IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 207
5442125

	BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION INC & ORS Applicants
	A N D	TSNZ PULP & PAPER MAINTENANCE LIMITED Respondent
Member of Authority:	T G Tetitaha	
Representatives:	L J Yukich, Advocate for Applicant K M Dunn, Counsel for Respondent	
Investigation Meeting:	On the papers	
Submissions Received:	18 May and 17 June 2016 from Applicant 7 June 2016 from Respondent	
Date of Determination:	23 June 2016	

DETERMINATION OF THE AUTHORITY

A. The application for removal to the Employment Court is dismissed. Costs are reserved.

Employment relationship problem

[1] The applicants apply for removal of this matter to the Employment Court pursuant to s.178 of the Employment Relations Act 2000 (the Act).

Background

[2] The original applicants filed their statement of problem on 6 December 2013. At that time, the applicants did not include the Union and named several individuals whom are no longer part of this claim. The original applicants had sought to delay the

investigation to await the outcome of a de novo challenge before the Employment Court (the Harris case)[1]. The decision was issued on 2 April 2015.

[3] Despite the Court determination, the parties were unable to agree resolution of the entire matter filed in the Authority. The parties were directed to mediation on 21 October 2015. If unsuccessful, the applicants were directed to file an amended statement of problem within 14 days of the mediation and the respondent was to file an amended statement in reply 14 days thereafter. A teleconference was then to be set down.[2]

[4] The applicants did not file an amended statement of problem until 29 February 2016. The respondent filed its amended statement in reply on 14 March 2016.

[5] The amended statement of problem was inadequate. It did not properly name the applicants continuing to prosecute this matter. More importantly, the amended statement of problem did not particularise how the claim of estoppel arose. The remaining and intended applicants were not employed at the time the alleged representations to the successful applicants in the Harris case were made giving rise to estoppel. No detail of how the remaining applicants could have relied upon the representations was set out therein. Specific directions about the particulars of the parties and estoppel claim were made. A further amended statement of problem was directed to be filed by 20 April 2016.[3]

[6] The second amended statement of problem was filed on 11 April 2016 joining the Union and others as applicants and removing those whose claims had been settled. The second amended statement of problem alleged the representations were made to the Union at the material time about the terms and conditions of a collective agreement to be applied to all of its members not just former employees of the respondent predecessor ABB.

[7] At a directions conference on 11 May 2016 the issues for hearing were identified as:[4]

(a) Is the respondent estopped from resiling from representations made to the first applicant that the second applicants would have the same

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1 *Weeraphong Harris v. TSNZ Pulp & Paper Maintenance Ltd* [2015] NZEmpC 43.
2 Minute dated 21 October 2015.
3 Minute dated 6 April 2016.
4 Minute dated 11 May 2016.

terms and conditions as the ex-ABB employee union members? The union in particular relies upon the Harris case.

(b) Did the respondent breach its duty of good faith to the second applicants by its advice in May 2015 that it would not pay them on the same basis as the ex-ABB employees?

(c) Did the respondent breach its duty of good faith to the first applicant by resiling from a promise made in 2009 that terms no less favourable than the ABB CEA would apply to all union members including any future members; and

(d) Has the respondent engaged in misleading and deceptive behaviour under s.12 of the Fair Trading Act 1986 by resiling from promises it made to the union which led it to believe that the CEA would have universal effect for all of its members?

[8] On 18 May 2016, the applicants applied for removal of a preliminary matter to the Employment Court.

Issues

[9] The application for removal does not identify what part of s.178 of the Act the application is made under. Similarly the grounds and submissions set out a discursive prose that does not with any clarity identify the legal grounds relied upon for this application.

[10] I have inferred from the application and submissions that it is being made on three grounds:

a) There is an important question of law arising about the application of the doctrine of estoppel to these facts (s178(2)(a));

b) There are similar proceedings that have been dealt with by the Court in the Harris case (s178(2)(c)); and

c) The Authority ought to exercise its discretion to remove the application (s178(2)(d)).

The Law

[11] Section 178(2)(a) of the Act allows for removal of a matter if *"an important question of law is likely to arise in the matter other than incidentally"*. An important question of law may arise if[5]:

- Resolution can affect large numbers of employers, or employees or both;
- If the consequences of the answer to the question are of major significance to employment law generally; and
- It is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.

[12] Section 178(2)(c) of the Act allows for removal if "*the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.*"

[13] This is a two-stage test. Even if one of the grounds is made out under s.178, I must still consider whether to exercise my discretion to remove this matter.

Is there an important question of law?

[14] The grounds for the application refer to a factual dispute about what representations were made by the respondent and their application (if any) to the current applicants. Whether these facts meet the requirements for imposition of the doctrine of estoppel is not an important question of law. Where there are settled principles of law as there are here, it is the Authority's role at first instance to determine any factual disputes in accordance with that law.

[15] While I accept there a number of applicants, they have been substantially reduced due to the Harris case. It may be arguable that 17 people are a large group of affected employees but it is not necessarily a factor in and of itself that would justify removal.

[16] More particularly, this application seeks to resolve a "preliminary matter" only. It will not be decisive of this case because the applicants also seek remission of the matter back to the Authority for hearing.

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[5] *Hanlon v. International Education Foundation (NZ) Inc* [1995] 1 ERNZ 1 (EmpC) at 7.

Does the court already have before it proceedings which are between the same parties and which involve the same or similar or related issues?

[17] The short answer to this question is no. The Harris case has been finally determined. There are no other similar proceedings currently before the Court that the applicants have identified.

Should I exercise my discretion to remove this matter in any event?

[18] There are no separately stated grounds for removal under s178(2)(d) then have been proposed above.

[19] Even if there were grounds I would decline to exercise my discretion to remove this matter because[6]:

a) The application sets out a number of disputed facts. Parliament intended those types of application to be dealt with at first instance by the Authority;

b) This matter has already been set down for a five day hearing in Tauranga on 19-23 September 2016 with timetabling directions;

c) An oral determination or indication may be given at the end of submissions;

d) Accordingly, this matter may be resolved earlier than in the Court, i.e. by September 2016;

e) There is a statutory right of challenge to a determination of the Authority by way of de novo hearing; and

f) To exclude the Authority's investigative problem-solving and decision-making would deprive the parties of one general *"right of appeal"*.

[20] Accordingly, the application for removal is dismissed. Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority

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6 *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v. Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 (EmpC) at 83.