**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**WC 17/07**
**WRC 28/06**

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| IN THE MATTER OF | the referral of a question of law from the Employment Relations Authority |
| BETWEEN | KEN FINAU<br>OKA MAIAVA<br>MARK REYNARD<br>NIKO ALOISIO<br>CHRISTOPHER DOWNS<br>LYLE SMITH<br>LEON MAKARA<br>Applicants |
| AND | SOUTHWARD ENGINEERING COMPANY LIMITED<br>Respondent |

Hearing: 16 November 2006
(Heard at Wellington)

Court: Judge G L Colgan
Judge C M Shaw
Judge A A Couch

Counsel: J A Wilton, Counsel for the Applicants
T P Cleary and Elizabeth Brown, Counsel for the Respondent and for Business New Zealand Inc as Intervener
Peter Cranney and Anthea Hughes, Counsel for the New Zealand Council of Trade Unions as Intervener

Judgment: 25 July 2007

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## JUDGMENT OF THE FULL COURT

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[1] This judgment deals with new legal issues about strike breaking and suspensions of non-striking employees who are said to be parties to the strike. A question of law has been referred to the Court by the Employment Relations

Authority which has suspended its investigation into the employment relationship of the parties pending an answer to the question.

[2] Because the issues raised have implications for parties other than those to the present proceedings, the New Zealand Council of Trade Unions (the CTU) and Business New Zealand took the opportunity we offered to be represented at the hearing and make submissions. Business New Zealand was represented by counsel for the employer, Mr Cleary and Ms Brown, although no separate submissions were made on its behalf.

## Background

[3] The following facts are as found by the Authority in its referral to the Court.

[4] The employment relationship problem arises from a collective bargaining dispute between Southward Engineering Company Ltd (Southward), which operates engineering factories in Lower Hutt and East Tamaki, Auckland, and the applicants' union, the NZ Engineering, Printing and Manufacturing Union (the EPMU). The applicants are members of the EPMU who were to be bound by a collective agreement being bargained for in 2005.

[5] In August and September 2005, during bargaining for the collective agreement, some members of the EPMU at Southward took strike action. On 22 September two machinists (not applicants in the present proceedings) refused to operate a coil slitter machine and were suspended by Southward as parties to the strike. The next day two other employees, the applicants Mr Smith and Mr Makara, were instructed to operate the coil slitter. They refused because they did not want to perform the work of the striking operators. They were then suspended under s87 of the Employment Relations Act 2000 because Southward said they were parties to the strike. Their suspensions lasted until 5 October 2005.

[6] Both Mr Smith and Mr Makara are trained to operate the coil slitter and do so from time to time when the usual operators are unavailable. Their employment

agreement permitted Southward to require them to transfer to other jobs within the scope of its operations if they were competent to perform those jobs.

[7] In this proceeding, the Court is not otherwise concerned with the facts. They must be for the Authority to determine. What we must decide are any questions of law which arise from the facts.

## The question of law

[8] The Authority framed the question in the following way:

> *Can employees, who are union members and who will be bound by the collective agreement being bargained for, who do not agree under s. 97 to do the work of striking employees, and which is not the work that they are principally employed to perform, be suspended under s. 87 even though the work in question is part of their normal duties to which they can be required to perform by way of transfer through the provision of their employment agreement?*

[9] For the applicants, Mr Wilton proposed that the question be reframed to read:

> [can] *employees be suspended under s.87 as parties to a strike if they*
>
> - *Are members of the same union as the striking employees;*
> - *Will be bound by the collective agreement being bargained for;*
> - *Refuse to perform the work of striking employees, the work in question not being the work that they are principally employed to perform, but work which they could normally be required to perform by way of transfer under their employment agreement;*
> - *Refuse to perform the work in reliance on s.97.*

[10] Mr Cleary took no issue with the way Mr Wilton reframed the question but wished to add a collateral issue: whether the applicants, having agreed as members of a union to take industrial action, may be lawfully suspended under s87 as parties to the strike any time after the strike commences irrespective of their later refusal to work.

[11] The difficulty with these questions is that they do not address satisfactorily the issues between the parties which became clear during submissions and are based on some assumptions which require testing.

[12] The concern of the union is that employees who did not agree to perform work as directed during the strike were suspended wrongly as parties to the strike. The employer's position is that it has express or implied rights in the collective agreement to redeploy its employees, and those employees who refuse to accept redeployment become parties to the strike because they have reduced the normal performance of their work. The employer goes on to say that, if the work to which employees are redeployed can properly be described as their own work rather than "the work of a striking employee" as contemplated by s97, then that section does not apply.

## The issues

1. What is the meaning of the words "*the work of a striking or locked out employee*" as used in s97?
2. Does an employee who does not agree under s97(3) to perform the work of a striking employee thereby become a party to the strike and liable to suspension?
3. Does an individual member of a union become party to a strike solely by reason of that membership?

## Statutory interpretation

[13] A number of sections in Part 8 of the Employment Relations Act 2000 need to be interpreted. In accordance with s5 of the Interpretation Act 1999, the meaning of an enactment must be ascertained from its text and in the light of its purpose.

### Relevant sections

[14] Section 81 of the Employment Relations Act 2000 is a codified definition of what constitutes a strike and a party to a strike:

> ***81 Meaning of strike***
>
> *(1) In this Act, **strike** means an act that—*

*(a) is the act of a number of employees who are or have been in the employment of the same employer or of different employers—*

*(i) in discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or*

*(ii) in refusing or failing after any such discontinuance to resume or return to their employment; or*

*(iii) in breaking their employment agreements; or*

*(iv) in refusing or failing to accept engagement for work in which they are usually employed; or*

*(v) in reducing their normal output or their normal rate of work; and*

*(b) is due to a combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by the employees.*

*(2) In this Act, **strike** does not include an employees' meeting authorised—*

*(a) by an employer; or*

*(b) by an employment agreement; or*

*(c) by this Act.*

*(3) In this Act, **to strike** means to become a party to a strike.*

[15] Section 87 concerns the suspension of striking employees:

***87 Suspension of striking employees***

*(1) Where there is a strike, the employer may suspend the employment of an employee who is a party to the strike.*

*(2) Unless sooner revoked by the employer, a suspension under subsection (1) continues until the strike is ended.*

*(3) The suspension under this section of all or any of the employees who are on strike does not end the strike and those employees do not, by reason only of their suspension under subsection (1), cease to be parties to the strike.*

*(4) An employee who is suspended under subsection (1) is not entitled to any remuneration by way of salary, wages, allowances, or other emoluments in respect of the period of the suspension.*

*(5) On the resumption of the employee's employment, the employee's service must be treated as continuous, despite the period of suspension, for the purpose of rights and benefits that are conditional on continuous service.*

[16] Section 97, which deals with strike breaking, reads:

***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.*

## Issue 1: The work of a striking or locked out employee

[17] This expression is used in s97 and its meaning is crucial to the operation of the section. For the purposes of this case at least, there is no material distinction between a striking employee and a locked out employee. Although in

this judgment we refer to employees on strike, the same principles apply to locked out employees.

[18] Many employees will have only one specified job, task or role which they perform consistently. What constitutes their work will be relatively easy to identify.

[19] Other employees, such as those in this case, may rotate around a range of tasks or have certain duties which they principally perform and other duties which they perform from time to time. Such work arrangements are not uncommon in practice. It is also quite common for employment agreements to conclude job descriptions with catch-all phrases such as "…and such other duties as the employer may require and for which the employee is qualified by training or experience." These are long-standing practices and Parliament could not have been ignorant of them when it enacted s97. We must therefore construe s97 in a manner which gives effect to the purpose of this part of the statute not only in relation to employees with a single consistent role but also in relation to those employees whose tasks change from time to time.

[20] Mr Wilton submitted that s97 reflects one of the purposes of the Employment Relations Act 2000 set out in s3(a)(ii), namely acknowledging and addressing the inherent inequality of power in employment relationships. There is force in that submission. As this court has recently held[1], strike or lockout breaking can significantly enhance the power of employers engaged in bargaining for a collective agreement and the purpose of s97 can be seen as an attempt by Parliament to restrict the ability of employers to gain such an advantage.

[21] In *National Distribution Union Inc v Carter Holt Harvey Ltd*[2] the full Court held that the purpose of s97 is to ensure that employers cannot use strike breakers to blunt the economic effect of a strike or lockout by limiting the circumstances in which an employer may use other persons to perform the work

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[1] *National Distribution Union v General Distributors Limited* unreported, Chief Judge Colgan, 4 September 2006, AC 49/06 and *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Air Nelson Limited* unreported, Chief Judge Colgan, 17 June 2007, CC 12/07

[2] [2001] ERNZ 822, 838

of striking or locked out employees. On appeal, this was reinforced by the Court of Appeal in that case[3] which found that s97 confers employment related rights on employees and constrains the bargaining power of an employer for the benefit of the striking or locked out employees. The recent cases about strike breaking just noted[4], have endorsed that approach.

[22] These constraints on an employer only apply, however, in cases where employees are lawfully locked out or are parties to a lawful strike and, importantly for this case, only where the employer wishes to employ or engage another person to perform the work of a striking or locked out employee in accordance with s97(2).

[23] The first issue for the Employment Relations Authority in considering the merits of the case is whether the work the particular employees were asked to do was the work of a striking employee or in fact their own work. While in any particular case the answer to this question will turn on the evidence, it must be answered on the basis of a proper interpretation of the s97(2) expression "*work of a striking … employee*".

[24] Looking at the words used, there are two alternative constructions available:

(a) The particular task that, but for the strike, would have been done by a worker on strike at the time in question; or

(b) The type of work usually done by a worker who is on strike.

[25] The union argued for the first alternative. Mr Wilton submitted that the work of a striking employee is the particular work the striking employee would have been doing had he or she not been on strike. This interpretation has the consequence that, whenever there is a lawful strike, an employer may only use other persons to do the particular work that a striking employee would have been

[3] *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239, 249
[4] see footnote 3

doing if the conditions in s97(3)(a)-(c) are met or if it is necessary for reasons of health or safety.

[26] The second alternative is to treat the work of the striking employee according to its general type. The question then is whether the type of work which was being done by a striking employee was work normally done by the non-striking employees who are being asked to perform it. If it is the type of work which comes within the normal duties of the non-striking employees then those employees are not being asked to do the work of a striking employee but their own work and s97 does not apply. Otherwise, the requirements of s97(3) must be met.

[27] Which of these alternatives is to be preferred must be determined by reference to the legislative purpose of s97 and the practical implications of each construction.

[28] The legislative history shows that s97 as enacted was a compromise. In its original form, the Employment Relations Bill could have made all strike breaking unlawful but the Select Committee process saw this ameliorated by introducing amendments allowing limited strike breaking in some defined circumstances. The result is that Parliament struck a balance between the interests of employees and unions in enhancing the effectiveness of strikes, and the interests of employers operating businesses affected by a strike. On the one hand, s97 is intended to limit the ability of an employer to break or undermine a strike by bringing in outside labour or compelling redeployment of other employees. On the other hand, it is not intended to cripple a business where only some of the employees are on strike.

[29] The application of the "particular task" approach in interpreting the work of a striking employee would tilt this balance very much in favour of the employees and unions engaged in a strike. It would, for example, prevent an employer re-arranging rosters to efficiently use the services of employees who were not on strike unless they explicitly agreed to such a change. We do not think s97 was intended to go that far. It is a permissive provision enabling employers

to employ or engage other persons to do the work of striking employees within statutory limits. The application of the "particular task" approach to the meaning of the term "*work of a striking … employee*" would render s97 essentially prohibitory and very largely rob it of any efficacy for employers subject to strike action.

[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. We therefore reject Mr Cleary's submission that the inclusion of such a general provision in the collective agreement covering the work of the applicants in this case would take them entirely outside the scope of s97(3).

[32] The application of this construction of s97 to the facts of this case will be a matter for the Authority in the first instance but we note that 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.

[33] In concluding our judgment on this issue we make a comment about the application of this construction of the term *"work of a striking or locked out employee"* to the meaning of s97(3)(b). There can be no doubt that, other than to the extent necessary to preserve health or safety, s97 as a whole was intended to prevent employers taking on new staff for the purpose of doing the work of existing employees about to strike. This judgment should not be taken as support for any construction of s97(3)(b) inconsistent with that legislative intention.

**Issue 2**

[34] The next question is whether an employee who, in reliance on s97(3), does not agree to do the work of a striking employee that is not his or her own work as just defined, becomes a party to the strike within the meaning of s81 and is liable to suspension under s87.

[35] Where s97(3) applies, it constrains an employer's right to employ another person to perform the work by requiring three conditions to be met. The condition in issue here is that an employer must obtain the agreement of an employee to do the work of a striking employee. It is implicit in the requirement for agreement that an employee has a choice whether to agree and therefore has the right not to agree. This is a statutory derogation of the common law principle that an employee is bound to comply with a lawful and reasonable instruction of his or her employer.

[36] It is the case for the defendant that a worker who says "no" to a request under s97(3) is refusing to perform normal work, is on strike under s81, and is therefore liable to suspension.

[37] Mr Wilton accepted that, before s97 was enacted, such a refusal could have made an employee a party to a strike but submitted that the exercise of what is now in effect a statutory right to say "no" cannot have been intended to lead to the same conclusion. We agree.

[38] An agreement under s97(3) must be informed agreement given freely. Any other construction would allow unscrupulous employers to obtain agreement

by coercion or deception and thereby undermine the purpose of the legislation. Equally, agreement must be given at the time the employer wishes the employee to do the work in question. To recognise agreement to perform unspecified work in the future by way, for example, of a term in an employment agreement, would also weaken the effect of s97(3) and cannot have been intended.

[39] While we are clear that such a construction is necessary to give effect to the legislative purpose of s97, it must be reconciled with other provisions of Part 8 of the Employment Relations Act 2000. When Parliament enacted s97 in the current Act, other key provisions dealing with strikes and lockouts, such as s81 and s87, were carried over largely unchanged from previous legislation. In particular, the definition of "strike" in s81 remained the same. This includes reducing the normal performance of work and breaking an employment agreement. It was submitted by Mr Cleary that a refusal to comply with an employer's instruction to do the work of a striking employee would be conduct of this nature. On this basis, he submitted that such employees could then be lawfully suspended under s87.

[40] We do not accept those submissions. A refusal by an employee to perform the work of a striking employee could only constitute a reduction in the normal performance of the employee's work if the instruction by the employer to do the work was a lawful and reasonable instruction. As s97(3) requires the employee's agreement to do such work, it follows that an unqualified instruction to do the work would be inconsistent with the statute and, as such, would be neither lawful nor reasonable.

[41] Equally, any provision of an employment agreement relied on by an employer to require an employee to do the work of a striking employee would be inconsistent with s97(3) and of no effect – see s54(3)(b) as to collective agreements and s65(2)(b) as to individual employment agreements.

[42] It follows that an employee exercising his or her right under s97(3) to refuse to do the work of a striking employee would not fall within the definition

of "***strike***" in s81(1). As a result, the employee would not be open to suspension under s87.

[43] In our view, this accords with common sense and justice in that it cannot have been intended by Parliament that an employee exercising a statutory right of choice under s97 would be open to penalty by way of suspension because of the manner in which he or she has exercised that right.

**Issue 3**

[44] On behalf of the defendant, Mr Cleary submitted that, regardless of his or her personal conduct, an employee could become party to a strike and liable to suspension under s87 simply as a result of union membership.

[45] Mr Cleary submitted that the starting point is that the applicants were members of the union which was involved in collective bargaining. Whether or not they participated in the strike ballot, they were bound by the rules of the union to accept the result and therefore they were parties to the strike. He submitted that the only way for them to have ceased being parties would have been to either resign from the union or persuade those acting on the agreement to strike to cease doing so. This is because, in his submission, union membership carries with it rights, responsibilities and consequences which all members must incur, including the consequence of suspension as well as any benefits that arise from the strike action.

[46] This issue was addressed directly by this Court in *Heke v Attorney-General in respect of the Department of Corrections*[5]. Goddard CJ considered whether an employee who had been named in a notice of strike action in an essential service but who was on sick leave on the day of the strike, should have her pay withheld for that day. The Chief Judge put the question this way[6]:

> *… was Ms Heke a party to the strike merely by virtue of the fact that notice of strike was given in her name, as well as in the name of hundreds of others and therefore presumably with her authority, and she did nothing to distance herself from that notification?*

[5] [1998] 1 ERNZ 583
[6] At p586

[47] While that case concerned the giving of a strike notice in an essential service, we find that the material findings are applicable to the present question. The Chief Judge held that notice of an intention to strike is notification of a future strike and not of participation in a present strike. For any particular employee to become a party to a strike it has to be shown that he or she was not only a party to the original agreement to strike but has continued to support the strike as it occurs.

[48] This accords with the definition of "***strike***" in s81(1) which is framed in terms of the "*act*" of a number of employees as opposed to the intention to act.

[49] The answer to the question of law posed by Mr Cleary is that mere membership of a union whose members have voted to take strike action is not sufficient without more to establish that any particular employee is a party to the strike.

[50] The issue is then one of fact. If that employee goes on to behave in any of the ways described in s81(1)(a) in accordance with the resolution to strike then he or she will be a party to the strike, provided of course that this conduct is accompanied by the mental element described in s81(1)(b).

## Conclusion

[51] The question posed to us by the Authority was one of mixed fact and law. As the substantive matter remains before the Authority, it was not appropriate that we address the factual aspects of the question and we have not done so. Rather, with the assistance and concurrence of counsel, we have discerned three issues of law inherent in the question and ruled on them. Our answer to the question posed by the Authority is therefore not a simple "yes" or "no" but should provide the framework within which the Authority can now make the findings of fact necessary to answer that question.

## Costs

[52] As this is a test case which came before the Court for guidance on issues of principle, it is appropriate that there be no order as to costs and we direct that costs lie where they fall.

G L Colgan
Chief Judge
for the full Court

Judgment signed at 5 pm on Wednesday 25 July 2007