IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 304
5380472

	BETWEEN	MARITIME UNION OF NEW ZEALAND Applicant
	A N D	PORTS OF AUCKLAND LIMITED Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Simon Mitchell, Counsel for Applicant Kylie Dunn, Counsel for Respondent
Investigation Meeting:	On the papers. Submissions received by Applicant on 23 August 2012 and Respondent on 28 August 2012
Date of Determination:	3 September 2012

DETERMINATION OF THE AUTHORITY

A. **The application by Maritime Union of New Zealand (MUNZ) for removal of this matter to the Employment Court to hear and determine is declined.**

B. **The Authority is to proceed with its investigation of MUNZ's employment relationship problem alleging a breach of the provisions of s.97 of the Employment Relations Act 2000 (the Act) by Ports of Auckland Limited (POAL) and seeking the award of penalties.**

[1] By consent the application for removal of this matter was determined on the papers, following receipt of written submissions by the representatives of each of the parties.

The employment relationship problem

[2] MUNZ and POAL are parties to a collective agreement. In early 2012, members of MUNZ employed by POAL were engaged in strike action. On 8 May 2012 a statement of problem was filed by MUNZ in the Employment Relations Authority alleging a breach by POAL of the provisions of s.97 of the Employment Relations Act 2000 ("the Act") and seeking penalties.

[3] In its statement of problem, MUNZ claims that during the strike action, work by its members employed by POAL, was carried out by contractors engaged by POAL. The work being carried out, it is alleged, was the work of the striking workers. The engagement by POAL of the contractors during the strike, MUNZ says constitutes a breach of s.97 of the Act. MUNZ seeks a penalty in respect of each alleged breach.

[4] POAL filed a statement in reply on 21 May 2012 and denies any breach of s.97 of the Act.

[5] In a letter dated 26 June 2012, MUNZ requested that POAL provide documentation to it relating to the contractors it claims were engaged by POAL during the strike and in breach of s.97.

[6] In a letter dated 6 July 2012 POAL's representative, Kylie Dunn declined the request by MUNZ.

[7] The letter of 6 July 2012 is as follows:

> *Dear Simon*
>
> ***5380472 – MUNZ/POAL – SECTION 97 ISSUES***
>
> *I refer to your letter of 26 June seeking documents in relation to the above matter.*
>
> *I understand that these documents are being requested in relation to proceeding 5380472. A penalty is sought in relation to this matter. As you will be aware, regulation 39 of the Employment Court Rules states that the discovery regime in the Employment Court does not apply to any action for the recovery of a penalty. This legal principle has been applied in the Authority in Aarts v Barnados New Zealand & Ors [2012] NZERA, Auckland 22.*
>
> *Accordingly, given the relief sought by MUNZ in its statement of problem, POAL declines to provide the documents sought.*

Yours sincerely
Kylie Dunn
Associate

[8] The Authority decision in *Aarts v Barnados New Zealand & Ors* [2012] NZERA Auckland 22 ("*Aarts*") relied on by Ms Dunn, is the subject of a challenge in the Employment Court which was to be heard by Judge Travis on 24 July 2012. The investigation meeting scheduled for the current matter was vacated by me on the basis that the Employment Court was shortly to determine the challenge to the *Aarts* decision and its decision may have affected the Authority's management of the current case.

[9] One of the issues the subject of challenge in *Aarts* is the application of Regulation 39 of the Employment Court Regulations (Court Regulations). Regulation 39(2) precludes the Court ordering disclosure in an action for the recovery of a penalty. The question is whether Regulation 39(2) applies to the Authority in proceedings where a penalty is sought. This is the legal principle relied on by POAL in declining MUNZ's request for documentation.

[10] The Employment Court's hearing of the challenge has been adjourned to an unknown date. On 30 July 2012 an application for removal of this matter to the Employment Court was brought by MUNZ. POAL has filed a notice of opposition to the application for removal.

The removal application

[11] Mr Mitchell seeks to have the entire matter removed to the Employment Court and relies on s.178(2)(a) and (d) of the Act in support of his application. Section 178(2) is set out below, and the subsections on which the applicant's application is grounded are highlighted:

> *178* ***Removal to Court***
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> *(1)* *The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.*
>
> *(2)* *The Authority may order the removal of the matter, or any part of it, to the court if—*
>
> ***(a) an important question of law is likely to arise in the matter other than incidentally; or***

> *(b)* *the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or*
> *(c)* *the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*
> ***(d)*** ***the Authority is of the opinion that in all the circumstances the court should determine the matter.***
>
> *(3)* *Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).*
>
> *(4)* *An order for removal to the court under this section may be made subject to such conditions as the Authority or the court, as the case may be, thinks fit.*
>
> *(5)* *Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the court, the court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.*
>
> *(6)* *This section does not apply—*
>
> > *(a)* *to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and*
> > *(b)* *without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.*

Question of law

[12] The question of law posited in Mr Mitchell's application for removal of the matter to the Employment Court relates to the ability of the Authority to compel provision of documents. However, in his submissions in support of the application for removal, Mr Mitchell appears no longer to be advancing this ground. In paragraph 21, Mr Mitchell accepts the Respondent's argument opposing removal. The Respondent submits that if the matter is removed to the Employment Court, discovery issues will be dealt with pursuant to the Employment Court Regulations and no issue will arise regarding the Authority's powers to order discovery. Removing the matter to the Court means no question of law will arise for it to consider. I accept that to be the case. There being no question of law arising for the Employment Court to consider, this ground for removal has not been satisfied.

The Authority is of the opinion that in all the circumstances the Court should determine the matter

[13] Mr Mitchell's second ground for removal is s.178(2)(d) of the Act and he cites the importance of the matter to his client and urgency as matters for the Authority to take into account. In his submissions in support, Mr Mitchell argues that removing the matter to the Court will mean the employment relationship problem can be dealt with by way of an adversarial process rather than an investigative process and therefore no issue as to the provision of documents will arise.

[14] The fact that the matter is of importance to the applicant and is urgent are not in themselves, without any details or particulars in support, sufficient grounds for the Authority to exercise its discretion and remove the matter to the Authority. Nor in my view is the fact that the applicant would like the employment relationship problem to be dealt with by means of an adversarial process in the Court rather than the Authority's investigative process.

[15] The employment relationship problem before the Authority is whether there has been a breach by POAL of s.97 for which a penalty should be awarded. This is an enquiry which the Authority has undertaken on many occasions since its inception some 12 years ago.

[16] Section 161(1)(l) of the Act confers exclusive jurisdiction on the Authority to make determinations on, among a number of matters, *proceedings related to a strike or lockout (other than those founded on tort or seeking an injunction).* The Authority is being asked to investigate an alleged breach of s.97 of the Act which is concerned with duties of striking or locked out employees. This is a matter falling squarely within the Authority's jurisdiction to deal with and there is no good reason for it not to in my view. The Act contemplates such a matter to be dealt with by way of investigation rather than by an adversarial process[1].

[17] The legal principle in the Authority's determination in *Aarts* relied upon by Ms Dunn to refuse Mr Mitchell's request for documentation may or may not be considered by the Employment Court when considering the challenge to *Aarts* and in any event has been adjourned to an unknown date. The outcome of the challenge may not be known for many months.

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[1] *New Zealand Amalgamated Engineering & Related Trades IUOW v. Carter Holt Harvey Limited*, AA 172/02, 10 June 2002, A Dumbleton

[18] To determine whether there has been a breach of s.97 of the Act assumes the provision of relevant information to the Authority in the normal manner as part of its investigative process and the Authority will proceed on that basis.

[19] This removal application is declined and costs in respect of it are reserved. Arrangements will now be made for the employment relationship problem to proceed to an investigation.

Anna Fitzgibbon
Member of the Employment Relations Authority