim in a developing area of the law.

[20] The threshold to reach before an application to strike-out can succeed is a high one.

### **Defendant's submissions**

[21] In summary Ms Dunn submitted for Meridian that:

- (a) on a challenge the Court is able to make any orders the Authority was able to make;<sup>6</sup>
- (b) the Authority's jurisdiction, in s 161(1)(ea) of the Act, is limited and arises only in relation a controlling third party joined to a personal grievance claim under s 103B;
- (c) section 103B applies only if:

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<sup>6</sup> *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc* [2009] ERNZ 342 (EmpC).

- (i) the employee has raised a personal grievance against an employer and applied to the Authority to resolve it; and
  - (ii) that personal grievance relates to an action that is alleged to have occurred while the employee was working under the control or direction of the controlling third party.
- (d) section 103B does not contemplate action against the controlling third party in the absence of a personal grievance proceeding against the employer; and
- (e) the statement of problem in the Authority did not and could not pursue a personal grievance against Fujitsu because of the settlement.

[22] Applied to Mr Riddler's circumstances it was said that the absence of a personal grievance claim by him against Fujitsu deprived the Authority of jurisdiction. In turn, the Court could not hear the challenge.

### **Plaintiff's submissions**

[23] Ms Hubble submitted for Mr Riddler that:

- (a) there is a live personal grievance which was raised directly with Meridian;
- (b) Mr Riddler is seeking compensation from Meridian arising from its unjustifiable action as the controlling third party, not merely as a consequence of the claim he made against Fujitsu;
- (c) Meridian's submissions rested on a narrow interpretation of the Act; if accepted the only way a person adversely affected by the actions of the controlling third party could bring that party to account was in conjunction with the employer, but that is not consistent with the purpose of the legislation; and

- (d) Mr Riddler accepted his claim for unjustified dismissal was resolved by the settlement agreement, but a personal grievance for unjustified disadvantage was still available against Meridian arising from its letter to Fujitsu that triggered the dismissal that followed.<sup>7</sup>

[24] An integral part of Ms Hubble's submissions was that Parliament enacted the Employment Relations (Triangular Employment) Amendment Act 2019 (the Amendment Act) to give employees in Mr Riddler's position "genuine access to employment law remedies".

[25] Central to these submissions was that while s 103B of the Act provides a procedure for joining a controlling third party, that did not exclude the possibility of the Authority (and the Court on a challenge) from addressing a residual or remaining grievance directly between an employee and a controlling third party. Allowing the proceeding to continue was said, therefore, to be consistent with the intention of the legislation.

[26] Ms Hubble supplemented her submissions by drawing on the Court's equity and good conscience jurisdiction to enable Mr Riddler's claim to proceed.<sup>8</sup>

## **Analysis**

[27] The Amendment Act introduced sections creating the jurisdiction to join a controlling third party to a proceeding and to provide for remedies against that party. Meridian's application raises issues about the scope of those changes.

[28] When the Amendment Act was passed it:

- (a) made changes to the Act in ss 5 and 103;
- (b) introduced ss 103B, 115A, 123A;

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<sup>7</sup> Employment Relations Act 2000, s 103(1)(b).

<sup>8</sup> Section 189.

- (c) made consequential amendments to s 144 dealing with mediation services; and
- (d) added to the jurisdiction of the Authority by introducing a 161(1)(ea).<sup>9</sup>

[29] The power to join a controlling third party was created by s 103B. Because the section is central to this application it is set out in full:

**103B Joining controlling third party to personal grievance**

- (1) This section applies if—
  - (a) an employee has—
    - (i) raised a personal grievance in accordance with section 114; and
    - (ii) applied to the Authority to resolve a personal grievance with the employee’s employer; and
  - (b) 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.
- (2) The employee or the employer, or both, may apply to the Authority or the court to join the controlling third party to the proceedings to resolve the personal grievance.
- (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.
- (4) The Authority or the court may, at any stage of the proceedings, of its own motion join a controlling third party to the proceedings by order.
- (5) If the Authority or the court joins the controlling third party to the proceedings, the Authority or the court must consider whether to direct

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<sup>9</sup> The amendments came into effect on 27 June 2020. Changes were also made to sch 1AA to the Act.

the employer, the employee, and the controlling third party to use mediation services to seek to resolve the personal grievance.

[30] Section 10(1) of the Legislation Act 2019 requires the Court in undertaking an analysis of legislation to ascertain its meaning from the text and in light of its purpose and context.<sup>10</sup> It is appropriate to begin this analysis by considering the text of s 103B.

*The text*

[31] The text of s 103B indicates that before the Authority has jurisdiction to join a controlling third party there must be an unresolved personal grievance between an employer and employee to which it can be joined.

[32] First, the heading of s 103B, refers to “joining” a controlling third party, suggesting adding a party to an existing claim. Second, the section only applies if a personal grievance has been raised under s 114, which must occur between an employer and an employee.<sup>11</sup>

[33] Third, the conjunction “and” between ss 103B(1)(a)(i) and (ii) indicates both requirements must be present before the section applies. The existence of the personal grievance is necessary and must have resulted in the employee applying to the Authority to resolve it. The section supports a conclusion that there must be litigation between an employer and employee, not that a separate cause of action arises as between the employee and the controlling third party.

[34] Fourth, under s 103B(1)(b), a causative link is required because the personal grievance must relate to an action alleged to have occurred when the employee was working under the control or direction of the controlling third party.

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<sup>10</sup> See the discussion in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] which relates the former, but similarly worded provision; and *Te Whatu Ora – Health New Zealand v Public Service Association, Te Pūkenga Here Tikanga Mahi* [2023] NZEmpC 56. The power under s 103B is distinct from the power to join a party under s 221.

<sup>11</sup> Section 114(1).

[35] The text of s 103B supports the conclusion that there is no ability for an employee to pursue the alleged controlling third party without also pursuing a personal grievance claim against the employer.

[36] That interpretation is reinforced by ss 103B(2) and (3). Under s 103B(2) either, or both, the employee or employer may apply to the Authority to join a controlling third party. That language contemplates the existence of an unresolved personal grievance in the same way as s 103B(1) does.

[37] Under s 103B(3) an application to join must be granted if the conditions in ss 103B(3)(a) and (b) are satisfied. The first condition is that notice was given to the controlling third party.<sup>12</sup> The second condition is that there is an arguable case that the party to be joined is the controlling third party and that its actions caused or contributed to the personal grievance.

[38] The language of s 103B(3) indicates that the grievance referred to is one between the employer and employee. The section provides a mechanism to incorporate into that unresolved dispute a party that may bear some responsibility for what happened.

[39] Notably, s 103B(3)(b)(ii) creates a threshold. An applicant seeking to join a controlling third party needs to show that the third party caused or contributed to the personal grievance. That language is mirrored in the notice provisions in s 115A(1). The existence of a threshold test supports the conclusion that an unresolved personal grievance between the employee and employer is necessary before a controlling third party can be joined to the proceeding seeking to resolve that grievance.

[40] Significantly, the Amendment Act did not amend s 103 to create a separate personal grievance between an employee and the controlling third party. The closest the Amendment Act came was to introduce s 103(4), which defines certain terms for the purposes of ss 103B, 115A and 123A. It did not, however, create a new type of personal grievance.

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<sup>12</sup> Under section 115A.

[41] Had the intention been to create a new category of personal grievance, bypassing the involvement of the employer, there would be no necessity for s 103B, the notice provision under s 115A and for the restrictions on remedies in s 123A.

[42] Further, under s 161(1)(ea) the Authority's exclusive jurisdiction expressly relates to joining a controlling third party to a personal grievance under s 103B. The section would not be required if s 103B created a personal grievance between the employee and controlling third party without the necessity for litigation involving the employer.

[43] Finally, s 123A limits the range of available remedies. Remedies are only available against the controlling third party if there is an unresolved personal grievance before the Authority which requires them to be apportioned between those responsible. Section 123A contemplates that at the point in time where remedies are addressed there are at least two parties before the Authority, or Court, that might be liable for the compensation to be awarded; the employer and the controlling third party.

#### *Purpose*

[44] The Amendment Act did not contain a statement of purpose. However, it was described as being intended to strengthen the position of employees in triangular employment relationships.<sup>13</sup>

[45] The framework of the Amendment Act indicates that its purpose is to prevent the controlling third party from insulating itself from the consequences of its actions by interposing an employer between it and the employee it effectively controls. The framework of the Act indicates that the purpose was not to create a new or separate personal grievance, but to ensure that all those exercising control are able to be held to account where appropriate.

[46] The purpose of the Amendment Act is consistent with its text.

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<sup>13</sup> (3 April 2019) 737 NZPD 10266–10269.

*Applied to this case*

[47] Mr Riddler does not seek to claim compensation from Meridian for unjustified dismissal, accepting that such a claim was compromised by the settlement with Fujitsu. Instead, his claim against Meridian is for an unjustified disadvantage under s 103(1)(b) because of the steps it took initiating the actions by Fujitsu leading to his dismissal.

[48] There are two problems with Mr Riddler's claim that are insurmountable. The first problem is that s 103B only contemplates Meridian being joined as a controlling third party where there is an unresolved personal grievance between him and Fujitsu before the Authority. Without an unresolved personal grievance claim against Fujitsu in the Authority s 103B does not apply.

[49] The settlement with Fujitsu means there was no proceeding before the Authority between Mr Riddler and that company to which Meridian could be joined. He could have preserved an opportunity to take action that potentially encompassed Meridian by not settling with Fujitsu. That may not have been an appealing prospect if it involved a delay in resolving the personal grievance and increased his costs. Nevertheless, it was an option.

[50] I do not accept Ms Hubble's submission that an approach should be adopted to s 103B that preserves Mr Riddler's claim against Meridian, or that would allow him to effectively sidestep the necessity to have an unresolved claim against Fujitsu. That is not what s 103B contemplates.

[51] The position is not saved by the Court's equity and good conscience jurisdiction. While the jurisdiction is broad it is only available where the decision would not be inconsistent with the Act. A finding in Mr Riddler's favour would be inconsistent with s 103B and it follows that the equity and good conscience jurisdiction is not available to assist him.

[52] The second problem facing Mr Riddler is that he accepted the settlement agreement with Fujitsu was comprehensive, so that its scope precluded him from

taking action against Meridian for unjustified dismissal. There was no explanation as to why the scope of that agreement did not prevent all other potential personal grievance claims from being pursued against Meridian. The settlement agreement is a bar to this litigation.

## **Conclusion**

[53] Mr Riddler is unable to satisfy s 103B of the Act. It follows that the Authority, and the Court in relation to his challenge, do not have jurisdiction to entertain his claim. Meridian's application to strike out the challenge is successful except in relation to the Authority's cost award.

[54] The Registrar is requested to organise a telephone conference the purpose of which will be to provide directions to deal with Mr Riddler's challenge to the Authority's costs determination.

[55] Costs are reserved. If they cannot be agreed memoranda may be filed.

K G Smith  
Judge

Judgment signed at 3.45 pm on 13 June 2023