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Replacing Striking Workers with Contractors - Supreme Court Decision

Air Nelson Ltd v The New Zealand Amalgamated Engineering, Printing & Manufacturing Union Incorp [2010] NZSC 53

Background

The case of *Air Nelson* has finally had its day in the Supreme Court. As expected the decision has resulted in one disgruntled party, fortunately in this case not the employer. We can rest assured however that the Supreme Court decision, even with its opposition and dissenting judgment, settles this particular legal question regarding independent contractors and striking employees once and for all (at least for the duration of the current legislative provisions).

We briefly remind you of the facts. Air Nelson Ltd is a wholly-owned subsidiary of Air New Zealand Ltd. In June 2007 some Air Nelson employees went on strike. This consisted of a refusal to:

(a) work overtime;
(b) handle and perform any administration tasks connected with foodstuff freight at Nelson airport;
(c) perform de-icing of aircraft; and
(d) to train other staff.

It was usual for Air Nelson's engineering work to be performed by both employees and independent contractors. The contractors mainly performed heavy maintenance, but in addition they carried out an average of 5 hours of line maintenance work per week (minor repairs and the servicing of aircraft between flights and overnight). During the strike, some contractors performed line maintenance on two occasions.

S.97 of the ERA sets out the circumstances in which an employer, faced with a lawful strike, can employ or engage others to perform the work of striking employees. The relevant clauses of s.97 are:

"(3) An employer may employ another person to perform the work of a striking 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."

As stated by the Employment Court in its original decision, "*s.97 as a whole is intended to limit the degree to which employers subject to strike action may reorganise their workforce to limit the effect of the strike".*

The central issue was whether the maintenance work fell within the scope of s.97 as '*work of a striking or locked out employee'*. The union submitted that by having the contractors carry out the particular line maintenance during a lawful strike, Air Nelson had contravened s.97. It argued that because the line maintenance work was work done by the employees, irrespective of the fact that contractors had, from time to time, done this work, Air Nelson could not replace striking employees with the independent contractors, as to do so meant that they were being employed principally to replace those workers rather than to do their own work.

Employment Court Decision – The Question to be Asked

With regard to the line maintenance work the Employment Court determined that the question to be asked was whether the extent to which the contract engineers were deployed to do line maintenance work during the strike was within the range of work they '*routinely'* or '*normally'* performed.

The Employment Court asked "*If it is the type of work which comes within the normal duties of non-striking employees, then those employees are not being asked to do the work of a striking employee but their own work".*

The Employment Court gave a broad interpretation to the s.97 reference to '*employ'* or '*engage'* and found in favour of Air Nelson Ltd. It held that "*the extent to which the contract engineers were deployed to do line maintenance work by the defendant during the strike in June 2007 was within the range of work which they routinely performed."* The Court concluded that this limited amount of line maintenance could properly be regarded as the contract engineer's own work rather than that of striking employees. It stated that *"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".* The engagement of the contract engineers was therefore lawful and s.97 did not apply.

The Court of Appeal Decision and '*The Correct Question to be Asked'*

The Union appealed to the Court of Appeal on a question of law as to the meaning of the words, '*the work of a striking or locked out employee'* as used in s.97.

The Court of Appeal determined that the Employment Court had asked the wrong question. The focus should not have been on what the contract engineers engaged by Air Nelson *normally did,* but instead the correct question was whether they were performing work which, *but for the strike*, a striking employee would have been performing. The Court of Appeal referred to the roster system which it assumed would be prepared weeks or months in advance, which "*would reveal that, but for the strike, a striking employee would have been performing*" and if the work probably would have been done by the striking employee, then s.97 would have applied. On this basis the Court of Appeal rejected the decision of the Employment Court.

The Supreme Court Decision

Air Nelson, dissatisfied with the decision of the Court of Appeal, then appealed to the Supreme Court. The five judges of the Supreme Court examined the reasoning behind the decisions of both the Employment Court and the Court of Appeal. It ultimately found in favour of Air Nelson.

The Supreme Court stated that it had difficulty with the reasoning of both the Employment Court and the Court of Appeal, and further that the Employment Court did not ask the wrong question. Of interest, the following points were made:

1. The Court of Appeal held that the Employment Court's focus should not have been on what the contract engineers normally did but whether they did work which, but for the strike, a striking employee would have done. The Supreme Court stated however that the essential question is concerned not with the meaning of "*work*" but with recognising the nature and scope of particular work in particular cases.

2. It recognised that a person's work may in fact be more or less varied than what is stated in their employment agreement, and it may be integrated with the duties of another employee. How and to what extent will establish a pattern. Analysis may require consideration of what the employee's work usually, normally, regularly or routinely entails.

3. The examination of the usual work of one who is not striking or locked out, as well as one who is striking or locked out, is part of the method for determining whether there has been or might be a breach of s.97.

4. The Court of Appeal found that the Employment Court's interpretation would be difficult to apply in practice because an employee who performs the work of a striking employee would have difficulty in ascertaining what a striking worker's usual work would be. The Supreme Court stated however that if there is an integration of work then it could be assumed that the integrated employees/contractors know what their usual work is. If not, that would indicate a break in usual work patterns and therefore a possible contravention of s.97.

5. The Court of Appeal had criticised the Employment Court's interpretation of s.97 and commented that it could lead to potential abuse through wide job descriptions in employment agreements. Its concern was that union secretaries, when called upon at short notice to give advice, could not simply have regard to the terms and conditions of the collective agreement but would need to receive additional information on how a particular workplace operated in practice. The Supreme Court refuted this reasoning and stated, *"....we think it is wrong to assume that union secretaries will act in ignorance of workplace practices and realities; that unbriefed on all relevant considerations, they would make a decision whether or not to object to a situation simply on the basis of reading a collective agreement*".

6. The Supreme Court approved of the Employment Court's approach of seeking a balance between a person's right to strike and another person's right to work. The Employment Court's conclusion that the use of contract engineers who themselves habitually performed some of the line maintenance work (although a small portion of it) was not in the circumstances performance of '*work of the striking employee'* was in fact the correct conclusion and therefore s.97 did not apply.

The importance of contingency planning when there is the prospect of strike action is paramount. This obviously includes determining how or whether the work of striking employees can be carried out by existing employees and/or contractors. We would strongly urge you to seek advice in this regard and note that the Supreme Court decision will only have limited application.

McPhail Gibson & Zwart - Level 2, 155 Kilmore Street PO Box 13-780, Christchurch **Tel** (03) 365 2345 **Fax** (03) 365 2347 **www.mgz.co.nz**

Neil McPhail - Email neil@mgz.co.nz Mobile 0274 387 803 **Raewyn Gibson** - Email raewyn@mgz.co.nz Mobile 0274 387 802

Peter Zwart - Email peter@mgz.co.nz Mobile 0274 367 757 **Sarah Bradshaw** - Email sarah@mgz.co.nz Mobile 021 486 448