



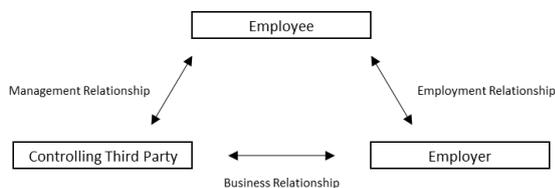
DYHRBERG DRAYTON
EMPLOYMENT LAW

What's New Update: February 2020

Expansion of employees' personal grievance rights under the Employment Relations (Triangular Employment) Amendment Act 2019

The Employment Relations (Triangular Employment) Amendment Act 2019 (**the Act**) will come into force on 28 June 2020. This change recognises the changing nature of workplace relations in New Zealand. It will enable employees in a *'triangular'* employment relationship to join a *'controlling third party'* to a personal grievance against their employer.

'Triangular' employment relationships arise where an employee is employed by one organisation but works under the *'direction'* or *'control'* of another in a manner similar to an employer/employee relationship (a diagram is shown *below*). Such relationships are common in today's labour market. Both short and long-term arrangements between organisations are used. Common examples may include; secondments, labour-hire/temp worker models, and specialist consulting arrangements. Often, there is no contractual relationship between the employee and the third-party organisation.



Currently, employees working under the direction or control of a third-party organisation cannot easily raise a personal grievance against that organisation. They may only raise a personal grievance against the third party if (upon an application) the Employment Relations Authority (**the Authority**) or the Employment Court (**the Court**) determines the *'real nature of the relationship,'* between the employee and the third party to be in the nature of employment. The Act

explicitly provides for more than one party to be liable for a personal grievance.

Joining a controlling third party to a personal grievance claim

The new legislative changes require a number of steps to be taken before a third-party organisation can be joined to a personal grievance claim:

1. The employee must have raised a personal grievance with their employer within the 90-day limitation period.
2. The action giving rise to the grievance must have occurred while the employee was working under the direction or control of the controlling third party.
3. The employee must have applied to the Authority/Court to resolve the personal grievance.

The employee or employer (or both) may then apply to the Authority, or Court, to join the third-party organisation to the proceedings, if:

- The employee notified the third-party organisation within the 90-day limitation period that the actions of the third-party organisation caused or contributed to the personal grievance; or
- The employer notified the third-party organisation within 90-days of the personal grievance being raised by the employee that the actions of the third-party organisation caused or contributed to the personal grievance.

If the Authority/Court is satisfied the third-party organisation was appropriately notified of the grievance, and there is an arguable case that their actions caused or contributed to it, the application to join them to the proceedings must be granted.



The Authority or Court may also join a third-party organisation to the proceedings, on its own motion.

If a third-party organisation is joined to the proceedings, the Authority/ Court must consider whether to direct the parties to mediation.

Apportionment of remedies between the employer and controlling third party

Where a personal grievance claim is upheld, and it is determined the actions of the third party organisation caused or contributed to the action giving rise to the personal grievance, the Authority or Court may apportion liability between the employer and third party organisation for lost wages and compensation. This must be done in a way that reflects the degree of contribution of the employer and third-party organisation to the action giving rise to the personal grievance.

Implications

Historically, there have been blurred lines of responsibility and accountability for employees in triangular employment relationships. Now, third-party organisations will no longer be shielded from personal grievance claims by employees who experience some unjustified action while under their direction or control.

The Act places enhanced *'good employer'* obligations and increased accountability on third-party organisations, requiring them to deal with the employees of other organisations under their direction or control, fairly, and in good faith. It also means employers need to maintain a degree of control over the triangular employment relationship, to ensure these obligations are being complied with, and to mitigate any potential employment relationship problems.

We recommend you undertake an assessment to determine if any of your workforce arrangements meet the test for a triangular employment relationship and ensure all of your employment relationships comply with your legislative duties. We are available to assist with this.