

LEGAL UPDATE MAY 2010

Indemnification of employees

In a judgment delivered in March 2010 by Chief Judge Colgan, New Zealand Tramways and Public Transport Employees' Union Inc v Wellington City Transport Ltd [2010] NZEMPC 12¹, the Employment Court ruled that a bus driver who had successfully defended a criminal charge arising from a passenger complaint should have had his legal expenses covered by his employer.

The Collective Agreement included an indemnity for "driving related" events. In this respect, the Chief Judge found for the employee in that "driving related" was to be interpreted widely, and that it included some actions taken by drivers when they were not actually behind the wheel.

The Judgment also confirmed that the common law of employment in New Zealand includes an implied term that an employer must generally indemnify an employee for expenses and liabilities incurred in the reasonable performance of his or her duties.

This decision is a timely reminder of employers' obligations, and also of the importance of careful drafting and review of indemnity clauses, which in certain circumstances can limit the extent of the required indemnity.

A Supreme balancing act?

The Supreme Court has also now delivered its decision in the long-running Air Nelson dispute concerning the use of replacement workers during industrial action under s.97 of the ER Act: Air Nelson Ltd v EPMU (SC 78/2009). Media commentary has generally reported the result as being a triumph for bosses and a blow for unions and employees. But is that really the case?

The Employment Court had taken a practical approach, examining both the work performed by the strikers in the usual run of things, and to what extent the contractors would usually be involved in that same work at the time the strike took place, a "*type of work*" enquiry. The Court of Appeal however preferred a purposive analysis, concluding that the words meant; "*the work a striking or locked out employee would probably have been performing had he*

¹ It should be noted that this firm acted for the Tramways Union in this case.

not been striking or locked out”, limiting the enquiry to a “*particular task*” which, but for the strike, would have been done by the striking worker.

The Supreme Court majority noted the Employment Court’s caution that the “*particular task*” approach would be unbalanced and prohibitory, moving the scales too far in favour of unionised workers. Their Honours however pointed out (despite the eventual decision being in favour of the employer on the facts) that this was the objective of Parliament, in that s.97 is a “firm antistrike-breaking mechanism” to be given weight by the Courts.

Therefore, each case will need to be carefully examined on its facts in order to see on which side of the line it falls.

For advice from our employment law specialists either call us on 04 801 5427 or contact us via email:

Paul McBride (Partner) - paul@mdjlaw.co.nz
Geoff Davenport (Partner) - geoff@mdjlaw.co.nz
Tanya Kennedy (Senior Associate) - tanya@mdjlaw.co.nz
Tina Mitchell (Senior Associate) - tina@mdjlaw.co.nz
Guido Ballara (Associate) - guido@mdjlaw.co.nz

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