

Shaping up for some change – New legislation on triangular employment relationships

Sherridan Cook

15 November 2019

Triangular employment relationships are commonplace in the modern labour market. An example is where an employee is employed by a company, such as a labour hire company, but then is sent to work under the control or direction of a separate third party. Another example could be a secondment arrangement.

As the law currently stands, if an employee wishes to raise a personal grievance against the third party in the triangular relationship, he or she must prove that the third party was in fact their true employer. This is often difficult, involving the application of a number of legal tests. The new Employment Relations (Triangular Employment) Amendment Act 2019 (TE Act), which was passed on 27 June 2019, cuts through this process, allowing employees to raise personal grievances against these third parties without altering the employee/employer relationship.

Under the TE Act, the third party is called a "controlling third party", being a person or entity which:

- Has a contract or arrangement with an employer under which an employee of the employer performs work for the benefit of the controlling third party
- Exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction the employer exercises over that employee.

To raise a personal grievance against the controlling third party, the employee must first raise a personal grievance with his or her employer, relating to an action alleged to have occurred whilst they were working under the control or direction of a controlling third party. Then, the employee (or employer) can, within 90 days, notify the controlling third party that they consider that such party has caused or contributed to the grievance. If proceedings are filed, then the Employment Relations Authority (Authority) may, on application by either party, join the controlling third party to the proceedings. The Authority has jurisdiction to apportion responsibility, liability and awards between the employer and the controlling third party.

Undoubtedly, the TE Act will have far-reaching implications for employers who use third party labour, whether on a temporary or long-term basis. Third parties may no longer be able to simply refer the worker to their employer in order to protect themselves from personal grievance claims. They should remain alive to the possibility that workers within their control and direction could bring a claim against them, and that they could be drawn into proceedings and held liable.

Ultimately, for a controlling third party to be liable, it must have acted unjustifiably. Controlling third parties should be mindful to act fairly and reasonably towards workers engaged through a triangular employment relationship, particularly when ending the relationship. This is likely to require the controlling third party to hear from the worker on this before a decision is made, and to potentially enquire into what it might mean for the worker's ongoing employment with their employer.

The TE Act is due to come into force on 27 June 2020, or earlier by Order in Council.

Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659

