

# Supreme Court Wraps Up Open Country Cheese Saga

In a case that has been maturing over the last few years, the Supreme Court has refused to allow an appeal and consequently upheld the Court of Appeal's decision that Open Country Cheese breached section 97 of the Employment Relations Act. Section 97 significantly limits an employer's ability to employ or engage substitute labour ("strike-breakers") to carry out the work of lawfully striking workers.

While the case had a relatively complex factual background, the critical facts were as follows.

The Cheese Company was formed in 2002. It owned and operates a cheese and milk powder plant at Waharoa, in the Waikato. The Open Country Dairy Ltd (the Dairy Company) acquired the Cheese Company in 2008 and has since operated it as a wholly owned subsidiary. The Cheese Company has its own board of directors. But, at least prior to the events in issue, the board never held formal meetings. All its directors are also directors of the Dairy Company. Its general manager, Mr Timothy Slade, is responsible to and directed by Mr Mark Fankhauser, the Dairy Company's chief executive officer.

The Cheese Company is a manufacturer, processing about 1.6 million litres of milk per day from over 300 dairy farms. At peak season it usually employs about 130 staff including management, administrators and seasonal and contract labour. The Dairy Company is responsible for selling and marketing the Cheese Company's product in conjunction with commodities produced by its other factories.

In June 2009 the Union initiated bargaining for a collective agreement with the Cheese Company, prospectively covering all employees who were or would become Union members. About 36 of the Cheese Company's 130 employees were then Union members. However, the bargaining broke down. In late August 2009 the Union issued a notice of intention to strike for an eight day period beginning in mid-September. The Cheese Company responded by issuing a notice of lockout for a period of six weeks to start when the strike was due to cease. The eight day strike coincided with the Cheese Company's peak production season. It is common ground that the strike action actually taken was lawful.

On receipt of the Union's notice, Mr Fankhauser called a meeting at the Dairy Company's premises in Auckland. Mr Slade, Mr Steven Koekemoer, a Dairy Company senior executive, and another cheese company manager attended at his direction. Mr Fankhauser issued instructions on the group response to the strike action.



Mr Slade's evidence was that Mr Fankhauser directed him to make available the Cheese Company resources to induct the Dairy Company employees and the plant for them to run it; that in his capacity as the Cheese Company's general manager he provided access to the plant and made it available; and that, in conjunction with the Dairy Company management, he prepared a roster for the replacement workers.

The Union claimed that the Cheese Company had breached the provisions of s 97 by employing or engaging the Dairy Company's employees and some volunteers in its factory during the strike and the lock out. It sought a compliance order accordingly.

The sole issue for determination by the Employment Court was whether the Cheese Company had, in breach of s 97(2), employed or engaged the replacement workers to perform the work of striking or locked out employees.

In the Employment Court, the Cheese Company's argument prevailed. Judge Travis was satisfied that Mr Fankhauser was acting for and on behalf of the Dairy Company alone in making all the arrangements including giving the necessary directions. He found that the Cheese Company and Mr Slade had no role in the initial employment or engagement of the Dairy Company employees. Instead, they simply acted according to Mr Fankhauser's directions.

In closing, however, the Union advanced a new argument based squarely on the words of s 97(2). The Union argued that it was irrelevant whether the Dairy Company or the Cheese Company initially employed or engaged the replacement employees. What was decisive was that once those replacements arrived and worked on the site the Cheese Company was employing or engaging them in a strike-breaking role.

While finding in favour of Open Country Cheese, Judge Travis accepted the Union's submission to the effect that the word "employ" in s 97(3) was synonymous with "deploy" or "use".

The Union was granted leave to appeal to the Court of Appeal on the basis that:

*“The Employment Court, having held in [the Union’s] favour that ‘employ or engage another person to perform the work of a striking or locked out employee’ in s 97(2) ... included ‘the concept of using another person to perform’ such work and having further found that employees of [the Dairy Company] were being used to perform the work of the [the Cheese Company’s] lawfully striking employees, erred in law in declining to find that [the Cheese Company] had as a consequence acted in breach of s 97.”*

In upholding the Union’s appeal and over turning the decision of the Employment Court, the Court of Appeal found that:

*“Striking is effective because it inflicts economic hardship on the employer by depriving it of the productivity of its employees. Its effect is negated, however, if the employer is able to avoid that detriment by substituting other workers. The strict nature of s 97(2) is reinforced by its admission of two limited exceptions (ss 97(3) and (4)). In our judgment, when construing the words “employ” or “engage” for the purposes of s 97, the focus must be on the benefit gained by the employer from the work of the replacement workers...*

*The words “employ” and “engage”, when read in the light of the purpose of s 97(2), refer to the employer’s use of the other persons, irrespective of its legal relationship with them. In terms of s 97(2), the question then is: Did the Cheese Company use other persons to perform the strikers’ work — that is, the work normally undertaken by them for its benefit? The section’s concern is with the employer’s acts or omissions — not those of another entity or that entity’s relationship with the replacement workers. What is required is an objective inquiry into the purpose, nature and effect of their work, assessed by reference to all the relevant circumstances.*

*The material circumstances are not in dispute. The Cheese Company continued its processing and manufacturing operations throughout the strike period. The only difference was that the work of the strikers was performed by another company’s employees or by volunteers. However, in law the work they performed was the Cheese Company’s work. That was the work which the strikers normally undertook for and on the company’s behalf; and which enabled the company, as the Judge himself found, to satisfy its contractual obligations. The Cheese Company made use of the replacement workers for that specific purpose and with that specific effect. And it secured the consequential commercial benefits.*

*The Cheese Company breached s 97(2) by employing, engaging or using other persons to perform the work of its employees who engaged in a lawful strike in September 2009.”*

In refusing Open Country Cheese leave to appeal, the Supreme Court stated that the Court of Appeal had correctly taken the view that the words “employ” and “engage”, when read in the light of the purpose of s 97(2), referred to the employer’s use of other persons, irrespective of its legal relationship with them; and that in law the work done by the employees of the parent company was the applicant company’s work which those on strike normally undertook for it. The work enabled the applicant to satisfy its contractual obligations. That constituted an employment or engagement by the applicant.

In conclusion the Supreme Court stated:

*“We find the Court of Appeal’s conclusions to be unimpeachable and accordingly we are not satisfied that it is necessary in the interests of justice for this Court to hear and determine the proposed appeal.”*

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