

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**CC 12/07  
CRC 23/07**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND AMALGAMATED ENGINEERING PRINTING AND MANUFACTURING UNION INCORPORATED Plaintiff
AND	AIR NELSON LIMITED Defendant

Hearing: 15 June 2007  
(Heard at Auckland)

Appearances: Tony Wilton, Counsel for Plaintiff  
David France and Rachel Larmer, Counsel for Defendant

Judgment: 17 June 2007

---

**JUDGMENT OF CHIEF JUDGE GL COLGAN**

---

[1] This is a challenge to the Employment Relations Authority's refusal to grant an interlocutory injunction to prevent an employer using certain strike breaking or strike blunting arrangements until the Authority can determine this dispute substantively. The plaintiff union sought and obtained an urgent hearing of its challenge: lawful strike action by its members is continuing as are the employer's measures to counter this. It will take some time for the Employment Relations Authority (or this Court) to investigate and determine the legality of those tactics.

[2] This judgment (that is the final version of the draft judgment sent to counsel late last Friday afternoon 15 June) deals only with the question whether the employer

should be restrained by injunction from using alternative means of performing the work of striking employees including the loading and unloading of freight, aircraft de-icing, and staff training, until the substantive merits of the case can be decided.

[3] Employees of the airline include union members on whose behalf the union is bargaining with the company for a collective agreement. Bargaining has taken place since the union formally initiated it on 31 January 2007 but agreement on the contents of a new collective agreement has not yet been reached. Counsel tell me there have been further bargaining sessions recently and more are planned. Although there is apparently some cause for optimism, there is no settlement in sight.

[4] On 9 May 2007 the union served notice of strike action beginning on 24 May and continuing until 8 July 2007 covering the work of tarmac and traffic employees and being, in particular, a continuous reduction of the normal performance of their work for that period including a refusal to work overtime, to handle or perform any administrative tasks connected with foodstuff freight, a refusal to de-ice aircraft, and a refusal to train other staff. Some of these strikes are confined to the airline's home base at Nelson and others apply to its operations anywhere in New Zealand. For the purpose of this case, those distinctions are not material because the union's concerns affect measures taken by the airline to perform the work of striking employees wherever strike action is taking place.

[5] Soon after the commencement of the strike, union officials discovered persons not previously employed by the defendant loading freight on aircraft at Nelson. These were four or five managerial employees of Air New Zealand Limited ("Air NZ"). Air Nelson Limited ("Air Nelson") is a wholly owned subsidiary of Air NZ and part of the Air New Zealand group of companies.

[6] A division of Air NZ, although not a separate legal entity, is known as Air New Zealand National Cargo. As its name suggests, its business is with the transport of cargo by air within New Zealand. Because Air Nelson operates regional airline services to a number of secondary airports throughout the country (including

Nelson) and Air NZ does not, New Zealand National Cargo's business at, and to and from, those subsidiary airports is handled by Air Nelson where it has a presence.

[7] Those arrangements are the subject of written commercial agreements between Air New Zealand National Cargo and Air Nelson.

[8] On 23 May 2007 Robert Burdekin, Air Nelson's manager of Airports and Network Operations, e-mailed Ricky Nelson, Air New Zealand National Cargo's manager, about the impending strike action "*which affects our ability to process and handle food stuff freight*" and which Mr Burdekin apprehended would make the defendant "*unable to fulfil our obligations to National Cargo as per our Service Level Agreement for the duration of this strike*". The e-mail continued:

*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.*

[9] The e-mail concluded, significantly for the plaintiff's case:

*Could you please make the necessary arrangements to ensure the continuation of cargo out of Nelson.*

[10] After 24 May cargo operations usually performed by striking employees at Nelson Airport were handled by a combination of substitute methods. Some freight has been despatched by road. Some non-striking Air Nelson employees were directed to undertake some of this work. There is no challenge to the entitlement of the defendant to this methodology. However, a number of managerial employees of Air NZ have come from other centres to Nelson to there perform some of the work that would usually be undertaken by striking employees and, in particular, the work of loading food products onto aircraft from Nelson. These freight consignments consist principally of salmon from King Salmon New Zealand Limited ("KSNZ") that relies upon Air NZ air freighting its products daily to markets elsewhere in New Zealand and overseas.

[11] Pending investigation and determination of its substantive claim for penalties for breach of s97, the union sought injunctive relief from the Employment Relations

Authority at Christchurch. The Authority investigated this claim at a meeting on 30 May and, by a reserved determination issued six days later, declined to grant the relief sought. It did so by concluding that the plaintiff union had no arguable case of breach of s97 by the defendant. The Authority's reasoning included the following:

*[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.*

[12] Section 97 of the Employment Relations Act 2000 provides as follows. I have underlined the significant passages.

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

[13] Section 97 must be read in context of the purposes and objects of the Act which include an acknowledgement and addressing of the inherent inequality of power in employment relationships (s3(a)(ii)) and a recognition that certain strikes and lockouts will be lawful despite unions and employers having to deal with each other in good faith (s80(a)).

[14] The objective of s97 is generally to constrain an employer of striking or locked out employees from strike or lockout breaking, that is from having the work of the striking or locked out employees done otherwise during the strike or lockout. Strikes and lockouts are lawful economic weapons in bargaining disputes. A strike will be undertaken by union members with the intention of causing their employer economic harm and, thereby, to encourage the employer to settle the bargaining on the union's terms. Striking employees also suffer economically as a result of their strike action: they are not entitled to remuneration for not performing their usual work. Similarly, a lockout is an economic weapon available to an employer to cause economic harm to employees for whom a union is bargaining collectively, so that those employees will be encouraged to settle the bargaining on the employer's terms.

[15] The economic harm caused to an employer by strike action, or resulting from its own action in locking out employees, can be at least alleviated and perhaps even eliminated if the employer is able to have the work of the striking or locked out employees performed otherwise during that period of what is sometimes called industrial action. Commonly known ways of doing so include having other non-

striking staff perform the work of strikers or bringing in outsiders to do that work. The same tactics can be employed in the case of a lockout.

[16] To address what Parliament considered was the unsatisfactory and unregulated position under the previous legislative regime, it enacted s97 in 2000 as a permissive provision allowing for the performance of the work of striking or locked out employees but in certain defined circumstances.

[17] Where an employer seeks to strike break other than by using its own existing workforce that is not on strike, the statute imposes very stringent conditions upon doing so. Those are that there must be reasonable grounds for believing that it is necessary for the work to be so performed for reasons of safety or health. There is no suggestion that this test is met in this case.

[18] Generally, s97 is more permissive where an employer employs or engages another to do the work of a striker where that other is already an employee of the same employer. So there is a more severe constraint upon an employer wishing to engage external alternate labour to perform the work of a striker.

[19] The Employment Relations Authority appears to have followed the judgment of this Court in another interlocutory injunction application, *National Distribution Union v General Distributors Limited* unreported, 4 September 2006, AC 49/06. Certainly the defendant sought to rely upon it in this case. That case is, however, both distinguishable on its facts and does not address directly the question of statutory meaning at issue in this case.

[20] In the *General Distributors* case, locked out employees were employed in supermarket distribution warehouses to receive and despatch goods received from suppliers to supermarkets as and when these goods were required. The employers that owned and operated the distribution warehouses were wholly owned subsidiary companies of a larger entity and one of the distribution centre owners also operated the chains of supermarkets. The detail of the work being performed by locked out employees was dictated by the supermarkets although the transport of goods to and from the distribution centres was undertaken by independent transport companies.

The unions claimed that the employers had circumvented the distribution warehouse process where the locked out employees were engaged by having an independent logistics company deliver goods to the supermarkets directly using its own employees for this work.

[21] The Court rejected an argument for the unions in that case that the words “*An employer*” in s97 should be read absolutely literally to include any employer of any employees however connected or disconnected to the dispute. The Court found that this was very unlikely to have been Parliament’s intention, the more likely meaning of the phrase being any employer of striking or locked out employees. Mr Wilton for the plaintiff in this case accepts this position but says his argument accommodates it. In *General Distributors* there was evidence that the logistics company was undertaking the warehouse work that would otherwise have been undertaken by the employers and, in particular, the specific work of receiving, selecting and out-loading goods for supermarkets. However, the Court concluded that there was no or insufficient evidence that the logistics company had been engaged by the employers and indeed such evidence as was then available tended to indicate that the logistics company was performing this work on the instructions of the supermarkets. In that case, the stronger inference at the interlocutory injunctive stage was that it was the producers and suppliers of the goods who had made alternative arrangements for their distribution to the supermarkets and not the employers of the locked out employees.

[22] As the Court noted in the *General Distributors* case:

*... The industrial weapons of strike and lockout necessarily involve the infliction of economic hardship upon employers and employees designed to influence or persuade them to unwilling acceptance of the other side’s demands. In the past, employers subject to strike or lockout action have adopted ingenious strategies to allow their enterprises to keep operating without the involvement of employees on strike or locked out. These tactics have, in turn, broadened some disputes in the sense of compelling employees and unions to curb or eliminate that avoidance behaviour by such tactics as picketing, secondary boycotts, black bans, and similar tactics aimed at the activities of others who assist the employer subject to the strike or lockout action. Such responses have often tended to inflame and harden disputes rather than to encourage their settlement under economic duress. So Parliament has legislated, it may be said, for reciprocity of pain sharing to encourage resolutions of employment bargaining disputes on their merits.*

[23] The circumstances of the *General Distributors* case are plainly distinguishable from those in this case. In *General Distributors* the prevailing inference to be drawn was that suppliers or end customers had arranged for other parties than the employer to undertake alternative work arrangements so that the employer's part of the supply chain was avoided altogether. There was no evidence that these arrangements had been made or participated in by the employer or that it had engaged others to do the work of locked out employees.

[24] Here, by contrast, Air Nelson continues to convey freight on its aircraft. The task of loading that freight and of associated administrative work is undertaken at the employer's premises but by persons who are not employees of Air Nelson and are employees of another entity. There is evidence of a communication in which it might be said that Air Nelson has arranged for Air NZ to undertake that work.

[25] The Authority in this case appears to have focused on whether the employer may have come within the statutory terms of s97(3), that is the subsection permitting (in certain circumstances) the assignment of other existing employees to the work of strikers. Although there is evidence that this has occurred, that is not what the union is challenging. Rather, the case seems to fall more naturally into subs (4), dealing with the employment or engagement of another person to perform the work of the strikers.

[26] The Authority's determination reveals some fundamental errors. Although it is not entirely clear what the Authority meant when it referred to establishing evidence on the balance of probabilities, that is not the test for interlocutory injunction. Rather, the plaintiff must establish an arguable case and, in doing so, will usually require evidence of such a case unless it is conceded. It is not a matter of assessing whether one party's case, or any particular part of it, is more probably correct than the other's. At an urgently conducted investigation or hearing where decisions are made on affidavit evidence, there is no cross-examination, and there has been no full disclosure of documents, the probabilities of the truth of evidence are not in issue.



[27] The Authority also erred when it considered whether the union's undertaking as to damages could properly extend to cover third party losses. The undertaking as to damages addresses only whether an applicant for interlocutory relief will make good the financial losses of the party or parties against whom an injunction may be granted if the Court subsequently so directs. Its form and contents are prescribed and must be adhered to. Although effects on third parties may, in many cases, be a discretionary consideration as to whether relief is granted, for example whether hospital patients will suffer during a strike, that is not the subject of the undertaking. In this case, in any event, if Air NZ suffers monetary losses as a result of the imposition of an injunction affecting its business, its recourse will be against either or both of the defendant or the union. If Air Nelson defaults on its contractual obligations to Air NZ it may become liable in damages or penalties to its contracting party. If, in these circumstances, Air Nelson's use of strike breakers is vindicated when the case is determined substantively, it will be able to call upon the union to honour its undertaking, if necessary by proceedings to this effect. Losses incurred by KSNZ, the consignor of the freight through Air NZ, may be recoverable by that company from Air NZ and, by a knock-on effect through Air Nelson, sheeted home to the union if injunctive relief was not warranted.

[28] The expression by Parliament of its intention in s97 is not entirely felicitous. On the defendant's argument, its use of the word "*employ*" in subs (2), (3) and (4) does not seem entirely consistent. In subs (2) Parliament permits an employer to "*employ or engage*" another person to perform the work of striking employees in accordance with the following subsections. Subsection (3) dealing with the deployment to do that work of employees who are already "*employed*" by the employer uses the same word, "*employ*". Assuming that the word "*employed*" in both subs (3)(a) and (3)(b) means being in an employment relationship or contract between employer and employee, it is arguable that the opening words of subs (3) ("*An employer may employ ...*") intended a wider meaning to be given to this use of the word than simply being in an employment relationship or contract between employer and employee. The meaning to be ascribed to the word "*employ*" in the opening words of subs (3) will colour its use in the phrase "*employ or engage*".

[29] Complicating the position is the repetition of the word “*employ*” in subs (4) in the phrase “*An employer may employ or engage*” where the intention appears to be to exclude the use of outsiders except in extraordinary circumstances of health or safety risk. To be consistent, therefore, it is arguable for the plaintiff that the verb “*employ*” used in s97(2) and for the first time in each of subs (3) and (4), means simply to use. That meaning will also arguably be consistent with the position of community or other external volunteers covering for striking or locked out employees as is not uncommon, for example in the health sector. Nor is it clear what Parliament meant by use of the word “*engage*”. The question of what meaning should be ascribed to the words “*employ*” and “*engage*” in s97 is far from clear and is not settled. Considering the scheme or purpose of the section being to constrain strike breaking, it is distinctly arguable for the plaintiff that an employer will act in breach of s97 by having another or others perform the work of striking or locked out employees.

[30] Contrary to the Authority’s view, I conclude that there is an arguable case that Air Nelson “*employed*” or “*engaged*” Air NZ to perform the work that would otherwise have been undertaken by Air Nelson employees but who were then on strike. Asking Air NZ, as Air Nelson did, to “*make the necessary arrangements to ensure the continuation of cargo out of Nelson*” is arguably evidence of employment or engagement of Air NZ to perform the work of the striking employees. Air NZ could, of course, only perform that work through human agents and the evidence points to its assignment of various managerial personnel from other parts of the country to undertake that work and, although remaining employed by Air NZ, to nevertheless perform the work of the striking employees.

[31] It is arguable that, for the purpose of s97, the terms of any contractual arrangement between the defendant and Air NZ may allow for performance of that work in that way in circumstances of fault by Air Nelson. Such contractual terms cannot be contrary to law. Put another way, Air Nelson cannot plead contractual entitlement or obligation as a defence to statutorily prohibited conduct. Mr France acknowledged this and confirmed that his client’s contract is subject to s97 as part of the law of New Zealand. Clause 25 of the contract also so confirms.

[32] That arguable case is strengthened by other parts of the e-mailed advice from Air Nelson to Air NZ of 23 May 2007. The e-mail advises that the impending strike action will affect Air Nelson's ability to process and handle freight as it contracted with Air New Zealand it would. The e-mail advises of the duration of the strike and therefore of that potential inability. The e-mail notes the employer's potential to itself handle some but not all of the work of striking employees. It arguably purports to invite Air NZ to make necessary arrangements to ensure that its cargo continues to be carried out of Nelson. It is arguable that this is the employment or engagement of another party to do the work that would otherwise be undertaken by the strikers.

[33] Having concluded that there is an arguable case of breach of s97, I must now consider where the balance of convenience may lie between the parties until this issue can be tried and decided substantively. As was noted in the *General Distributors* case:

*... Although the statutory sanction for breach of 97 is a penalty able to be imposed by the Employment Relations Authority after the event, where a breach is established and the Court is satisfied of the likelihood of a repetition or continuation of that breach, the law permits prospective illegality to be restrained. Although I do not suggest so in this case at this stage, this would ensure that, under s97, an employer cannot cynically calculate that the cost to it of a penalty subsequently imposed will be a lesser sanction than the cost of compliance with the law. ...*

[34] So one relevant consideration whether to grant an injunction is the efficacy of the ultimate remedy to which the plaintiff might be entitled if the defendant's conduct is unlawful. Section 97(6) provides that an employer who fails to comply with the section is liable to a penalty imposed by the Authority in respect of each person who performs the work concerned. On its face, the penalty is assessed not by reference to the number of occasions on which the work may be performed or the economic value of the work performed or the economic consequences to the striking or locked out employees. Rather, the Authority or the Court will be guided in the imposition of a penalty by the number of strike breakers. The evidence at this stage points to four or, at most, five Air NZ managerial employees having performed the work of the striking employees.

[35] The generic penalty provided by the Act in respect of a s97 breach is \$10,000 (s135(2)(b)) so that the maximum penalty that the defendant is at risk of suffering is, by my estimate, \$50,000. Some or all of that may be payable to the union but that is discretionary and it is unlikely that the maximum fine would be imposed for what is arguably a first offence.

[36] That is not, of course, the only consideration. Unlawful conduct during difficult and finely balanced negotiations or bargaining for a collective agreement may skew significantly the balance of power in those negotiations and the Court should not be seen to sanction a party taking unlawful advantage in bargaining at the risk of a subsequent monetary penalty that may be significantly less than the advantage it gains. Even a penalty as great as the theoretical maximum of \$50,000 may be minor compared to the reduction of a fraction of a percentage of a wage increase across a workforce for the duration of a collective agreement, that an employer may be able to achieve in collective bargaining by use of strike breakers.

[37] The scheme of the legislation is that, as the Court put it in the *General Distributors* case, there should be “*pain sharing*” in strikes and lockouts. The statutory objective of persuading parties to settle negotiations by bargaining under threat or actuality of strike or lockout action would be defeated if one party were permitted to relieve, entirely or substantially, the adverse effect upon it otherwise than the law allows.

[38] Unlike in the Authority where it provided none, the plaintiff has now given evidence of its ability to back its undertaking as to damages. That is an essential element of the case of any plaintiff seeking injunctive relief where a consequence of the grant may be financial loss to the party enjoined that the plaintiff undertakes to meet if so ordered by the Court. Such information is frequently omitted in cases seen by this Court and applicants for interlocutory injunctive relief should be on notice that unless it is provided, relief may be postponed at best and refused at worst.

[39] I accept that if the employer is prevented from having the work of its striking employees done by Air NZ employees as has been the case, it is likely to suffer economically. It may be liable to Air NZ for the losses that the latter incurs by being

unable to transport its cargo out of Nelson, at least in the way that it has to date on Air Nelson's aircraft. But that liability will eventually be attributable to the defendant because of its inability to perform its contractual obligations with Air NZ. That loss is potentially recoverable from the union in reliance on the undertaking. That is the economic risk that any applicant for injunctive relief faces where there is potential monetary loss.

[40] The union has now given evidence of its financial circumstances in support of its undertaking as to damages and there is no challenge to this. That evidence discloses that the net value of the union's assets is very substantial divided approximately equally between fixed and liquid assets with quite modest current liabilities. I am satisfied that the union is in a financial position to meet any likely call upon it pursuant to the undertaking: it will be able to meet any damages award (including indemnification by Air Nelson of Air NZ's and KSNZ's losses attributable to the grant of an injunction) made against it if it is eventually established that the injunctive relief it seeks was wrongly granted. In that sense, damages will be an adequate and realistic remedy for Air Nelson.

[41] At one level it appears to be counter-intuitive to discount financial loss when considering the balance of convenience as one of the tests applicable to the grant or refusal of an interlocutory injunction. But this is not a usual case. In many instances, conduct that is alleged to be unlawful is the direct cause of economic loss so that stopping or stemming the economic loss by prohibiting the conduct is a relevant consideration. Here, however, the situation is one of a lawful activity (strike) causing economic loss, but the allegedly unlawful conduct is that having the purpose of minimising the loss. In a sense, this is the obverse of many injunction cases.

[42] It must be remembered in this case that there is lawful strike action. As is the rationale for such action, it is causing loss not only to the employer (Air Nelson) but to the party to which it is contracted (Air NZ) and indeed to the party to which the contractor is itself contracted (KSNZ). The evidence is that some of these financial losses are occurring as a result of the lawful strike action and, as such, cannot be

sheeted home to the union in the sense of making it liable at law to make good those losses.

[43] It is also important to record that there is at best only a faint suggestion amongst the comprehensive evidence of loss filed by the defendant (including affidavits from representatives of Air NZ and KSNZ) that there is more than ascertainable and quantifiable financial loss. There is no real suggestion of loss of customer goodwill or other similar intangible and difficult-to-quantify economic loss that will often be a significant factor in the balance of convenience. The evidence is that the losses to KSNZ have included reductions in production level, making alternative arrangements to ship freight by road, considering making alternative arrangements for air transport of product other than by Air Nelson, and similar strategies to minimise KSNZ's loss that would not appear to involve a breach of s97. Clearly, the easiest way to counter the effects of the strike action is to do what has been done to date, that is to bring in managerial staff from other albeit associated entities to perform the work of striking employees. I infer from the evidence that if this were to be stopped by injunction, alternative methods of ameliorating the effects of the strike on non-parties could and would be used, albeit at greater inconvenience and cost.

[44] A further relevant consideration in the assessment of both the balance of convenience and the overall justice of the case is when it can be determined substantively. I am told by counsel that the Employment Relations Authority has set aside time for its investigation on 8 and 9 July 2007. In the meantime, however, the union has applied to the Authority under s178 for removal of the proceeding for hearing in this Court at first instance. The defendant has not yet determined whether to consent to or oppose this application or to remain neutral towards it but the parties anticipate the Authority considering and determining it next week. Whether the proceeding is removed is entirely a matter for the Authority in the first instance but contingency plans have been made for a hearing of the proceeding if it is removed. Subject to the availability of a venue, the case will be able to be heard by the Court in Nelson. Subject to the availability of witnesses (counsel confirm that they themselves will be available), the Court can hear the substantive proceeding between the parties on 4, 5 and, if necessary, 6 July 2007.

[45] Amongst the exhibits are commercially sensitive freight contracts and details of the union's financial situation. The parties have agreed that there will be no need to make non-publication orders at this stage because my judgment is able to be expressed without reference to the details of that sensitive evidence. I do, however, direct that no person is to have access to the affidavits dealing with that information on the file without leave of a Judge and after submissions from the parties.

[46] For the foregoing reasons I am satisfied that the plaintiff has a sound arguable case of breach of s97 by the defendant. The balance of convenience, although not by any means overwhelmingly so, favours the granting of interlocutory injunctive relief for three principal reasons. First, damages that might be attributable to the effects of injunctive restraint will be an adequate remedy for the defendant and, through it, for others affected economically. Second, there is a relatively short period before the substantive merits of the case can be determined. Third, the integrity of the legislative scheme to prohibit strike breaking except in limited and defined circumstances should be preserved, and the respective bargaining strengths of the parties in their negotiations maintained in accordance with that legislative scheme that addresses bargaining power inequality.

[47] There are no particular considerations affecting the overall justice of the case that have not already been dealt with under the first two tests. Nevertheless, standing back from the detail of the case, I consider that its overall justice requires the grant of injunctive relief for a limited period.

[48] The following are the formal orders of the Court:

- a. Until further order of the Court, Air Nelson Limited is not to employ and/or engage any person to perform the work of striking employees at Nelson Airport or elsewhere unless the person is already employed by the defendant at the time the strike commenced and has agreed to perform the work or it is necessary for the work to be performed for the reasons of safety or health.

- b. Until further order of the Court, Air Nelson Limited is not to employ and/or engage Air New Zealand Limited and/or any or all of Kenneth Raymond Walker, Kenneth Bleach, Gavin Carter and James Howe, from performing the work of striking employees unless it is necessary for that work to be performed for reasons of safety or health.

[49] Costs are reserved.

[50] If the proceeding currently before the Employment Relations Authority is removed to this Court for hearing at first instance as has been applied for, the Registrar is to be advised promptly and a conference convened with a Judge to timetable the case to a hearing.

GL Colgan  
Chief Judge

Judgment signed at 12.00pm Sunday 17 June 2007