cullings

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cullings is the newsletter of ***Cullen – the Employment Law Firm***

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Use of Strike-Breakers

The ability for a business to maintain its operations during a strike can be a tricky task. The question of whether an employer can lawfully employ others to undertake the work of striking employees has recently been tested by the Court of Appeal in *Finau & Ors v Atlas Speciality Metals Ltd* and *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Air Nelson Ltd*.

The *Employment Relations Act* provides that an employer may employ another person to perform the work of a striking or locked out employee if the substitute employee:

- is already employed at the time the strike commences;
- has not been employed principally for the purpose of performing the work of a striking employee; and
- agrees to perform the work.

The Facts

In *Finau* the union and employer were engaged in collective bargaining, and union members took strike action, refusing to perform certain work functions. Two union members refused to operate a coil slitter and were suspended. The next day other employees were instructed to operate the coil slitter. They refused, saying they did not want to perform the work of their striking colleagues. They were suspended on the basis that they were party to the strike. While they were trained and capable of operating the coil slitter, had the two striking employees not been on strike, they would have been operating the machine.

In *Air Nelson* union members went on strike and the employer engaged contractors and some Air New Zealand employees to carry out some line maintenance work which would otherwise have been done by its striking employees. The contract engineers did at times perform this work, although only 1 to 2% of the line maintenance is done by contract engineers.

The Employment Court

The Employment Court considered the application of Act to the two cases, focusing upon the interpretation of "*the work of a striking or locked out employee*".

The Court concluded that if a non-striking employee normally undertook the same type of work as the striking employee, then instructing the non-striking employee to do that type of work would not breach the Act, and the agreement of the non-striking workers would not be required.

The Court found that the Act was not breached in *Air Nelson*. In *Finau* the case was sent back to the Employment Relations Authority for a decision on the facts.

These decisions were appealed.

The Court of Appeal

The Court of Appeal focused upon the purpose of the Act, stating "*what an employer faced with a lawful strike wants to know is: can I employ someone else to do the work which, but for the strike, the striking workers would have been doing? Non-striking employees … want to know … whether they can be made to do the work of their striking colleagues*".

The Court concluded that these questions were intended to be easy to answer. The purpose of the Act is to restrict the use of strike-breakers and ensure employee choice.

The Court stated that in a strike situation, the parties need to focus on what the striking employees would have been doing but for the strike. If the work probably would have been done by a striking employee, then the Act prevented the employer directing a non-striking employee to do that work without that employee's agreement.

What this means

When a strike occurs the answer is now much simpler should the employer want to use alternative employees to undertake the work of striking employees. The key question is 'but for the strike, would the work have been done by a striking employee?' If so, the Act applies. The employee must:

- already be employed at the time of the strike;
- not be principally employed for the purpose of covering the strike; **and**
- consent to undertake the work of the striking employee.