

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 310/07
5073993

BETWEEN New Zealand Amalgamated
 Engineering Printing &
 Manufacturing Union (Inc)

AND Solid Energy New Zealand Ltd

Member of Authority: Janet Scott

Representatives: Anne-Marie McNally for Applicant
 Pheroze Jagose for Respondent

Investigation Meeting: 25 June 2007 at Hamilton

Submissions received: 25 June 2007 for applicant
 25 June 2007 for respondent

Determination: 5 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The problem the applicant wishes the Authority to resolve is the unlawful suspension of non-striking workers and consequent unlawful non-payment of wages for the period of the suspension. The Union seeks an order directing the respondent to pay each affected employee a sum equivalent to the remuneration he or she would have earned during the period of the suspension

[2] The respondent denies the claim and submits strike action commenced on 30 June 2005 firstly at the Rotowaro blending plant facility and then at the Huntly East Mine and Huntly Screens. All striking workers were suspended.

[3] Non-striking employees were subsequently suspended when Solid Energy was unable to provide them with work that was normally performed by them.

Background

[4] Solid Energy has three mining operations in the North (Huntly). It directly operates the Huntly East Mine and the Huntly Coal Screening Plant. Rotowaro Mine is operated by Henry Walker Elkin (HWE) under contract. Solid Energy's Huntly mines are operated on a 365 day basis.

[5] New Zealand Steel takes about 90% of the coal mined at Huntly East. The coal is transported by rail to the New Zealand Steel plant at Waiuku. That company relies on three trains of coal per day from the Huntly East Mine and (I believe the Rotowaro mine).

[6] The Huntly East mine has its own screening¹ operation. Rotowaro coal is transported by truck to the Huntly Screening Plant for screening. Slaters Transport has that contract.

[7] In February 2005 Solid Energy were negotiating with the Engineering Printing and Manufacturing Union (EPMU) for a multi-employer collective agreement (MECA). The proposed MECA was to cover (among other mining industry operations) Solid Energy's northern operations at Rotowaro and Huntly East and the Huntly Coal Screening Plant (HCSP).

[8] On 3 June 2005 there was a strike affecting the company's operations at these sites. The strike included a load out ban (trains and other transport), a ban on overtime and a ban on acting up in a supervisory capacity.

[9] On 28 and 29 June the negotiating teams met in Dunedin to continue their negotiations. The Union's negotiating team returned to Huntly on 30 June and reported back to delegates at a meeting convened at the Huntly Working Men's Club late in the afternoon that day. There a decision was taken to take strike action. That action included a load-out ban on trains and other transport, a ban on overtime and a ban on acting up.

¹ Coal is screened and cleaned prior to being stockpiled and available for loading out to customers.

[10] The evidence discloses that news of the strike came to the attention of mine managers from approximately 6pm on 30 June. A worker at Huntly East refused to act up as a supervisor and advised the mine manager on site there was a load out ban in place and a ban on overtime and acting up. Further, Slaters reported a load out ban was in effect at Rotowaro (as a result coal would not be transported from there). It is also the company's evidence that the manager at Huntly Screens (Bruce McKenzie) was advised by Owen Dodd, a leading hand at Huntly East mine, that there was a load out ban in place along with a ban on overtime and acting up. Mr Dodd denies telling his manager this.

[11] After the news of the strike came to the notice of the respondent six workers at Huntly East and HCSP responsible for loading out and acting up (among other tasks) were suspended under s. 87 of the Act (Suspension of striking employees). The suspensions were communicated orally and followed up the next day by written notice of suspension.

[12] Among the tasks carried out by the suspended workers was the task of removing coal that spreads out around the rill tower. The rill tower captures and disperses coal evenly it is spills out at the end of the conveyer system bringing it from the coal face as it is mined. That coal must be moved to a stockpile on a regular basis to ensure the production cycle can continue. Otherwise once the rill tower is full, the conveyer carrying coal from the coal face must stop and if coal cannot be carried from the coal face then production must cease.

[13] Once the workers responsible for loading out were suspended as striking workers under s.87 no coal was moved from around the rill tower and the rill tower filled up. This stopped the conveyer carrying coal to the surface and once that happened production stopped. This happened at around 2pm on 1 July coinciding with the end of the production day shift. These workers were suspended under s.88 of the Act (Suspension of non-striking workers) as they came off shift. Other workers were progressively suspended under s.88 of the Act as they turned up for their shifts over the next day or two.

[14] The strike continued for 17 days. It was called off on 18 July. During the period of the strike the Union was contacted and offered urgent work that became available. The Union refused that work and it was undertaken by Mines Rescue.

Issues to be determined

- Was the suspension of Solid Energy employees under s. 87 of the Act (Suspension of striking employees) lawful?
- Was the suspension of Solid Energy employees under s. 88 of the Act (Suspension of non-striking employees) lawful?

Position of the Parties

[15] The essence of the Union's complaint with respect to the suspension of workers under s.87 of the Act is:

- That six workers were dismissed pursuant to s. 87 of the Act as being striking workers when they were not in fact on strike and did not intend to refuse work until 12.30pm the next day (1 July) when they would refuse to load a train bound for NZ Steel.
- That none of the six workers were asked (prior to being suspended) if they would undertake their normal work. Rather they were simply informed there was a load out ban and they were suspended or simply told that they were suspended.

[16] The Union also submits that the respondent suspended other workers under s.88 of the Act when it could not be said that the employer was unable to provide for those workers work that was normally performed by them. In this respect it is submitted that:

- Other workers should have been deployed to move the coal building up around the rill tower. In this way normal work could have continued for non-striking employees for another week/10days (given the stock pile which has a capacity of

40,000 – 50,000 tonnes held only 17,000 tonnes at the time of the initial suspensions).

[17] It was also the applicant's position there was a significant amount of work available that was independent of production including:

- Advancing and retracting work i.e. putting in roads, conveyers, ventilation, lighting and water into new sections to be opened up for mining and reversing the process and sealing off sections where mining had been concluded.
- Mechanical and electrical maintenance including both trades and general maintenance (which production workers are competent and expected to undertake) including maintenance of conveyers, roads, pumps, ventilation systems, stone dusting and stopping maintenance

[18] The respondent's position is succinctly summed up in its Statement in Reply and was supported by evidence of its witnesses. The company's position is:

“All actual mine work is a continuous cycle driven by the production schedule. All normal back up maintenance is similarly driven by, and integrated with, coal face development and production work. Where this cycle breaks down at any point, this has a flow on affect for all other work in the mine.

In this instance, once the striking employees refused to load out coal, normal production ceased, which in turn affected all normal back-up maintenance. No normal work remained available while the strike continued.

As Solid Energy was unable to provide not non-striking employees at the mine with work that is normally performed by them, it suspended them”.

[19] By way of example, company witnesses described its operations in terms of a continuous cycle of coal production. The primary tasks in that cycle include the cutting and transporting of coal to the surface and its sizing, cleaning and screening

followed by stockpiling and loading out. Alongside these primary tasks is the general and mechanical maintenance work and the advancing/contracting work which is scheduled to take place simultaneously to support the production process. As I understand it all work (including the work ancillary to the production process) is subject to sophisticated planning and is scheduled to take place simultaneously with and to support the production process. Machinery, for example, is maintained to a good standard continuously and the criteria for scheduling that work is based on the number of hours a machine has been in operation. Advancing and contracting work is also done according to a schedule (linked to the production of coal) to ensure production is maintained at uniform levels.

[20] As I understand the respondent's evidence then, normal work is that work that is usually done by the employees (be it primary production or ancillary work supportive of the production process) scheduled and carried out simultaneously with the production cycle.

[21] However, it was conceded by the respondent that some work is performed slightly independently of coal production tasks e.g. stone-dusting and the maintenance of roads – albeit it too is planned and scheduled to be performed simultaneously with coal production. It was noted too, that the company can operate with a backlog of that type of work and that this work runs out very quickly when production ceases.

[22] The company submits that, given the sophisticated planning process where all work done is scheduled to take place simultaneously with the production of coal, it relies on *NZ Labourers IUOW & Others v Joint Venture Zublin-Williamson* [1986] ACJ 349 to support its position that where normal work is defined by reference to a stopped production line, ancillary work (even if normally carried out) is not normal once it ceases to be ancillary.

[23] The respondent also submitted that if work was made available to non-striking workers that work would not be available to be done by them on the resumption of normal work. As a result the company would be penalising itself by paying workers to do work not normally performed by them (because it was not performed simultaneously with the production of coal) and it would be paying them after the strike when they did not need to do all the work normally performed by them.

Statutory Provisions

S. 81 – *Meaning of strike*

(1) *In this Act, strike means an act that –*

(a) *Is the act of a number of employees who are or have been in the employment of the same employer or of different employers*

–

(i) *In discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it;*
or

(ii) *In refusing or failing after any such discontinuance to resume or return to their normal employment; or*

(iii) *In breaking their employment agreements; or*

(iv) *In refusing or failing to accept engagement for work*

(v) *In reducing their normal output or their normal rate of work; and*

(b) *Is due to a combination, agreement, common understanding, or concerted action whether express or implied, made or entered into by the employees.*

(2) *In this Act strike does not include an employee meeting authorised –*

(a) *By an employer; or*

(b) *By an employment agreement; or*

(c) *By this Act.*

(3) *In this Act, to strike means to become party to a strike.*

...

S. 87 – *Suspension of striking employees*

(1) *Where there is a strike, the employer may suspend the employee who is party to the strike.*

(2) Unless sooner revoked by the employer, the suspension under subsection (1) continues until the strike has ended.

(3) The suspension under this section of all or any of the employees who are on strike does not end the strike and those employees do not, by reason only of the suspension under subsection (1), cease to be parties to the strike.

(4) An employee who is suspended under subsection (1) is not entitled to any remuneration by way of salary, wages, allowances, or other emoluments in respect of the period of the suspension.

(5) On the resumption of the employee's employment, the employee's service must be treated as continuous despite the period of suspension, for the purposes of rights and benefits that are conditional on continuous service.

...

S.88 – Suspension of non-striking employees where work not available during strike

(1) Where there is a strike, and as a result of the strike an employer is unable to provide for a non-striking employee work that is normally performed by that employee, the employer may suspend the employee's employment until the strike is ended.

(2) A non-striking employee who is suspended under subsection (1) is not entitled to any remuneration by way of salary, wages, allowances, or other emoluments in respect of the period of suspension.

(3) On the resumption of the employee's employment, that employee's service must be treated as continuous, despite the period of suspension, for the purpose of rights and benefits that are conditional on continuous service.

(4) Where a non-striking employee or group of non-striking employees is suspended under subsection (1), that employee or group of employees may –

(a) Challenge the suspension by applying for a grant of a compliance order under s.137; and

(b) Seek remedies under this Act in respect of the suspension including (without limitation) arrears of wages.

(5) In this section, non-striking employees means an employee who is in the employer's employment and who is not on strike

[24] Both parties made extensive legal submissions in the matter

Discussion and Findings

[25] In arriving at my determination in this matter I have had regard to the witnesses' evidence, the submissions of the parties and the extensive case law cited.

Suspension of Striking Employees

[26] I did not find the evidence of the six employees suspended under s.87 of the Act to be credible. There were significant inconsistencies both within and between their evidence and some unfortunate admissions by them which contradicted the position they wished to impress upon me.

[27] A strike by definition is the act of a number of employees in (among other things) discontinuing their employment, either wholly or partially, or in reducing the normal performance of it ...due to a combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by the employees.

[28] The principles to be considered in determining whether or not the six employees in question were on strike on the evening of 30 June are settled². Those principles have applied to the facts of this case.

[29] It is not in dispute that a decision was taken by Union delegates at the meeting at the Huntly Workingmen's club on the afternoon of 30 June 2005 to impose a load out ban on all transport and to ban overtime and acting up duties in respect of the northern mining operations of Solid Energy. That decision satisfies the test that the

² *New Zealand Labourers etc IUOW & Ors v Fletcher Challenge NZ Ltd & Others* [1989] 3 NZILR 129; *NZ Meat Processors IUOW v Alliance Freezing Co (Southland) Ltd* [1990] 1 NZILR 725.

action imposed be due to explicit or implicit collaboration of the employees in question who are members of EPMU.

[30] I find the ban took effect immediately, albeit it was to, and did, manifest itself differentially across the mining operations in question at the time instructions to load out, act up or to do overtime were communicated. The bans imposed constituted a strike within the meaning of s. 81 (1) (a) (i) & (iv) of the Act. They encompassed the partial discontinuance of employment (bans on loading out and acting up) and the refusal of work for which employees are usually employed (the ban on overtime).

[31] The strike began when it came to the notice of the employer who believed it was definite. I find that Solid Energy managers were advised that action had commenced when a worker refused to act up on the incoming (6pm) shift at Huntly East and when advised by Slaters of the load out ban in effect at Rotowaro around the same time. Management team members were also advised that the action included a load out ban, a ban on overtime and a ban on acting up. I find that the management team were possessed of sufficient information to come to the conclusion that the action in train definitely amounted to strike action.

[32] Each of the workers in question advised they accepted the Union decision to take the action agreed upon. Their beef is that they were not “*on strike*” on the evening of 30 June – their position being that they did not intend to refuse to implement the load out ban until approximately 12.30pm on 1 July when they planned to refuse to load the next train due to be loaded. I find, however, that the six employees in question were parties to the strike within the meaning of s.81 (3) of the Act because they accepted the bans imposed and they did nothing to distance themselves from the decision when it was made known to them. Further the decision not to load out in the future was, in law, a *present* partial discontinuance of employment.

[33] In conclusion then I find that in fact and in law the workers, Owen Dodd, Warren Baxter, Jeff Brendenbeck, John Hunter, John Stone and Trevor Williams were each party to the strike which commenced on the evening of 30th June 2005 and that pursuant to the provisions of s. 87 of the Act the respondent was entitled to and did suspend them as striking workers. The communication was given orally to them on the evening of 30 June and confirmed in writing the next day. It is unusual in my

experience for workers to be suspended orally but there is nothing in the Act that requires notice to be given in writing at the time the suspension is affected.

Suspension of Non – Striking Employees

[34] Once the striking employees had been suspended production continued until the rill tower was full. It was submitted for the applicant that other workers could have been instructed to remove coal building up around the rill tower and if that had been done then production could have continued for up to 10 days.

[35] That would have involved the company requesting other employees to undertake the work of striking employees. I accept the company's evidence that was not feasible and in fact would have been seen as antagonistic and rejected by the employees requested to move the coal from around the rill tower.

[36] It is the respondent's position that work for non-striking workers ran out when the rill tower was full. This occurred about 2 -2.30pm on 1 July and coincided with the day shift production workers coming off shift at 3pm. They were suspended at that time and all other workers at the company's northern operations were progressively suspended from that point, mainly as they turned up for their shifts.

[37] In determining the second question to be decided the following features of s.88 call to be considered in light of relevant case law.

[38] There must be a strike and as a result of that strike the employer is unable to provide for a non-striking employee work that is normally performed by that employee.

[39] As I read the section it calls for an employer to consider the situation of individual non-striking employees. An employer is not entitled to suspend en masse but must but must give thought to whether or not work can be made available for the various groups which are employed.³ It also requires the employer to consider where there this is a strike (as was the case in front of me) whether as a result of the strike it is unable to provide for an employee work normally done by that employee.

³ *New Zealand Federation of Wood-Pulp, Paper and Related Products Workers Incorporated v New Zealand Forest Products Ltd* [1978] ACJ 31

[40] The Court of Appeal in the *Ford Motor Co* case⁴ addressed the concept of *inability* of an employer to provide normal work. It drew a direct analogy between the word *unable* and the case of *R. v Kelman* [1957] N.Z.L.R. 904 where the term *incapable* was considered. It said:

“...in all cases of alleged inability the issue can only be one of fact and degree. Where a case is doubtful, the practical test to be applied to make the section workable must be what a reasonable employer would have done in the circumstances”.

[41] Another test to be applied in respect of these suspensions is that set out in *New Zealand Forest Products Ltd v Northern (with exceptions) Wellington and Otago and Southland Woodpulp Paper and Related Products Union* 1981 ACJ, 613. There it was said:

“A section of this kind has to be applied in a practical way. If it can be foreseen that some normal work will be available but that there will be less of it than usual because of the strike, it must be a question of fact and degree whether there will be enough normal work to make it reasonable to keep the worker on..... We reject two extreme interpretations; on the one hand that the unavailability of a small amount of normal work will be automatically enough to justify suspension; on the other hand, that the availability of a small amount of work will be automatically enough to rule out suspension..... the matter is one of fact and degree and reasonable foresight”.

[42] The Union submits there was a considerable amount of normal work available for non-striking employees and that the suspensions under s.88 were unlawful. The respondent differs on this point for the reasons above. (paras 18-23)

[43] When I consider the respondent’s reasoning in light of the provisions of s.88 and the relevant case law I cannot accept that reasoning.

[44] In the first place I note a point made in the respondent’s oral evidence⁵ that casts a somewhat troubling light on the respondent’s submissions. That was that ‘*while*

⁴ *Ford Motor Company of New Zealand Ltd v The Wellington (with exclusions) IUOW & Anor* [1984] ACJ 1049

⁵ Evidence of Mr Smith

some limited work could have been found for non-striking workers it meant going to a lot of trouble to find a small amount of work for a small amount of people and that the company was not set up to find normal work and people to do it’.

[45] On my reading of s. 88 and the relevant case law the respondent was required – after the cessation of coal production – to assess what normal work was available. This was a necessary first step to then determining whether or not there was enough normal work available to keep one, some or all of the workers engaged in that normal work. I accept the respondent did consider the state of the mine and have regard to the fact that it continuously maintains the mine to an optimum standard. But it is also clear on the evidence that the respondent did not undertake the steps set out above because it said it was “not set up to find normal work and people to do it and to do so would put it to a lot of trouble”.

[46] I find, however, that it would be only after making the described assessment that the respondent could have arrived at the position where it could reasonably have said there was insufficient work to justify continuing to offer work to non-striking employees. As I result I am not satisfied that the respondent was *unable* to provide for non-striking employees work that would normally be performed by them.

[47] I note in closing on this point that the respondent relied on the findings in the Zublin case (cited above) and N.Z. Amalgamated Engineering etc IUOW v Toyota New Zealand (Christchurch) Ltd [1988] NZILR 1123 These cases were described as “*very analogous*” to and “*on all fours with*” Solid Energy’s production process.

[48] I have considered these cases and that of N.Z. Meat Processors etc IUOW v N.Z. Light Leathers Ltd [1988] NZILR 1359 another case where technical/sequential factors resulted in a tightly constrained production process. I am not convinced that the nature and performance of work at Solid Energy’s northern mining operations exhibits the same rigid planning, technical, sequential and mutually interdependent characteristics of the operations cited in the above cases, such that it can be described as *very analogous* and *on all fours with* those operations. In any event I note in respect of those cases that the respondent’s did carry out the basic assessment as to what normal work was or would be available after the suspension of striking workers impacted on production or when production actually ceased. I am not satisfied that first and fundamental step was taken with sufficient particularity in this case. And as

noted that step is critical to whether, in any event, there was enough normal work to warrant offering it to non-striking workers.

[49] This is not to say that I find there were no technical/sequential considerations associated with the planning and management of the coal production to be weighed in assessing whether or not the respondent was able to make normal work available to some or any of its non-striking employees in July 2005. The respondent is entitled to, and has, integrated its maintenance/advancement/contraction and other work into the coal production cycle where it supports the production cycle. I also accept that much of that work is designed to be done according to plan and where for example machinery maintenance is planned on the basis of hours in operation and, as a result of the strike, a machine is not operated for the necessary hours, maintenance of that machine would be out of sequence and would not be 'normal' work.

[50] Lastly, I find the employer's submission that upon resuming work some workers would be idle because work they would normally do on resumption of work following the strike would not be available to them, is an immaterial consideration in weighing and deciding this matter. *NZ Engineering etc IUW v Ford Motor Co of NZ* [1978] ACJ 287.

Conclusion

[51] On balance and relying on the above reasoning I must find the suspension of the non-striking workers was illegal.

[52] That said, I do not accept the Union's view that there was a substantial amount of normal work available for non-striking employees. At best had the s.88 test been appropriately applied and if some normal work been found to be available for some or all of the non-striking employees I believe, on the evidence before me, that that normal work would have been completed within a shift or two and it would not have lasted for days/weeks.

Determination

[53] The suspensions of striking workers under s. 87 of the Act were lawful and the applicant's claim under this head must be declined.

[54] The suspension of the non-striking employees from 1 July 2005 was unlawful.

[55] I understand the parties wished me to determine only the question of liability. That done the parties are directed back to mediation in the first instance to attempt to resolve the payment of remuneration lost by non-striking employees as a result of their unlawful suspension. If they cannot agree I reserve leave for the parties to return to the Authority to have the matter decided.

Costs

[56] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Janet Scott

Member of the Employment Authority