

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 474
3165521

BETWEEN IAN RIDDLEL
Applicant

AND MERIDIAN ENERGY LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Mary Hubble, counsel for the Applicant
Kylie Dunn, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 20 June 2022 from the Applicant
3 June 2022 and 27 June 2022 from the Respondent

Date of Determination: 20 September 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ian Riddler was employed by Fujitsu New Zealand Limited. After his employment came to an end, Mr Riddler raised a personal grievance against Fujitsu as his employer and Meridian Energy Limited as a controlling third party.

[2] Mr Riddler and Fujitsu settled his personal grievance and he then sought to pursue his grievance further with Meridian. Meridian was opposed to any engagement over Mr Riddler's grievance, asserting there was no basis for the grievance to be maintained and advanced, as Mr Riddler had settled with Fujitsu.

[3] Mr Riddler then lodged a statement of problem in the Authority against Meridian claiming it was a controlling third party that acted unjustifiably toward him, causing him to be dismissed.

[4] Meridian lodged a statement in reply stating amongst other things that Mr Riddler had settled his personal grievance with Fujitsu and had not commenced a proceeding against Fujitsu in the Authority; and as there is no proceeding which Meridian can be joined to as a controlling third party (if it was one – which is denied) there is no jurisdiction for the Authority to deal with this matter.

The Authority's investigation

[5] Meridian has applied:

- (a) To have this proceeding struck out on the basis that the Authority does not have jurisdiction; or alternatively
- (b) To have this matter dismissed, pursuant to clause 12A of Schedule 2 of the Employment Relations Act 2000 (the Act) as it is frivolous.

[6] Counsel for the parties agreed that this application by Meridian should be dealt with as a preliminary matter and that it could be done on the papers. So, I received written submissions from counsel and these were the basis for my determination.

[7] As permitted by s 174E of the Act I have not recorded all the submissions received, in this determination; I have set out the relevant facts that the parties agree on and I have

expressed my view on the relevant law; based on this I have made conclusions on issues as necessary to dispose of the matter, and I have specified the orders made as a result.

What happened

[8] Mr Riddler was employed by Fujitsu from 4 July 2011 until 24 November 2020. Mr Riddler was employed as a Desktop Support Analyst and carried out his role, providing desktop support for Meridian, from Meridian's Twizel office.

[9] On 2 November 2020 Meridian wrote to Fujitsu and asked for Mr Riddler to be removed from their account and any ongoing desktop support related activity. This led to Fujitsu conducting a disciplinary process with Mr Riddler resulting in his dismissal on 24 November 2020.

[10] On 29 January 2021 Mr Riddler raised a personal grievance for unjustified dismissal with Fujitsu as his employer and Meridian as a controlling third party.

[11] On 24 February 2021 a record of settlement between Mr Riddler and Fujitsu was signed by a mediator pursuant to s 149 of the Act. This record of settlement provided terms of settlement between Mr Riddler and Fujitsu, which were recorded as being in full and final settlement of all and any outstanding issues or matters between the parties and their relationship as employer and employee.

[12] On 5 March 2021, Mr Riddler, through his counsel, wrote to Meridian enquiring about when it might receive a substantive response to the personal grievance raised with it.

[13] Meridian responded, through its counsel, on 5 March 2021. It advised Mr Riddler that it had not responded because it understood he had settled his personal grievance with Fujitsu. It then explained that it was not a controlling third party and was not involved in the termination of Mr Riddler's employment and that, in any event, as Mr Riddler's personal grievance had been resolved there was not (and there cannot be) an Authority proceeding for Meridian to be joined to.

[14] Then Mr Riddler lodged his statement of problem asserting:

- (a) He was employed by Fujitsu and Meridian was a controlling third party.
- (b) Meridian acted unjustifiably by making allegations relating to his performance and seeking his removal from its account.
- (c) Meridian's unjustifiable actions led to his dismissal, that dismissal being unjustified.

[15] Meridian lodged a statement in reply asserting:

- (a) Mr Riddler was employed by Fujitsu and worked at Meridian premises.
- (b) Mr Riddler was not employed by Meridian and Meridian was not a controlling third party (as defined by s 5 of the Act).
- (c) Mr Riddler and Fujitsu have settled all issues relating to Mr Riddler's employment.
- (d) Mr Riddler has not commenced proceedings in the Authority against Fujitsu.
- (e) As there is no proceeding to which Meridian can be joined the Authority does not have jurisdiction to deal with this matter.

[16] Meridian then lodged its application to strike out or dismiss Mr Riddler's statement of problem.

The parties' positions on Meridian's application

[17] Meridian's application to strike out Mr Riddler's statement of problem is premised on the assertion that the Authority does not have jurisdiction to deal with it.

[18] Counsel for Meridian accepts that pursuant to s 161(1)(ea) of the Act the Authority has jurisdiction to deal with joining a controlling third party to a personal grievance under s 103B of the Act.

[19] But counsel says that the Authority's jurisdiction pertaining to a controlling third party does not extend to claims or proceedings only brought against the controlling third party:

(a) Neither s 161(1)(ea) nor s 103B provide for this and there is no other provision in the Act which enables this.

(b) And s 103B and other provisions relating to a controlling third party, in the Act, only contemplate joining a controlling third party to an existing proceeding; that proceeding being a personal grievance claim against the employer.

[20] Counsel for Mr Riddler says:

(a) A personal grievance was raised directly with Meridian and in circumstances where Meridian acted unjustifiably causing Mr Riddler's dismissal it should not be able to hide behind the settlement between Mr Riddler and Fujitsu.

(b) Mr Riddler is not seeking to be compensated for actions by Fujitsu nor is he seeking additional remedies that are otherwise covered by the settlement with Fujitsu. Rather, Mr Riddler is seeking compensation specifically and only for the actions of Meridian which cause him hurt and humiliation and the terms of settlement with Fujitsu do not preclude this.

(c) The presence of joinder provisions in relation to a controlling third party does not mean the Authority does not have jurisdiction to deal with a personal grievance raised against Meridian.

- (d) The express aim of the amendment made to the Act in relation to a controlling a third party was to give a remedy against a “secondary employer” in precisely the circumstances alleged here i.e., the ability to have recourse against an organisation that an employee is placed with where that organisation acts contrary to the requirements that apply to employers.¹
- (e) Section 103(4) of the Act provides that for the purposes of ss 103B, 115A and 123A of the Act (provisions relating to a controlling third party) provisions of the Act that describe, define terms of and provide the application of the grounds for a personal grievance, apply with necessary modifications as if references to the employer were to the controlling third party and references to the employee’s work include work done under the control or direction of a controlling third party. This means that the intention is that all aspects of the personal grievance process may be utilised by an employee in relation to a controlling third party.
- (f) The Authority has sufficient jurisdiction to investigate this matter in its present form without relying on the controlling third party provisions, being an investigative body that establishes the facts and makes determinations according to the substantive merits of the case, without regard to technicalities.²

Discussion

[21] The Authority’s jurisdiction is set by the Act. The fact that I have investigatory powers that require me to establish facts and determine matters based on the substantial merits and without regard to technicalities does not empower me to investigate matters that are not within the Authority’s jurisdiction.

¹“Hansard” for 3 April 2019, passim ([https://parliament.nz/en/pb/hansard-debates/rhr/combined/ Hans Deb 20190403](https://parliament.nz/en/pb/hansard-debates/rhr/combined/Hans_Deb_20190403) 20190403 28).

² Section 157 of the Act; and *Bay of Plenty District Health Board v Culturesafe New Zealand Limited* [2020] NZEmpC 149.

[22] The starting point is therefore s 161(1)(ea) of the Act which provides that the Authority has jurisdiction to make determinations about joining a controlling third party to a personal grievance under s 103B of the Act. There is no other reference to the Authority's jurisdiction in relation to a controlling third party.

[23] Section 103B of the Act states:

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

[24] This is straightforward; s 103B provides a process for joining a controlling third party to an existing proceeding – that proceeding being a personal grievance claim against the employer. If there is no existing proceeding there is no basis for joinder and no jurisdiction.

[25] Further, I am not persuaded that s 103(4) of the Act means modifications are to be made to all of the personal grievance provisions such that the process by which a grievance alleged against a controlling third party is raised and then pursued (under ss 103B, 115A and 123A of the Act) can be replaced by commencing a personal grievance directly against a controlling third party as the employer. Rather this section means that the analysis of a

personal grievance as informed by other sections of the Act, for the assessment of raising the grievance against a controlling third party, the joinder of the controlling third party or the apportionment of any remedies between an employer and a controlling third party, is to be done as if the controlling third party was the employer and its actions were done as the employer.

[26] Put simply, s 103(4) of the Act does not create consequential amendments to the Act that would enable an employee to commence a claim against a controlling third party or join a controlling third party to its own proceeding – which might be the otherwise logical extension of the application that counsel for Mr Riddler suggests for s 103(4).

[27] I also note that where the provisions in relation to a controlling third party refer to mediation, those provisions contemplate mediation occurring between three parties, the employer, the controlling third party and the employee. This supports the view that the controlling third party provisions relate solely to a proceeding being commenced against the employer for a personal grievance and a controlling third party being joined to that proceeding.

[28] As a final point I note that the circumstances of this case, where Mr Riddler has settled his personal grievance, which arises out of and relates to his employment, it seems at odds with the substantial merits of the situation to allow a further claim arising out of that personal grievance to be commenced.

Conclusion and orders

[29] There is no basis for a proceeding to be commenced by Mr Riddler against Meridian directly, as a controlling third party.

[30] There is no basis for Meridian to be joined to a proceeding as a controlling third party as Mr Riddler has not commenced a proceeding against Fujitsu for his personal grievance.

[31] I do not have jurisdiction to investigate the statement of problem as lodged.

[32] As I do not have jurisdiction in respect of the proceeding commenced against Meridian I cannot take further steps in respect of the matter; this matter must be, and is, struck out.

Costs

[33] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Meridian may lodge, and then, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Riddler will have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[34] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.³

Peter van Keulen
Member of the Employment Relations Authority

³ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.