

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 317
5563462

BETWEEN

PETER MATHIS
First Applicant

MANUFACTURING AND
CONSTRUCTION WORKERS
UNION INC
Second Applicant

A N D

CARTER HOLT HARVEY
PULP & PAPER LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Lou Yukich, Advocate for the Applicants
David France, Counsel for the Respondent

Investigation Meeting: On the papers

Date of Determination: 12 October 2015

FIRST DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In its statement of problem filed in the Authority on 10 June 2015, the applicants (Mr Mathis and the Union) raise an employment relationship problem alleging non-compliance with the Holidays Act 2003 by the respondent (Carter Holt Harvey).

[2] In its statement in reply, Carter Holt Harvey deny any wrongdoing in respect to the Holidays Act 2003 but also raise a preliminary issue as to the standing of the Union to be a party in the proceeding.

[3] Then by application dated 4 August 2015, the Union filed an application to remove the matter to the Employment Court on the basis than an important question

of law is likely to arise in the matter other than incidentally: s.178(2)(a) of the Employment Relations Act 2000 (the Act).

[4] That application was promptly resisted by Carter Holt Harvey in a statement in reply dated 19 August 2015.

[5] The issues having been usefully canvassed by the representatives during these exchanges I have just described, it was agreed that the Authority could consider the application to remove on the papers and without the necessity for the parties' representatives to file any further submissions.

Materials facts

[6] Mr Mathis is employed by Carter Holt Harvey and it is common cause that he has standing to have his claim progressed and determined in the Authority including with the Union acting as his advocate. What is in issue is whether the Union may also be a party to the proceeding as the matter is currently pleaded.

[7] The statement of problem filed in the Authority names the Union as second applicant, which effectively means the Union is claiming it has standing to progress the matter as a party to the proceeding and not simply as the entity which is providing advocacy services for Mr Mathis.

[8] Mr Mathis derives his standing in the matter because he is an employee of Carter Holt Harvey (unlike the Union) and his individual employment agreement is based on the terms of a collective agreement negotiated between Carter Holt Harvey and certain other Unions, one of which Mr Mathis was a member of until 23 April 2015 when he joined the Union in this proceeding.

[9] As I have just noted, the Union has no employment relationship with Carter Holt Harvey and is not a party to the employment agreement by which Mr Mathis is employed by Carter Holt Harvey either.

[10] Moreover, Mr Mathis' claims relates to events which occurred on Good Friday, 3 April 2015, before Mr Mathis became a member of the Union.

Is there an important question of law arising?

[11] Mr Mathis' position is that the application of s.74 of the Holidays Act 2003 in the particular circumstances of this case constitutes an important question of law likely to arise other than incidentally.

[12] In order for Mr Mathis to be successful, I would need to be persuaded that the legal meaning of s.74 was somehow in dispute and that therefore the interpretation of that section required the intervention of the Employment Court to consider and resolve the matter.

[13] But it does not seem to me that there is any proper legal question of the interpretation of s.74 of the Holidays Act arising in this matter. Section 74 simply says that the Holidays Act may be enforced by a number of identified individuals or entities. Those identified individuals or entities include, of course, the employer and the employee and a Labour Inspector. But for our purposes, the important provisions allow enforcement by either an authorised representative or a representative of a union which the employee is a member of.

[14] Nothing precludes the Union in the present proceeding from acting for Mr Mathis in the enforcement of the Holidays Act. And, if I understand Mr Yukich's email to the Authority of 2 October 2015 correctly, the Union is not seeking standing at all *only the ability to exercise the statutory right of enforcement provided under the Holidays Act section 74*. The Union already has that right of enforcement on the plain wording of s.74.

[15] What is complained about by Carter Holt Harvey is the Union's drafting of the statement of problem with the Union representing itself as the second applicant. By drafting the statement of problem in that way, Carter Holt Harvey say (and I agree) that the Union is purporting to represent itself as if it were a party in the proceeding when it is not.

[16] But of course the Union does not need to be a party in order to exercise its statutory right to enforce the Holidays Act on behalf of its member; that is the whole point of workers joining the Union and nothing precludes the Union from undertaking its responsibilities toward Mr Mathis in that regard. But in order to do that, they do not need to be a party to the proceeding and indeed they cannot be a party to the

proceeding because, as I have already made clear, they do not have standing as a party.

[17] Of course, Mr Mathis himself as the affected employee does have standing, again for reasons that I have already identified. Indeed, Mr Mathis has both standing as a party and the right to enforce the Holidays Act, whereas his Union has only the right to enforce the Act on his behalf.

[18] I am obligated to apply the law concerning whether an important question of law is likely to arise, and a clear statement of the test is contained in *Hanlon v. International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1, where the Court said that removal was justified if the question of law would *be decisive of the case or some important aspect of it or strongly influential*

[19] Put shortly, I have simply not been persuaded that the application for removal gets anywhere near that level of importance because the words of the relevant section are as plain as can be and based on the email from the Union's representative, I am not even sure that the present claim is not activated by some misunderstanding of the position.

[20] As I have been at pains to emphasise, nothing precludes the Union from looking after the interests of Mr Mathis; the only question that Carter Holt Harvey raise is whether the Union is entitled to represent itself as a party to the proceeding and I am satisfied that it is not entitled to do that and that that is plain on the face of any proper reading of s.74 of the Holidays Act 2003.

Other grounds?

[21] There is nothing in the application which suggests a public interest ground for removal (s.178(2)(b) of the Act) or an intimation that the Court has before it similar proceedings (s.178(2)(c) of the Act) or indeed any contention that the Authority should exercise its discretion to remove the matter (s.178(2)(d) of the Act).

[22] Nor does the exercise of my residual discretion encourage me to revisit the conclusions that I have already reached. Amongst other things, removal at this point would delay the Authority's investigation into Mr Mathis' employment relationship problem and it is difficult to see what benefit such a delay would be to Mr Mathis or indeed to his Union.

[23] Moreover, as I have endeavoured to emphasise throughout this determination, it is difficult to see what benefit would accrue either to Mr Mathis or to the Union from the matter being removed to the Court, in particular because nothing precludes the Union getting on with representing its member before the Authority now.

Determination

[24] I have not been persuaded that the application to remove this matter to the Court to enable the Court to adjudicate on the appropriate meaning to be ascribed to s.74 of the Holidays Act 2003, particularly as it pertains to the Union having standing as a party in this proceeding, ought to be granted.

[25] It follows that the application to remove is denied and the matter will remain in the Authority's list for disposition by investigation by the Authority. An Authority officer will contact the representatives after the statutory challenge period has expired in order to set up arrangements for a conference call to progress the matter.

Costs

[26] Costs are reserved.

James Crichton
Member of the Employment Relations Authority