Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 59/07
5088699

	BETWEEN	NZ AMALGAMATED ENGINEERING PRINTING & MANUFACTURING UNION INC Applicant
	AND	AIR NELSON LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Tony Wilton, Counsel for Applicant David France, Counsel for Respondent
Investigation Meeting:	30 May 2007 at Christchurch
Determination:	5 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, NZ Amalgamated Engineering Printing & Manufacturing Union Inc ("the Union") say that the respondent Air Nelson Limited ("Air Nelson") is in breach of s97 of the Employment Relations Act 2000. This section provides:

> "97 Performance of Duties of Striking or Locked Out Employees
>
> (1) This section applies if there is a lock out or lawful strike.
>
> (2) An employer may employ or engage another person to perform the work or a striking or locked out employee only in accordance with subsection (3) or sub section (4).

(3) An employer may employ another person to perform the work of a striking or locked out employee if that person –

(a) is already employed by the employer at the time of strike or lock out commences; and

(b) is not employed principally for the purpose of performing the work of a striking or locked out employee; and

(c) agrees to perform the work.

(4) An employer may employ or engage another person to perform the work of a striking or locked out employee if:

(a) there are reasonable grounds for believing it is necessary for the work to be performed for reasons of safety or health; and

(b) the person is employed or engaged to perform the work only to the extent necessary for reason of safety or health.

(5) A person who performs the work of a striking or locked out employee in accordance with sub section (3) or sub section (4) must not perform that work for any longer than the duration of the strike or lock out.

(6) An employer who fails to comply with this section is liable to a penalty imposed by the Authority under this Act in respect of each person who performs the work concerned."

[2] The Union applies to the Authority for an interim injunction restraining Air Nelson from:

(a) Employing and/or engaging any person to perform the work of striking employees at Nelson Airport or elsewhere unless:

(i) The person was already employed by the respondent at the time the strike commenced, and has agreed to perform the work; or

(ii) It is necessary for the work to be performed for reasons of safety or health, and specifically from;

(b) employing and/or engaging Kenneth Raymond Walker and/or Kevin Bleach and/or Gavin Carter and/or James Howe, who are not employees of the respondent, from performing the work of striking employees unless it is necessary for that work to be performed for reasons of safety or health.

[3] Air Nelson opposes the application and denies that it breached s97 of the Employment Relations Act 2000. Air Nelson says that the respondent has not employed or engaged any person to do the work of the striking employees.

[4] The investigation meeting proceeded on the basis of the affidavits lodged and submissions from counsel. The Union provided an undertaking as to damages to abide by any order the Employment Relations Authority may make in respect of damages sustained by Air Nelson through the granting of the order for an interim injunction.

[5] I prohibit from publication under clause 10 (1) of Schedule 2 of the Employment Relations Act 2000 the commercial documents provided to the Authority by Air Nelson.

[6] As a result of the urgent nature of the interim proceeding the Authority made no direction that mediation take place before its investigation meeting but that will be a matter to be discussed at the next telephone conference.

Jurisdiction of the Authority

[7] The substantive remedies claimed by the Union in this case are penalties for a breach of s97 and an order for compliance. The Authority has exclusive jurisdiction under s161 of the Employment Relations Act 2000 to make determinations about employment relationship problems including actions for recovery of penalties for a breach of any provision of the Employment Relations Act 2000 s161(m)(ii) and compliance orders s161(n). The Employment Court in *National Distribution Union Inc v. General Distributors Limited* (unreported) 4 September 2006 Chief Judge Colgan AC 49/06 concerned an application by the unions to restrain the defendants from contravening s97. In para [9] of that judgment Colgan CJ stated … *I am satisfied that the Court is empowered to enforce compliance with statute by injunction including interlocutory injunction.* I refer to this judgment in the determination from

hereon as *General Distributors Limited* to distinguish it from another National Distribution Union judgment I intend to refer to.

[8] The full Court of the Employment Court held in *Credit Consultant Debt Services NZ Limited v. David Wilson and E C Credit Control Limited* 5 April 2007 WC 12A/07 that s162 means the Employment Relations Authority has the power to grant interlocutory, interim and permanent injunctions in cases before it within its jurisdiction as conferred by s161.

[9] I am satisfied that the Authority has jurisdiction with respect to the application by the Union.

The Background

[10] The affidavit evidence and supporting documentation provides the background which I have set out below.

[11] The Union has members at Nelson and Wellington airports.

[12] Air Nelson is a limited liability company and is part of the Air New Zealand group of companies. It carries on the business of operating an air transport service business.

[13] The Union and Air Nelson are parties to a collective agreement which expired on 31 March 2007. Bargaining was initiated for a new collective agreement by a notice dated 31 January 2007.

[14] The Union served a strike notice dated 9 May 2007 on Air Nelson under s90 of the Employment Relations Act which advised that various strike actions would commence on Thursday 24 May 2007 and continue until Saturday 8 July 2007.

[15] The strike action included tarmac and traffic employees. The nature of the proposed strike by tarmac and traffic employees was a continuous reduction of the normal performance of their employment from 0001 hours on Thursday 24 May 2007 until 0600 hours 8 July 2007. This consisted of a refusal by the employees to work any overtime anywhere in New Zealand, a refusal to handle and perform any administration tasks connected with foodstuff freight at Nelson Airport, a refusal to perform de-icing of aircraft at Nelson Airport and the refusal to train other staff at Nelson or anywhere else in New Zealand.

[16] Air Nelson and Air New Zealand National Cargo are parties to a sales and handling agency contract ("the agency contract") dated 17 July 2006. Air New Zealand National Cargo is a division of Air New Zealand Limited. Under the agency contract Air New Zealand National Cargo counter sales and handling and loading operations are performed by Air Nelson staff. As part of the agency contract Air Nelson tarmac staff load freight of Air New Zealand National Cargo customers on to aircraft. Air Nelson also does some counter cargo sales on behalf of Air New Zealand National Cargo where Air New Zealand National Cargo customers can drop off or pick up their freight.

[17] Ricky Nelson is the Manager of Air New Zealand National Cargo. He is responsible for all aspects of the management of National Cargo's business. Mr Nelson had been kept updated by the Air Nelson Manager Airports and Network Operations, Robert Burdekin about possible strike action. On 23 May 2007 Mr Burdekin emailed Mr Nelson and advised:

> *Rick,*
>
> *Due to the impending strike action which affects our ability to process and handle food stuff freight we are unable to fulfil our obligations to National Cargo as per our Service Level Agreement for the duration of this strike. The duration of strike action is 24th May to 7th July.*
>
> *During this period we are however able to offer limited support to National Cargo in being able to supply some staff to carry out handling and documentation.*
>
> *Could you please make the necessary arrangements to ensure the continuation of cargo out of Nelson.*
>
> *Regards,*
>
> *Rob.*

[18] The evidence from Mr Nelson is that as a result of the advice that Air Nelson would be unable to fulfil its obligations under the agency agreement for the period of the strike Air New Zealand National Cargo then took on responsibility for handling and loading its customers goods from 24 May 2007. The main customer of National Cargo affected by the strike action was a salmon business.

[19] On Thursday 24 May 2007 after the strike had commenced, the Union organiser for the aviation industry Strachan Crang and Union delegate, John Ivanof

entered the Air Nelson site at Nelson airport for the purpose of monitoring compliance by Air Nelson with s97 of the Act. They approached a person who stated his name was Kevin Bleach and that he was an airport manager employed by Air New Zealand Limited at Napier. Mr Bleach confirmed that he had been loading fish on to aircraft at Nelson which was a task that would have been performed by a striking union member if the strike had not been taking place. Mr Crang and Mr Ivanof were directed to another person who identified himself as Kenneth Walker, an Air New Zealand employee from Palmerston North. Mr Walker acknowledged that he had been loading fish on to aircraft.

[20] Two other employees of Air New Zealand were also seen by Air Nelson staff doing handling and loading of foodstuff freight, James Howe and Gavin Carter.

[21] Mr Burdekin deposed in his affidavit that Air New Zealand Limited employee, Martin Bellamy, was also present on 24 May 2007.

[22] Mr Wilton wrote to the Manager of Nelson Airport, John Hambleton on 24 May 2007. He advised that the named individuals had been seen doing the work of striking union members and asked for a written undertaking that Air Nelson had ceased employing or engaging Messrs Walker and Bleach and/or any other person, in breach of s97, and will not commit any further breaches.

[23] Mr France responded to Mr Wilton by letter dated 25 May 2007. He advised amongst other matters that Air Nelson was not employing or engaging another person or persons to perform the work of the striking employees. He said in his letter that the work is being performed by Air New Zealand employees for Air New Zealand National Cargo in terms of the Sales and Handling agency contract.

[24] At the current time salmon production at Nelson airports continues to be handled and loaded by Air New Zealand staff and by Air Nelson staff who were employed by Air Nelson at the time the strike commenced, not employed principally for the purpose of loading and handling produce and have agreed to perform the work.

Determination

[25] An interim injunction is a discretionary remedy. Counsel agreed about the approach to be adopted in consideration of interim injunctions and submissions were directed to the following well settled principles:

(i) Is there an arguable case?

(ii) Where does the balance of convenience lie?

(iii) Is there an adequate alternative remedy available to the applicant?

(iv) What is the overall justice of the case?

[26] The main question before the Authority is that of statutory interpretation and whether there has been a breach of s97 of the Employment Relations Act 2000 by Air Nelson. I accept Mr France's submissions that the Authority has to, in the circumstances, be careful to examine the information before it in terms of whether or not there is an arguable case.

[27] The purpose of s97 was considered in *National Distribution Union v. Carter Holt Harvey Limited* [2001] ERNZ 822, para.[67] where the Court stated:

> *When the provisions are read in this way, it becomes clear that Mr Kiely's argument that s97 confers no rights on employees is not tenable. The Act supports and sets out to promote collective bargaining and recognises and addresses "the inherent inequality of bargaining power in employment relationships": s3(a)(ii). Section 97 is one of the provisions that does so. Its purpose is to ensure that employers cannot use strike breakers to blunt the economic effect of a strike (or, equally, a lock out) by limiting the circumstances in which an employer may employ other persons to perform the work of striking or locked out employees …*

[28] Both counsel agreed that an employer in the context of s97 must be read as referring to the employer of the striking employees – *General Distributors Limited*. In that case an argument that an employer should be read in that section *as any employer* was rejected.

[29] The loading of the fish onto aircraft is the work of a striking employee for the purpose of s97. Section 97 places constraints on Air Nelson's ability to employ or engage other persons to perform the work of a striking employee. Air Nelson may employ another person to perform the work if he/she is already employed by Air Nelson at the time the strike commences, and is not employed principally for the purpose of performing the work of a striking employee and agrees to perform the work.

[30] It is not suggested in this case that the work of loading fish was performed for reasons of health and safety. If health and safety grounds exist then an employer may employ or engage another person to perform the striking or locked out employees' work, but only to the extent necessary for safety or health.

Arguable Case

[31] The Union say that Air Nelson has permitted and/or invited Air New Zealand Limited to perform the work of its striking employees using Air New Zealand Limited employees. The Union say that it is arguable in doing so that it has employed or engaged another person or persons, namely Air New Zealand Limited and/or various of its employees, to perform the work.

[32] In the *General Distributors Limited* case Colgan CJ said at para.[19]:

> *… It seems almost inarguable that the constraints imposed by s97 are upon the employers of striking or locked out employees so it is those employers who are not to employ or engage others to perform the work of their striking or locked out employee. It cannot be argued, at least with any degree of confidence, that Parliament intended a broader definition of the nature of persons so constrained.*

And at para.[31]:

> *But a purposive interpretation of a statute is just that, a guideline to interpreting the words and phrases that Parliament has used and which must themselves be given effect to. In the case of s97, Parliament has required that the prohibition is upon the employment or engagement of others. In this case, it is engagement which is in issue. For the necessary evidential foundation before an injunction can be granted, the unions must establish an arguable case that the employers (GDL and TSCL) have engaged another or others to perform the work usually done by the striking or locked out employees.*

[33] The prohibition in s97 is upon employment or engagement of others by the employer or the striking or locked out workers to perform their work if it is not in accordance with s97(3) or s97(4). The Union must establish an arguable case Air Nelson employed or engaged others to do the work of the striking employees. It is a necessary evidential foundation before an injunction can be granted.

[34] The affidavit evidence lodged by the Union is to the effect that the individuals doing the work of striking employees are Air New Zealand Limited employees. To the extent that it is possible to draw an inference from the applicant's affidavit

evidence that Air Nelson employed or engaged the named individuals any such inference is significantly weakened by the evidence of the agency contract between Air Nelson and Air New Zealand National Cargo.

[35] Section 97 prohibits Air Nelson from employing or engaging others to perform the work of its striking employees, but as was held in *General Distributors Limited* it cannot be argued with confidence that it prevents others from doing so. In Mazengarb Employment Law para. 97.5 at pg. 554, 007, s97 was compared with clause 109 of the British Colombia *Labour Code* which prohibits the utilisation of the services of any person to discharge the duties of an employee who is striking or who is locked out.

[36] Mr Wilton submits that the email of Mr Burdekin of 23 May 2007 and, in particular, the last paragraph, is evidence that Air New Zealand Limited was permitted and/or invited to perform the work of the striking employees.

[37] There were commercial arrangements between Air Nelson and Air New Zealand National Cargo. The sales and handling contract provides several remedial options for Air New Zealand National Cargo in the event that Air Nelson is unable to meet its service obligations under the contract. These include providing or procuring the service itself or even terminating the contract. Care has to be taken with finding an arguable case that Air Nelson permitted the work to be performed by Air New Zealand Limited and by extension this could mean it employed or engaged other persons. It could equally be argued that Air New Zealand National Cargo was exercising its rights under the contract in providing the service to its customers itself. The email is insufficient evidence to establish an arguable case that Air Nelson engaged or employed Air New Zealand Limited and/or its employees to do the work of its striking employees.

[38] There is no evidence that the named individuals were asked by Air Nelson to undertake the work of the striking employees and the evidence for Air Nelson is that they were asked by Air New Zealand National Cargo to undertake the work on behalf of its customers. To the extent that it could be argued that Air Nelson did not stop the arrangements the sale and agency contract establishes that Air New Zealand National Cargo was entitled to perform the services itself if Air Nelson was unable to do so.

[39] There is no evidence that Air Nelson provided financial reward or other consideration to the named employees or any evidence of a contractual relationship between them and Air Nelson.

[40] Mr Wilton submits that it is arguable that the definition of employ within the context of s97(3) can mean to *use* employees and that is what Air Nelson is doing. Mr Wilton submits that it does not matter who the ultimate beneficiary of work being carried out may be. An arguable case on that basis still requires there to be the essential evidential foundation that Air Nelson employed or engaged Air New Zealand Limited and/or the named individuals to perform the work of the striking employees for an injunction to be granted. I do not find on the balance of probabilities there to be evidence of that at this interim stage.

[41] In the circumstances of this case I do not find that the Union has established an arguable case at this interim stage that Air Nelson employed and/or engaged others, in particular Air New Zealand Limited and/or their employees to perform the work of the striking employees in breach of s97 of the Employment Relations Act 2000. The application for an interim injunction is declined.

[42] I do not consider it is necessary therefore to go on to consider the other tests of balance of convenience, adequacy of remedies and overall justice. Had I gone on to consider these matters then the Authority would have faced a difficult question about the impact any injunction would have had on a third party namely Air New Zealand Limited and whether the undertaking for damages provided by the Union is wide enough to cover potential damages to those third parties.

Costs

[43] I reserve the issue of costs in this application.

[44] A support officer will make arrangements with counsel for a telephone conference to discuss mediation and meeting dates for a substantive investigation meeting.

Helen Doyle
Member of the Employment Relations Authority