IN THE SUPREME COURT OF NEW ZEALAND SC 78/2009

BETWEEN **AIR NELSON LIMITED**
Appellant

AND **NEW ZEALAND AMALGAMATED ENGINEERING, PRINTING AND MANUFACTURING UNION INC**
Respondent

Hearing:	23 February 2010
Court:	Elias CJ Blanchard J McGrath J Wilson J Anderson J
Appearances:	C H Toogood QC and D J France for the Appellant R E Harrison QC and G Lloyd for the Respondent

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CIVIL APPEAL

MR TOOGOOD QC:

May it please Your Honours, I appear with my learned friend Mr France for the appellant.

ELIAS CJ:

Thank you Mr Toogood, Mr France.

MR HARRISON QC:

May if please Your Honours, I appear for the respondent with my learned friend Mr Lloyd.

ELIAS CJ:

Thank you Mr Harrison, Mr Lloyd. Yes Mr Toogood?

MR TOOGOOD QC:

Thank you Ma'am. If Your Honours please the essence of the employer's case on appeal is a very straightforward proposition. Namely that nothing in section 97 prevents an employer from directing a non-striking employee or contractor to perform a task which they regularly or routinely perform. So nothing in the section prevents an employer from directing a non-striking employer or contractor to perform a task which they regularly or routinely perform. Or to put it another way from the perspective of the non-striking employee, nothing in the section entitles a non-striking employee to refuse to perform a task which they regularly or routinely perform. That was one of the issues in *Finau* and although that issue didn't arise directly in the Air Nelson case because the contractors were happy to perform the work, nevertheless those propositions are, in our respectful submission, right at the heart of this case and they are why this employer and, I would submit with respect, employers generally have a very live interest in the outcome of this appeal. We say that those propositions are true because the work which a non-striking employee or contractor regularly or routinely performs is their work and we say therefore that section 97 does not apply because the section is concerned with limiting the circumstances in which a non-striking employee or contractor maybe used to perform somebody else's work, that is the work of a striking or locked out employee.

It helps, in our respectful submission, to understand the employer's proposition. If you look at the issue in terms of the respective rights and obligations of the striking employees on the one hand and the non-striking employees or contractors on the other, in relation to what may respectively be defined or identified as their work. For a striking worker they would normally be obliged to conform to an employer's lawful and reasonable instruction to carry out their work. But provided the criteria for a lawful strike are met, they may, in those circumstances, refuse to do their work. But there is nothing, in our submission, in section 97 or indeed any other provision of the

Employment Relations Act, which provides non-striking employees for the right to refuse to do their work. The right conferred on non-striking employees by section 97 is the right to refuse to do someone else's work. That is the work of a striking employee.

ELIAS CJ:

Mr Toogood, is it part of your argument that section 97(3)(b) sheds light on this? I mean are you submitting to put – to start with the text rather than to look at the policy –

MR TOOGOOD QC:

Yes.

ELIAS CJ:

– that someone who performs the work is not employed principally for the purpose of performing the work of a striking or locked out employee?

MR TOOGOOD QC:

That of course is directed to circumstances where an employer may engage casual staff, casual employees, for the purpose principally of being held in reserve to carry out the work of striking employees in the event of a strike.

ELIAS CJ:

I know the Court of Appeal thought that but is there some authority on that, on the interpretation?

MR TOOGOOD QC:

No, no, because the section is new and that hasn't been considered but that seemed, with respect, to be the generally accepted view that –

McGRATH J:

Would the legislative history give us any support for that meaning?

MR TOOGOOD QC:

Yes and I pause because I'm just wondering where I might find it. It certainly does and one can see at once why that would be so. You could nullify completely the effect of the section if an employer had casual employees on its books.

ANDERSON J:

It is mentioned by the select committee isn't it?

MR TOOGOOD QC:

Yes it may –

ANDERSON J:

In response to submissions.

MR TOOGOOD QC:

I think that's right.

ANDERSON J:

To prevent a sort of pre-emptive action by an employer.

MR TOOGOOD QC:

Yes so that if, if notice of strike is given in an essential service, for example, the employer might quickly engage a number of staff specifically to take over the work of the employees who go on strike. My learned friend Mr Harrison 65 of the – for the case on appeal. Oh no, I beg your pardon, the respondent's casebook.

ELIAS CJ:

Which page?

MR TOOGOOD QC:

65 Your Honour. Yes we noted submit concerned and recommend that this clause is redrafted to clarify that while an employer cannot order an existing

employee to do the work, it is permissible for an existing employee to agree to work, and this is the relevant part, and that restrictions exist in respect of the employer's ability to hire new replacement employees or to contract out the work of affected employees.

ELIAS CJ:

So it's the last sentence that's the significant one in terms of the proposition I was putting to you.

MR TOOGOOD QC:

Yes, yes and that then goes on to clarify that anyone who's principally brought simply to cover the eventuality of a strike or lockout.

ELIAS CJ:

Well that would be so but is that the full meaning of section 97(3)?

MR TOOGOOD QC:

In my submission it is Your Honour.

ELIAS CJ:

So it's simply pre – to stop people –

MR TOOGOOD QC:

Pre-emptive.

ELIAS CJ:

– carrying people on their employment in the expectation or in the – for the eventuality that there may be a strike at some stage?

MR TOOGOOD QC:

Yes and it's, that approach to (3)(b) is entirely consistent with our interpretation because in that event the employee who was held in reserve or engaged pre-emptively would not have their own work because they don't regularly or routinely perform any work.

BLANCHARD J:

Why doesn't 97(3) say anything about a contractor? Isn't the implication from that, that it's not intended that a contractor can be used in the circumstances contemplated by (3)?

MR TOOGOOD QC:

Yes. That is correct. But again it doesn't, that does not defeat our argument because we say that the section does not apply at all because on the facts of this case, as found, the threshold is not crossed.

ELIAS CJ:

I'm not –

MR TOOGOOD QC:

Contractors may only be engaged if the section applies for health and safety reasons.

BLANCHARD J:

Why was it necessary to refer to a contractor in subsection (4) in that case?

MR TOOGOOD QC:

In order to extend the category of persons who may be brought in on health and safety grounds.

BLANCHARD J:

But surely then if contractors were intended to be able to be used within a situation in subsection (3), that would have been mentioned?

MR TOOGOOD QC:

I'm not arguing that contractors are brought within subsection (3). I agree with Your Honour's initial proposition –

BLANCHARD J:

Isn't subsection (3) intended to be comprehensive?

MR TOOGOOD QC:

No.

BLANCHARD J:

I see a complete inconsistency between (3) and (4) if your argument is accepted?

MR TOOGOOD QC:

No, with respect, that's not the case if Your Honour pleases. (3) and (4) provide separate instances in which the work of a striking employee may be done by somebody else. In the first case, (3), existing employees of the employer may do the work of the striking employee if they agree and if they're not employed principally for the purpose of carrying out that work.

BLANCHARD J:

And you say outside that subsection any contractor can do it?

MR TOOGOOD QC:

No. Any contractor can do it only for health and safety reasons if the contractor is being asked to do the work of the striking employee. Our case, in this particular case supporting the use of contractors is that the contractors were not employed or not engaged in doing the work of the striking employee, they were doing their work, work which they routinely or regularly performed. That was the Court's finding of fact. Contractors were engaged on a regular basis to carry out maintenance, principally heavy maintenance but from time to time on a routine basis, engaged in light maintenance which was at issue here.

ELIAS CJ:

I wonder whether the reference to contractors helps at all because I know it's part of Mr Harrison's submission, but it does seem to me that the reason that

subsection (3) is confined to employees, is because of (3)(a) rather than the use –

MR TOOGOOD QC:

Yes.

ELIAS CJ:

And that the distinction is between employing someone to do work and engaging someone to do the work.

MR TOOGOOD QC:

Yes.

ELIAS CJ:

So you could engage them by employing them or you could engage them as an independent contractor, I'm not sure that it matters.

MR TOOGOOD QC:

Only if, the second part of Your Honour's proposition is correct, only if there's a health and safety ground.

ELIAS CJ:

Oh yes, yes I understand that.

MR TOOGOOD QC:

And the reason we're talking about contractors here is simply because of the rather unusual factual situation in which there were union employees who were on strike engaged alongside contractors, independent contractors. Not uncommon but equally not usual. It could well have been the case, and we referred in our submissions to one of the facts in the case, although not germane to this appeal, of aircraft loaders. There were a number of non-union employees employed to load and unload aircraft working alongside and doing exactly the same type of work and possibly on the same aircraft as union employees and one could have the situation there where the union

employees go on strike and the non-union employees simply get on with loading and unloading aircraft. That just happened to be, in this case, that the maintenance work was done by people who were employed as contractors to carry out that type of work.

WILSON J:

Mr Toogood do you accept that on the facts there was a high probability that if they had not been on strike, the striking employees would have performed the work in issue?

MR TOOGOOD QC:

I don't, with respect, believe that it's possible to answer that question Sir because the Employment Court's analysis did not produce that result. The Employment Court said that this work might have been done, might have been done, by the contractors and it might have been done by the striking –

WILSON J:

But wasn't it common ground, correct me if I'm wrong, that only some 1 to 2% of line maintenance was undertaken by contractors?

MR TOOGOOD QC:

Yes and I think 5% of the contractors work or time was taken up with this work but –

McGRATH J:

Wasn't it five hours?

MR TOOGOOD QC:

Yes I think five hours.

McGRATH J:

Equates more to an eighth doesn't it?

MR TOOGOOD QC:

Five hours in a –

McGRATH J:

12.5%?

MR TOOGOOD QC:

Yes, thank you Sir, yes you're quite right.

WILSON J:

Sorry, can I just come back to my question? If only some 1 to 2% of line maintenance was undertaken by contractors, isn't it a reasonable inference that there was indeed a high probability that if they hadn't been on strike, the striking employees would have performed the work in issue?

MR TOOGOOD QC:

Well I would accept that only if Your Honour applies a strictly mathematical approach because the work practice did not identify when the contractors might be used. It could be for any number of reasons. It could have been that there were more aircraft than normal overnight in Nelson or that they were in particularly – one aircraft was in a particularly bad state of disrepair so that more maintenance employees were required so one couldn't say. And that was the point that the Employment Court made, so it wasn't a regular occurrence but it was certainly routine. There was nothing out of the ordinary in using the contractors for this purpose.

ANDERSON J:

Implicit in your proposition of course is that the contractors work which it usually did couldn't be constrained by the fact of the strikers not doing their work. It's not a question, I would have thought, of what are the probabilities but whether if they weren't striking they could have done that work.

MR TOOGOOD QC:

And that's why I invite Your Honours to look at this from the point of view of the contractual arrangements and the contractual rights and obligations because if we assume for a moment, and this is quite possible this scenario although not true on the facts, that instead of contractors being principally involved in heavy maintenance, employees were involved in heavy maintenance, and for five hours a week they might also be engaged in line maintenance, if you look at it from the point of view of what were the rights of the non-striking employees? Could they say to the employer well although routinely you instructed me to carry out line maintenance and I'm obliged to do that, because my colleagues are on strike I refuse to do it and our answer is no you can't say that. The section was not intended to interfere in the contractual arrangements between the employer and the non-striking employees. All it is intended to do is support the bargaining position. Support the industrial action taken by the striking workers. It gives them rights. It gives them bargaining power because it makes it harder for the employer to ameliorate the effect of the strike. But there is nothing in section 97 to indicate that Parliament intended that the section would confer a right on non-striking employees to refuse to do work which they regularly or routinely performed. And that I take to be Justice Anderson's point.

ANDERSON J:

Well it becomes essentially factual because here if the, if the contractors started doing it the next day as well then that would be breaking the pattern of their occasional work –

MR TOOGOOD QC:

Yes, yes.

ANDERSON J:

– and you say well you're actually now starting to take over the striker's work.

MR TOOGOOD QC:

Yes indeed and –

ANDERSON J:

The mere fact that they might do it on one occasion during a strike when they did it occasionally when there wasn't a strike doesn't mean they'd be taking the work away.

MR TOOGOOD QC:

No and that really was a point that the Employment Court made bearing in mind that these – we make the point in this submission that if one looks at *Finau* and *Air Nelson* together all four Judges of the Employment Court shared this view. That you have to be able to apply section 97 across a variety of workplace arrangements where you might have a highly unionised workforce, all employees are members of a union so it's absolutely clear what is their work and what isn't. But here, and in many other workplaces, you have non-union employees, non-striking employees working alongside striking workers and you've got to be able to apply section 97 equally and we say that there is nothing in the Act which is intended to interfere with the relationship between an employer and an employee who is not on strike or locked out.

ELIAS CJ:

Mr Toogood I know it's not part of your argument but I do always prefer to start with the text and I'm not sure why you aren't making more of section 97(3). I know you say that it's directed at a different situation but can you help me? If someone, because it's a very strangely framed section, as I think in one of the lower court judgments it's said, although it's expressed permissively it's actually a prohibition.

MR TOOGOOD QC:

Yes.

ELIAS CJ:

And so it's hard to know whether section 97(3)(b) is a condition or a – whether it implicitly describes an exemption from the operation of the prohibition. What I'd like to know is if someone is employed principally for the purpose of

performing the work of a striking or locked out employee, and I understand your argument to be about the same sort of work as the work of the striking or locked out employee, is there any impediment under section 97 to the employer using them?

MR TOOGOOD QC:

It depends Your Honour. If the employee who is already employed by the employer is being asked to do work which they regularly or routinely perform, then we would say they are not doing the work of the striking worker.

ELIAS CJ:

Well that depends if you take a very possessive view of the work of the striking or locked out employee. I had understood you to be arguing that it's work of the type?

MR TOOGOOD QC:

Yes because, because it's conceivable that if one takes the aircraft loader for example, for example it's very difficult to identify precisely by reference to a particular task what the work of the striking employee is because it will be loading and unloading, there's no distinction between types of goods being carried or material being loaded or unloaded, there's nothing of that, and they are working alongside non-striking employees who are employed to do exactly the same type of work so in that, there is often an overlap. There may well be situations where both the particular task and the type of work are the work of both a striking and a non-striking employee. That's not uncommon in my respectful submission.

ELIAS CJ:

Yes and –

MR TOOGOOD QC:

And the Court held that to be so.

ELIAS CJ:

But if section 97(3)(b) does describe an exception to the prohibition, at least inferentially, then I'm not sure why you wouldn't be grabbing it.

MR TOOGOOD QC:

Well simply because we don't need to –

ELIAS CJ:

Because it does seem to me that almost one of the most powerful policy arguments against you is the rostering argument. That if you have a pool of workers who are all doing the same job, and you're faced with a strike, can the employer decide to prioritise what service he or she will maintain –

MR TOOGOOD QC:

Yes, yes.

ELIAS CJ:

– and on the approach adopted by the Court of Appeal you wouldn't be able to –

MR TOOGOOD QC:

That's correct.

ELIAS CJ:

– because you'd have to take a mental picture of was Joe sitting in that chair, would he have been sitting in that chair in which case you can't. You've got to look at the actual rosters and things like that.

MR TOOGOOD QC:

Yes. The answer to that if Your Honour pleases in my submission is brought back into this envelope of regular or routine performance and it will depend very much on the ability of, a contractual ability of the employer to alter rosters without employee consent at any time to meet any contingency.

ELIAS CJ:

Well it's a question of fact.

MR TOOGOOD QC:

Yes, yes.

ELIAS CJ:

For the Employment Relations Authority or the Court.

MR TOOGOOD QC:

Yes so it may be that on the particular facts of a particular case including bearing in mind what the collective agreement says or what the rostering provisions in the employment agreement say, it may be that the employer having rostered employees who then give strike notice, cannot change the rosters to meet that contingency. But there will be other cases, in our submission, where an employer can do that. That's why we give the example of the essential service where the striking employees are bound to give notice to an employer so that in provision of services which are important in the public interest, an employer may take remedial action by prioritising and so on and the airline industry of course is famously one of those. Ferries, the dairy industry, health, I mean of course hospitals and so on where employers have regularly and routinely, if I can pick up that expression, massaged their rosters to ensure that priority is given to where it's needed most. I know that the health and safety exception –

ELIAS CJ:

It's a different provision.

MR TOOGOOD QC:

– creates another element but it's the same principle that there are, the whole point of giving notice in an essential service is to give the employer an opportunity to take some sort of remedial action, often by changing rosters and so on in order to prioritise in that way. So we say that across all of those different facts one has to have a consistent application of section 97 and if you

take the view which the Employment Court took, which in our submission is practical, it meets every workplace and it's very workable, it requires no speculation, the "but for" test does require one to try and create something that one can't be sure about, then that is the approach which should be taken. And that the Court was right where there was that policy issued, where does the boundary lie, to take the approach which meant that employers could, to a degree, take remedial action. It doesn't, that does not mean that section 97 becomes unworkable and it doesn't nullify the effect of strike action because of course the employer has to accommodate the fact that the striking worker's services are not available and that might be a significant percentage of the workforce and that will create problems and it will no doubt, the longer a strike continues, make it more difficult for the employer to resist at the bargaining table. But the section was not intended to allow a handful of employees to go on strike and to hold the employer to ransom.

McGRATH J:

Mr Toogood if you're just pausing a moment can I just go over to a different matter? I'd just like you to help me with this. You were asked some questions by Justice Wilson about the sort of factual element of this. Am I right in saying that there's been no trial of facts at the moment in this case? It's come up from the Employment Relations Authority as a question of law?

MR TOOGOOD QC:

No, no the Employment Court heard evidence although it was of relatively limited scope because there was not much disagreement.

McGRATH J:

I think I must be confusing one of the other cases, the *Finau* case.

MR TOOGOOD QC:

Yes it's the other case, the *Finau* case was one in which the Court was asked to answer a question of law and –

McGRATH J:

Thank you.

MR TOOGOOD QC:

– it's interesting because *Finau* may well have been on the facts when it sent that – it never got back to the Authority as far as I understand, it may well have been decided against the employer just on the facts because in that case it would seem that the employer was relying on that sort of residual power. These are the duties of the employee or anything else that the employer directs them to do and the Court held that that sort of residual power in a contract could not be resorted to. That you had to look at not what the contract said so much as what the employee actually did as a matter of routine or regularity. So it was a very factual enquiry.

McGRATH J:

The other matter, and I'm sure there's a simple answer to this, is can you just relate to me why it is that you have five hours per week I think for independent contractors on line maintenance which is, I'm not sure if we're dealing with a 40 hour week here or –

MR TOOGOOD QC:

Um, probably.

McGRATH J:

But quite a relatively kind percentage compared with the 1 or 2% of overall line maintenance work that that category does.

MR TOOGOOD QC:

Really because the contractors are there to provide assistance on line maintenance work where it becomes necessary through some contingency or something, as I say –

McGRATH J:

They're in reserve as it were?

MR TOOGOOD QC:

Well, and available to do the work and it may be that the particular line maintenance that's required is related to something which, in which the contractor has expertise. It might be just a work flow issue. It may be that there is a higher proportion than usual of employees who are away on annual leave or off sick or something of that nature so it wasn't regular work but it was certainly routine and part of what they did on a day to day basis from time to time. I wouldn't want to put it any higher than that.

ELIAS CJ:

It does sound like a reserve –

MR TOOGOOD QC:

Well except that it was more than just once a year. It was certainly routine.

ELIAS CJ:

Yes, yes as to whether it was sufficient though, that would be a matter of fact and degree.

MR TOOGOOD QC:

And, quite Your Honour and that's the point that we make and I want to emphasise this. That that's where we say the Court of Appeal fell into error because it, with respect, massaged the facts and mis-stated the facts as found by the Employment Court. The Employment Court was entitled to come to the view it did on the facts and no challenge could be made, in our submission, to its findings in that regard. There was no suggestion in the Court of Appeal that the employment – that there was no evidence on which the Employment Court could come to the view it did on the facts and in those circumstances the employer is entitled to rely on it there and here.

ANDERSON J:

I have a hypothetical situation for you Mr Toogood. You see the extent of your proposition. Three people in a workshop floor are all operating metal

presses and Fred who is the most senior has got the very latest one that's got a very high output and it's easier to use and he goes on strike. Can Arthur take over Fred's machine?

MR TOOGOOD QC:

Yes. That will depend, but instinctively I'd say yes, because that will depend on what happens when Arthur is away on holiday, or Fred's away on holiday.

ANDERSON J:

Then it is matter of timing, really. You'd have to look at it and say is he stepping in to relieve Arthur if he's on holiday, or is he stepping in to relieve Arthur if he's on strike?

MR TOOGOOD QC:

And it will depend whether or not Arthur, who's not on strike, has the skill set to do it, and whether it can be said as a matter of fact whether that is a routine part of Arthur's role to operate that machine. If the answer is no, he does not routinely do that work, then consistent with the Employment Court's approach we would say no, when Fred goes on strike, Arthur would not be able to operate that particular machine.

ANDERSON J:

Everybody in a highly unionised type of workshop would say, ah, that's Fred's machine, you can't use his machine.

MR TOOGOOD QC:

Yes, that may well be the case on the facts. So it would depend whether 48 weeks of the year Fred is at his machine, and Arthur isn't. But if, on the other hand, on a regular or routine basis Fred is engaged in paperwork in the office because he's the senior supervisor and so on, and Arthur hops on to the machine. Then it might –

ANDERSON J:

But Arthur only uses that machine when Fred is on leave.

MR TOOGOOD QC:

That may be so.

ANDERSON J:

Not when Fred is on strike.

MR TOOGOOD QC:

On the facts as Your Honour puts them, it may well be not possible for the employer to direct Arthur to do that work.

ANDERSON J:

It's a similar situation, isn't it, where the deputy foreman takes over supervision when the foreman is on leave. But if he's deputed to supervise because there's a strike situation, he is actually doing the foreman's work.

MR TOOGOOD QC:

Yes, that may be the case on those facts. And in that case, the deputy would have the right to refuse to do that work, because it's not his work. So it is very much a factual inquiry, and in our respectful submission, when the Employment Court talk about normal work patterns and what was someone's normal work, and they defined that by reference to being regular or routine, that was about as good as you could put it. It's practical, it's workable. Because all you need to do is say, well, over the last month or two months or six months, what has Arthur been doing on a regular or routine basis, and what is Arthur now doing, or what is he being asked to do? Now, it's not difficult for the employer and the employee to answer that question. They will know. Where you get into the realm of speculation and hypothesis is where you apply the "but for" test. It might be very simple to answer that question in that case, the case Your Honour – both tests would have Arthur entitled not to do Fred's work. But there will be more situations, in my respectful submission, where it will be hard to know how to apply the "but for" test. And the aircraft loader example that we've given is one.

ANDERSON J:

In the *Finau* case, the work that Mr Finau was being asked to do was actually someone else's work.

MR TOOGOOD QC:

Yes, and that's where I say that with the Employment Court having said what it believed the test was in referring the matter back to the authority, it may well have been decided against the employer and the authority on the facts, because the employer was relying on that sort of residual or catch-all provision in requiring employees to do anything the employer asked them, so long as it was reasonable to ask them to do that work.

ELIAS CJ:

So your submission is that this was a matter of fact?

MR TOOGOOD QC:

Yes.

ELIAS CJ:

For the assessment of the Trier of fact. What's the error that you say that the Court of Appeal fell into? Is it really an interpretation point?

MR TOOGOOD QC:

Yes, it was, because we say that because they got into the facts, and came to a different view of the facts, they did that and then asked themselves the wrong question. Because in the Court of Appeal –

ELIAS CJ:

In some cases, that might be the right question. You know –

MR TOOGOOD QC:

The "but for" question?

ELIAS CJ:

Yes.

MR TOOGOOD QC:

Yes. Well, we've suggested to Your Honours that there are two parts to meeting the threshold. The first is, is there a lockout or a lawful strike. The second is, on the facts, when you look at what work has been done, is that the work of the person who's doing the work; is the disputed work the work of the non-striking employer. And if it's their work, then that excludes the possibility that section 97 would apply. There's actually a third possibility here, that the work might be neither of the work of the non-striking employee, nor that of the striking employee, in which case section 97 does apply. So in a sense, there are three steps. The lawfulness of the strike, or is there a lockout? Can it be said in relation to the person that's doing the work that's disputed that it's their work? If not, is it the work of the striking employee? And that's where a "but for" test might provide some assistance. But simply applying the "but for" test fails to take account of the possibility that it is actually the work that the non-striking employee regularly or routinely performs, and is therefore their work.

McGRATH J:

So is it your argument, really, that the work of the non-striking employee is only one way of getting to ascertain, in terms of subsection (2), what the work of the striking employee is?

MR TOOGOOD QC:

Yes.

McGRATH J:

It could be another independent group?

MR TOOGOOD QC:

Yes, it could be, Your Honour.

McGRATH J:

The Employment Court, however, seems to, as I read its judgment, deal with them as alternatives, not – it doesn't seem to have considered the third option.

MR TOOGOOD QC:

They didn't really, they didn't directly address the circumstance where the work might be both the work of the striking employee and the work of a non-striking employee, and they didn't consider the possibility that it might be the work of neither. But that doesn't mean that the test is wrong, because if you apply their test, regular or routine carrying out of that work –

McGRATH J:

So are you saying it doesn't mean the test is wrong, it just means that they didn't have to look at that situation?

MR TOOGOOD QC:

Quite, Sir.

McGRATH J:

I understand that argument, yes.

MR TOOGOOD QC:

And I just come back again to the contractual arrangements. If it is their work, if it can be shown in relation to the non-striking employee that it's their work, they have no right to refuse. And that is why this is a very important provision, and why this analysis, in our respectful submission, is so important, because there will be cases such as *Finau* where the employees who are directed, the non-striking employees who are directed to do the work will not want to do it. They may be members of the same union, some of whose members are on strike. They will not want to do that work. And the question then becomes, can the employer direct them to do it? And we say, if it is their work because they regularly and routinely perform it, section 97 does not give them the right to refuse to do it. It gives the employer the right to say, you will do the work for which you are regularly or routinely engaged.

McGRATH J:

The other point, Mr Toogood, I take it the concept of the work of an employee, this notion of the property metaphor, if you like. I take it that's not specialist usage, no-one has ever suggested it was.

MR TOOGOOD QC:

No.

McGRATH J:

There's been no evidence of usage.

MR TOOGOOD QC:

It's really just because of the way the section is drafted, and you talk about the work of a striking employee.

ELIAS CJ:

Is that the work undertaken by the employee in terms of the employment contract? Is it more than that?

MR TOOGOOD QC:

No. Well, to be consistent, you'd have to say the inquiry is not confined to the wording of the contract. It's actually confined to what is done in the workplace. Very often, when technology changes, employees who are contracted to do a certain type of work move into a different type of work because the technology has changed, without there being any contractual change. And so the wording of the contract becomes inapt to describe all of the things which they regularly or routinely do. So while you have to have regard to the wording of the agreement, it's not determinative, in our submission.

ELIAS CJ:

It's part of the factual context for the assessment of facts –

MR TOOGOOD QC:

And the Employment Court made that point in *Finau*. They were very careful at the end of their judgment, when they were sounding a word of caution. This does not entitle employers to change what might be regarded as normal and usual arrangements.

WILSON J:

Or to right agreements that are so comprehensive –

MR TOOGOOD QC:

Yes.

WILSON J:

– that they defeat the spirit of the section.

MR TOOGOOD QC:

Yes, because in reality anything that's drawn very widely may not accurately describe what it is that an employee does as a matter of regularity or routine. Now I don't, we appear to have touched on almost everything that we've dealt with in our submissions. We've talked about the efficacy of the Employment Court's approach, how it covers all of the different types of working arrangements. We've talked about how it's important to look at it from the point of view of the contractual arrangements and the right of an employee to refuse to do certain types of work. We've looked at the structure of the Act. The purpose, we've touched on the Parliamentary history. I'll just, if I may, just look to see whether there's anything else. There was a point, I think the Court of Appeal suggested that the Employment Court's approach required writing in some additional wording into section 97 and we'd submit that that is not the case. That that, if you take the Employment Court's approach, if you look at paragraph 53 of our written submissions, "Before an employer determines whether they wish to employ or engage another person to perform the work of a striking employee, the first consideration is whether in fact the work a person is doing or is being required to do is their own work, ie the work which they normally or routinely perform pursuant to the terms and

conditions of their employment contract. If it is, the employer is not intending to employ or engage another person to do the work of a striking employee. Therefore section 97 does not apply." And we touched also on the practicality of it and also looking at the policy question of whether or not the Employment Court's affect test blunts the effect of the section and makes it unworkable as the Court of Appeal suggested.

WILSON J:

Mr Toogood could I raise one further matter with you and that is to ask you to take a hypothetical, to avoid the possible factual issue we touched on earlier.

MR TOOGOOD QC:

Yes.

WILSON J:

Of the employees on strike who, had they been at work, would have been rostered to do the work in issue here.

MR TOOGOOD QC:

Yes.

WILSON J:

Would you accept that such employees would, if that work had been under a duty, to perform that work?

MR TOOGOOD QC:

Yes.

WILSON J:

Given then that the heading of section 97 is performance of duties of striking workers, couldn't it be said, I just put this to you for your response, that on that hypothetical the section would apply because it would be a question of the performance of duties of striking workers?

MR TOOGOOD QC:

You mean if the non-striking employees were rostered to do that work?

WILSON J:

Yes. I'm just talking in terms of the possible application of the section which I understand to be your fundamental argument and suggest to you that if hypothetically it were the duty of the striking employees if at work to perform the work, the heading of section 97 would suggest that the section should apply?

MR TOOGOOD QC:

Well it begs the question and that's really my point. I mean it, the first question is, is the employee who is doing the work which is disputed, under a duty to do that work. The answer will be yes if the employer, if they are regularly or routinely performing that type of work, and if the employer has a right to require them to do it because doing that is consistent with the employer's right to change rosters and so on in certain circumstances so –

WILSON J:

But isn't that looking at it from the perspective of the contractors rather than the striking workers which I understand to be Mr Harrison's argument?

MR TOOGOOD QC:

Well that is quite right and we say that is a necessary question as part of the threshold. You must look at it from the point of view of those who have been asked to do the work or are doing the work to determine whether or not what they are doing is their work. If it is their work, even if it might also be the work of a striking worker, section 97 does not apply.

WILSON J:

Thank you.

ELIAS CJ:

Can you just, with the benefit of that argument which has been very helpful, can you just take us to the judgments of the Court of Appeal, the two judgments, and identify the passages you particularly take exception to?

MR TOOGOOD QC:

I think we've probably, I think, as I go to the written submissions, we've probably identified them there. Paragraph 39 of our written submissions if Your Honour pleases. We contrast there the way in which the facts were described by the Employment Court with the way in which they were described by the Court of Appeal, that's the first point that we want to make. The first point is that the Employment Court talked about contractors engaged by Air Nelson. They were already engaged by Air Nelson and over some period of time before the strike was even mooted.

ELIAS CJ:

I'm just wanting to see the error of law that you say that the –

MR TOOGOOD QC:

Well that's the first, that's the first error in that they intruded and restated the facts in a way which misrepresented what the Employment Court actually found and we – I'd like Your Honour to compare the quotations paragraph, in respect of paragraph 1 of the judgment, paragraphs 39 and 40 of the submissions. The Employment Court said, "…they carried out work which **might** otherwise have been done," and the Court of Appeal said this was, "…work which **would** otherwise have been done." They are not entitled, in our respectful submission, to make that point. Then we say that they failed to address the threshold question and this is really the point at paragraph 42 which arises from Justice Wilson's question. "The focus should not have been on what contract engineers engaged by Air Nelson normally did but rather on whether Mr O'Donnell was, on 21 and 22 June, performing work which, "but for" the strike, a striking employee would have been performing." We say that because the way in which the Employment Court expressed its finding of fact,

it was entitled then to come to the view that this could be described as the work of the contractor, their work, and not the work of the striking employee.

WILSON J:

So this is where the factual error becomes operative of the decision?

MR TOOGOOD QC:

And then read to asking the wrong question and stating the wrong test.

ELIAS CJ:

I'm not sure that really there is a wrong question which is why I tried to ask you to identify what the wrong question was or was it just –

MR TOOGOOD QC:

Well –

ELIAS CJ:

– was it just their evaluation of the facts that you take issue with?

MR TOOGOOD QC:

Well no, not just that because we object to the "but for" test being applied in consideration of the work of the striking employee without considering whether or not this was work which could properly be described as the work of the non-striking employee or contractor and the Court simply refused to deal with that issue. They took the view, if you apply the "but for" test then automatically section 97 prevents the employer from directing a non-striking employee to do the work because "but for" the strike. The employee – the striking employee will have been doing that work and the point we make is that that does not allow for the possibility that a certain work where a particular task or a type of work might be both the work of the striking employee and the non-striking employee and that is why we then direct the Court's attention to the contractual arrangements because the real issue here is the ability of the employer to say to an employee, you have no choice in this

matter. This is your work. This is what you are engaged to do routinely and regularly. You will do this work whether you like it or not.

ELIAS CJ:

But I just wonder really whether you're saying anything very different from the "but for" test. You're simply saying that in applying it there was a wider context which the Employment Court was conscious of but the Court of Appeal was not and so that it's the error of fact that you're really complaining of rather than the test –

MR TOOGOOD QC:

Well –

ELIAS CJ:

– because on your analysis "but for" the strike the employee asked to perform the task still had that duty.

MR TOOGOOD QC:

Yes.

ELIAS CJ:

So, you know, the "but for" doesn't work?

MR TOOGOOD QC:

No and we say it doesn't work because you need to ask the question in relation to the work of the non-striking employee as well as the striking employee.

ELIAS CJ:

Yes I see.

MR TOOGOOD QC:

And the Court of Appeal said no you only look at the striking employee's work.

BLANCHARD J:

Mr Toogood, another matter which probably is not of significance in the particular case, do you accept that "engage" covers both existing engagements and new engagements?

MR TOOGOOD QC:

I do but I say if you look at the scheme of the section, "employee" is used in relation to employees and "engage" is intended to be referred to contractors.

BLANCHARD J:

Yes I –

MR TOOGOOD QC:

But I do agree with Your Honour in ordinary usage "engage" would cover employment as well.

BLANCHARD J:

Well that wasn't quite my point. I was just seeking to nail down that it's not restricted to going out and finding a new contractor. That where there is a prohibition in relation to a contractor, as in subsection (4), it applies to contractors who are operating under existing contracts.

MR TOOGOOD QC:

Yes, yes, yes, I do, yes.

BLANCHARD J:

Thank you.

MR TOOGOOD QC:

Yes Your Honour is quite right.

ELIAS CJ:

But the basis for that may be slightly different than what has just been put to you because if employ is used in the sense of use someone, direct someone

to do something, you may be able to direct them under their employment contract or under their independent contract but "engage" means actually bring in.

MR TOOGOOD QC:

Well that, that could be, Your Honour could – that would be a more limited interpretation or application of the word "engage." It may be that "engage" is used there because it's not appropriate to talk about employing a contractor, it's better to talk about engaging a contractor.

ELIAS CJ:

Well I just give notice that I'm not terribly persuaded about that analysis.

MR TOOGOOD QC:

Well that seems to be the way in which the legislation is drafted because subsection –

ELIAS CJ:

It may be, yes, the whole legislation may give that context but the wording of section 97 doesn't seem to.

MR TOOGOOD QC:

Well –

ELIAS CJ:

Because section 97(3) starts with, "An employer may employ another person to perform the work…" and it's only the restriction in (3)(a) that brings in the employment concept.

MR TOOGOOD QC:

Yes and that's why "engage" is not used in –

ELIAS CJ:

Yes.

MR TOOGOOD QC:

– subsection (3) because it's only referable to employees. There's no, there's nothing in subsection (3) which –

ELIAS CJ:

Well it may in fact apply to people who are employed pursuant to independent contracts who are not employees.

MR TOOGOOD QC:

Well that's really my point Your Honour –

ELIAS CJ:

You cant go outside whereas you can where health and safety is an issue. You can bring someone in. That, it seems to me, is the scheme of the section but it may be that there's a wider statutory context which –

BLANCHARD J:

I think the wider statutory context may be the definitions.

ELIAS CJ:

Yes.

MR TOOGOOD QC:

Yes.

BLANCHARD J:

There is no definition of "employ" but there's a definition –

MR TOOGOOD QC:

Definition of "employee" –

BLANCHARD J:

Employee, no.

ELIAS CJ:

But this isn't about employee.

BLANCHARD J:

Oh yes, yes there is a definition of "employee" and "employer" –

MR TOOGOOD QC:

And "employment agreement".

ELIAS CJ:

And "engage"? It just seems to me that they're used in this section as ordinary words.

BLANCHARD J:

They use "engage" in the definitions when they're extending to a home worker.

MR TOOGOOD QC:

Well if you look at, if you look at subsection –

BLANCHARD J:

Which is under a contract for services.

ELIAS CJ:

Yes.

BLANCHARD J:

But not otherwise.

MR TOOGOOD QC:

If you look at section 61 an employee means any person of any age employed by an employer to do any work for hire or reward under a contract of service.

I mean it would help us to be able to argue that "employee" includes bringing on a contractor but to be honest –

ELIAS CJ:

Yes.

BLANCHARD J:

Oddly enough they blur the line in the extended part of the definition of "employer" because there it talks about including a person engaging or employing a home worker so there's a lack of consistency.

MR TOOGOOD QC:

Under definition of "employer"?

BLANCHARD J:

Yes.

MR TOOGOOD QC:

Yes.

BLANCHARD J:

But then "employment agreement" distinguishes between a contract of service and a contract of services between an employer and a home worker.

MR TOOGOOD QC:

Yes. Well that is because home workers may not be, they may be piece workers employed –

BLANCHARD J:

On contract?

ANDERSON J:

Employer, as was pointed out by Chief Judge Colgan has connotations of utilisation but it's broader than that because it's also intended to convey that

it's not just using them, you might have to pay them more for it if they consent to do it and it's a much more nuanced activity than simply using someone for it.

MR TOOGOOD QC:

Yes. I think Your Honour the Chief Justice the point would be that if, if employer in subsection (3) was intended to embrace the concept of taking on a contractor then there would have been no need to use "engage" in subsection (4) which is –

ELIAS CJ:

Yes because you've already, because of subsection (3)(a) so in (4) it's clearly bringing in someone.

MR TOOGOOD QC:

Bringing in somebody, yes. Who's not an employee.

ELIAS CJ:

Yes.

MR TOOGOOD QC:

Yes.

ELIAS CJ:

Or who may be engaged under an employment contract. I'm just not sure that it is, that we should necessarily wear blinkers about contract and employment.

MR TOOGOOD QC:

If one looks at the practical realities here subsection (4) will apply in the Health Service for example where there was a strike of service workers, for example, and it's necessary for a temporary period only, that is during the duration of the strike, to bring in people from outside who are not existing employees to do that work and that would often be done by entering into a contract with Spotless Catering or some other company which provides

services through its own employees who do not become the employees of the hospital for example. But that is the concept that's certainly incorporated in the subsection (4) exception.

ANDERSON J:

Is there anything to indicate on the evidence or a finding that the line work by the contractors had included washing, I think it's the compressor is it?

MR TOOGOOD QC:

I don't, from memory I don't believe the factual findings went into that degree of detail I don't believe it was argued that some of the line maintenance work that they were doing was not work that they would regularly or routinely perform. I think the –

ANDERSON J:

Because it could be relevant in a case, couldn't it?

MR TOOGOOD QC:

It could be.

ANDERSON J:

You'd then just say well they need 2% light maintenance, you might have to say they do 2% and it's usually of this type.

MR TOOGOOD QC:

This type, yes, yes. Yes I accept that that is a possibility and that's why we say it's essentially a factual issue. And that, and it will be one where the employer and the employees who are asked to do the work would have little difficulty in most cases in understanding where the line was drawn.

ANDERSON J:

They have to act in good faith towards each other.

MR TOOGOOD QC:

Yes.

ANDERSON J:

But how readily could they have a genuine dispute –

MR TOOGOOD QC:

Well it has, it has very important consequences Your Honour because if you go to the facts of *Finau* there was plainly resistance on the part of the employers. Now they were arguably putting themselves in a position where they could have been dismissed for failing to follow a lawful and reasonable instruction, so it has real practical bite for the non-striking employee, and that's why I say their contractual rights and obligations are very important in this consideration. At what point are they entitled to refuse to carry out the lawful and reasonable instruction of their employer?

ANDERSON J:

I'm just envisaging a situation where both sides are acting in good faith, but they have a different view?

MR TOOGOOD QC:

Yes.

ANDERSON J:

How readily, in practice, could they get that resolved?

MR TOOGOOD QC:

Arguably, quite quickly, because the –

ANDERSON J:

Because it always was a very difficult situation for Mr Finau. That's the type of workshop situation where there are historical views about taking people's jobs and demarcation disputes and all that sort of thing.

MR TOOGOOD QC:

If you take the approach which the Employment Court, we say the Employment Court took here, the enquiry will be directed, at least initially, at what the non-striking does, routinely or regularly. Now, that employee will know that, and the employer will know that. While the employer might be able to apply a "but for" test, the employee, the non-striking employee may not, because the non-striking employee may not have any idea what the arrangements are, how his or her colleagues routinely or regularly perform their duties.

ANDERSON J:

One of the things that seems to have influenced the Court of Appeal was the feeling that their approach gave greater certainty.

MR TOOGOOD QC:

Yes.

ANDERSON J:

Whereas your approach is going to envisage situations of bone fide differences that need to be resolved.

MR TOOGOOD QC:

Well, in my respectful submission, the Court of Appeal was wrong to take that view because, we would suggest, that far more certainty can be taken if one applies, or can be achieved, if one applies the Employment Court's approach, because you have known facts. What they regularly –

ANDERSON J:

You don't have to posit a hypothesis.

MR TOOGOOD QC:

You don't. You just look at what has been done regularly and routinely and you look at are they being asked to do. The two parties to that agreement, the non-striking employee and the employer, will know those things. But the

non-striking employee may not know how to apply a “but for” test. So that is the bite, that is the real difficulty, because the issue, in many cases, is not just how are the interest of the striking workers affected by the employer’s attempt to ameliorate, but how are the interests of the non-striking workers affected? Are they putting themselves at risk by refusing to do the work? Because, of course, if there is consent on the part of the non-striking employee it doesn’t matter whether it’s their work or not, so it’s – this test really only comes to be applied in situations where the non-striking employee may not want to do the work.

ANDERSON J:

Could we go back to the hypothetical situation that Justice Wilson raised? Suppose you have bus drivers and they work on rosters, and they may work night or they may work one shift or whatever, it’s just a matter of chance, but they all do the work of bus drivers.

MR TOOGOOD QC:

Yes.

ANDERSON J:

But suppose one of them habitually works the night shift and a striking driver works the day shift, what then?

MR TOOGOOD QC:

Question of fact, it might be – if an employer does not regularly or routinely move the night shift worker onto a day shift, then it would be difficult for that employer to argue that this was simply that, a non-striker doing his or her work. If, on the other hand, the rosters are interchangeable, if the employer can change them at short notice, for the employer’s own reasons, whatever they might be, and that is a contractual right and the employee has a corresponding contractual obligation to carry out the work in accordance with the changed shift, then it may be their work.

ANDERSON J:

It's a factually idiosyncratic approach, isn't it, rather than –

MR TOOGOOD QC:

Yes.

ANDERSON J:

– semantic or definitional?

MR TOOGOOD QC:

Yes, and it's very much a workplace issue, and it's an issue which will have to be resolved, in almost every case, by the employer and the employee, the non-striking employee concerned. It's no answer to say, "Well, go and see a lawyer and get some advice and go to the authority and get a ruling or whatever," that's not helpful. So this is why the Employment Court was mindful of this variety of workplace arrangements, the practical possibility that there will be non-union and union employees working alongside each other, doing the same work. How do you deal with that in the situation where an employer says, "I want you to do that work", and the employee says, "I don't want to do it?"

McGRATH J:

Mr Toogood, can you help me with this? You speak of the Employment Court being entitled to make the findings that it did. Is it your argument that it was not open to the Court of Appeal to differ from that?

MR TOOGOOD QC:

Yes.

McGRATH J:

Now, is that something that, I gather from recollection, from Mr Harrison's submissions, he engages with you on?

MR TOOGOOD QC:

Yes.

McGRATH J:

So could you perhaps just give us the legal –

MR TOOGOOD QC:

Because –

McGRATH J:

– basis on which you reach, you make those submissions?

MR TOOGOOD QC:

– the Court of Appeal's jurisdiction is limited to questions of law, and a question of law in relation to a finding of fact arises only if the finding of fact is one in respect of which there is no reasonable evidence to support it, or it's capricious, something of that nature, and that argument was not led. There was a basis in the evidence for the Employment Court to come to the view it did, and in our submission it was –

McGRATH J:

So you're saying they treated it as an appeal on fact, when the statute does not permit that?

MR TOOGOOD QC:

Well –

McGRATH J:

Is that what you're saying?

MR TOOGOOD QC:

– that was what they did, because having massaged the facts and changed the statement of the facts, the Court of Appeal then found it easier to justify its "but for" test and the approach it took, which was to disregard whether or not

this might have been the work of the non-striking contractor. Because stating the facts the way they did made it inevitable, inevitable, that you would say this was the work of this –

McGRATH J:

I understand that, but I was really just wanting to clarify it, and I think you have.

MR TOOGOOD QC:

Yes.

McGRATH J:

You're saying that that was not within their jurisdiction.

MR TOOGOOD QC:

Yes.

McGRATH J:

Thank you.

WILSON J:

Just coming back to my first question, can I confirm that there was no finding by the Employment Court on the question of whether, had they not been on strike, these employees would have undertaken the work in issue?

MR TOOGOOD QC:

They said they might have –

WILSON J:

Might have, yes.

MR TOOGOOD QC:

– and the contractors might have.

WILSON J:

Might have, equivocal.

MR TOOGOOD QC:

Yes, that's as far as they were prepared to speculate, and it shows, in our submission, the difficulties of that approach, that "but for" approach, and it's better to look at what had been done in the past by the non-striking person. I have nothing to add, Your Honours. I'm happy to answer more questions, but I don't think I can assist any further.

ELIAS CJ:

Thank you, Mr Toogood.

MR TOOGOOD QC:

As Your Honours please.

ELIAS CJ:

Thank you, Mr Harrison.

MR HARRISON QC:

If I don't, Your Honours, if I don't correct this typographical error I know I'll lose sight of it. Page 24 of our written submissions – I think you probably picked up on this – about half way down the paragraph numbered 3, third line, the reference should be *Air Nelson* CA, not *Finau* CA. This relates to some of the interchanges about the percentages of duty that the contractors had.

ANDERSON J:

I'm sorry, is that page 24 or paragraph 24, Mr Harrison?

MR HARRISON QC:

Paragraph 3. Page 24, the middle paragraph, the one beginning, "Furthermore," third line, "*Air Nelson* CA."

Now, the starting point, in my submission, as Your Honour, the Chief Justice, seems to have sympathy with, must be section 97 of the Employment Relations Act, and that is at page 14 of the casebook. Now, we have, obviously, two quite marked differences in approach between the parties as to the starting point of the enquiry as to whether section 97 is engaged. My learned friend argues that you begin by looking at the work of the non-striking employees or contractors, and you apply some such expression as regularly or routinely or usually or normally, to assess whether what that non-striking employee is to be ordered to do comes within a concept of his or her work, and our submission is no, you begin by inquiring into the striking employee's work. Now, going back to the text, as I note in the written submissions, the expression, "the work of a striking or lock-out employee," occurs in section 97 five times, and it is obviously the statutory enquiry. We begin by asking whether the work which either has been done or is being done during a strike is the work of a striking employee. You must begin, I submit, by asking that question. The argument for the appellant is, well, you don't get onto asking that question until you've asked a question which the statute does not provide for, either expressly or impliedly. Now, in a nutshell, we say that that approach is simply misconceived. You must start with the statutory question. When you start with the statutory question, you then have to decide what is the content of the test posed by those words, "the work of a striking employee." The Court of Appeal said that the test inherently is a "but for" test, and we support that. But even if the Court of Appeal was wrong or that test required fine tuning, the first and foremost enquiry must still be into the work of a striking employee, which has been performed or is being performed, for present purposes, during the period of striking. So, our submission is that there's a fundamental flaw in the analysis based on the first step, which the appellants which to, with which the appellants wish to begin the enquiry.

Now, the two approaches, the two alternative first steps, as Your Honours will realise, involved two quite different time frames and types of enquiry. The appellant's test is a backward-looking test, which looks at the job performance and work history of the non-striking employee. It involves saying, well what

has this non-striking employee been doing, conceivably during the whole period of his or her employment, because what is normal for that employee? Now, it might be that in the last six months particular non-striking employee, Joe, has not worked this machine at all. But if we go back two years we might find that Jo has worked, further back, worked the machine a number of times. Does that mean that Joe normally works that machine? Those are the kinds of enquiry one gets into. By contrast, the time frame of the Court of Appeal's "but for" test is simply contemporaneous with the transaction under examination. What would this striking employee have been doing at this particular date and time? And it is a very easy enquiry, certainly in the normal run of cases, and I give the example of the rostered employee – we know what the rostered employee would have been doing, at least during the period while the roster is running – and it is a more straightforward enquiry. My learned friend argues that it's not an enquiry which the non-striking employee would be at ease with, but it is an enquiry which the non-striking employee's union would, if he or she has one, would be able to address, and it's certainly an enquiry which the employer would have no trouble with, and it's the employer that is bound by the provision.

The appellant's argument, furthermore, involves creating two classes of non-striking employee. One class having the right to refuse to engage in strike-breaking, and the other having no such right. And a point we make, looking to the broader statutory purposes, is that the creation of those two classes is not consistent with the objects of the Act and, referring to the casebook at page 2 to 3, where the section 3 objection is spelled out, object A, on page 2, "It's a main object with subsidiary aims, shall we say, building productive employment relations," et cetera, et cetera, and then there's (i), over the page, (ii), "Acknowledging and addressing the inherent equality of power in employment relationships," (iii), "Promoting collective bargaining," and (iv), "Promoting the integrity of individual choice." Now, although I argue that (ii) and (iii) and more important and directly engaged, nonetheless, my point about creating two classes of non-striking employees is, and this being undesirable, is underscored by (iv), because the argument

for the appellant here undercuts that right to refuse to be a strike breaker by substantially narrowing the ambit of section 97.

Now, section 97(2) – if we go back to that provision, at page 14 of the casebook – is, in our submission, critical, because it plainly demonstrates that section 97 is intended as a code where an issue arises as to the performance of the work of a striking or locked-out employee, because the employer may employ or engage another only in accordance with, and I stress "only", in accordance with subsection (iii) or subsection (iv). So that the section, and what I've called "the statutory enquiry", must be fully engaged from the outset, otherwise the plain statutory language and purpose is subverted.

So, my first point, really, about the statutory language, is that the first enquiry is not the work of the non-striking employee but into the work of the striking employee. But, logically, even if you ask the question, "What is the non-striking employee's normal work?" and also ask the question, "What is the striking employee's normal work?" in many cases you'll get nowhere, because if you asked the two questions together the answers may well cancel each other out. You're looking at this work and you say, "Is it the non-striking employee's normal work?" "Yes." You ask next, "Is it also the striking employee's normal work?" "Yes," you've answered nothing. So, there is no statutory justification for asking the non-striking employee's normal work question first, far less asking that question without also asking about the striking employee's normal work.

Now, there is assistance in the legislative history in support of my submission that normal work is not the concept anyway, whether it be of the non-striking employee or of the striking employee. If we could turn to page 12 of the written submissions –

ELIAS CJ:

Do we have the Bill as introduced?

MR HARRISON QC:

Yes, yes, we do have it, and I am about to take Your Honours through it.

ELIAS CJ:

Yes, thank you.

MR HARRISON QC:

So this is the section, it starts at page 12 of the written submissions. Now, and this is my point about why normal work isn't the appropriate concept. In short, because it was jettisoned as we went through the legislative process. So, paragraph 33 refers to casebook page – sorry, page 53, 33 refers to page 53 of the casebook, and this is the Bill as originally introduced, and at the bottom of that page 53 it said, clause 111, which became 97, is new, "It prevents an employer requiring employees who are not affected by a strike or lockout to do work that is normally done by the employees who are striking or affected by a lockout, or hiring replacement to do that work." So, it's this stage they were defining the work of the striking employees by reference to the work normally done by those employees. And this came through into clause 111 which is at page 55, we see 111(1)(a), "The employer may not require an employee not participating in the strike or lockout to perform the work that is normally performed by an employee who is participating in the strike or affected," et cetera.

Now, the position then was that, as I note in paragraph 35, "There were concerns about a lack of clarity," and starting at page 56 of the casebook – I'm sorry, it's a bit of a mess and it doesn't have a heading or a first page – but it is the, as the index indicates, it's the Department of Labour recommendations –

BLANCHARD J:

I'm not sure whether we can look at that.

ELIAS CJ:

Sorry, what are we looking at, 84?

MR HARRISON QC:

Page 56.

ELIAS CJ:

Sorry, what is it?

MR HARRISON QC:

It's –

ELIAS CJ:

Oh, this came out under – yes, I had the same note – this is all OIA released stuff.

BLANCHARD J:

Yes.

MR HARRISON QC:

Yes.

BLANCHARD J:

I have problems with your paragraphs 32 and 35 –

ELIAS CJ:

Yes.

BLANCHARD J:

– which I haven't read because I don't think we can receive that. It's certainly permissible for us to look at the explanatory note and the clauses in the Bill at various stages, and at the report from the select committee, but I'm not sure that the communications from the Department are properly before the Court.

MR HARRISON QC:

That was not a concern raised in the Court of Appeal, but I can –

BLANCHARD J:

It may not have been, but I'm raising it.

MR HARRISON QC:

Yes, oh, no, no, and, with respect, I'm not suggesting –

BLANCHARD J:

And it's a point we've taken before, when given these materials, and I don't know that we've ever given any formal ruling on it, because it's never been critical anyway, and I suspect it's probably not critical here.

ELIAS CJ:

Well, it's not really. I think, Mr Harrison, you need to move on to the select committee report.

MR HARRISON QC:

Yes, I'm happy to do that, and I can deal with it that way. That's page 36 of the written submissions and, of course, starting at page 63 of the casebook, where the report back summarises the submissions, page 63 under that first heading two-thirds down. So that, just to summarise it, "Clause 111 attracted a lot of comment, support from unions, employees, opposition from employers concerned about inability to replace striking labour," and so on. And then in a passage – oh, it's then said, page 64, quarter of the way down, "A number of submitters expressed the need for clause 111 to be clarified," and how it should be clarified is set out," and then the passage which appears in paragraph 36 of the submissions, with highlighting, and just to talk my way through that, there was a concern under, the paragraph beginning, "Many comments," "The concern that the provision as drafted meant that employers may not use existing employees at all to perform the duties of striking workers. The intention of the clause is to prevent an employer from ordering other employees not affected by the relevant industrial action to do the work of employees who are lawfully striking." Now, there's absolutely no suggestion that there are two categories of employee, one that may be ordered and one

that may be not, and they may not be, depending on the normal work issue. It's a blanket reaction to an employer complaint that 111 as drafted didn't allow existing employees to be used at all. And the select committee's solution was to say, "Well, they can be if they consent, across the board, necessarily all employees, as being talked about." And again we've moved to that second paragraph, last sentence, "An employer is not prevented from using existing employees to do the work of affected employees, those are strikers, so long as those employees requested to do the work being free to choose not to and agree to do the work," and so the rest of it follows, including the last sentence of the quote which relates, as we've heard, to the effect of section 97(3)(b) is it?

So, I make my points about the legislative history at 37. Now, at that point, when 97 comes back in, normal work is dropped and instead it's just the work of a striking employee, if normal work of the striking employee had stayed in, that would have been a wider concept, in my submission, than a "but for" test, work of a striking employee, because you then look, the converse of the Employment Court's approach, you'd look at everything the striking employee normally did, whether or not he or she was actually going to do it at the time of the strike, and you'd say, "Well, this employee normally drives buses or normally acts as cabin crew, therefore none of that category of work can be done."

ELIAS CJ:

Is this a convenient place to take the adjournment? All right, we'll take the adjournment now, thank you.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.51 AM

MR HARRISON QC:

A further point I wish to make among those I've already been making is what Your Honour Justice Wilson was putting to my learned friend. The appellant's

argument, in my submission, results in a particular case being treated as not the striking employees' work even if it is demonstrated that the employee, striking employee, would in fact definitely have been carrying out that work and that is a surprising conclusion that you could prove, absolutely if you like, that that work would have been done by the striking employee but nonetheless because it is shared as normal work by a non-striking employee, the non-striking employee not only can do it but can be ordered to do it.

Now the related, a separate but related concern about the implications of the argument, and indeed some of the exchanges this morning, is that it seems to be premised on a notion that there is a concept of work that belongs to an employee so that you identify some kind of possessory right of or connection with the work of a particular employee and that, I submit is, is likely to be, unlikely to have any contractual foundation given modern employment contracts but it's a completely artificial concept to try and attribute a form of proprietary interest of an employee in a particular task. So it's not a question, there was an exchange with Your Honour Justice Anderson about the contractors and Your Honour commented, well the mere fact that there's an occasional filling in doesn't mean that the contractors are taking the work away from the striking employees. With respect I submit that that's not the notion. It's not work that is taken away in some kind of conceptual sense. It's a purely factual enquiry into the work that would have been done.

ANDERSON J:

It does suggest that there's a possessory concept but there's a definitional approach that's required. You have to define what the work of the striking employee is.

MR HARRISON QC:

Yes.

ANDERSON J:

That's not a possessory concept at all that's a matter of definition and analysis.

MR HARRISON QC:

Yes.

ANDERSON J:

And judgement to a light extent.

MR HARRISON QC:

Yes, yes, I accept that. The –

ELIAS CJ:

What about the case of a roster arrangement? Is that the work of the striking employee until the roster changes or what do you say to that?

MR HARRISON QC:

Well it, when there is a roster it is easy to apply the "but for" test. If the strike went on so long that rosters ceased to exist in relation to the status quo at that point, the case for the plaintiff union would probably break down. The union would, by that time quite conceivably, be unable to prove that the work that was being done on an entirely new roster, created after an earlier roster had expired, was the work of a striking employee.

ELIAS CJ:

Might well be able to say but for the strike, the roster would have been quite different.

MR HARRISON QC:

They might and that – so it becomes at that point a matter of the union or the employee who asserts breach of section 97 making that up the "but for" test at the margins may become more of a complex enquiry but nonetheless it could well be straightforward. And I noted, and this is on this topic as well, I noted what appeared to be a concession late in the day by my learned friend when Your Honour Justice Anderson put the bus driving shift example to him. He seemed to say that the driver who is invariably on a day shift, I may have this

the wrong way round, might not be treated as normally or routinely driving a night shift. Now that's an implicit concession that words like "normally" or "routinely" are very difficult concepts because I would have thought that the logical argument for the appellant is to say the bus driver normally drives buses and therefore the bus driver can be directed to drive buses because that's his normal job rather than a refinement which isn't the type of work that's normally done but the type of work and when it's normally done therefore maybe where it's normally done and the whole, the whole proposition that you go first to the non-striking employees normal work starts to become meaningless.

The examples at the end of our submissions are intended to be instructive, hopefully they are, at page 28 on. The first example is intended to illustrate that it's in the competition between which of the two competing tests is the more practical and workable. The Court of Appeal's test is and I won't take Your Honours through that. The second example is the bus driver example and there's a point arising out of it that I wish to emphasise and that is at paragraph 12, page 30. This is quite a critical point. If you apply the Employment Court's approach without the refinement by my learned friend that I have just referred to, on my example you've got three non-striking drivers who can be directed without their consent to work the three striking drivers' rosters because that's what they normally or routinely do. But a critical downstream consequence of this approach and interpretation is that having directed your non-striking drivers to do the work of the striking drivers, which you couldn't bring an outside – a new employee or contractor in to do, you couldn't do that, but you can then direct, you can then hire to replace the non-striking drivers who've been moved in –

ELIAS CJ:

But surely the Employment Court would go right to the substance of the transaction?

MR HARRISON QC:

I don't accept that the Employment Court necessarily would because it is, it's a question of, purely a question of defining the work of the striking employees and if you define it the way the way the Employment Court does, it follows that the non-striking bus drivers can do the work of the striking employees even though the roster bites and once you've got to that point you are not employing new employees or contractors to do the work of the striking employees, that's been taken care of so its' not a question of substance, it's purely a question of how and to what extent section 97 bites.

ANDERSON J:

If you have six bus drivers required for a certain amount of work and three go on strike and you employ three new people to make the complement up to six, you must necessarily be employing people to do the work of the striking bus drivers?

MR HARRISON QC:

I agree but not on the appellant's argument. On the appellant's argument you take your non-striking, existing non-striking employees and order them onto the striking employees' duties.

ANDERSON J:

I think that's, I thought that was more your argument because you're showing the significance of the roster?

MR HARRISON QC:

Yes but on the appellant's argument, taken step by step, the appellant's argument must mean that you, because they say how important it is to be able to accommodate and direct and move around when there's a strike. Their argument is the non-striking bus drivers normally drive buses, they can be directed without consent to do the work of the striking drivers. Once they've filled that gap what legal impediment is there to new employees or contractors being brought in to do the work of the non-striking drivers? It's not caught by section 97.

BLANCHARD J:

No their argument is that they would be doing their own work?

MR HARRISON QC:

Yes.

BLANCHARD J:

So if that argument is accepted the employment of the new people would be to do the work of the strikers and would be met by the bar. I think your argument, your example proves more than you intend it to.

MR HARRISON QC:

Well they, on the appellant's argument they're doing their own work and it's immaterial that it's also the work of the striking employees.

BLANCHARD J:

Yes.

MR HARRISON QC:

But, but – and that's because they say the section doesn't bite at all on their approach so the section not biting they go ahead and they're working, they're working – they're doing the duties that the striking employees would have done. My only point is, reach that point in the argument and, and adopting the Employment Court approach what impediment is there to them making up the numbers by fresh employees or contractors who do –

BLANCHARD J:

Well I've already told you what I think the answer is.

MR HARRISON QC:

Yes I acknowledge that.

ANDERSON J:

What you would face though is if they consented, if the non-strikers consented and then that would be an opening to strike breaking in that way but the Act envisages that anyway.

MR HARRISON QC:

Yes, yes, it does and that's why the question of the right to refuse and, and the extent of that right in the categories employer it applies to is so critical because otherwise you, you render that safeguard around the right to refuse to strike-break completely nugatory in my submission. Now just a couple of other points. One raised by Your Honour about the potential impact of section 97(3)(b) which is at page 14 of the casebook. Both my learned friend and I have responded that the statutory history gives (3)(b) a clear intended and fairly narrow purpose but my submission is that if you read subsection (3) as a whole it is wrong to categorise (b) as an exception to a general prohibition rather subsection (3) specifies three pre-conditions to an employer's ability to utilise any existing employee and each of those has to be ticked off before there is authority to employ under subsection (3). So it's not –

ELIAS CJ:

I don't disagree with that but my point was, is it implicit that there is an exception because otherwise why is it there? Well your answer to that is it's for the very narrow purpose of stopping people keeping a pool of employees in place against the possibility of a strike. It just seems rather a sledgehammer.

MR HARRISON QC:

Well it was obviously a matter of concern to a select committee. They wanted –

ELIAS CJ:

Yes.

MR HARRISON QC:

When moving from what employers saw as a blanket prohibition they wanted to open the door only so far and, and they therefore set out to exclude the possibility of new hires being brought in. But at the end of the day if we're back to the decision about the content of performing the work of a striking employee because if that concept is what the Court of Appeal says it is, then that impacts on the interpretation of (3)(b) as well. The focus is someone who's employed principally to perform that work as, as defined, and it's not an enquiry into the nature of the work done by the non-striking employee who potentially comes within (b) and not looking to see what their, what their work normally or principally is, but rather what the purpose of their being employed relative to the identified work of a striking employee in the present circumstances. It takes it back, in effect, to the primary, primary question. I hope I've made myself sufficiently clear on that.

Now the next and separate point I wanted to address –

ELIAS CJ:

If, as a matter of substance, an employee is substituted for a striking employer, your submission is that that can only be done with consent and only if the worker is not part of a pool recruited for the purposes of strike breaking, is that right?

MR HARRISON QC:

Unless subsection (4) is available.

ELIAS CJ:

Yes, yes leaving aside subsection (4), yes.

MR HARRISON QC:

Yes. And there are two, two ways subsection (3)(b) might be in question. One would be if the employer had a pool of people already on the books who would only be called in to work in the case of a strike and the other would be, as my learned friend says, when the employer knows a strike is about to

happen or indeed the strike is happening, the employer goes out into the market and seeks to get fresh employees. Either of those scenarios would fall within (b), (3)(b). I wanted to deal –

ELIAS CJ:

Are you really differing very much from Mr Toogood in terms of the function of the Employment Court here to look at the matter as one of, I suggested a fact and degree, is that the assessment that has to be made?

MR HARRISON QC:

The –

ELIAS CJ:

Is it possible to refine it more than that?

MR HARRISON QC:

Well the big difference, in my submission, is over the starting enquiry because the starting, the two starting enquiries produce quite different results. Your starting enquiry is into the work of the non-striking employee and you can't apply a “but for” test to that then you – and his argument is that depending on the outcome of that enquiry –

ELIAS CJ:

It’s an aspect of the “but for” enquiry because if someone could have been employed on that work it is not, he’s not necessarily doing the work of the striking employee.

MR HARRISON QC:

I, with respect, I don’t accept that that kind of enquiry is part of the statutory enquiry into the work of the striking employee. What it does is fail to address the nature of the work that would have been done by the striking employee and substitute enquiry into the work capacities and the work history of the non-striking employee or at least have those two considerations competing with each other but you’re not, the considerations don’t compete like with like.

They're unrelated considerations so that one of them would prevail or the other.

ELIAS CJ:

Well in context it may be relevant as a matter of assessment of fact.

MR HARRISON QC:

It's only relevant to determine the outcome of the "but for" test.

ELIAS CJ:

Yes. That's really what I'm putting to you.

MR HARRISON QC:

And if it's possible to demonstrate that someone else would have been doing the work in question, the argument falls.

ELIAS CJ:

Yes. That's why some assessment in particular contexts of whether the worker who is doing the work would, could have been doing it, will be a relevant factor. I'm just grasping for what's the problem?

MR HARRISON QC:

Well it's the –

ELIAS CJ:

I mean there's a problem with the result in the appellant's submission because the Court of Appeal on its submission has determined a question of fact.

MR HARRISON QC:

Ah, that's something I was just about to come to but just to complete this topic my submission is that the enquiry is not and never should be into what the non-striking employee could have been doing. It is, it is into what he or she would have –

ELIAS CJ:

Yes, yes.

MR HARRISON QC:

– been doing but that is equally likely to be answered by an enquiry into what the striking employee would have been doing.

ELIAS CJ:

Yes, yes. They're two sides of the same coin really.

WILSON J:

Isn't the essential difference between you and Mr Toogood that when section 97 refers to the work of a striking employee, you say that's a reference to the actual work that that employee would have been performing whereas Mr Toogood says, no that's a wider reference to work of the kind, of the general kind that they might have been performing?

MR HARRISON QC:

Yes except that I think both my learned friend and the Employment Court actually do an immediate flip flop because it's not an enquiry into the kind of work that the striking employee would have been doing, it's turned on its head, without statutory warrant, into enquiry into the kind of work the non-striking employee would have been doing. That's, that's my most serious complaint and criticism of the argument and the Employment Court's reasoning. It's a point I make where I quote at 8.4, page 4 of the written submissions, where I talk about the two non sequiturs in that critical passage of the Employment Court judgment in *Finau* that I set up. They begin with treating the striking employees with, according to its general type, which was a proposition Your Honour put to me, and then say well no the question is then what was normally done by the non-striking employee and it simply doesn't follow.

If I may, Your Honours, I'll go on to deal with this argument, the complaint of impermissible fact finding. In my submission there's nothing in it, with respect.

The fact finding engaged in by the Employment Court had to be based on a correct interpretation of section 97. If the Court of Appeal's interpretation is correct, then the Employment Court proceeded to its fact finding task on an erroneous view of the section. They therefore failed to ask themselves whether the "but for" test produced a result favourable to the union. So that's the first point and I deal with that in paragraphs 3 to 7 of the submissions. It really is a red herring in my submission. Determining the correct interpretation of section 97 as between the two competing interpretations or some alternative, is going to decide the appeal. But coming back to the detail of the complaint, and I deal with this at page 24 of the written submissions, and can we go also to the Court of Appeal decision in *Air Nelson* at page 41 of the case? What – this is summarising the submissions at page 24 and following, we go to page 40, sorry 42 of the case on appeal, the criticism by the appellant is all directed to paragraph 1 of the Court of Appeal judgment. And the criticism is that the Court of Appeal used the expression "some work which would otherwise have been done" whereas it should have said, "could otherwise have been done" but this is only an introductory paragraph. If we go on to look at what the Court of Appeal actually did and the references are in the paragraph numbered 4 on page 24, we'll see that it didn't engage in fact finding on this "but for" issue at all.

ELIAS CJ:

Sorry what are you referring to, the casebook or the?

MR HARRISON QC:

No the case on appeal Your Honour.

ELIAS CJ:

Yes.

MR HARRISON QC:

With the judgment under appeal starting at page 42.

ELIAS CJ:

Yes, thank you.

MR HARRISON QC:

So I made the point that it's in paragraph 1 that the statement is made which is the subject of the appellant's emphasis and criticism. But paragraph – page 24 of my submissions, the paragraphs which follow, if I may I'll take Your Honours –

ELIAS CJ:

Which paragraphs? I'm working, sorry, off a separate copy. Which paragraphs of the Court of Appeal decision are you referring to?

MR HARRISON QC:

Does Your Honour have page 24 of my –

BLANCHARD J:

It's a very confusing page. It might be easier to go to the Court of Appeal judgment. I got lost too trying to read page 24.

MR HARRISON QC:

I'm going to go to the judgment.

BLANCHARD J:

Good. Now.

MR HARRISON QC:

I simply say that at page 24, subparagraph 4) I give all of the paragraph references –

BLANCHARD J:

Can we go to them please?

MR HARRISON QC:

Yes but I'm just ensuring that Her Honour the Chief Justice has –

ELIAS CJ:

I've got it now, thank you.

MR HARRISON QC:

So that paragraph 12 of the judgment, page 44 of the case, the parties have not supplied us with the evidence that is before the Employment Court. "We suspect that Air Nelson runs a roster system. We suspect that the roster would reveal that but for the strike the line maintenance would probably have been done. That was the union's allegation. This is the first thing the Court should have made a finding on. If the word probably would have been done by a striking employee section 97 would have applied," et cetera. So then they're obviously not making that finding, they're saying that the Employment Court failed to make it.

ELIAS CJ:

If you're using the statutory test, "work done by the striking employee," "probably would have been done" is a test that the Court of Appeal is using to come to the conclusion. Is it the right test, "probably"?

MR HARRISON QC:

Well, it's just one way of formulating the "but for" test and, in my submission, is, yes, it's the right test. But at the moment I am just meeting the improper fact-finding argument.

ELIAS CJ:

And the point at 12 is they are expressly saying, "Well, we don't have the evidence and the Employment Court didn't, failed to make that necessary finding." Paragraph 14, again, under subsection 4, health and safety, "This is a matter with which the Employment Court should have grappled, they never considered it." And again, paragraph 12 of the judgment, "Although we are satisfied the Employment Court's approach was wrong, that's in law, we

cannot say whether Air Nelson's actions breached section 97, because of its approach the Employment Court do not make findings of fact on matters which are relevant under our approach, nor have you been given the evidence, we do not have jurisdiction to make findings of fact on appeals from the Employment Court." I do quarrel with that, but that's neither here nor there for the moment. And 22 to 24 –

BLANCHARD J:

What's your quarrel with that? Are you saying that if there's an error of law and they've also gone wrong factually or the error has led to them going wrong factually, then the Court of Appeal can get into the facts?

MR HARRISON QC:

They can if they have sufficient material before them.

BLANCHARD J:

Yes, yes.

MR HARRISON QC:

The ordinary rules as to disposition of appeals would allow that. I'm simply –

BLANCHARD J:

You're saying that statement that they've made there is far too bald?

MR HARRISON QC:

Yes. I accept entirely that in this case it was appropriate for them not to go on to make facts.

BLANCHARD J:

Yes.

MR HARRISON QC:

For the very reasons they're giving. And the passages at 22 to 24 and 27 –

ELIAS CJ:

Sorry, which passages, paragraphs?

MR HARRISON QC:

Paragraphs 22 to 24 of the judgment.

ELIAS CJ:

Yes, thank you.

MR HARRISON QC:

Where they're indicating that they can't, for example, 24, without evidence they can't make the finding, and then finally, in response to a submission from me, 27, "We cannot take, Dr Harrison, the next step, for the reasons given." So –

ANDERSON J:

What do they decide, then?

MR HARRISON QC:

What they decide is what section 97 means and that the Employment Court erred in law…

ANDERSON J:

Did they define the question of law, in respect of which they accepted the appeal?

MR HARRISON QC:

Yes, they had defined it, yes, most certainly.

ANDERSON J:

It's a bit hard, sort of, there are so many obscure aspects to the case that it's rather hard to find out what the allowing of the appeal amounted to.

MR HARRISON QC:

Well, with respect, it's not the – if ex hypothesi our interpretation of section 97 is right, which coincides with the Court of Appeal's interpretation, it's not our fault that the Employment Court failed to make the necessary finding of fact which it ought to have made on that interpretation. So, we go to the Court of Appeal and we say, "Well, the Employment Court got the law wrong and we'd like the breach also declared," the Court of Appeal says, "We agree the Employment Court got the law wrong but we won't go the second step," we're entitled to –

WILSON J:

But in giving –

MR HARRISON QC:

– the benefit of that judgment and the ruling on the interpretation question, unless Your Honours disagree on the law.

WILSON J:

Mr Harrison, in giving leave to appeal, did the Court of Appeal identify the issue in respect of which leave was being given?

MR HARRISON QC:

Oh, yes, undoubtedly.

WILSON J:

And what was that?

MR HARRISON QC:

I don't know if you've got the leave judgment in the –

WILSON J:

No, I couldn't see it.

BLANCHARD J:

Well, their own judgment says, in formal terms, that the Employment Court's construction of section 97 was erroneous.

MR HARRISON QC:

One of the – not to duck this too much – one of the problems or one of the features is, of course, that the lead judgment was *Finau* at page 50. That was the lead judgment, and if we go to page 50 of the case on appeal we'll see the question of law that the Court of Appeal addressed and answered, on page 50, of the case on appeal.

ELIAS CJ:

Well, I was just working off the judgment separately, but that's all right, I'll go back. It's just, I've marked it up, so being told the paragraph in the judgment would help me.

MR HARRISON QC:

This is responding to the question, "What was the question of law in *Air Nelson*?"

ELIAS CJ:

Yes.

MR HARRISON QC:

The answer is – one actually has also to go to the question of law in *Finau*, because this –

WILSON J:

But was it the same question?

MR HARRISON QC:

Yes, yes. So there's the question set out in *Finau. Finau* being the lead judgment, they answered it in *Finau,* they'd answered it. So then in *Air Nelson* they simply applied it, and what the appellant is doing is trying, if I

may put it this way, trying to focus with blinkers on the judgment directly under appeal, in *Air Nelson*, and avoiding a direct critique of the lead judgment in *Finau.*

ANDERSON J:

If I read them together.

MR HARRISON QC:

And you've got to read them together.

ELIAS CJ:

But, Mr Harrison, I am still troubled about this "probably", because why is it not sufficient to say the work a striking or locked out employee would have performed, and then probability is a question of how you assess the substance of it perhaps. I just –

MR HARRISON QC:

I think that probably, probably –

ELIAS CJ:

It makes no difference.

MR HARRISON QC:

– probably was in there just as an indication that it was on a balance of probabilities and you can say, as Your Honour has just done, well, leave that aside, that's simply the onus of proof.

ANDERSON J:

Is it implicit in your client's argument, or your argument as the case may be, that a striking worker can constrain the work of a non-striking worker?

MR HARRISON QC:

I, no, I wouldn't put it – well, there's a statue of constraint and it's incidentally the statute that overrides contractual provisions. My learned friend says that

section 97 can't possibly override a contractual obligation to work or a contractual entitlement to direct work. With respect, it's precisely what it does. But it's not – it's the statute that has whatever effect it has, and while it gives rights to the striking employee in the nature of strengthening his or her collective bargaining position, I wouldn't put it quite the way Your Honour has.

ANDERSON J:

You see in the *Air Nelson* case if there weren't a strike the contractor would have been quite entitled to do the work it did and charge for it.

MR HARRISON QC:

Yes.

ANDERSON J:

So, that was its contractual entitlement with Air Nelson, and why should the fact that a person goes on strike freeze that contract?

MR HARRISON QC:

Well, we don't have the contract in evidence but I submit that the more likely analysis is that the contractor is simply to work as directed in, maybe in a mopping up way, so that it's not that the contract, contractor had every right to do the work of the striking employees.

ANDERSON J:

But there are factual hiatuses here –

MR HARRISON QC:

Yes

ANDERSON J:

– which make it difficult, but also the term "work", which is really an ordinary English term, is being stretched to cover a multiplicity of workplace arrangements and that, that raises difficulties I think.

MR HARRISON QC:

Well, much more so on the appellant's argument is it having to do, cover all manner of enquires and issues. On our argument, and the Court of Appeal's approach, it's a much simpler enquiry, certainly in the vast majority of cases.

ANDERSON J:

Most cases would be pretty simple on the appellant's approach. I think it's the rostering type situation is where you start running into difficult questions of definition.

MR HARRISON QC:

Well if you take my first example, with the machine operators, that deliberately doesn't involve rostering. What it involves is people who are multi-skilled in a workplace and that, I think, is really the *Finau* situation. Some more skilled than others, some with traditional roles and then there's a very difficult exercise in line drawing on the normal or routine or usual enquiry of the appellant's. Just one moment, Your Honours. Yes, I'm not sure I can assist or add to what's already been debated on the meaning of "employ" or "engage". It, what I would submit is clear about the use of "employ" in section 97(3) is that it must deal with the employment relationship in a strict sense because of (3)(a) which talks of the person being already employed by the employer, so that it would appear that, as I've argued, that "employ" means both the act of entering into an employment agreement in the strict sense and utilizing, and equally under subsection (4) one may have to interpret "employ" or "engage" as a kind of compendious expression to deal with all alternatives, both existing employees and existing contractors, and entering into a new employment or a new independent contract. All of those come within subsection (4) and I think probably my learned friend and I don't really differ on that. But certainly you can't just say it's "employ" in the sense of enter into a contract with, contract of employment with. But, as I indicate in my written submissions, it may not be an issue which needs to be decided in this case.

ELIAS CJ:

Well subsection (4) is very wide in scope and doesn't have the restriction to somebody already engaged, if you want to use that term. So clearly you're right that it extends to the four different types that you have referred to, I would have thought.

MR HARRISON QC:

And subsection (4) is a very significant pointer towards the overall, the ultimate interpretation issue because it's saying that we'll make a further exception where health and safety are at issue and health and safety permits consent to be overridden or outsiders to be brought in. That's part of the statutory scheme that points towards the interpretation I'm advancing.

ELIAS CJ:

What, because it suggests a more, a pretty narrow exception?

MR HARRISON QC:

Well, yes. It –

ELIAS CJ:

In subsection (3) I mean.

MR HARRISON QC:

It – what it suggests is that the consent mechanism in subsection (3) applies across the board subject only to a further exception where safety or health outweighs the respecting of the employee's consent.

ELIAS CJ:

I think also subsection (5) may be a pointer as well.

MR HARRISON QC:

Yes, yes, again it's part of a pattern that sees the – a series of restrictions being placed on the use of strike breakers. Unless I can be of any further assistance, Your Honours, those are my submissions.

ELIAS CJ:

Thank you. Yes, Mr Toogood.

MR TOOGOOD QC:

If Your Honours please I will just touch on a few main points in reply. I'll deal first with my learned friend's submission that because of the wording of the section the work of the striking employee must be the statutory question and certainly the first statutory question. Our submission is that it is important in construing the section in this case, not only at the text but also at the purpose, and we're dealing, in our submission, with the perhaps not common but by no means unusual situation where the work of the striking employee might also be properly described as the work of the non-striking employee if you apply some kind of "but for" test, and that was the situation here on the Employment Court's findings. In the absence of the strike the work might have been done by the contractors or it might have been done by the striking employees.

I move forward to my next point, which is, if the Court of Appeal did not actually make some findings of fact on this issue, why was it necessary for Justice Chambers in writing the judgment of the Court to change the Employment Court's first paragraph summarising the facts and thereby alter the emphasis and make it inevitable that the case would be decided in favour of the union? Why was that done? Why was the Employment Court –

ELIAS CJ:

Well does it really matter?

MR TOOGOOD QC:

Well it does, in my respectful submission, because, because it meant that that finding negated the Employment Court's proposition, which was that the contractors might have done this work. That's why they said it – it was their work –

BLANCHARD J:

The Employment Court on a reference back wouldn't be bound by that view of the facts would it?

MR TOOGOOD QC:

I beg your pardon, Sir?

BLANCHARD J:

The Employment Court on a reference back wouldn't be bound by that view of the facts because the facts are their prerogative.

MR TOOGOOD QC:

It was really – no, I accept that.

BLANCHARD J:

It's not even really a finding of fact. It's just a method of stating the general problem.

MR TOOGOOD QC:

Yes, although our proposition is that in stating the general problem in that way, which was not consistent with the way in which the Employment Court had determined the factual issues, that the Court embarked on the wrong enquiry, because it disallowed the prospect which arose here that the work in question might be both the work of the contractor and the striking employee. I mean, that is part of our case, that this is – the hard question is where it might properly be described as both.

ANDERSON J:

It seemed implicit in what the Employment Court said that if there hadn't been a strike the work would probably have been done by the employees.

MR TOOGOOD QC:

Yes, I accept that. But might have done by the contractor because it's the sort of work that the contractor routinely and regularly performed.

ANDERSON J:

In reality, the question would be, what does work mean? The question would be, has there been a breach of section 97?

MR TOOGOOD QC:

Yes, yes.

ANDERSON J:

Which requires a consideration of a number of matters.

MR TOOGOOD QC:

Yes, including the purpose.

ANDERSON J:

And including what the non-striking employee's work is.

MR TOOGOOD QC:

Yes. And, with respect, Your Honour Justice Anderson asked the very apt question, does the section contemplate that a decision by a union as to who will be on strike and when and where, does that constrain the contractor, in terms of his or her contractual rights, or does that constrain the employer in respect other employees, who are not members of the union and who are not on strike? And our answer is, no, section 97 was not intended to have that effect. It was intended to affect the balance of power and the contractual arrangements between the employer and the striking employees, to constrain the employer from blunting the effect of the strike action by using contractors or employees to do the work of the strikers and therefore rendering their industrial action less effective.

McGRATH J:

In your argument, is it the case that your proposition involves the work of a striking employee as being work it would certainly have done?

MR TOOGOOD QC:

No, no, we don't need to go that far.

McGRATH J:

Well, what's the level of expectation involved?

MR TOOGOOD QC:

Well, there might – well, I would prefer to leave the proposition on the basis that if it might be done by the striker or might be done by the non-striker, then the section doesn't apply, because it is the work of both.

ELIAS CJ:

But if it is the work of both, that's a question which may lead the Employment Court on the facts to say that the employee is not doing the work of the striker.

MR TOOGOOD QC:

Yes.

ELIAS CJ:

So, it just seems to be, it just all comes down a question of fact.

MR TOOGOOD QC:

Well, except that how you answer the question of fact will determine the scope of section 97. Because, as I've endeavoured to –

ELIAS CJ:

Well, that's always the case.

MR TOOGOOD QC:

But what I was endeavouring to point out when I addressed Your Honours earlier, towards the end of my oral submissions, was that the real issue that arises under this section arises where the employee who is not on strike does not want to do the work he or she has been directed to do.

ELIAS CJ:

Well then, the employer better be careful.

MR TOOGOOD QC:

Well, it will indeed. But equally, the employee had better be careful, because if they make a wrong judgment call they render themselves liable to dismissal for failing to follow a lawful and reasonable instruction. So, if the non-striking employee is perfectly happy to do the work it doesn't matter whether it's their work or not. Someone could be brought – a manager could be brought in to do the work on the shop floor, or someone who's a clerical worker who's qualified to do the work could be brought in to do it. It doesn't matter that it's not their work, it doesn't matter whether they routinely or regularly perform it. The issue in this case is about the ability of the employer to say to somebody, who might be a union member or might be sympathetic, might be a member of a different union and not on strike, might be a non-union member who is nevertheless sympathetic who says, "I don't want to go into the workplace and do that job," and the employer says, "Well, it's work that you do regularly or routinely, it's your work, and I direct you to do it." That is the proposition that we make. And we say that section 97 did not contemplate and was not intended to apply in those circumstances where an employer is simply directing the employee to do work that they regularly or routinely perform. And then it becomes a question of fact as to whether or not that is in fact the case.

WILSON J:

But if it can be shown that the striking workers would have undertaken the work in question, does section 97 then apply?

MR TOOGOOD QC:

Yes, because one would say in those circumstances it was not work – you could only say that if you could show in those circumstances it was not work that the employee, non-striking employee, would routinely or regularly perform in those circumstances. I mean – and the Employment Court was at pains to

point this out – it will depend very much on not just what the contract says but how the work is done from a historical point of view. And to take my learned friend's example, the fact that one employee might have done the particular job two years ago doesn't begin to get across the line. And the Employment Court would have dismissed that sort of approach. It wasn't saying that. And employers can't adopt unusual practices in order to bring this within the rubric of the employee's, or the non-striking employee's, work. But if you go the aircraft loader example, which is demonstrated on the facts of the case although, as I say, on a different point, you've got union and non-union members working alongside each other doing precisely the same type of work. On the Court of Appeal's approach, on my learned friend's "but for" approach, it will be difficult to say what work would be done by the non-striking workers and what would be done by the striking workers, because they would al be doing exactly the same work, loading and unloading. On a strict application of the Court of Appeal's test, the non-striking loaders, the non-union members, would not be able to do any of the loading work because of the strike by the union members.

WILSON J:

To come back from loaders to engineers, it just seems to me to be unrealistic in the situation where we're told 98 to 99 percent of line maintenance is carried out by the employees, to suggest that if those employees had not been on strike they would not have undertaken all or the great majority of the line maintenance.

MR TOOGOOD QC:

Well, as I say, Your Honour, that is a strictly mathematical approach –

WILSON J:

Yes.

MR TOOGOOD QC:

– and, in my respectful submission, it's flawed because it doesn't look at the facts, and it may well be that one would not know, until the aircraft arrive and

stay in Nelson overnight, whether the heavy maintenance contractors would or would not be doing their two percent or their five hours on that occasion, you just don't know.

WILSON J:

I take your point, yes.

MR TOOGOOD QC:

If I may just touch briefly on the parliamentary history issue, and our proposition is simply this, that the report back, to which my learned friend referred at paragraph 36 of his submission, simply doesn't address the issue on the appeal. It doesn't – none of the report back, none of the parliamentary discussion, the admissible material, addresses – in fact, even the inadmissible material, it doesn't address this question, where there is the possibility that the work is that of both, the non-striker and the striker.

If I might just turn to the two examples my learned friend has given at the end of his submissions. So far as the first example is concerned, my learned friend suggests on page 29 of his submission, paragraph 8 –

ELIAS CJ:

Well, he didn't go into this, there's no –

MR TOOGOOD QC:

Well, he didn't really, but he suggest that it would be very difficult to work out then how the Employment Court's test would be applied and what it would result in, and our submission is it wouldn't be difficult at all. We wouldn't argue, for example, that Y and Z, who don't, as a matter of regularity or a matter of routine, work on that machine, they would not be permitted – well, they would be permitted, I beg your pardon, to say, "We're not going to do it, because we don't usually, routinely, or regularly, work that machine. X, on the other hand, who does that work as a matter of routine, could be required to do it. So I don't, with respect, see there's a difficulty with that proposition. And, similarly, for the second example, it's suggested that it's conveniently – this is

paragraph 30 of my learned friend's submissions – conveniently ignored by the appellant and the Employment Court whether the bus company is at liberty to engage as contractors three new-hired bus drivers to perform the work of the non-striking drivers and, with respect, the answer is that which I think Justice Anderson pointed out. The proposition which my learned friend puts is that the non-striking workers are doing the work of the striking employees. We say, no, they're doing their own work. That means necessarily that what is left of the other three must be the work of the striking employees and couldn't be done, except by existing employees who consent to do it.

And those are the only matters I'd raise in reply, if Your Honours please.

ELIAS CJ:

Thank you, Mr Toogood. Thank you, counsel, for your submissions. We will reserve our decision in this matter.

COURT ADJOURNS: 12.49 PM