Attention is drawn to the penalty imposed under this determination.

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 453
5380472

	BETWEEN	MARITIME UNION OF NEW ZEALAND Applicant
	A N D	PORTS OF AUCKLAND LIMITED Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Simon Mitchell, Counsel for Applicant Kylie Dunn, Counsel for Respondent
Investigation Meeting:	29 and 30 November 2012 at Auckland
Date of Determination:	12 December 2012

DETERMINATION OF THE AUTHORITY

A. The respondent, Ports of Auckland Limited (POAL) is ordered to pay a penalty of $10,000 (a total of $40,000) in respect of each of the four people who performed the work of a striking employee in breach of s.97 of the Employment Relations Act 2000.

B. POAL shall pay $30,000 of the total penalty ($40,000) to the Authority for subsequent payment to the Crown Bank Account. The remaining $10,000 is to be paid by POAL to the Maritime Union of New Zealand (MUNZ).

Employment relationship problem

[1] Auckland's port is run by Ports of Auckland Limited (POAL). It is a busy international port operating 24 hours a day, 7 days a week. POAL provides shipping, cargo and other services in respect of cruise and container ships calling at the port each year.

[2] Straddle carriers, cranes, hoists and other equipment are used at the port to load and unload cargo and to move containers. This equipment is specialised and is maintained and repaired by employees in POAL's engineering division most of whom are members of the Maritime Union of New Zealand (MUNZ). Some of the maintenance and repair work is carried out by external contractors.

[3] From 24 February 2012 to 22 March 2012, MUNZ members were on strike for a new collective agreement. Accordingly, the port was much less busy than usual. While on the picket line, Harry Mayn, a MUNZ member took photos of two men repairing straddles at the port. He says one of the men was an apprentice employed by POAL and the other was Mr Andre Labus, an employee of Noell Mobile Systems (Noell), an external contractor. MUNZ says this straddle breakdown repair work being done by these men was the work normally performed by MUNZ members who were on strike.

[4] MUNZ says refuelling of straddles and also some straddle breakdown repair work normally done by MUNZ members was performed during the strike by another contractor, Port Star.

[5] The action of POAL in engaging Noell and Port Star to do the work of MUNZ members during the strike, MUNZ says, was deliberate and in breach of the anti-strike breaking provisions of s.97 of the Employment Relations Act (the Act). MUNZ seeks significant penalties against POAL.

[6] Noell is the manufacturer of Noell straddles used at the Port. Over the last 5 years, Noell has provided training to employees in POAL's engineering division on the servicing and repair of this equipment. Mr Michael Osborne, Manager, Engineering at POAL says Noell's employee, Mr Labus, was engaged before the strike to do "*hands on*" training at the Port. This training was not work normally performed by MUNZ members, it was the work of the contractor and so there was no breach of s.97 of the Act.

[7] Port Star is an existing contractor used by POAL. Mr Osborne says it has occasionally performed repairs on straddle breakdowns. Accordingly, Mr Osborne says the straddle breakdown work performed by Port Star during the strike was not in breach of s.97 of the Act.

[8] Mr Osborne says Port Star refuels equipment at the port. Refuelling straddles during the strike was the same *"type"* of work Port Star performs and so Mr Osborne says there was no breach by POAL of s.97 of the Act.

Issues

[9] The Authority must determine the following issues:

(a) During the strike, did Mr Labus perform work normally done by MUNZ members?

(b) Was the straddle breakdown work being undertaken by Mr Labus, performed in the context of training and therefore his own work?

(c) During the strike, did Port Star perform work normally done by MUNZ members?

First issue

During the strike, did Mr Labus perform work normally done by MUNZ members?

[10] The strike affected productivity at the port. Many employees and contractors had very little to do. Mr Labus was in New Zealand at the time of the strike to train users of Noell straddles at the port. Because of the strike, the only POAL employee able to participate in the training was an apprentice. Given POAL was paying Mr Labus to undertaking training, Mr Osborne allowed him and the apprentice to perform straddle breakdown work.

[11] POAL's engineering staff include electricians, mechanics, fitters. They are rostered 24 hours a day, 7 days a week and their primary role is the service and repair of POAL's equipment including straddles. Straddle breakdowns are common and are dealt with immediately by employees in the engineering division to avoid disruption to the port's work.

[12] There is a process by which the straddle breakdown repair work is managed by the team in the engineering division. Two mechanics are assigned by a supervisor to a breakdown truck and it is their role to go in to the container terminal and diagnose the straddle breakdown. At this stage of diagnosis, the work is performed just by employees in the engineering division.

[13] Mr Harry Mayn, a crane fitter employed by POAL and a MUNZ member, says straddle breakdown repair work is the work of employees in POAL's engineering division, not of contractors. Mr Cameron Buchanan, shift mechanic and Mr Russell Mayn, a former electrician and trainer on portainer cranes and both MUNZ members agree. Mr Osborne agrees employees in POAL's engineering division normally perform this work and that during the strike, Mr Labus and the apprentice regularly did some of this work.

[14] Section 97 of the Act states:

> ***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 of 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 perform 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.*

[15] Section 97 prevents employers from employing or engaging others to perform the work of striking employees. The exceptions are if the other person:

- Is already employed by the employer at the time of the strike;
- Is not employed principally to do the work of the striking employee; and
- Agrees to perform the work.

[16] There are exceptions contained in s.97(4) in situations where health and safety may be an issue. Section 97(4) is not relevant in this case.

[17] The leading decision on s.97 is the Supreme Court decision *Air Nelson Ltd v. NZ Amalgamated Engineering, Printing & Manufacturing Union Inc*[1]. In the *Air Nelson* case, the Supreme Court considered the meaning of performing the work of a striking employee. At para.[20], the majority of the Court held:

> *A person's work may in fact engage many tasks, not necessarily as comprehensive in practice as may be stipulated in a particular employment contract. Other employees of the same employer may have similarly described duties in their employment contract. Some may regularly, for a greater or lesser length of time, carry out some of the tasks that another worker usually does. In such cases the duties, or work, of one is integrated with, or qualified by, or adumbrated by the work or duties of another. How, and to what extent, will establish a pattern, analysis of which will determine whether a striking or locked out worker's work is being performed in breach of s97, rather than whether the non-striker is performing his or her own work. Where there is a departure from a pattern of integration of work, that may indicate s.97 has been contravened.*

[18] During the strike, Mr Labus and the apprentice did work on a daily basis which was normally done by MUNZ members. If MUNZ members had not been on strike, they would have performed this work, not Mr Labus and the apprentice.

Second Issue

Was the straddle breakdown work being undertaken by Mr Labus, performed in the context of training and therefore his own work?

[19] Mr Osborne says the straddle breakdown work being performed by Mr Labus was done in the context of training the apprentice. Ms Dunn on behalf of POAL submits that the work performed by Mr Labus "*was his own work, in that it was work conducted as part of a training programme. Accordingly, Ports of Auckland did not breach s.97 in relation to the work performed by Noell*".

---

1 [2010] 3 NZLR 433

[20] This submission relies on the *Air Nelson* case. At para [20] their Honours state:

> *If the contractors were doing their own work it is obvious that they were not doing another person's work.*

[21] On the basis of this reasoning it is submitted by Ms Dunn that POAL is not in breach of s.97 of the Act.

[22] I do not accept Mr Labus was doing his own work. Mr Russell Mayn gave evidence of the danger of training in *"breakdown"* conditions and that such training was never done at the port. Mr Mayn says *"hands on"* training was always done in fault conditions where a fault could be simulated safely.

[23] Further, the discussions with Noell about training at the port took place in November 2011. POAL did not confirm the arrangements for Mr Labus to travel to New Zealand and undertake the training until 14 February 2012. By that time, POAL had received the strike notice and knew a strike was to take place at the time the training was scheduled. Mr Osborne says because POAL had made a commitment that Mr Labus travel to New Zealand and undertake the training at POAL he decided to continue with the arrangement. The cost to POAL for Mr Labus to undertake the training was €950 per day. This equates to NZ$2,000 per day, NZ$10,000 per week. Travel and accommodation costs were additional.

[24] Mr Osborne accepts he knew when confirming the training arrangements he may or may not be able to use Mr Labus for training, because of the strike. It seems highly unlikely that POAL agreed to Mr Labus travelling to New Zealand to undertake training at a cost of in excess of $2000 a day when it had notice of strike action and there would be no employees to train because they were on strike.

[25] In fact because of the strike, there was only one person for Mr Labus to train, an apprentice about to finish his apprenticeship with POAL. Because of this, Mr Osborne says he asked Mr Labus to do the straddle repair work *"in the context of training"* the apprentice. This is not plausible.

[26] It is my view that Mr Osborne, knowing there was to be a strike and that there would be no employees to train decided to allow Mr Labus to come to New Zealand as planned. In making this decision he knew Mr Labus would be able to perform some straddle breakdown work of the striking employees. The port's production was

severely affected by the strike and Mr Labus was allowed by Mr Osborne to perform work of the striking employees in breach of s.97 of the Act.

Third Issue

During the strike, did Port Star perform work normally done by MUNZ members?

[27] Straddle breakdowns and refuelling is work performed by employees in the engineering division of POAL. If straddles are not refuelled, the port's work would come to an end within a day. Port Star is an existing contractor with which POAL has a longstanding relationship. During the strike, there was little work for Port Star to do. POAL continued to pay Port Star for its services. Mr Osborne decided to allow Port Star to undertake work refuelling straddles. This was not work normally done by Port Star, it was work normally performed by POAL employees. Mr Osborne also allowed Port Star to attend straddle breakdowns.

[28] As part of its other work for POAL, Port Star refuelled equipment including fork hoists. Mr Osborne says refuelling of straddles was the same *"type"* of work that Port Star, an existing contractor performed. Therefore he says he believed he could use Port Star to perform this type of work during the strike. Similarly, with the straddle breakdowns, Port Star had performed repairs in the workshop before and had on one occasion, on 1 September 2011 attended a breakdown. Ms Dunn contended the work performed by Port Star in attending straddle breakdowns was the same *"type"* of work performed previously by it and therefore not in breach of s.97 of the Act.

[29] In her submissions, Ms Dunn contended that the Authority should not take a technical approach in determining whether refuelling of straddles was work normally performed by POAL employees. Ms Dunn referred to the *Air Nelson* decision of the Supreme Court referred to above and argued that *"performing the same work on a new piece of equipment does not lead to a breach of s.97"*.

[30] In the *Air Nelson* case it was held that contract engineers habitually performed some (even if only a small proportion) of the line maintenance work. In those circumstances they were not performing the work of striking employees who did line maintenance work.

[31] The facts in this case differ. It was accepted that refuelling of straddles was the normal work of employees in the engineering division of POAL. This was the pattern of work. Port Star did not refuel straddles. Similarly with the repair of straddle breakdowns, this was work normally performed by employees in the engineering division of POAL. That was the normal pattern. A break in the pattern is indicative of a breach of s.97.

[32] Further, s.97 refers to *"the work of a striking ...employee"*. The section does not refer to the *"same work", "the same type of work" or "the type of work"* as contended by POAL. As their Honours state in *Air Nelson* at paras [23] and [24] :

> *As we have indicated above, s97 does not raise issues of construction but of application. We would decline to refine upon the statutory language, which is straightforward. It calls for judgment. Another worker cannot be substituted for a striking worker in the performance of the work of the striking worker. The approach adopted by the Employment Court was not in error. Nor do we think it differs in substance from the approach suggested by the Court of Appeal, base on the position that would have applied "but for" the strike. The Employment Court was right to stress that this was a matter of practical substance not potential duties under the employment contract.*

[33] It is my assessment that the refuelling of straddles was the work of POAL employees. If there had not been a strike, POAL employees would have refuelled the straddles, not Port Star. Similarly, with the straddle breakdown work. Port Star performed the work of the striking employees and this constituted a breach of s.97 of the Act.

Penalty

[34] Under s.97(6) of the Act, the Authority can impose a penalty on an employer found to be in breach of s.97. The Authority has the power to impose a penalty in respect of each person performing the work of a "striking employee". Under s.135(2), a company is liable to a penalty not exceeding $20,000 in respect of a breach of the Act.

[35] Mr Mitchell for MUNZ seeks four separate penalties in respect of Mr Labus, Port Star and employees of Port Star, for performing the work of striking employees.

Mr Labus

[36] Mr Osborne says Mr Labus was legitimately brought to New Zealand to undertake training for users of the Noell straddles. Mr Labus was unable to undertake the training envisaged because of the strike. Mr Osborne allowed Mr Labus and the apprentice to undertake straddle breakdown work which he accepted was work normally done by POAL employees in the engineering division. Mr Osborne says that while undertaking the straddle repair work, the apprentice was gaining experience and training.

[37] For the reasons given earlier in this determination, I do not accept Mr Osborne's explanation. There was a strike and employees to be trained were going to be on strike. Why bring Mr Labus to New Zealand at a cost of more than $10,000 a week in such circumstances? It is my view that Mr Osborne's decision to retain Mr Labus "for training" was to enable essential work at the port to continue during the course of the strike. Mr Osborne knew about the anti-strike breaking provisions of s.97 and decided to take the risk and ask Mr Labus to perform work of the striking workers on the basis of "*training*" to which POAL had already committed.

[38] Port Star, as is evidenced by the significant number of invoices rendered by it for work done during the strike, performed refuelling and straddle repair work which was the normal work for employees in POAL's engineering division. The fact that Port Star was an existing contractor with a longstanding relationship with POAL does not alter the fact that POAL engaged it during the course of the strike to undertake the work of striking employees. Mr Osborne says he was aware of the anti-strike breaking provisions contained in s.97, he discussed these with members of POAL's senior management team and they concluded that it was a "*grey*" area because Port Star was an existing contractor which performed the "*same type of work*" as that normally done by the striking employees. Mr Osborne says he took the risk knowing that this action would undermine the strike because POAL was a service business.

[39] Mr Osborne's decision then was a calculated one. When Mr Harry Mayn took photos of Mr Labus and the apprentice undertaking what he believed to be breakdown repair work on a straddle, a letter was sent by MUNZ's legal representatives to POAL. Shortly after the letter was sent, containers were stacked around the perimeter fence and the engineering workshop which obscured the vision of MUNZ employees on the picket line. Mr Osborne was not aware of the legal letter to POAL but accepts

that the containers went up and that they would have prevented the striking workers seeing into the area.

[40] POAL's legal representatives sent a letter in reply claiming Mr Labus was performing training and that *"straddles are not being repaired when they break down"*. I have found this not to be correct, straddle breakdown repairs were performed during the strike by Mr Labus and the apprentice and by Port Star employees.

[41] It is my view POAL was aware of s.97 but in order to keep the port operating during the strike, made calculated decisions to breach the provision.

[42] At para.[12] of *Air Nelson*, the majority of the Supreme Court stated;

> *Section 97 is intended to be prohibitory except in the specific restricted situations described is subsections(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 "constrain[s] the bargaining power of the employer for the benefit of striking or locked out employees."*

[43] Counsel for both parties referred me to *Xu v McIntosh*[2] which provides some guidance in determining whether a penalty should be imposed. Punishment, deterrence, whether the breach was deliberate or flagrant and the degree of harm suffered by the victim are all relevant factors.

[44] I believe penalties are appropriate.

[45] Ms Dunn argued that this was not a case of new contractors being engaged by POAL specifically for the purpose of replacing striking workers. Rather, they were existing contractors who performed *"additional"* work. In my view this would defeat the purpose of s.97 which is a prohibitory section.

[46] Ms Dunn further argued that Mr Osborne did not allow certain types of work of the striking workers to be performed by contractors, as it was clear this would breach s.97. However, there was other work, as in the circumstances of this case, that he felt fell in to a "grey" area. For those reasons, Ms Dunn argued any penalty awarded should be minimal.

---

2 [2004] 2 ERNZ 448

[47] The breach by POAL was calculated. POAL knew it may be in breach of s.97 but took the risk to keep the port operating. POAL denied being in breach of s.97 when asked by MUNZ for an explanation and took steps to prevent MUNZ viewing work it may consider in breach of s.97. POAL accepted its actions undermined the strike. Given the rationale for the anti-strike breaking provisions and as observed by the Supreme Court in *Air Nelson*, a penalty in such circumstances should punish and act as a deterrent.

[48] This was not a flagrant breach in which a new workforce of employees was employed to take over all of the work of the striking employees. POAL made use of existing employees to perform some work only. However, the breach was deliberate and serious. I consider a penalty of $10,000 in respect of each of the four people who performed the work of the striking employees, to be appropriate. The total penalty is $40,000.

[49] Section 135(3) enables the Authority to join the penalties if the claim is against the same person as in this case. I consider it appropriate to impose one penalty against POAL. I order a penalty of $40,000 to be imposed against POAL. Under s.136 of the Act, $30,000 of the total amount ($40,000) shall be paid to the Authority for subsequent payment to the Crown Bank Account. The remaining $10,000 shall be paid by POAL to MUNZ.

Costs

[50] Costs are reserved. MUNZ has 14 days from the date of this determination to file a memorandum as to costs. POAL has 14 days from receipt of MUNZ's submissions to file its memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority