

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 244
3159442

BETWEEN JOHN ALLAN WILLIAMS
Applicant

AND MITEK NEW ZEALAND
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Jo Malcolm, for the Respondent

Investigation Meeting: On the papers

Information Received: 29 March 2022 from the Applicant
30 March 2022 from the Respondent

Date of Determination: 14 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr John Williams lodged a Statement of Problem (SoP) with the Authority on 20 December 2021 that named Mitek New Zealand Limited (Mitek) as the respondent.

[2] Mitek disputed that the Authority had jurisdiction to investigate Mr Williams' claim(s) on the basis there was no employment relationship between the parties named in the SoP.

[3] Mitek said it did not employ Mr Williams, because he was employed by Smart Recruitment Limited ("SRL"), as per a written employment agreement signed by those two parties. Mitek was not a party to Mr Williams' employment agreement.

[4] SRL placed Mr Williams at Mitek's business as a temporary worker in the lead up to Christmas 2021. Mr Williams had a four or five week assignment with Mitek. The placement

by SRL of Mr Williams to do work for Mitek was undertaken in accordance with a standard terms and conditions agreement SRL had with Mitek, that recorded their commercial arrangement.

[5] Mr Williams resigned from his placement with Mitek in order to take up permanent employment elsewhere in the New Year. His last day of work for Mitek was therefore due to be 23 December 2021.

[6] Before Mr Williams' notice period ran out, an incident arose. As a result of that, Mitek did not require Mr Williams to attend work during the last week of his assignment with it.

[7] Mitek said it reached that conclusion due to health and safety concerns associated with the incident that had occurred. Mitek considered it best for everyone that Mr Williams did not return to the workplace in order to avoid any potential issues arising.

[8] Mitek said in its Statement in Reply that, as far as it was aware, Mr Williams had not raised a personal grievance with SRL, which Mitek said he would need to do so if he wanted to include Mitek in an Authority claim. Mr Williams and SRL confirmed that a personal grievance had not been raised with SRL.

[9] Mr Williams wanted the Authority to direct the parties to mediation, but the Duty Member declined to do so until the jurisdiction issue had been resolved. The Authority therefore invited Mr Williams to join SRL as a second respondent in this matter, however he declined to do so.

[10] This determination therefore resolves the jurisdiction issues Mitek raised.

Authority's investigation

[11] The Authority conducted an 'on the papers' investigation meeting. The Authority received information from the parties. It also sought and received information from SRL.

[12] The Authority informed the parties in writing of its preliminary view that it did not appear to have jurisdiction over Mr Williams claims, because the parties named in the Statement of Problem were not in an employment relationship.

[13] The parties were invited to specifically address that concern, and were directed to the relevant sections in the Employment Relations Act 2000 (the Act) that would have assisted them to do so.

Material facts

[14] SRL's standard terms and conditions with Mitek (to provide it with temporary staff) specifically stated (among other things) that:

As the provider of staffing services, **Smart Recruitment Limited will be the employer of temporaries** [...]. The client (Mitek) acknowledges that it is the responsibility of Smart Recruitment Limited to attend to any disciplinary or performance management concerns affecting a temporary and the client [...].
(emphasis added)

[15] The individual employment agreement SRL entered into with Mr Williams governed the normal way it employed its temporary staff. Mr Williams and SRL signed an individual employment agreement on 12 July 2021 ("the employment agreement").

[16] The "Background" section of Mr Williams' employment agreement recorded that:

Smart Recruitment Limited is a personnel consultancy which provides services to third party ("Client"). **Smart Recruitment Limited employs me on a temporary basis to work on assignments** ("Assignment or Assignments") for the Client.
(emphasis added)

[17] Clause 4.1 of the employment agreement expressly stated that the employee (Mr Williams) will be employed by SRL.

[18] Clause 4.2 of the employment agreement provided that the employment came into force at the commencement of Mr Williams' assignment and will continue until the termination of his assignment, unless sooner terminated in accordance with clause 6 of his employment agreement.

[19] Clause 6.3 of the employment agreement stated:

If, for any reason whatsoever, the Client reassesses its needs and terminates an Assignment earlier than originally indicated, then my employment for the Client will terminate and Smart Recruitment Limited is under no obligation to offer me an alternative or additional Assignment. There will be no compensation in the event of an early termination of an Assignment.

[20] The reference in clause 6.3 to "Client" referred to Mitek. It is therefore clear Mitek had the right to terminate an assignment earlier than expected. Mitek pointed out to the Authority that in Mr Williams' case it did not actually terminate his assignment early but simply advised SRL that Mitek did not require Mr Williams to attend work.

[21] Although there was no right to be compensated for a terminated assignment, in this case SRL did in fact pay Mr Williams for the duration of his assignment with Mitek, so he was not out of pocket.

[22] Clause 25 of the employment agreement was headed “Resolving employment relationship problems”.

[23] Clause 25.1 said that employment issues should be raised immediately with SRL so that they could be resolved. This indicated SRL was the employer, not Mitek.

[24] Clause 25.3 stated that a personal grievance had to be raised within 90 days beginning on the date of the alleged action giving rise to the grievance occurring, or coming to Mr Williams’ attention, whichever was the later.

[25] Clause 29 of the employment agreement was an “Employee acknowledgement” clause, in which Mr Williams declared that he had read and understood the terms and conditions of his employment and agreed to be bound by them on each and every assignment he undertook on behalf of SRL.

[26] Mitek did not pay Mr Williams for the work he did. Instead SRL, as Mr Williams’ employer, paid him directly for the work that he performed while working on assignments that SRL had placed him on. Mr Williams was therefore paid an agreed hourly rate by SRL for the hours he worked for Mitek.

[27] SRL invoiced Mitek by way of a GST invoice for the hours of work that Mr Williams did for Mitek, in accordance with the standard commercial terms and conditions Mitek and SRL had agreed to. In accordance with the usual practice of a recruitment business, SRL invoiced Mitek for more than the hourly rate it paid to Mr Williams for the hours he had worked.

[28] There was no dispute that Mr Williams was placed on a short-term assignment with Mitek. It was always intended that his placement with Mitek would end by Christmas 2021. As it turned out, Mr Williams gave Mitek notice that he wanted to end his assignment (work placement) on 23 December 2021. He therefore had no expectation of working after that date.

[29] Although Mitek did not require Mr Williams to attend work at its premises during the last week of his assignment, he was still paid by SRL for the hours he would have worked, had

Mitek not advised SRL that it did not want Mr Williams to work the last week of his assignment with it.

[30] Mr Williams has not raised a personal grievance SRL.

Issues

[31] The following issues are to be determined:

- (a) Does the Authority have jurisdiction over the claims Mr Williams has made against Mitek?
- (b) If not, should the Authority exercise its power under s 221 of the Employment Relations Act 2000 (the Act) to join SRL as a second respondent in these proceedings?
- (c) What, if any, costs should be awarded?

Does the Authority have jurisdiction to investigate Mr Williams' claims against Mitek?

[32] The Authority does not have jurisdiction to investigate Mr Williams' claims against Mitek because there was no employment relationship between them. Section 4(2) of the Act defines employment relationships the Authority has jurisdiction over.

[33] In this case there is no jurisdiction because Mitek did not employ Mr Williams. He was employed by SRL. The employment relationship was therefore between Mr Williams and SRL, not Mr Williams and Mitek.

[34] SRL is not a party to these proceedings, so the Authority does not currently have before it any claims involving parties who were in an employment relationship. While Mr Williams could have remedied that situation by joining SRL as a party to his claims, he chose not to.

Should the Authority join SRL as a party to these proceedings?

Authority's input

[35] The Authority issued a Minute to the parties dated 25 March 2022. This Minute was also copied to SRL, on the basis that it had a potential interest in this matter, as the Authority was considering joining it as a party to this matter.

[36] The Authority recorded in its March Minute that it did not appear to have jurisdiction to investigate Mr Williams' claims on the basis that there was no direct employment relationship between the parties named in the Statement of Problem.

[37] The Authority identified that there appeared to be a triangular employment relationship, which meant that Mr Williams needed to join SRL as a second respondent if he wanted the Authority to be able to investigate his dismissal grievance against Mitek, because it was SRL who had employed him.

[38] The Authority also alerted the parties and SRL of its power under s 221 of the Act to direct a party to be joined to a proceeding, in order to be able to more effectively dispose of a matter before it. The Authority expressed its preliminary view (subject to feedback from the parties) that it was thinking about exercising that power to join SRL as a second respondent.

[39] Mr Williams, Mitek and SRL were all invited to respond to the Authority on the jurisdiction concerns and to provide feedback on whether or not it should exercise its power under s 221 of the Act to join SRL as a party to these proceedings.

Duty Member's involvement

[40] Prior to this matter being allocated to this Authority Member, a Duty Member had also engaged with Mr Williams and Mitek regarding the jurisdiction concerns.¹

[41] The Duty Member emailed the parties on 12 January 2022, advising that this appeared to be a situation involving a triangular employment relationship. This was explained by the Duty Member as a situation where the employer (the agency) arranges for the employee's placement or assignment with a third party (controlling third party).

[42] The Duty Member pointed out that such an arrangement was called a triangular employment relationship, because there were three parties to an employment arrangement, with each party having distinct relationships with the other.

[43] The Duty Member also stated in the 12 January 2022 email to Mr Williams that it appeared Mitek may be a controlling third party and that his actual employer could be SRL. It was suggested that an employment agreement or a letter of offer could assist Mr Mitek to identify his correct employer.

¹ Member E Robinson.

[44] The Duty Member informed Mr Williams that he needed to raise a personal grievance with his employer within 90 days, so if SRL was his actual employer then he needed to raise his personal grievance with it as soon as possible.

[45] Mr Williams responded by email on 12 January 2022 stating among other things “*I have no agreement to hand but it is a triangular situation*”. He then set out further details of his claim(s) against Mitek.

[46] The Duty Member’s email of 12 January resulted in Mitek providing the Authority with a copy of Mr Williams’ employment agreement with SRL. At the same time Mitek reiterated that it did not have an employment agreement with Mr Williams, because there was no direct employment relationship between them.

[47] Mr Williams responded with a further email to the Authority stating that although he did not have an employment agreement with Mitek he still considered that Mitek was his employer, because it was the party that he had been performing work for.

[48] Mr Williams sought a direction to mediation from the Duty Member on the basis that he had been involved in another triangular employment relationship (not with Mitek) that had resulted in mediation. He therefore stated that entitled him to a direction to mediation in this matter as well.

[49] The Duty Member disagreed that the matter should be directed to mediation when, on the face of it, it did not appear the Authority had jurisdiction over Mr Williams’ claim(s). This matter was therefore identified as one that required the involvement of an Authority Member in order to progress it.

Case Management Conference

[50] The Duty Member set up a case management conference (CMC) with the parties to address the jurisdiction concern and to:

- (a) Explain the decision not to direct this matter to mediation;
- (b) Identify to Mr Williams what he needed to do in order to progress his matter (namely join SRL as the second respondent); and

- (c) Explain how he could do that easily and without any cost to him (by amending the front page of his Statement of Problem to add SRL as the second respondent).

[51] During the CMC that was held on 9 March 2022, the Duty Member also explained to Mr Williams the relevant sections in the Act that applied to his situation, namely s 114 regarding the raising of a personal grievance, and s 103B regarding the joining of a controlling third party to a personal grievance claim.

[52] Mr Williams was therefore clearly put on notice by the Duty Member that he had to raise a personal grievance with his employer SRL in order for Mitek to be joined to these proceedings as a controlling third party.

[53] Mitek advised the Duty Member that Mr Williams' assignment with it was not shortened, but it was deemed that his presence in the workplace was unnecessary and therefore not required.

[54] SRL had informed Mr Williams that Mitek did not want him to return to its premises to work out the last week of his assignment. That situation was permissible under clause 6 of his employment agreement. Mr Williams apparently continued to be paid by SRL for January and the Christmas public holidays as he remained its employee.

Duty Member's Minute

[55] The CMC was followed up by a Minute dated 10 March 2022 that was issued by the Duty Member. This further explained what had been discussed during the CMC about the situation appearing to fit within the definition of triangular employment relationships in the Act.

[56] Copies of the relevant sections were set out in the Minute along with an instruction:

In order to progress this matter Mr Williams was advised that he needs to join Smart Recruitment Limited (Smart Recruitment) to his claims since Smart Recruitment Limited was his employer as identified in the employment agreement signed by Mr Williams and a representative of Smart Recruitment Limited.

[57] Mr Williams deliberately declined to do that.

Exercise of Authority's discretion

[58] The Authority has decided it is not appropriate to exercise its discretion under s 221 of the Act to join SRL as a second respondent. It was made clear to Mr Williams, in writing (via email), verbally during the CMC and in the Minute of the Authority dated 10 March 2022, what he needed to do if he wanted to pursue a claim against Mitek.

[59] When the matter was allocated to this Member, Mr Williams was given a further opportunity to join SRL to these proceedings. He still declined to do so.

[60] Mr Williams has had the jurisdiction issue clearly explained to him by two Authority Members. Both Members have advised Mr Williams to add SRL as a second respondent in order to progress his claim(s) against Mitek. Despite Mr Williams has being given multiple opportunities to do so, he has deliberately elected not to. That is a decision he is entitled to make and which should not now be superseded by the Authority exercising its power under s 221 of the Act.

[61] The Authority does not consider it is appropriate to put Mitek and SRL to the time and expense of adding SRL to these proceedings in order to give the Authority jurisdiction over Mr Williams' claim(s) against Mitek.

[62] Mr Williams' claim(s) against Mitek appeared weak, so it is not in the overall interests of justice to keep these proceedings going.

[63] Even if SRL was to be joined as a party by the Authority, that would immediately create another jurisdictional issue, about Mr Williams not having raised a personal grievance with SRL within the 90-days required by s 114(1) of the Act.

[64] Based on the available information, that failure to raise his grievance within time would likely mean the Authority still would not have jurisdiction over the claim(s) he wanted to make against SRL and therefore also Mitek.

[65] The prerequisite to the Authority being able to investigate a claim against Mitek is for the Authority to have a valid grievance against the employer (in this case SRL) in front of it, as per s 103B(1) of the Act, and it does not have that.

[66] The Authority was therefore not satisfied that joining SRL in such circumstances met the requirement in s 221 that it "*would more effectively dispose of a matter before it*". The

Authority considered that joining SRL at this stage would cause unreasonable time and cost for the parties involved in this matter, without there likely being any ultimate benefit to Mr Williams by doing so.

[67] Mr Williams has been encouraged by the Authority to take advice about his situation, he has had the law relating to triangular relationships verbally explained to him during the CMC held on 9 March 2022, he has been advised what he needed to do if he wanted to progress this matter in emails from the Authority and in the Authority's two Minutes, the first issued on 10 March by the Duty Member and the other on 25 March 2022 by this Member.

[68] The Authority has decided that in these circumstances it would not be an appropriate exercise of its discretion to join in a party in circumstances where the applicant, having been informed of the need to do so, had decided not to do it. Mr Williams must bear the consequences of his decision not to raise a personal grievance against SRL and not to join it as a party to these proceedings.

[69] Because the Authority has declined to exercise its discretion under s 221 of the Act to join SRL as a party to these proceedings, there is no employment relationship currently before the Authority on which Mr Williams can base his claim(s).

Outcome

[70] The Authority does not have jurisdiction to investigate Mr Williams' claims as set out in his Statement of Problem that was lodged on 20 January 2020. Accordingly, this matter has now been closed due to lack of jurisdiction.

Costs

[71] The parties were self-represented so there is no issue as to costs.

Rachel Larmer
Member of the Employment Relations Authority