

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 74
EMPC 80/2023**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN YANFANG HU
Plaintiff

AND PASSION FRESH LIMITED
First Defendant

AND WHVER HUB LIMITED
Second Defendant

Hearing: 29 November 2023
(Heard at Christchurch via Audio Visual Link
and further submissions filed on 8 March, 18 March and 9 April
2024)

Appearances: M Moncur, advocate for plaintiff
M McGoldrick and K Zafar, counsel for first defendant
No appearance for second defendant

Judgment: 13 May 2024

JUDGMENT OF JUDGE K G SMITH

[1] Yanfang Hu was employed by Whver Hub Ltd, a company which provides labour hire services. Whver assigned Ms Hu to work for Passion Fresh Ltd.

[2] Issues arose between Ms Hu and Passion Fresh over her pay and complaints she made about the work culminating in a claim of unjustified dismissal.

[3] When those issues remained unresolved Ms Hu lodged a claim in the Employment Relations Authority. During the Authority's investigation she unsuccessfully applied to join Passion Fresh as a controlling third party.¹ She has challenged that determination.

[4] Passion Fresh defended Ms Hu's challenge, and maintained it was not a controlling third party, but Whver did not participate in the proceeding.

What happened?

[5] Evidence was provided by an agreed statement of facts and common bundle of documents. Ms Hu entered into an individual employment agreement with Whver in early 2021, as a casual greenhouse worker. She began work on 6 January 2021 and was sent to Passion Fresh. Whver invoiced Passion Fresh weekly for the labour services it provided through Ms Hu's work. In turn she was paid by Whver.

[6] On 11 April 2021, Ms Hu sent an email to Passion Fresh which dealt with four subjects. The first was to question the hours Passion Fresh recorded her working and, therefore, the wage paid. The second was a claim that one of Passion Fresh's managers allocated work to her, and other Chinese workers, in a discriminatory way because they were given hard jobs while Indian workers were given easier ones. The third subject touched on in this email was about alleged shortcomings in health and safety, and health and safety related instructions, given by the same manager. The fourth subject was an allegation that she was not being provided with her entitlement to breaks.

[7] Ms Hu's email was sent to a manager at Passion Fresh who dealt with payroll-related matters. That manager replied the next day, 12 April 2021, saying she would consider the pay query. As to the other matters in the email, permission was sought from Ms Hu to refer them on to other Passion Fresh managers.

[8] The pay query was addressed by Passion Fresh in a further email of 12 April 2021 when Ms Hu was advised that the company did not share her view that her wages

¹ *Hu v Passion Fresh Ltd* [2023] NZERA 54 (Member Fuiava).

were incorrect. She was informed that the company considered the hours for which she was paid correlated with timecard hours, but an invitation was extended to discuss the matter in person.

[9] On 13 April 2021, Ms Hu met representatives of Passion Fresh. During the meeting she was advised that the work assignment with it had ended and she was no longer required. Later that day, she sent the company an email about how her concerns were dealt with including stating her view that she was “fired” from her position as a “subcontractor”. Passion Fresh was criticised for making a decision that she considered was wrong instead of finding a “proper solution”.

[10] Ms Hu’s email included the comment that in New Zealand everyone is “equal while protected by the law”. Her dissatisfaction with the decision to terminate the assignment was plain in further comments that “staff are not the slaves”, and that they have legal rights that can be fought for. The email ended with a statement that she would seek legal support through the Ministry of Business, Innovation and Employment (MBIE).

[11] The next day Ms Hu contacted MBIE seeking assistance. Her request was handled by the Mediation Services’ Early Resolution Team, with which both she and Passion Fresh corresponded until 14 May 2021. As part of that correspondence, on 23 April 2021, Passion Fresh provided a detailed answer to Ms Hu’s complaints. It referred to having no oversight of her actual pay because she was employed by Whver. Passion Fresh commented that Ms Hu’s start and finish times matched everyone else’s and pointed out that it paid from the designated start time to avoid workers seeking to gain an advantage by deliberately clocking in unnecessarily early. It should be added for completeness that Passion Fresh did not suggest Ms Hu had engaged in such a practice.

[12] As to the balance of Ms Hu’s complaints, Passion Fresh did not accept the allegation that its manager assigned work in a discriminatory way. It noted that senior directors of the company often worked with that manager and their observations of his work never caused them concern. Complaints about a lack of health and safety

training were not accepted and the company maintained that it provided the required breaks.

[13] Essentially, Passion Fresh responded to all of the allegations made on 11 April 2021 and rejected them.

[14] Having not been successful through engaging with the Early Resolution Team, on 23 May 2021 Ms Hu applied for mediation assistance. In the application she named Whver and Passion Fresh as the “other party(ies)”. Passion Fresh declined to attend mediation.

[15] Ms Hu’s next step was to lodge a statement of problem in the Authority which she did on 23 June 2021. Passion Fresh was described in this claim as the “subcontracted employer” and Whver as the employer. The form used by Ms Hu to describe the problem invited her to state what the Authority was being asked to resolve. The problem was stated to be “Discrimination, Unjustified dismissal”. In the body of the claim Ms Hu referred to writing a complaint about a pay problem, health and safety risk, and a manager.

[16] In the remainder of the pleading, where Ms Hu was invited to set out the facts that had given rise to the problem or matter she sought to have resolved, she referred to what happened on 13 April 2021. This pleading attributed to Passion Fresh statements that Ms Hu could continue to discuss payment issues with the manager she had written to before but that it rejected her claims that the manager she complained about was a racist.

[17] Ms Hu pleaded that the way the problem was dealt with was unfair and “illegal”. She also referred to raising the matter with the Early Resolution Team that had tried to communicate with Passion Fresh to “solve the problem”.

[18] A copy of the 11 April 2021 email was attached to the statement of problem along with correspondence with the Early Resolution Team. While the 11 April 2021 email contained claims about not being provided with sufficient breaks, the summary

of the problems to be resolved, and the body of the pleading, did not repeat that complaint.

[19] For reasons that were unexplained, Passion Fresh was not served with the statement of problem until 18 October 2021. It filed a statement in reply, a copy of which was in the bundle of documents.² Whver's statement in reply was not in the documents provided to the Court.

[20] Passion Fresh and Whver participated in the Authority's investigation and their involvement was referred to in case management conferences and the minutes which followed them.

[21] The Authority directed the parties to attend mediation but after two unsuccessful attempts the problems remained unresolved.

[22] The issue about Passion Fresh's status in the Authority's investigation emerged at a case management conference on 19 September 2022. In the subsequent minute the Authority recorded an issue being raised by Ms Moncur, who was by that stage acting for Ms Hu, about a triangular employment relationship with Passion Fresh as the controlling third party. The disagreement about the company's status resulted in the Authority timetabling an exchange of submissions to resolve that issue.

[23] Subsequently, the Authority declined the application to join Passion Fresh and this challenge arises from that determination.³

[24] Before considering the parties' submissions it is necessary to make some comments about the relevant sections of the Employment Relations Act 2000 (the Act).

² An Authority direction of 12 April 2022 included in the bundle of documents also referred to an amended statement of problem, but one was not in the bundle or otherwise referred to by the parties.

³ *Hu v Passion Fresh Ltd*, above n 1.

Controlling third party

[25] The Authority has exclusive jurisdiction under s 103B to join a controlling third party to a personal grievance.⁴ That section applies where the employee has:

- (a) raised a personal grievance in accordance with s 114;
- (b) applied to the Authority to resolve a grievance with the employee's employer; and
- (c) the 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.

[26] Where those steps have been taken the employee, the employer, or both of them may apply to the Authority or Court to join the controlling third party to the proceeding to resolve the personal grievance.⁵

[27] An application to 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.⁶ 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.⁷

[28] Section 115A contains two separate processes for giving notice, one each for the employee and employer. So far as employees are concerned the process has two steps:

- (a) the section is complied with when an employee considers that the actions of a controlling third party caused or contributed to the personal grievance; and

⁴ Employment Relations Act 2000, s 161(1)(ea).

⁵ Section 103B(2). The Authority or the Court may, at any stage of the proceedings, of its own motion join a controlling third party: s 103B(4).

⁶ Section 103B(3)(a).

⁷ Section 103B(3)(b).

- (b) notifies the controlling third party of that fact within the applicable employee notification period.

[29] The employee's notification period for the purposes of s 115A has the same meaning as in s 114(7), that is a period of 90 days beginning with the date on which the action alleged to amount to the personal grievance occurred or came to the notice of the employee whichever is later.⁸

[30] For completeness, s 115A provides for a controlling third party to consent to be notified after the notification period has elapsed or for the Authority to grant an extension of time if it is just to do so.⁹

Plaintiff's submissions

[31] Ms Moncur submitted in summary that the Act was satisfied because:

- (a) it was evident that during Ms Hu's employment she raised employment issues and concerns directly with Passion Fresh treating it as her employer;
- (b) Passion Fresh was aware from the beginning that Ms Hu had a dispute with it over wages and that she claimed to have been unjustifiably disadvantaged and unjustifiably dismissed;
- (c) Ms Hu took immediate steps by contacting MBIE;
- (d) Passion Fresh corresponded with MBIE and it would be disingenuous for it to now claim to be unaware of the issues to be resolved;
- (e) correspondence between Ms Hu and MBIE must have been communicated to Passion Fresh and, if necessary, that would satisfy the obligation to give notice of a personal grievance;

⁸ There is an extended time for personal grievances under s 103(1)(d).

⁹ Section 115A(2)-(4).

- (f) if it was necessary to do so, lodging the statement of problem in the Authority within the 90-day notification period could be relied upon to satisfy the obligation to give notice;
- (g) Passion Fresh did not suffer any prejudice because of the informal way in which the substance of the personal grievance claims was raised and/or communicated; and
- (h) if there were any deficiencies in the steps taken by Ms Hu they were mere technicalities, given that the substance of the complaints was conveyed to Passion Fresh and it was clear she held it responsible.

First defendant's submissions

[32] Mr McGoldrick, counsel for the first defendant, submitted in summary that the Act had not been complied with because:

- (a) there was no evidence that Ms Hu had raised a personal grievance with Whver at any time;
- (b) the absence of an unresolved personal grievance with Whver before the Authority, to which Passion Fresh could be joined, cannot be described as a mere technical deficiency because that is required to establish jurisdiction;
- (c) Whver being named as a party in the statement of problem does not assist; there were no allegations in it about the company;
- (d) the statement of problem could not be treated as providing notice to Passion Fresh under s 115A because it was not served until 18 October 2021, outside the 90-day notification period;
- (e) in any event, the statement of problem did not include an application to join Passion Fresh as a controlling third party;

- (f) Ms Hu was on notice through Passion Fresh's statement in reply that the company did not consider itself to be her employer and that the statutory requirements to join it as a controlling third party had not been complied with;
- (g) this proceeding is analogous to *Riddler v Meridian Energy Ltd*;¹⁰ and
- (h) there was no application for an extension of time to raise a personal grievance against Whver or to give notice to Passion Fresh under s 115A.

Further submissions

[33] After the hearing, and in response to a question from the Court about one of the emails included in the bundle of documents, it became apparent that Ms Hu's email of 11 April 2021 was provided by Passion Fresh to Whver the next day, that is on 12 April 2021. That happened when Passion Fresh responded to Ms Hu's pay query and copied both its response and the 11 April email to Whver. The potential significance of Passion Fresh sending those emails to Whver led to an invitation to the parties to provide further submissions about whether that act meant Ms Hu had raised a personal grievance or grievances with Whver.

[34] Ms Moncur's supplementary submissions were that copying the email to Whver was effective in raising a grievance with it for unjustified disadvantage encompassing a claim for a shortfall of wages, discrimination, health and safety concerns and a failure to provide adequate rest and meal breaks.

[35] The submission was linked to an earlier one, that Ms Hu's email of 13 April 2021 to Passion Fresh was sufficient to raise a personal grievance for unjustified dismissal. The submission relied on an assumption that because the 11 April 2021 email was copied to Whver, it must have also received the 13 April 2021 email.

¹⁰ *Riddler v Meridian Energy Ltd* [2023] NZEmpC 87, [2023] ERNZ 339.

[36] Mr McGoldrick's further submissions were that copying the email to Whver did not change the outcome; the email was insufficient to raise a personal grievance with that company.

Analysis

[37] Given the requirements of ss 103B and 115A, to be successful in her challenge Ms Hu needs to establish that there was an unresolved personal grievance before the Authority between her and Whver to which it was appropriate to join Passion Fresh.

[38] On that basis the issues are:

- (a) Did Ms Hu raise a timely personal grievance with Whver for unjustified disadvantage, discrimination and/or unjustified dismissal?
- (b) If the answer to (a) is yes, are the other requirements in s 103B(1) satisfied?
- (c) If the answers to (a) and (b) are yes, was Passion Fresh given notice, within the notification period, that it was considered to have caused or contributed to any of those personal grievances?
- (d) If the answers to (a) – (c) are yes, is there an arguable case that Passion Fresh is a controlling third party and that its actions caused or contributed to Ms Hu's personal grievances with Whver?

Did Ms Hu raise a personal grievance(s) with Whver?

[39] As already mentioned, under s 114 of the Act an employee wishing to raise a personal grievance with his or her employer must do so within the employee notification period. Beyond that section, the Act does not specify what is involved in raising a personal grievance.

[40] Under s 114(2) a personal grievance is raised with an employer:

...as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employer wants the employer to address.

[41] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, the Court summarised principles from earlier cases about what is required to raise a personal grievance.¹¹ The summary was:¹²

[36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[42] I agree with that summary.

[43] It is convenient to deal first with the claim that a personal grievance for unjustified dismissal was raised with Whver.

[44] At all times Ms Hu knew and understood that Whver was her employer. She differentiated between that company and Passion Fresh in her emails, correspondence with the Early Resolution Team and the Mediation Service, and in the statement of problem in the Authority. She signed an employment agreement with Whver that was unequivocal.

¹¹ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

¹² Footnotes omitted.

[45] Ms Hu equated Passion Fresh's action in ending the assignment with being dismissed and she was dissatisfied with that decision. Her 13 April 2021 email conveyed that dissatisfaction and her intention to seek some form of redress for what happened. While Ms Hu was concerned about what Passion Fresh did there is, in fact, no evidence that her employment with Whver ended or, if it did, when that happened.

[46] From those comments it will be apparent that I do not accept Ms Moncur's submission that Ms Hu's email to Passion Fresh of 13 April 2021 must have been sent by it to Whver. The submission incorporated an unsupportable assumption about how the email was handled and offers no assistance in establishing that, in fact, she was dismissed by Whver.

[47] The position is not saved because unjustified dismissal was pleaded in the statement of problem in the Authority where Whver was cited as a respondent. I agree with Ms Moncur that a personal grievance may be raised in a statement of problem but that does not assist Ms Hu.¹³ The problem or matter she sought to have resolved was directed at Passion Fresh. The statement of problem does not contain any pleading that could be construed as a claim that Whver dismissed her, let alone one that it did so because of what happened at Passion Fresh.

[48] Even if Ms Hu was able to navigate those shortcomings with the statement of problem there would still be a difficulty in relying on it. There was no evidence that Whver was served with the statement of problem within 90 days to comply with s 114(7).

[49] The only evidence about service of the statement of problem is that the Authority sent it to Passion Fresh on 18 October 2021. Given that Whver was named as a respondent it is likely to have been served by the Authority at about the same time. However, even if that is correct, notification would have been too late. Ms Hu bore the onus of establishing that she raised this personal grievance with her employer within time but she has not met it.

¹³ *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79, [2012] ERNZ 257 at [11]–[13].

[50] It follows that, because no personal grievance was raised with Whver for unjustified dismissal, the Authority could not consider joining Passion Fresh to that part of Ms Hu's claim.

[51] Ms Hu's remaining claims are about personal grievances for alleged discrimination and/or unjustified disadvantage. She did not write to, or communicate directly with, Whver about those potential personal grievances. Consequently, two questions arise. The first of them is whether it is possible for Ms Hu to have raised a personal grievance with Whver indirectly, when the 11 April 2021 email was copied to that company. The second and related question is whether, if a personal grievance could be raised in an indirect way, there was sufficient in the 11 April 2021 email to achieve that result.

[52] Ms Moncur and Mr McGoldrick's submissions and further submissions did not address these subjects directly. Ms Moncur submitted enough was done to constitute raising the claimed personal grievances but without any analysis beyond pointing to Whver eventually receiving the 11 April 2021 email. Mr McGoldrick submitted that the email was insufficient to raise personal grievances with Whver.

[53] In *Premier Events Group Ltd v Beattie*, the Court considered what is required to raise a personal grievance within the meaning of s 114.¹⁴ That case was primarily concerned with whether a personal grievance could be raised by serving a statement of problem on the employer.

[54] In *Beattie*, the Court referred to previous decisions about s 114 and its predecessor, s 33 of the Employment Contracts Act 1991.¹⁵ One of those decisions was *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*.¹⁶ The comparisons drawn with s 33 included two decisions: *Wilkinson v ISL Computer Systems Ltd* and *Forever Living Ltd v Kruesi*.¹⁷

¹⁴ *Beattie*, above n 13.

¹⁵ At [6].

¹⁶ *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139 (EmpC) at [42].

¹⁷ *Wilkinson v ISL Computer Systems Ltd* [1993] 1 ERNZ 512 (EmpC); and *Forever Living Ltd v Kruesi* [1993] 2 ERNZ 636 (EmpC). The difference in wording between ss 114 and 33, where the former refers to raising a grievance and the latter to submitting it, was noted in *Beattie* but was not material.

[55] The Court in *Beattie* considered that the words in s 114, “has taken reasonable steps to make”, supported the conclusion that the employee must make his or her employer aware of the personal grievance, but it might be brought to the employer’s attention circuitously.¹⁸ The same conclusion was reached under the previous legislation in *Wilkinson* and *Forever Living*.

[56] I agree with the conclusion in *Beattie*, that the words “has taken reasonable steps to make” contemplate that a personal grievance may be raised with an employer indirectly. It follows that it was possible for Ms Hu to raise a personal grievance with Whver by a mechanism such as that company receiving an email in the manner it did on 12 April 2021. That conclusion does not mean, however, Ms Hu has succeeded in establishing that she actually did raise grievances for discrimination and unjustified disadvantage with Whver.

[57] In the 11 April 2021 email, Ms Hu sought to engage with Passion Fresh about her wages. She went to the extent of providing an analysis of her timesheets over several weeks. This part of the email is directed at adjusting her pay, because of the possibility that the hours paid for were less than those recorded and worked. It is, therefore, a pay-related claim not a personal grievance claiming an unjustified disadvantage.

[58] As mentioned earlier, Ms Hu’s email moved on from her calculation of hours to state that she was raising a complaint about a Passion Fresh manager. She expressed the view that this manager was “kind of racist” in how he allocated work among staff. She stated that the manager treated staff with a “very bad attitude” and did not respect them. He was accused of never saying please or thank you when arranging daily tasks and to have ordered staff to undertake work with an “impatient face” while not giving proper instructions. All of that was followed by one example where the manager was alleged to have had staff work outside in summertime without checking as to whether they were all right or taking steps to ensure they were properly hydrated. At the conclusion of the email Ms Hu expressed the view that she was unlikely to be the first

¹⁸ *Beattie*, above n 13, at [11].

person to be dissatisfied with the manager and went on to say she hoped he would make some improvements.

[59] As to health and safety, Ms Hu's concerns were about not being given adequate instruction, advice about the availability of cut-resistant gloves and about risks presented by a spray machine.

[60] These criticisms are about how Ms Hu considered she was poorly treated by Passion Fresh. Nothing in them could be said, even indirectly, to be a concern about Whver. Viewed objectively, there is nothing in the 11 April 2021 email from which it could be said that what was conveyed to Whver was the substance of a complaint she had with that company that needed to be responded to on its merits with a view towards resolution. This difficulty confronting Ms Hu's email is echoed in Ms Moncur's submissions which emphasised that, in reality, the focus of attention from the beginning was on Passion Fresh. It was only belatedly that attention turned to Whver.

[61] I am not satisfied that Ms Hu's 11 April 2021 email raised a personal grievance with Whver. The threshold for raising a personal grievance is reasonably low but there has to be something from which the employer could know that it was required to take steps to address the problem and in that respect the email fell short.

[62] That leaves for consideration whether the statement of problem may have been sufficient to convey to Whver that there were personal grievances Ms Hu wished to raise with it for discrimination or unjustified disadvantage. The first difficulty with relying on the pleading is that there was nothing in it to indicate that Ms Hu intended to make a claim against Whver even though it was named as a respondent.

[63] I am not prepared to infer, as Ms Moncur's submissions more or less sought, that, because Whver participated in conferences in the Authority and attended mediation, it must have been responding to timely personal grievances which in scope encompassed the matters identified in the 11 April 2021 email. Such an inference would be problematic because it necessarily involves an assumption about the nature of Whver's participation which is not clear from the pleadings or any of the other evidence.

[64] Ms Moncur sought to overcome these pleadings-related difficulties by referring to Whver's statement in reply in the Authority as if its contents established that the personal grievances had been raised with Whver on time. As has already been discussed, however, that statement in reply was not before the Court and when its absence was drawn to Ms Moncur's attention no steps were taken to remedy that situation. Whatever may have been in the pleading is, therefore, of no assistance.

[65] A second difficulty that emerges from relying on the statement of problem to advance those personal grievance claims is the absence of proof as to when the pleading was served.

[66] From this analysis it follows that the absence of a personal grievance or personal grievances between Ms Hu and Whver for discrimination and unjustified disadvantage is fatal to the application seeking to join Passion Fresh to the litigation in the Authority.

[67] For completeness, it is necessary to deal with two issues raised by Ms Moncur. Implicit in her submissions was that s 115A did not require notice to be given in any particular sequence. This submission was to overcome a perceived problem in that Ms Hu first communicated with Passion Fresh before any correspondence was received by Whver. I agree that s 115A does not specify any order in which notices must be given. The Act is complied with so long as the employer and controlling third party receive notice within the relevant notification period. That does not, however, assist the analysis of what has happened in this case.

[68] Ms Moncur also emphasised that Passion Fresh was the company considered to be responsible for Ms Hu's difficulties, presumably drawing attention to the prospect that if the claims succeeded in the Authority an invitation would be extended to apportion liability in a way which reflected that company's responsibility. On that basis, the submissions lent towards an invitation to concentrate on Ms Hu's communication with Passion Fresh almost to the exclusion of considering whether she did, or did not, deal with Whver. Wrapped up in such a submission is that Whver would therefore be a steppingstone to establishing liability against Passion Fresh.

[69] That submission, however, does not reflect the structure of the Act. The whole purpose of being able to join a controlling third party to an Authority investigation is to resolve a personal grievance as between the employee and employer. If appropriate an apportionment of liability can occur, but the ability to join the third party is not a mechanism which allows the employee to sidestep involving his or her employer.

[70] Ms Hu has not established that a personal grievance was raised with Whver in relation to which Passion Fresh is able to be joined as a controlling third party. That conclusion means it is not necessary to address the remaining issues.¹⁹

[71] It is possible that Ms Moncur's submissions were intended to go so far as to invite the Court to grant an extension of time to Ms Hu so that she could take the required steps (which may have been either to raise a personal grievance with Whver or to give notice of having done so to Passion Fresh, or both). There was no application of that sort before the Authority and no application was made to the Court. The subject was raised in passing and not otherwise pursued.

Outcome

[72] The challenge to the Authority's preliminary decision is unsuccessful and it is dismissed.

[73] Costs are reserved. If the parties are unable to reach agreement memoranda may be filed.

KG Smith
Judge

Judgment signed at 1.15 pm on 13 May 2024

¹⁹ See para [38] above.