

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 79/09
5151496

BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION First Applicant
AND	J S MOENGAROA & ORS Second Applicants
AND	CARTER HOLT HARVEY LIMITED Respondent

Member of Authority: Alastair Dumbleton

Representatives: Lou Yukich, advocate for Applicants
Daniel Erickson, counsel for Respondent

Investigation Meeting: 16 March 2009 (by telephone conference)

Determination: 17 March 2009

DETERMINATION OF THE AUTHORITY

Application for removal to Employment Court

[1] The applicants are a union and five of its members. On 11 February 2009 they lodged a statement of problem in the Authority seeking the following remedies;

- (a) *An order for the enforcement of s 69 [Employment Relations Act 2000] requirement for the employer to conclude an EPP [employee protection provision] prior to restructuring,*
- (b) *Compensation for pain and suffering and humiliation for the affected employees.*

[2] In their claim the applicants refer to collective bargaining carried out between their union and the respondent Carter Holt Harvey Limited and also to collective

agreements negotiated between that company and EPMU, another union which the applicants had previously been members of.

[3] The applicants claim that Carter Holt Harvey is required to conclude an employee protection provision, or EPP, in a collective agreement with their new union before the company may implement any proposal to restructure operations in which the applicant union members are employed.

[4] To that end the applicants seek an order of compliance with s 69 of the Act, requiring Carter Holt Harvey to conclude an EPP before carrying out any restructuring.

[5] As anticipated following a telephone conference with the parties' representatives, the applicants under s 178 of the Act applied on 10 March 2009 to have this matter in its entirety removed to the Employment Court.

[6] The ground relied upon for the application is that an important question of law is likely to arise in the matter other than incidentally. In response Carter Holt Harvey has supported the application for removal and offered a wider view of the important questions of law likely to arise, to include:

- (a) Where a collective agreement itself has not been ratified but terms of settlement preceding that agreement have been, are the requirements of s 51 of the Act with regard to ratification met?
- (b) If the relevant collective was not properly ratified in accordance with s 51, did the applicants by their conduct accept or affirm ongoing employment on the basis of individual employment agreements?
- (c) If the answer is no to (a) and (b) above, is there an EPP applicable to the second applicants' employment?
- (d) If there is no applicable EPP, does non-compliance with s 69OJ of the Act give grounds for injunctive relief to prevent the restructuring proposed by Carter Holt Harvey?

[7] I add that for the Authority to grant the remedy sought would arguably require a determination outside of its jurisdiction which, expressly under s 161(2), does not extend to fixing new terms and conditions of employment.

Order for removal

[8] I accept that grounds for removal have been made out under s 178(2)(a). I am also of the opinion under s 178(2)(d) that in all the circumstances the Court should determine the matter. Accordingly the Authority orders the removal of this matter to the Employment Court for the Court to hear and determine it without the Authority investigating.

[9] It is noted from the respondent's statement in reply that the parties have not tried to resolve the employment relationship problem by using mediation from any source, but also that it is considered in the absence of a determination of the important questions of law identified by them, mediation is unlikely to assist in the resolution of the dispute. The question of mediation is, however, now before the Court as a consequence of the removal order.

A Dumbleton
Member of the Employment Relations Authority