IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 22/07
CRC 26/07
CRC 27/07

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND AMALGAMATED ENGINEERING PRINTING & MANUFACTURING UNION INC Plaintiff
AND	AIR NELSON LIMITED Defendant

Hearing:	29 October 2007 (Heard at Christchurch)
Court:	Chief Judge G L Colgan Judge B S Travis Judge A A Couch
Appearances:	J A Wilton, Counsel for Plaintiff C H Toogood QC and David France, Counsel for Defendant
Judgment:	8 November 2007

JUDGMENT OF THE FULL COURT

[1] In June 2007, some of the staff employed by Air Nelson Ltd were on strike. During the strike, contractors engaged by Air Nelson Ltd and employees of Air New Zealand Ltd carried out some work which might otherwise have been done by the striking employees. The issue in this case is whether that was lawful.

[2] The case before the Court was the consolidation of two sets of proceedings. In the first (CRC 26/07), the plaintiff union alleged that Air Nelson Ltd had unlawfully engaged Air New Zealand Ltd to have its staff load foodstuffs onto aircraft at Nelson

Airport. On 17 June 2007 the plaintiff was granted an interlocutory injunction[1] restraining that work being done by those people, or any others the defendant might have wished to employ or engage, on grounds including that the Court was satisfied that the union had established an arguable case of statutory illegality. The second proceedings (CRC 27/07) related to certain work done by contractors during a strike by engineers employed by Air Nelson Ltd. The proceedings were removed by the Employment Relations Authority for hearing at first instance in this Court.

[3] The strikes occurred in the course of bargaining for a collective agreement which has now been settled. The issues came before the Court solely in the context of claims by the union for penalties for breach of the Employment Relations Act 2000.

[4] There is little dispute about the relevant facts. Rather the case turns on the interpretation of the provisions of s97 of the Employment Relations Act and their application to these facts. The relevant parts of s97 are as follows:

> ***97 Performance of duties of striking or locked out employees***
>
> *(1) This section applies if there is a lockout or lawful strike.*
>
> *(2) An employer may employ or engage another person to perform the work of a striking or locked out employee only in accordance with subsection (3) or subsection (4).*
>
> *(3) An employer may employ another person to perform the work of a striking or locked out employee if the person—*
>
> *(a) is already employed by the employer at the time the strike or lockout 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 reasons of safety or health.*

[1] CC 12/07, 17 June 2007

The relevant facts

[5] Air Nelson Limited is a wholly owned subsidiary of Air New Zealand Ltd. It is a separate legal entity but is integrated into the Air New Zealand network and operates in some respects like a division of Air New Zealand. It is based at Nelson Airport but carries passengers and freight between many cities and towns throughout New Zealand.

[6] Air Nelson has staff who perform different ranges of duties. Relevant to this case are aircraft loaders, some of whom are members of the union and others of whom are not. Their tasks include the loading and unloading of cargo and its receipt into and despatch from Nelson Airport. Also at issue is the work of aircraft maintenance engineers who include not only union and non-union employees but also contract engineers who are not employees.

[7] The union and Air Nelson were engaged in bargaining for a collective agreement for unionised staff. On 9 May 2007 the union served notice of strike action to begin on 24 May and to continue until 8 July in support of the union's claims in the bargaining. The strike was to include the refusal to handle or perform the administrative work connected with foodstuff freight and a refusal to perform line maintenance work on aircraft. Those strikes took place and they were clearly lawful.

[8] The freight regularly carried by Air Nelson includes fresh food. In particular, Air Nelson carries consignments of salmon which are the subject of a commercial contract between NZ King Salmon Co Ltd and Air New Zealand. This contract includes quite precise requirements for carriage of the cargo on particular scheduled flights out of Nelson.

[9] In order to fulfil those obligations, Air New Zealand has contracted with Air Nelson to load and carry the consignments of salmon out of Nelson. This is a commercial contract known as the Air New Zealand National Cargo Sales and Handling Agency Contract by which, in return for specified payments, Air Nelson

agrees to convey cargoes of salmon from Nelson to other airports. In clause 9 of the contract, the parties explicitly provided for the event of Air Nelson's inability to perform the specified services:

> ***Without prejudice to any other right or remedy, if you do not provide the services in accordance with the specification or at the times specified on this contract, we [Air New Zealand Ltd] may (at your [Air Nelson Ltd] cost in all respects):***
>
> *a)* *Require you to remedy the default within such time as we may specify by providing or providing again (as the case may be) without further charge to us such part of the service(s) to the relevant specification;*
>
> *b)* *Without terminating the whole of the contract, terminate the contract in respect of part of the delivery of services only, on written notice to you, and thereafter provide or procure the provision of such part of the services ourselves;*
>
> *c)* ***Provide or procure the provision of the services ourselves until we are satisfied that you are able to carry out the delivery/services in accordance with this contract;****…* (Emphasis added).

[10] In May 2007, Air Nelson anticipated that the intended strike action by cargo loaders would make it unable to fulfil its contractual obligations to Air New Zealand National Cargo to load and transport freight, including the regular consignments of fresh salmon. It notified Air New Zealand of this on 23 May 2007 in an e-mail sent by Robert Burdekin, Air Nelson's Manager of Airports and Networks Operations, to Ricky Nelson, Air New Zealand's Manager of National Cargo, as follows:

> *Due to the impending strike action which affects our ability to process and handle foodstuff freight we are unable to fulfil our obligations to National Cargo as per our Service Level Agreement for the duration of the 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.*

[11] During the strike which began on 24 May 2007, some of the fresh salmon that was usually air freighted from Nelson as cargo on Air Nelson aircraft was sent by road to other airports for consignment by air but not all of it could be dealt with in

this way. The balance was still delivered to Nelson airport for carriage by Air Nelson. Some non-striking staff were available to process and load this freight but they were assisted by several management staff employed by Air New Zealand and sent to Nelson from other centres. Those Air New Zealand employees did work that would otherwise have been performed by Air Nelson staff who were on strike.

[12] As already noted, Air Nelson has its engineering work done not only by employees, both unionised and non-unionised, but also by a number of aircraft engineers and tradespersons who are independent contractors. These contractors are engaged predominantly to do what is called *"heavy maintenance"* on Air Nelson's aircraft and those of other airlines for which the company performs such work. Heavy maintenance involves carrying out the major structural and other checks required on aircraft after extended periods in service and any repairs required as a result of those checks. Such procedures may take weeks or even months and require the aircraft to be withdrawn from service. Relatively minor repairs and servicing of aircraft between flights and overnight is known as *"line maintenance"*. This includes work done both on *"the ramp"* or airport apron and work done in the hangers. Line maintenance is performed predominantly by employed staff consisting of licensed aircraft engineers, engineering tradespersons and trainees.

[13] For line maintenance purposes, Air Nelson has between two and three engineers working during the day. These consist of one *"ramp"* engineer and one or two hangar engineers. By contrast, at night when the fleet is grounded and more available for line maintenance, up to 15 engineers undertake line maintenance on aircraft at Nelson.

[14] Although line maintenance is very largely done by employed staff, the evidence establishes that between 1 and 2 percent of all line maintenance work is performed by contract engineers. On average, contract engineers spend about 5 hours of each of their working weeks undertaking line maintenance on Air Nelson aircraft as directed by the company. The balance of their working time is on heavy maintenance. If the amount of line maintenance work required at any particular time during the day is more than the two or possibly three line maintenance engineers can

do, Air Nelson deploys contract engineers to assist the line maintenance staff. This does not occur regularly or frequently but does occur routinely.

[15] The work of the contract engineers is governed by the terms and conditions of their contracts with Air Nelson, a number of which were provided in evidence. They oblige the engineers to provide *"aircraft maintenance services to the aircraft operated by the COMPANY ... [including] attending to scheduled maintenance requirements, unscheduled defects, requests from pilots, and requests from operations or maintenance control."* We find this description includes line maintenance.

Previous cases

[16] The principal decision on which both parties relied is that of the full Court in *Finau & Ors v Southward Engineering Company Limited* WC 17/07, 25 July 2007. Leave to appeal that decision has been sought and the application for leave was heard by the Court of Appeal on 15 October 2007. Mr Wilton, who was also counsel in *Finau*, told us that at the conclusion of that hearing the presiding Justice intimated that leave will be granted but no judgment to this effect has yet been issued. Mr Wilton invited us to consider reserving our judgment in this case until the outcome of his appeal in *Finau* is known. However, we consider that this case should now be decided on its merits and by applying the law as this Court recently found it to be in *Finau*.

[17] *Finau* was a case dealing with the rights and obligations of an employer and non-striking union employees arising out of a direction to those employees to perform work that would otherwise have been done by striking employees. Relevant to this case, the Court in *Finau* defined what Parliament meant by the phrase *"the work of a striking or locked out employee"* in s97(2) and (3). The Court's conclusions are encapsulated in paragraphs [30], [31] and [32] of the judgment in *Finau* as follows:

> *[30] We prefer the "type of work" approach which would enable employers to direct non-striking employees to do particular tasks within the range of work they normally perform but would require the agreement of those employees to do work they do not normally perform.*

> *[31] This construction is based on the concept of what may properly be said to be work which an employee normally performs. We take the view that it comprises tasks which the employee regularly or routinely performs in the course of employment. This would not include tasks an employee might occasionally be required to do pursuant to a "catch all" provision of an employment agreement of the type referred to earlier. The key is what the employee actually does as a matter of practice, rather than what may be contained in a job description or otherwise be provided in an employment agreement. ...*
>
> *[32] ... the first issue will be whether the work the applicants were required to do was their own work or that of a striking employee. If it was work of a type which the applicants regularly or routinely performed when there was no strike in progress, it will be their own work and not that of a striking employee. In that case, s97(3) will not apply. If it is work which the applicants did not otherwise regularly or routinely perform, it will be the work of a striking employee, s97(3) will apply and the employees' agreement to do that work will be required.*

[18] We decide this case consistently with the *Finau* approach to the same words and phrases.

[19] In June 2007, some of the engineers employed by Air Nelson to do routine maintenance on the company's aircraft also took strike action. Work that might otherwise have been done by the striking engineers to maintain aircraft between flights was largely performed by other engineers employed by Air Nelson who were not on strike but some of this work was also done by self-employed contractors principally engaged by Air Nelson to carry out heavy maintenance work.

[20] There were originally three aircraft maintenance issues that underlay the union's allegations of breach. After hearing the evidence about one of these events involving a leaking refuelling valve, Mr Wilton responsibly abandoned any further reliance on the way in which this incident was dealt with by the company. We therefore only need to set out the factual background to the two other events.

[21] Each type of commercial aircraft has a schedule of minimum equipment which must be available and serviceable if any aircraft of that type is to fly. Provided that minimum level of equipment is maintained, aircraft may continue to operate with minor defects. In respect of the Saab A340 aircraft then operated by Air Nelson, the maximum number of defective cabin lights permitted was six. On 21 June 2007, a Saab aircraft ZK-NLE concluded its scheduled flying for the day at about 12.30 pm.

The aircraft was due for a routine inspection known as an LC2 check. It had five defective cabin lights. Although the aircraft was available to be worked on overnight when more maintenance engineers and tradespersons would be working, Air Nelson elected to have the LC2 check carried out by contract engineers during the afternoon. In the course of carrying out that check, one contract engineer replaced the defective cabin lights and also two reading lights.

[22] The second event involved an engine compressor wash carried out on Saab ZK-NLH by a contract engineer during the afternoon of 22 June 2007. This was done as part of Air Nelson's routine maintenance programme and was not urgently required. Although such maintenance procedures are more often undertaken overnight, they can be and are done at other times when aircraft are not in service. In the cases of both of the line maintenance jobs just described, performing this work when aircraft and staff are available to do so both utilises time and resources efficiently and ensures that operational aircraft are available in the event of a breakdown or delay on the company's network.

The freight loading work - Decision

[23] This aspect of the case turns on whether the use of Air New Zealand staff to assist with processing and loading food freight during the strike fell within the scope of s97(2) of the Employment Relations Act 2000. This involves two issues. The first is whether the work done by the Air New Zealand staff in question was the work of the striking Air Nelson employees. We are satisfied that it was.

[24] The second issue is whether those Air New Zealand staff did that work as a result of Air Nelson employing or engaging any person to do that work. It was submitted by Mr Wilton that the e-mail from Mr Burdekin to Mr Nelson dated 23 May 2007 amounted to a request by Air Nelson to Air New Zealand to carry out the work and that the subsequent provision by Air New Zealand of its staff to do the work completed an agreement between the two airlines to have Air New Zealand staff do the work. Mr Wilton submitted that this amounted to an engagement of the staff by Air Nelson for the purposes of s97(2).

[25] We do not accept that submission as, in our view, it does not reflect the true nature of events. Viewed in isolation, the e-mail of 23 May 2007 might appear to be the engagement by the defendant of Air New Zealand to perform the work and it was on this basis that the Court concluded that the union had an arguable case for the purposes of granting an interlocutory injunction. There was, however, a good deal of other evidence relevant to the issue including other e-mail correspondence, the unchallenged evidence of Mr Burdekin and Mr Nelson and, most importantly, the cargo sales and handling contract between Air Nelson and Air New Zealand.

[26] Taking all of the relevant evidence into account we conclude that Air New Zealand was not engaged by Air Nelson to perform the work in question. What the e-mail of 23 May 2007 established was that Air Nelson would be unable to discharge its obligation under the cargo handling contract to process and load freight during the strike. That triggered the provisions of clause 9 of the contract which included the right for Air New Zealand to carry out the work itself. We find that is what Air New Zealand did. Thus, rather than deploying its staff to Nelson Airport pursuant to any new agreement or engagement, Air New Zealand was exercising its rights under the existing agreement with Air Nelson to carry out the work. In doing so, Air New Zealand was not directing its staff to do the work for the benefit of Air Nelson but rather for its own benefit and in order to meet its contractual obligations to NZ King Salmon Co Ltd.

[27] The plaintiff's cause of action in respect of the cargo handling is not established and is dismissed. The interim injunction orders made on 17 June 2007 are now discharged. Mr Toogood QC for the defendant advised us that Air Nelson will not sue on the union's undertaking as to damages.

Line maintenance work - Decision

[28] We are similarly not satisfied that the events relating to line maintenance fall within the scope of s97. We find that the extent to which the contract engineers were deployed to line maintenance work by Air Nelson during the strike in June 2007 was within the range of work which they routinely performed. Their performance of such work was standard practice and unexceptional. Adopting and applying the

conclusions reached in *Finau*, we find that this limited amount of line maintenance can properly be regarded as the contract engineers' own work rather than that of striking employees.

[29] In reaching this conclusion, we considered Mr Wilton's submission that any particular task could not be the work of both a contracting engineer and of a striking engineer employee at the same time. The difficulty with that submission, and the reason we reject it, is that it relies on the *"particular task"* approach expressly rejected in *Finau*. Taking the approach preferred in *Finau*, we have no difficulty in finding that any particular task may be the *"type of work"* regularly or routinely performed by more than one person at a time.

[30] For these reasons, we find that the line maintenance work done by contract engineers was not the work of striking employees and that s97 therefore had no application to the actions of Air Nelson in deploying the contract engineers to do that work. This cause of action is also dismissed.

Observation

[31] We reiterate and extend the caution expressed in paragraph [33] of the judgment in *Finau*. Other than to the extent necessary to preserve health and safety, s97 as a whole was intended to limit the degree to which employers subject to strike action may reorganise their workforce to limit the effect of the strike. In *Finau* we specifically cautioned against interpreting the Court's decision as support for taking on new staff for the purpose of doing the work of existing employees about to strike. In this case, we wish to make it clear that whether work which is done by a contractor or non-striking employee during a strike is the work of a striking worker or that person's own work will be a matter not only of the type of work but also the extent to which the person does that type of work when there is no strike. To a large degree this decision turns on its relatively unusual facts. It should not be taken as a licence to employers to break strikes by changing significantly the pattern of work normally performed by contractors or non-striking employees.

Commercially sensitive affidavit evidence

[32] We confirm the permanent order that we made at the end of the hearing in respect of commercially sensitive freight contracts and details of the union's financial situation. No person is to have access to the affidavits on the court file dealing with that information without leave of a Judge and after the parties have had an opportunity to be heard.

Costs

[33] We reserve costs. Our present inclination is to regard this as a test case in which no order for costs should be made but, if either party wishes to apply for an order, it should do so by written memorandum filed and served within 28 days after the date of this judgment with the other party having a further 28 days to file and serve a memorandum in response.

GL Colgan
Chief Judge
for full Court

Judgment signed at 12.30 pm on Thursday 8 November 2007