

BETWEEN	E-LIGHTING LIMITED Applicant
A N D	GABRIELLE DICKENS First Respondent
A N D	DAX PETER Second Respondent
A N D	HUNZA PRODUCTION LIMITED Third Respondent

Member of Authority: Eleanor Robinson

Representatives: David Fleming, Counsel for the Applicant  
Simativa Perese, Counsel for the First and Second Respondents  
Peter Davey, Counsel for Third Respondents

Investigation Meeting: On the papers

Determination: 23 November 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Fleming, on behalf of the Applicant, E-Lighting Limited (E-Lighting), seeks an order for removal of the remaining part of the proceedings in this matter to the Employment Court pursuant to s 178(2)© and (d) of the Employment Relations Act 2000 (the Act), on the grounds that:

*(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.*

[2] Mr Perese for the First and Second Respondents also requests removal of the remaining matters before the Authority to the Court.

[3] The Third Respondent is not directly affected by the damages claim and therefore neither supports nor opposes the application for removal.

### **Brief Background Facts**

[4] The Authority issued a determination: [2015] NZERA Auckland 300 in which I ordered that:

- a. the First and Second Respondents were liable for damages, the quantum to be determined at a subsequent date following a further investigation meeting;
- b. the First, Second and Third Respondents were liable to pay penalties, which were to be paid to the Applicant; and
- c. Costs were reserved; following the final resolution of the matter or until the matter otherwise ceases to be before the Authority.

[5] The Third and the First and Second Respondents have filed applications for rehearings on a *de novo* basis in the Employment Court. The applications are numbered EMPC 301/2015 and EMP 314/2015 respectively.

[6] By memorandum dated 28 October 2015 the Applicant sought orders from the Authority that:

- The previously awarded penalties were to be paid; and
- a timetable is to be set for the determination of costs.

[7] The Third and the First and Second Respondents have by memorandum filed in the Employment Court on 9 November and 10 November 2015 respectively applied to the Court for a stay of proceedings.

### *Submissions of E-Lighting*

[8] Mr Fleming submits as relevant to this issue that:

- i. The question of the First and Second Respondents' liability to pay damages is before the Court, as is the question of each of the Respondents' liability to pay the penalties;
- ii. The Respondents have elected to have the questions put before the Court heard on a *de novo* basis, meaning that the Court is likely to undertake a wide inquiry;
- iii. All the Respondents have elected to have the question of a stay on proceedings determined by the Court rather than the Authority, despite the Authority's ability to grant a stay under s. 180 of the Act;
- iv. Aside from the setting of costs, there are no other issues remaining before the Authority;
- v. Having all the issues between the parties dealt within the one jurisdiction would simplify the management of the proceedings;
- vi. If removal were not granted, there will simultaneously be proceedings in relation to the same matter before both the Authority and the Employment Court. The Court has previously commented on the undesirability of this, stating (in relation to the former Employment Tribunal) that

*It is: desirable as a matter of public policy that the jurisdictions do not overlap and*

... section 94 [of the Employment Contracts Act 1991, the precursor to the current s 178]: *is drafted in sufficiently wide terms to enable the removal of proceedings from the Tribunal to the Court for the purpose of avoiding multiplicity of proceedings*

{NZ Harbour Workers Union v Lyttleton Port Company Ltd [1995] 2 ERNZ 177, 180-181

- vii. It would potentially expose the parties to unnecessary cost to have the question of quantum of damages determined before the Court had reheard the issue of liability to pay damages.
- viii. If the question of quantum of damages were to remain before the Authority for determination subsequent to the Court's decision on liability, there would be a very real possibility that if E-Lighting were successful in the Court, the Authority's determination on quantum of damages could itself become the

subject of further rehearing in the Court. Potentially this could make the resolution of the overall proceedings extremely protracted; and

- ix. Removing the remaining part of this matter would enable costs relating to the Authority proceedings to be quantified without the Authority's previous determination of 29 September 2015 being affected.

## **Removal Application and discussion**

### *General Principles of Removal*

[9] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

[10] In the event that the party or parties applying for removal satisfy the tests set out in s.178(2) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court<sup>1</sup>.

### **Determination**

[11] I am satisfied that the grounds set out in s 178(2)(c ) are established in this case. Further that in accordance with s 178(2)(d) I am of the opinion that the court should determine the matter.

[12] I am satisfied that it is appropriate for the Authority to exercise its discretion to remove in accordance with s. 178(2) (a), (b) and (d) of the Act.

[13] In all the circumstances the Employment Court should determine the quantum of damages which is the remaining part of the proceedings.

### **Costs**

[14] The removal of the remaining part of the proceedings means that the matter has ceased to be before the Authority.

[15] Authority usually sets its own costs. Whilst realistically I accept that a costs determination may be joined in due course to the matters already under challenge, I

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<sup>1</sup> *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]

nonetheless consider that costs should be determined by the Authority, the matter having completed in the Authority's process.

[16] Accordingly the Applicant is to file costs submissions within 7 days of the date of this determination. The First, Second and Third Respondents will have 14 days after that date in which to file submissions.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**