

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 479
3282399

BETWEEN	NICKA PAPER Applicant
A N D	FULTON HOGAN LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Applicant in person Dave Casey for the Respondent
Investigation Meeting:	8 August 2024
Date of Determination:	9 August 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nicka Papera describes his employment relationship problem as “Non Attendance at mediation” and “Medical Reasons”. He says that the respondent failed to answer calls and failed to reply to texts and emails. Mr Papera asks that the problem be resolved “With in the legal obligations of the employment relations authority”. He seeks compensation. No relevant documents were included.

[2] Mr Papera identified the respondent as “Fulton Hogan”. I later amended the name of the respondent to show its correct legal name, without objection. However, for convenience I will refer to the respondent as “Fulton Hogan” in this determination.

[3] Fulton Hogan does not accept that Mr Papera has a valid claim and says it never employed him. I am asked to strike out Mr Paper’s application.

The Authority sought clarification

[4] Fulton Hogan told an Authority Officer that Mr Papera through a lawyer had raised a personal grievance claim with his employer and included Fulton Hogan as a controlling third party. Mr Casey told the Officer that Fulton Hogan was not involved in any resolution of that personal grievance.

[5] I directed Mr Papera to provide details about his employment, relevant correspondence and a statement setting out what had happened with respect to his employment by or at Fulton Hogan. Mr Papera provided some material.

[6] The material included a letter from Mr Papera's then lawyer to his employer raising personal grievances and to Fulton Hogan as a controlling third party. It was unclear whether Mr Papera had resolved his personal grievances with the employer.

[7] Mr Papera later told an Authority Officer that he had previously lodged a claim in the Authority against his employer. He asked the Officer to access that file, as a source of other documents relevant for the present claim.

[8] Mr Papera's previous application to the Authority against his employer was lodged in Wellington, but was closed after advice from the Mediation Service that the matter had been settled in mediation. As the employment was based in Wellington, the present claim should have been lodged in the Authority's Wellington office, not the Christchurch office. I validated the present application to the extent necessary to cure any informality.

[9] The previous application to the Authority did not directly refer to "Medical Reasons", the matter raised in the present application. Fulton Hogan was not a party.

[10] Rather than requiring Mr Papera to provide any further information, I set today's investigation meeting and drew the parties' attention to an Employment Court judgment that might be relevant.¹

The Investigation Meeting

[11] Mr Papera attended, gave evidence and answered my questions. It was not necessary to hear evidence from Fulton Hogan.

¹ *Riddler v Meridian Energy Ltd* [2023] NZEmpC 87.

[12] Mr Papera told me that there was a settlement with his employer at mediation, but only with respect to wage arrears. When I told him that records showed the previous Authority application including the personal grievances was closed following mediation, Mr Papera told me that it had been reopened. Mr Papera did not produce any correspondence from the Authority to support his evidence.

[13] Mr Papera told me about the “Medical Reasons” that the present application turned on. In summary, Mr Papera says he inhaled fumes while working at a Fulton Hogan site, asked for but was refused a mask, could not breathe or sleep that evening, was not able to work the next day, next worked a nightshift, again could not breathe or sleep and then went to hospital. Mr Papera was treated at hospital and there are treatment notes dated 24 and 26 January 2023 in the material he provided to the Authority. The notes do not mention “inhaled fumes while working” but attribute his presentation to asthma.

[14] However, Mr Papera also referred to a letter dated 24 April 2023 from his doctor. It attributes the 24 and 26 January 2023 health issues to inhaling fumes at work.

[15] Several weeks after these events, Mr Papera was called by his employer and told that he was not needed at Fulton Hogan anymore.

This claim against Fulton Hogan cannot succeed

[16] Mr Papera was employed by a labour hire business.

[17] The employer assigned Mr Papera to work for Fulton Hogan. While there, Mr Papera worked as directed by Fulton Hogan but he remained an employee of the labour hire business. He was never employed by Fulton Hogan.

[18] Mr Papera worked at Fulton Hogan until 10 February 2023. That day, he was told by his employer that he was no longer to work at Fulton Hogan. The employer then assigned Mr Papera to work elsewhere. Mr Papera worked for his employer at this second assignment until March 2023.

[19] Mr Papera through his lawyer’s letter of 26 April 2023 raised a grievance about the actions on 10 February 2023, a claim of unjustified disadvantage with respect to a specific health and safety concern and put the employer and Fulton Hogan “on notice”

of another specific “possible” health and safety claim. This “possible” claim is the “Medical Reasons” referred to in the present application.

[20] Fulton Hogan does not accept it was a controlling third party with respect to Mr Papera. However, I am satisfied that there would be an arguable case that it fell within the definition of a controlling third party with respect to Mr Papera while he worked at sites under Fulton Hogan’s direction until 10 February 2023. Mr Papera raised grievances with his employer and notified Fulton Hogan. There would also be an arguable case that some action by Fulton Hogan contributed to at least some of the grievances raised by Mr Papera.

[21] The Authority has exclusive jurisdiction over personal grievances and joining a controlling third party to a personal grievance.²

[22] If an employee has raised a personal grievance with their employer, applied to the Authority to resolve that grievance and the grievance relates to an action which occurred while the employee was working under the direction of the controlling third party, then the employee may apply to the Authority to join the third party to the proceedings against their employer.³

[23] The employer may apply to the Authority to join the third party to the employee’s proceedings against the employer, or the Authority may of its own motion join the third party.⁴

[24] In *Riddler v Meridian Energy Ltd*,⁵ the Employment Court considered a case where the employee had settled his personal grievance claim against his employer then subsequently lodged a claim in the Authority seeking compensation against *Meridian Energy* as a controlling third party, based on its actions while it was a controlling third party. The Authority had struck out the claim, but the applicant challenged the determination and elected to have a full hearing of the entire matter.

[25] The Court held that there were two insurmountable problems with Mr Riddler’s claim. Unless there was an unresolved personal grievance claim in the Authority against the employer, the joinder power provided by s 103B of the Act did not apply.

² See s 161(1)(e) and (ea) Employment Relations Act 2000.

³ Employment Relations Act 2000 s 103B(1) and (2).

⁴ Employment Relations Act 2000 s 103B(4).

⁵ *Riddler v Meridian Energy Ltd* [2023] NZEmpC 87.

The second problem was that Mr Riddler had entered into a comprehensive settlement agreement with the employer, which precluded him from taking action against the employer for the personal grievance claim.

[26] The first insurmountable problem in *Riddler* applies here. Mr Papera does not have an unresolved personal grievance claim in the Authority to which Fulton Hogan could be joined as a controlling third party. Mr Papera is mistaken when he says that his earlier Wellington Authority claim has been reopened – it has not.

[27] That being the case, it is not necessary to consider whether Mr Papera could reopen the Wellington Authority claim, commence other personal grievance proceedings against the employer, or whether he would face the second insurmountable problem in *Riddler*.

[28] Mr Papera suggested that there is some other way to pursue the present claim against Fulton Hogan. He mentioned penalties. However, the present application was lodged on either 1 March 2024 (according to a date stamp) or 4 March 2024. Mr Papera last did not work at a Fulton Hogan site after 10 February 2023, so his claim must be based on actions before then. A claim has not been commenced within 12 months of any action relied on.⁶ The limitation period prevents a penalty claim.

[29] Fulton Hogan disputes Mr Parera's assertions about the mask, him inhaling fumes while working and about whether it used the gas referred to in the doctor's letter. It is not necessary to make any findings on those points.

[30] In the absence of an employment relationship between Mr Papera and Fulton Hogan, there is no other basis for this claim. I find that that Mr Papera has no valid claim against Fulton Hogan.

Conclusion

[31] Mr Papera's application is dismissed.

[32] There may be no issue about costs given Fulton Hogan was represented by a manager. However, if there is a claim Fulton Hogan may lodge a memorandum within 14 days and Mr Papera may lodged a reply in writing within a further 14 days. Costs

⁶ Employment Relations Act 2000 s 135(5).

would be determined with regard to those submissions and Authority's standard practice.

Philip Cheyne
Member of the Employment Relations Authority