IN THE COURT OF APPEAL OF NEW ZEALAND

CA687/2009
[2011] NZCA 56

BETWEEN	NEW ZEALAND DAIRY WORKERS' UNION INCORPORATED Appellant
AND	OPEN COUNTRY CHEESE COMPANY LIMITED Respondent

Hearing: 16 February 2011

Court: Glazebrook, Randerson and Harrison JJ

Counsel: R E Harrison QC and P Cranney for Appellant
I R Millard QC and G P Malone for Respondent

Judgment: 9 March 2011 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the Employment Court is quashed and substituted by a declaration that the respondent breached s 97(2) of the Employment Relations Act 2000.

C The appellant is entitled to costs for a standard appeal, to be calculated on a Band A basis together with usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] Section 97 of the Employment Relations Act 2000 (the Act) significantly limits an employer's ability to employ or engage substitute labour or strike-breakers to carry out the work of lawfully striking workers.[1] Following a closely contested trial in the Employment Court, Judge Travis dismissed a claim by the New Zealand Dairy Workers' Union Incorporated (the Union) that Open Country Cheese Company Ltd (the Cheese Company) breached s 97 during a lawful strike in September 2009.[2] The Union appeals.

[2] The substantive issue is whether Judge Travis erred in finding for the Cheese Company. A subsidiary but related issue is whether his error, if established, was one of law or fact. If an established error was of fact, this Court would be without jurisdiction, which is limited to determining appeals from the Employment Court on "significant questions of law".[3] This Court has granted leave, however, on three provisionally identified questions of law.[4]

[3] We note also that, while the underlying dispute has been resolved, the Union is still pursuing compliance proceedings against the Cheese Company before the Employment Relations Authority.

Facts

[4] The Employment Court decision contains a comprehensive factual narrative.[5] However the critical facts are not in material dispute and our summary can be truncated accordingly.

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1 *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239 (CA) at [30].

2 *New Zealand Dairy Workers' Union Inc v Open Country Cheese Company Ltd* [2009] ERNZ 488 (EmpC).

3 Employment Relations Act 2000, s 214; *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [19].

4 *New Zealand Dairy Workers' Union Inc v Open Country Cheese Company Ltd* [2009] NZCA 517, [2009] ERNZ 454 at [5].

5 *New Zealand Dairy Workers' Union Inc v Open Country Cheese Company Ltd* [2009] ERNZ 488 (EmpC) at [5]–[22].

[5] The Cheese Company was formed in 2002. It owns 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.

[6] 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.

[7] 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.

[8] 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.

[9] Judge Travis found that the result of the meeting was as follows:

> [17] Mr Fankhauser directed one of his staff members to mobilise Dairy Company employees to move to the Cheese Company's plant and he told Mr

> Slade that this was what they were going to do. In this context I understood the "they" to mean the Dairy Company. When asked whether this could have happened without Mr Slade and the Cheese Company making it happen, Mr Fankhauser replied, "*it absolutely happened without Tim making it happen. I made it happen*". He accepted in cross-examination that if Mr Slade and the Cheese Company had wanted to chain the gates and prevent Mr Fankhauser and his Dairy Company team coming on site, they could have done that. His answer carried the clear implication that Mr Slade would not have continued in employment at the wholly owned subsidiary of the Dairy Company if he had not accepted Mr Fankhauser's directions. Mr Fankhauser said that during the strike Mr Slade continued to run the business. Mr Fankhauser worked in the factory alongside employees from other plants operated by the Dairy Company. It was his uncontroverted evidence that the following persons had been on the site performing the work of striking employees:
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> a) Dairy Company management staff comprising Messrs Fankhauser, Koekemoer and John Robinson.
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> b) Warren Cook, who has been contracted to the Dairy Company for the last year to assist in the setting up of milk powder plants and the training of staff to operate those plants.
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> c) Four employees of the Dairy Company from its Invercargill dairy factory.
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> d) Four employees of the Dairy Company from its Wanganui dairy factory.
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> e) Several volunteer farmers.
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> ...
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> [22] During the course of the strike Mr Fankhauser personally directed employees in the powder packing and control rooms of the Cheese Company's factory. His counterpart, Mr Koekemoer, had been doing the same work on the opposite shift. Staff from the Dairy Company assisted in training Mr Fankhauser and getting him familiarised with the Cheese Company's plant. He accepted that the Cheese Company staff had also trained and familiarised employees from the Dairy Company in their work at the Cheese Company. Mr Fankhauser accepted that there were parts of the Cheese Company's plant that were different from other factories in the Group and that would have taken some familiarisation. Some parts of the cheese plant, however, were identical to that used by the Dairy Company at its other factories.

[10] 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.

Employment Court

[11] 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.[6]

[12] The full text of s 97 is as follows:

> **97 Performance of duties of striking or locked out employees**
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> (1) This section applies if there is a lockout or lawful strike.
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> (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—
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> (a) is already employed by the employer at the time the strike or lockout commences; and
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> (b) is not employed principally for the purpose of performing the work of a striking or locked out employee; and
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> (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—
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> (a) there are reasonable grounds for believing it is necessary for the work to be performed for reasons of safety or health; and
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> (b) the person is employed or engaged to perform the work only to the extent necessary for reasons of safety or health.
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> (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.
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> (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] The judgment recites that, first, while the Cheese Company originally ran a defence based on s 97(4) on the grounds of health and safety, its counsel conceded

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6 Pursuant to s 139 of the Act.

that it was without a sufficient evidential basis; and, secondly, the Cheese Company could not claim the benefit of the s 97(3) exception because the replacement workers were not Cheese Company employees.[7] Thus, the sole issue for determination 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.[8]

[14] The judgment then traces the evolution of the Union's case. Initially it argued that, in terms of s 97(2), Mr Fankhauser's actions were attributable to the Cheese Company which had thereby employed or engaged the Dairy Company's replacement employees (the attribution argument).[9]

[15] The Cheese Company's defence to the attribution 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.[10]

[16] 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.[11]

[17] Judge Travis accepted the Union's submission to the effect that the word "employ" in s 97(3) was synonymous with "deploy" or "use". He was satisfied that this construction was consistent with the statutory context and purpose and the relevant dictionary definitions.[12] The Judge then identified what he described as three relevant categories (in reality, possible permutations) where the Union's

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7 At [24] and [26].
8 At [26].
9 At [27].
10 At [47] and [48].
11 At [29].
12 At [31] to [42].

alternative argument might apply in the present case:[13] first, where the Cheese Company had requested the Dairy Company employees to perform the work of its striking workers; second, where the Dairy Company employees had simply arrived unannounced and volunteered their services; and, third, where the Cheese Company had then agreed to use the volunteers' services and directed them to work in various parts of the factory. He concluded, as a matter of law, that if the Cheese Company's actions had on the facts fallen into the first or third categories it would have breached s 97(2).[14] By inference, if the Cheese Company's conduct was in the second category, it could not have breached s 97(2).

[18] Judge Travis rejected the Union's argument, however, for these reasons:

> [50] If the evidence had established that the Dairy Company's employees were directed to their work by the Cheese Company's employees that contention would have succeeded. The evidence did not establish this.
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> [51] To the contrary the evidence established that the Dairy Company's employees worked solely under the direction of Messrs Fankhauser and Koekemoer. In this sense they were "*used*" or engaged or employed by the Dairy Company at all material times not by the Cheese Company.
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> ...
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> [60] I am not persuaded by what amounts to "*floodgate*" arguments. What led to the result in *Air Nelson*, in relation to the cargo handling issue, and what has determined the present case on its facts, was the dominant position of the company which provided the replacement labour over the subsidiary company employing the striking or locked out employees. It was because of the ability of the Dairy Company to direct its employees onto the Cheese Company's site, even if there was no strict legal entitlement to do so, without either the consent or the request of the Cheese Company, which has produced the particular result. The Dairy Company was at all times the user of the replacement employees and the Cheese Company was not given the option or choice of using them as part of its operations. That is a situation which could only arise when the parent company was directing its own employees to its wholly owned subsidiary.

[19] Finally, the Judge addressed briefly the position of the volunteers in this passage:

> [63] The evidence established that two or three farm owners presented themselves at the cheese factory and volunteered to assist during the strike. They were given some work to do, possibly by employees of the Cheese Company. This was arguably a breach of s97(2). In the course of the hearing

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13 At [42].
14 At [43].

> Mr Malone gave an undertaking on behalf of the Cheese Company that this would not happen again. Any volunteer farmers would undoubtedly be thanked for their offer of assistance but it would be declined and they would be turned away. Mr Malone expressed concern that volunteers were employed or engaged during strikes to help essential services such as hospitals to continue to operate. For this reason and because it did not become an essential element of the Union's case, I have chosen not to express a binding view on the use of such volunteers in a situation where the matter has not been fully argued.

Leave to appeal

[20] The primary ground formulated in the Union's notice of appeal was 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 ... .

[21] In deciding whether to grant the Union leave to appeal, this Court noted that the case was important and that the only real issue was whether a question of law might possibly be identified.[15] To that end, the Court noted some apparent defects in the Judge's reasoning and conclusions before identifying, subject to refinement, these possible errors of law:[16]

> (a) In concluding (apparently) that acquiescence by the Cheese company, presumably under the direction of the Dairy company, in the actions taken by the Dairy company and its workers did not constitute its employment or engagement of the Dairy company workers for the purposes of s 97(2) of the Employment Relations Act 2000.
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> (b) In not attributing the actions of the Dairy company to the Cheese company.
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> (c) In not exercising the equity and good conscience jurisdiction.

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15 *New Zealand Dairy Workers' Union Inc v Open Country Cheese Company Ltd* [2009] NZCA 517, [2009] ERNZ 454 at [1].

16 At [5].

Decision

[22] Mr Harrison QC, who did not appear for the Union in the Employment Court, relied upon both arguments advanced in support of the claim at first instance. However, for reasons which will become apparent, we do not need to address the attribution argument. Instead we will limit ourselves to the Union's alternative argument.

[23] We agree with Mr Harrison that s 97 calls for a purposive construction. The provision falls under Part 8 of the Act, which includes this object:[17]

> To recognise that the requirement that a union and an employer must deal with each other in good faith does not preclude certain strikes and block outs being lawful.

[24] Part 8 confers on organised workers the right to strike. As the authors of *Mazengarb's Employment Law* have observed:[18]

> The right to strike has long been regarded as a fundamental protection for workers. The reason is obvious. In the absence of a right to strike workers have no protection against the inherently unequal bargaining power of employers.

[25] Anti-strike breaking provisions are thus necessary to preserve the bargaining power of striking workers. In *Air Nelson Ltd v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc* the majority of the Supreme Court stated:[19]

> ... s 97 is intended to be prohibitory except in the specific restricted situations described in sub ss (3) and (4), compliance with which exempts an employer from the general prohibition. It is clear that the section intentionally tilts the balance in favour of striking or locked out workers. It is a firm anti-strike breaking mechanism. It confers employment-related rights on employees and "constrains the bargaining power of the employer for the benefit of striking or locked out employees".

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17 Section 80(a).

18 Andrew Gray (ed) *Mazengarb's Employment Law* (looseleaf ed, LexisNexis) at [ERA P8.11].

19 *Air Nelson Ltd v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc* [2010] NZSC 53, [2010] 3 NZLR 433 at [12].

[26] Striking is effective because it inflicts economic hardship on the employer by depriving it of the productivity of its employees.[20] 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. Judge Travis himself acknowledged that the replacements were brought in:[21]

> ... to ensure that the Cheese Company could meet its commitments to farmers that relied on it and its commitments to the Dairy Company, because of its need to fulfil the Dairy Company's sales.

[27] In this respect, as Mr Harrison emphasises, Judge Travis essentially accepted the Union's construction of s 97(2). The Judge agreed that the words "employ" and "engage" where used in that provision have meanings wider than their legal or technical senses. Each extends respectively beyond either employment under a contract of employment or engagement under a contract of services to include the concepts of use or deployment. Moreover, he agreed that it does not matter how the replacement labour arrived at the Cheese Company's site and who organised it; the focus must be on the entity which used the labour.

[28] The Judge was, we think, correct to that extent: 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.

[29] The material circumstances are not in dispute. The Cheese Company continued its processing and manufacturing operations throughout the strike period.

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[20] *National Distribution Union v General Distributors Ltd* [2006] ERNZ 790 (EmpC) at [30].
[21] At [19].

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.

[30] Nevertheless, despite his apparent acceptance of the substance of the Union's argument, Judge Travis found that the Cheese Company could not have employed or engaged the replacement workers in terms of s 97(2). That was because they were employed (in a contract of service sense) and directed by the Dairy Company.[22] With respect, that gloss is contrary to the test mandated by s 97(2) and the Judge's earlier acceptance of the Union's argument. He was apparently diverted by the attribution argument. It does not matter that the Dairy Company directed or controlled the manner in which a replacement performed the Cheese Company's work. The question is whether the Cheese Company employed or engaged them. As we have said, and as the Judge himself appeared to accept, the employment status of the replacement workers has no bearing on that question.

[31] Judge Travis' error is exemplified in two ways. One is in his identification of the three permutations arising from the Union's argument on the meaning of "employ" or "engage" where used in s 97(2). He fixed the categories according to whether the replacement workers were requested or had arrived voluntarily and were then directed to work. But these distinctions are inconsistent with the broad meaning of the words. The inquiry is not into the means of a worker's employment or engagement but the nature of their use or deployment.

[32] The other example of the Judge's error is in his finding that the Cheese Company did not consent to the presence of the replacement workers and was not given the choice of using them as part of its operations. However, the issue of the Cheese Company's consent or acquiescence as employer is relevant only to the limited extent of establishing its acceptance of the replacements by using them to

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[22] At [51] and [60].

perform the strikers' work. Plainly, as a separate legal entity – and we agree with Mr Millard QC for the Cheese Company that it was inappropriate to lift the corporate veil here – the Cheese Company was entitled to refuse access to the replacement workers, either to the plant itself or its manufacturing equipment (as Mr Fankhauser admitted and the Judge found). It did neither but instead co-operated with the replacements by rostering their work and making its plant and supervisors available to them. It is immaterial that the Cheese Company's general manager, Mr Slade, inferred that he had no option except to comply with Mr Fankhauser's directions.

[33] Mr Millard sought to uphold the decision by a variant on the Judge Travis' reasoning. He argued that the words "employ" and "engage" when coupled with the word "perform" are active verbs, requiring positive action by the employer of the striking workers to engage the substitute workers to perform that work and connoting a degree of direction or control. He said s 97(2) does not apply unless there is a request by the employer followed by the employees' consent, in the form of an express arrangement; and that there has to be a direct relationship between the employer and "another person", not an indirect arrangement that has the employer's acquiescence.

[34] We do not accept Mr Millard's argument. It postulates an additional gloss on s 97(2), contrary to its statutory purpose. The plain words do not require proof that the employer has taken active steps to engage "another person". It is sufficient that the Cheese Company allowed the other persons to perform the strikers' work, which was itself the Cheese Company's work. In any case, as noted, (at [32] above), on the evidence accepted by Judge Travis, the Cheese Company participated actively in the strike-breaking events occurring at its plant.

[35] In support of his conclusion, Judge Travis relied principally on the Full Court of the Employment Court's decision in *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Air Nelson Ltd (No 2).*[23] Mr Millard did likewise. The facts of that case require recitation, to provide the necessary context.

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[23] *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Air Nelson Ltd (No 2)* [2007] ERNZ 725 (EmpC).

Air Nelson Ltd was a wholly owned subsidiary of Air New Zealand Ltd and operated as its division. Air New Zealand contracted Air Nelson to carry freight including loading and carrying consignments of salmon out of Nelson. The agreement allowed Air New Zealand to provide the services itself if Air Nelson was unable to provide them. In anticipation of a strike by its employees, Air Nelson invited Air New Zealand to invoke that provision.

[36] Instead of performing the contract itself, Air New Zealand sent some of its employees to perform the work with non-striking Air Nelson employees. In dismissing the Union's claim of a breach of s 97(2), the Full Court noted:[24]

> In doing so, Air New Zealand was not directing its staff to do the work for the benefit of Air Nelson but rather for its own benefit and in order to meet its contractual obligations [to the salmon producer].

[37] Judge Travis cited this statement to draw an analogy with the dominant relationship of the parent, Dairy Company, and its subsidiary, the Cheese Company. However, the issue in the *Air Nelson* case was different from this case – it was whether the work actually carried out by the Air New Zealand employees was their own work or that of the striking employees within the phrase "the work of a striking or locked out employee".[25] The Court's statement was made in that context, where Air New Zealand was deploying its staff according to its existing contractual relationship. The replacement work carried out was the work of and to the direct benefit of Air New Zealand, the primary contractor with the salmon producer. By contrast, the Cheese Company was the primary beneficiary of the substitute labour; its work, not the Dairy Company's work, was performed by other persons, with the Dairy Company taking an indirect benefit. The *Air Nelson* decision does not assist the Cheese Company.

[38] Judge Travis focussed primarily on the strike breaking role of the Dairy Company employees. He referred briefly to the volunteer farmers. He accepted that the Cheese Company arguably breached s 97(2) by using the volunteers. But he did not express a final view because the issue was not argued fully. On our approach, it

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[24] At [26].

[25] The appeal on this issue was ultimately determined by the Supreme Court in *Air Nelson Ltd v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc* [2010] NZSC 53, [2010] 3 NZLR 433; see above at [25].

must follow that any work actually undertaken by the volunteers constituted a breach by the Cheese Company of s 97(2).

[39] In the result we are satisfied that the Employment Court erred in law (see at [30] above) in finding that the Cheese Company did not "employ or engage [other] person[s] to perform the work" of its striking employees within the meaning of s 97(2) because at the relevant times they were employed (in the contract of service sense) by the Dairy Company. That error involved a significant question of law and was decisive to the Court's dismissal of the Union's claim against the Cheese Company for breach of s 97(2).

Result

[40] The Union's appeal is allowed. The decision of the Employment Court is quashed and substituted by a declaration that 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. All issues of compliance are to be determined by the Employment Relations Authority in terms of s 97(6).

[41] The Cheese Company is to pay the Union's costs on a standard Band A basis together with usual disbursements. We certify for two counsel.

Solicitors:

Oakley Moran, Wellington, for appellant
Solutions Law Office, Nelson, for respondent