A-Z Guide

STRIKES AND LOCKOUTS

Contents

Use This Guide To Understand

- The Employment Relations Act 2000 definition of lawful and unlawful strikes and lockouts
- The right to lawfully strike or lockout
- The provisions relating to non-essential services, essential services, and certain passenger transport services, in relation to strikes and lockouts
- The notice provisions for a strike or lockout
- Lawful strikes and lockouts related to collective bargaining or on the grounds of safety or health; any other reason for a strike or lockout will render it unlawful
- The many implications to strikes and lockouts affecting employers and employees

Introduction

This **A-Z Guide** provides information on strikes and lockouts which may occur either lawfully or unlawfully; the Employment Relations Act 2000 provides for all of these. The Act provides for protections in respect of lawful strikes and lockouts, and for remedial interventions in respect of unlawful strikes and lockouts.

The following **A-Z Guides** should be referred to depending on the information you are seeking at the time:

- Bargaining
- Communication during Bargaining
- Employment Relationship Problems
- Essential Services
- Good Faith
- Health and Safety
- Suspension
- Union Rights

Definitions

Strike

The meaning of strike is defined in section 81 of the Act.

The wording in the Act makes it clear that a strike is not a strike within the meaning of the Act until two or more employees are striking. It also confirms that an employee can be a party to a strike even when he or she is not actually taking part in the discontinuance of the employment.

In the Act, it means an action that:

Is the action of a number of employees who are or have been in the employment of the same employer or different employers:

- In either wholly or partially discontinuing that employment or reducing the normal performance of it ("go slow" or "work to rule"); or
- In refusing or failing to resume or return to their employment after such discontinuance; or
- In breaking their employment agreements (including implied terms); or

- In refusing or failing to accept engagement for work in which they are usually employed; or
- In reducing their normal output or their normal rate of work; and
- Is due to a combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by the employees.

It does not include an employees' meeting authorised by an employer, an employment agreement, or the Act.

Lockout

The meaning of lockout is defined in section 82 of the Act. For an employer's action to constitute a lockout under this definition the employer must take the action with the intent of compelling its employees to either accept terms of employment, or comply with its demands. A lockout within the meaning of this definition means a total abeyance in the performance of the employment; by locking out and disentitling employees to remuneration they cannot be required to work at all.

It is technically possible under this Act, for an employer to lockout a single employee.

In the Act, it means an action that:

- Is the action of an employer
- In closing the employer's place of business, or suspending or discontinuing the employer's business or any branch of that business; or
- In discontinuing the employment of any employees; or
- In breaking some or all of the employer's employment agreements; or
- In refusing or failing to engage employees for any work for which the employer usually employs employees; and
- Is done with a view to compelling employees, or to aid another employer in compelling employees, to:
    - Accept terms of employment; or
    - Comply with the demands made by the employer.

Lawful Strikes & Lockouts

The Act provides that lawful strikes and lockouts may occur in relation to collective bargaining or health and safety.

Participation in a strike or lockout is lawful if the strike or lockout is not unlawful under section 86 (see below) and relates to bargaining for a collective agreement that will bind each of the employees concerned or is justified on the grounds of health and safety.

The Act makes a distinction between non-essential services (every service that is not an essential service, defined in Schedule 1 or a certain passenger transport service), essential services, and certain passenger transport services in respect of strikes and lockouts.

Strikes and lockouts in essential services, lawful and unlawful, are covered fully in the A-Z Guide on Essential Services; they are only summarised here.

The difference between the lawfulness and unlawfulness of strikes and lockouts in essential versus non-essential services is the notice provisions. Time specific notice is required before a strike or lockout in an essential service is lawful. The requirements in respect of that notice relate to time and details about who is striking or being locked out, and where and when the strike or

lockout will be effected. This is the same for strikes and lockouts in certain passenger transport services (see below). Notice is also required in writing in the case of a strike or lockout in non-essential services.

Only in prescribed circumstances are strikes and lockouts lawful; one of the prescriptions for strikes and lockouts in relation to collective bargaining is that they are not unlawful. So, in respect of strikes and lockouts over collective bargaining, it is easier to understand what a lawful strike or lockout is by understanding what it is not i.e. when it is an unlawful strike or lockout.

Unlawful strikes and lockouts

Section 86 states that participation in a strike or lockout is unlawful if the strike or lockout:

Occurs while a collective agreement binding on the employees participating in the strike or affected by the lockout is in force, unless:

- The right to strike or lockout is made available to the employers and employees (or either of them), in regard to an aspect of a collective agreement that covers them, by a declaration of the Court, for the duration of the bargaining, where it has:
- Suspended an aspect of the agreement; and
- Directed the parties to reopen bargaining in respect of that suspended aspect; and
- Required the parties to make use of mediation to assist with the bargaining; or
- The employees are bound by different collective agreements, the first of which has expired, but some of which remain in force, so long as the bargaining continues;

Occurs during bargaining for a proposed collective agreement that will bind the employees participating in the strike or affected by the lockout, unless:

- At least 40 days have passed since the bargaining was initiated; and
- If on the date bargaining was initiated the employees were bound by the same collective agreement, that collective agreement has expired; and
- If on that date the employees were bound by different collective agreements, at least one of the collective agreements, has expired; or

Occurs in a situation where:

- In the case of a strike, the employee has failed to comply with the notice requirements or in the case of a lockout the employer has failed to comply with the notice requirements; or
    - Relates to a personal grievance; or
    - Relates to a dispute; or
    - Relates to a bargaining fee clause or proposed bargaining fee clause under Part 6B; or
    - Relates to the freedom of association guaranteed by Part 3 of the Act; or
    - Is in an essential services and the requirements for notice have not been complied with; or
    - Takes place when the Court has issued an order ordering it not to.

In this provision, a collective agreement is no longer in force when the date specified in the agreement as the date on which it expires, is reached.

Refer to the **A-Z Guides** on **Disputes, Personal Grievances, and Essential Services** for more information.

Secret ballots for strikes

In May 2012 the Employment Relations Act was amended to include a requirement for unions to hold a secret ballot for their members when voting on strike action. The requirement for a secret ballot came into force on 14 May 2013.

Union rules need to contain a provision relating to the process for holding a secret ballot.

Before a proposed strike may proceed, the union must hold, in accordance with its rules, a secret ballot of its members. In order for a legal strike to proceed the result of the secret ballot must be in favour of the strike.

The secret ballot requirement does not apply to a strike that is lawful on the grounds of health and safety.

Notice of strikes or lockout

In addition to the notice provisions already in the Act the amendment in March 2015 provides for notice requirements for all strikes and lockouts.

Notice of an intended strike or lockout must be provided in writing.

The Employment Relations Amendment Act requires notice to be given to the employees' employer and to the chief executive of the Ministry of the employees' intention to strike; and before the date and time specified in the notice as the date and time on which the strike will begin.

In the case of a lockout an employer must give notice the employees' union or unions and to the chief executive of their intention to lockout.

I*n Secretary for Justice, for and on behalf of the Ministry of Justice v New Zealand Public Service Association* [2018 NZEmpC 129; Judge Perkins] the MoJ alleged that the 30-minute notice period was *"wholly inadequate"* and therefore unlawful. The Court concluded that there was no arguable case that the lightning strikes by the CSOs were unlawful, and declined to grant the orders sought by the MoJ. The Court held that the notice given by the CSOs was compliant with section 86A of the Act, and that participation in the strikes was not unlawful.

The December 2018 amendment to the ERA provides that minor or technical errors will not invalidate strike notices.

Withdrawal of a strike or lockout notice

A strike notice may be withdrawn at any time by a representative of the employees' union giving written notice of the withdrawal to the employees' employer; and the chief executive.

A lockout notice may be withdrawn at any time by the employer or a representative of the employer giving written notice of the withdrawal to the employees' union or unions; and the chief executive.

Redundancy and unlawful lockouts

Where employees' employment is terminated on the grounds of redundancy, but the real motive behind the dismissals is to impose new terms and conditions of employment, the dismissals may be stayed (a halt is put on them until the issue is resolved) or reversed on an interim or permanent basis.

As already noted, it is unlawful to lockout employees if an applicable collective agreement is in force.

The basis for reinstatement or preservation of employment is twofold; firstly, the obligation of parties to employment relationships to deal with each other in good faith in collective bargaining may be undermined by this tactic, and secondly, the

courts will not countenance termination of employment on the grounds of redundancy where there is no genuine reason to end the employment permanently.

In *McCulloch v NZ Fire Service Commission* 1998 3 ERNZ 378, the Employment Court held that the Commission had threatened to discontinue the employment of some employees and also intended to induce those same employees (or most of them) to work on different terms of employment. That was held to be a threatened lockout.

The case for one group of employees was that there was a current collective employment contract; the case for the other group of employees was that if the Commission's advice of redundancy constituted a lockout, then it lacked the requisite notice and it did not genuinely relate to a desire to negotiate a collective employment contract.

The Court was satisfied that the fire-fighter employees were being made redundant and then invited to apply for the same positions by another name, and that the Commission's course of conduct fell short of "negotiation" for the purposes of collective bargaining under the Employment Contracts Act 1991. It granted a permanent injunction restraining the Commission from disestablishing the fire-fighters' positions.

Refer to the **A-Z Guide** on **Redundancy** for more information.

Lawful strikes and lockouts

Health and safety

Participation in a strike or lockout may be lawful if either the employees who strike, or the employer who locks out, has reasonable grounds for believing that the strike or lockout is justified on the grounds of safety or health.

The burden of proving that it has reasonable grounds for believing that the strike or lockout is justified is on the party alleging the lawfulness of the strike or lockout.

If you believe that your employees' strike on grounds of safety or health is not justified, then you may seek to restrain the strike by applying to the Employment Court for an injunction. You will be required to show that it is at least arguable that the employees involved in the strike are unlikely to be able to show reasonable justification for the strike on grounds of health or safety.

Notice is required by the Act. In the past when notice was only required in essential services the provisions about notice have been interpreted rather strictly.

In *Air New Zealand Limited v The Flight Attendants and Related Services (NZ) Association Inc AND Krissansen and Hansen:* AC 78A/02; 9 December 2002; Travis J The Employment Court found that there was an arguable case that the notice required for the planned strike action was defective, rendering the strike unlawful, so the injunction restraining the action was granted.

In *Air Nelson Limited v The New Zealand Air Line Pilots' Association IUOW Inc and Palmer*; AC 17B/08; 17 September 2008; Colgan CJ. Shaw J. Couch J The full Court stated the "The statutory requirement is to specify *"the"* period of notice. What is specified must therefore be particular and accurate." The Court went on to state that *"An acceptable way of doing so is to specify the points in time at which the period of notice is to start and end." "For example, a strike notice might record that the period of notice will begin when the written notice is received by the employer and end when the strike action described in the notice is scheduled to commence."*

Refer also to the **A-Z Guide** on **Essential Services.**

Collective bargaining

A lawful strike or lockout is one that is not unlawful, and:

Relates to bargaining:

- For a collective agreement that will bind each of the employees concerned; or
- The right to strike or lockout is made available to the employers and employees (or either of them), in regard to an aspect of a collective agreement that covers them, by a declaration of the Court, for the duration of the bargaining, where it has:
    - Suspended an aspect of the agreement; and
    - Directed the parties to reopen bargaining in respect of that suspended aspect; and
    - Required the parties to make use of mediation to assist with the bargaining.

Notice is now required by the Act, in relation to strikes or lockouts in all industries. However, in essential services, the Act sets out the specific timeframe requirements for employers and employees to give each other notice of strikes and lockouts. The provisions about notice are interpreted strictly and if not met, may negate the lawfulness of the action.

Refer to the **A-Z Guide** on **Essential Services** for guidelines about notice in those.

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Additional Issues

Wages

Strikes

The Wages Protection Act 1983 provides that an employer may recover overpayments made to an employee for any period in respect of which the employer was not required by law (which means that this event must be provided in the employee's employment agreement) to pay any wages to the employee by virtue of that employee being on strike within the meaning of section 81 the Employment Relations Act 2000.

In order to recover an overpayment, you must comply with the notice provisions of the Wages Protection Act 1983. However, if the provisions of a collective agreement provide for the recovery of an overpayment those provisions prevail. An overpayment recovered pursuant to the Act must be recovered from the next payment of wages that the employee becomes entitled to.
A right to not pay wages is problematic when the strike action involves less than a complete withdrawal of labour. The right to suspend striking employees resolves this, and other, issues related to the payment or wages for the duration of strike action.

Lockouts

The Wages Protection Act 1983 provides that an employer may recover overpayments made to an employee for any period in respect of which the employer was not required by law (which means that this event must be provided in the employee's employment agreement) to pay any wages to the employee by virtue of that employee being locked out within the meaning of section 82 of the Employment Relations Act 2000.

In order to recover an overpayment, you must comply with the notice provisions of the Wages Protection Act 1983. However, if the provisions of a collective agreement provide for the recovery of an overpayment those provisions prevail. An overpayment recovered pursuant to the Act must be recovered from the next payment of wages that the employee becomes entitled to.

The provisions of the Employment Relations Act 2000 state that you are not obliged to pay wages for any period that an employee is lawfully locked out.

If you unlawfully lock out an employee, you will be obligated to pay the employee his or her wages for that period; it is unlikely that an employee would ever consent to the deduction of wages in respect of a period during which he or she was unlawfully

locked out.

Suspension

The power to suspend employees applies only in respect of strikes. An employee, who is suspended regardless of whether or not the strike is lawful, is not entitled to any remuneration by way of wages, salary, allowances, or other payments, in respect of the period of the suspension.

Refer to the **A-Z Guide** on **Suspension** for more detailed information.

Continuity of employment

As already discussed, a strike or lockout does not mark an end to an employment relationship. It merely refers to the abeyance of performance of the employment.

Employment is continuous even where its performance is interrupted by a strike or lockout, even if an employee participating in a strike is suspended. Section 87 provides for this in respect of suspended employees. Any benefits of employment that are dependent on continuous service continue throughout the period when an employee is striking.

Other employees

A noted above, the power to suspend applies only in respect of strikes.

Where there is a strike, an employer may suspend a non-striking employee if the strike results in the employer being unable to provide work for the non-striking employee that is work that that employee normally performs. The effect of this suspension is the same as the suspension of any striking employee; it disentitles the employee to any remuneration by way of wages, salary, allowances, or other payments, in respect of the period of suspension.

In this instance suspension may be strategically important. The suspension of non-striking employees tends to put pressure on the striking employees to return to work (or resume full work) and end the strike.

Refer to the **A-Z Guide** on **Suspension** for more detailed information.

Performance of work

In the event of either a lockout or a lawful strike, an employer may employ or engage another person to perform the work of a striking or locked out employee in limited circumstances set out in s 97 (3) (4) of the Employment Relations Act 2000. The legislation stipulates that an employer may employ or engage another person to perform the work of a striking or locked out employee if:

- The person is already employed by the employer at the time the strike or lockout commences; and
- The person is not principally employed for performing the work of a striking or locked out employee; and
- The person agrees to perform the work; or
- There are reasonable grounds for believing it is necessary for the work to be performed for reasons of safety or health; and
- The person is employed or engaged to perform the work only to the extent necessary for reasons of safety or health.

An employer who employs or engages any person in contravention of this provision of the Act is liable to a penalty imposed by the Employment Relations Authority in respect of every person who performs the work concerned.

In *NZ Dairy Workers' Union Inc v Open Country Cheese Company Limited* NZCA 56 2011 the Court of Appeal considered that when construing the words *"employ"* or *"engage"* in section 97, the focus must be on the benefit gained by the employer of the replacement workers. The question was: *"Did the Cheese Company use other persons to perform the strikers' work?"* What was needed was *"an objective inquiry into the purpose, nature and effect of their work, assessed by reference to all the relevant circumstances."*

The Court of Appeal concluded that on their approach, any work actually undertaken by volunteers at the Cheese Company during the strike constituted a breach by the Cheese Company of section 97(2). The Court of Appeal concluded that the Employment Court had erred in law in finding that the Cheese Company did not employ or engage other persons to perform the work of its striking employees.

In *Finau & Ors v Atlas Specialty Metals Limited* CA 600/2008 2009 and NZAEPMU Inc v Air Nelson Limited CA 206/2008 the Court of Appeal dealt with s97 of the Employment Relations Act 2000, *"Performance of duties of striking or locked out employees"* and with the meaning of *"the work of a striking or locked out employee"* as used in s97. The Court of Appeal treated Finau as the lead decision and answered the question thus: Those words mean *"the work a striking or locked out employee would probably have been performing had he or she not been striking or locked out".*

Air Nelson appealed to the Supreme Court, *Air Nelson v NZAEPMU Inc* SC 78/09 2010 who closely examined the previous decisions and Finau & Ors v Atlas Specialty Metals Ltd. The Supreme Court held by a majority that the approach adopted by the Employment Court was correct. The Employment Court held that Air Nelson had not breached s97 and their view was that the contract engineers had not been performing the work of striking employees; they had been performing their own work. The Supreme Court did not favour a narrow, prescriptive approach that would encourage one worker's entitlement to work being undermined by another worker's entitlement to strike, and considered that if the contractors were doing their own work, then it was obvious that they were not doing another person's work. Whether a person was or was not performing the work of a striking or locked out employee is essentially a question of fact to be ascertained by analysis of the circumstances of a particular case.

Pickets

The Employment Relations Act 2000 stipulates that the Employment Court may determine proceedings issued for the grant of an injunction to stop any picketing, or any threatened picketing, in relation to a strike or lockout. The Court has exclusive jurisdiction to deal with any proceedings founded on tort (non-contractual wrongs) in relation to picketing.

Picketing describes a range of conduct that is associated with strikes and lockouts that is designed to frustrate the efforts of the employer in carrying on business and to generate sympathy for the employees' cause among other workers and the public.

The Summary Offences Act 1981 provides for a number of offences that are relevant in the context of picketing:

- Section 3: Disorderly behaviour
- Section 4: Offensive behaviour or language
- Section 5A: Disorderly assembly
- Section 9: Common assault
- Section 11: Wilful damage
- Section 21: Intimidation
- Section 22: Obstructing public way

- Section 23: Resisting Police, prison, or traffic officer
- Section 33: Billsticking, defacing, etc.

The Trespass Act 1980 may also be applied to instances of picketing; however, the provisions of this Act do not override the provisions of the Employment Relations Act 2000, or the provisions contained in any employment agreement, that provide for a right of entry.

The New Zealand Bill of Rights Act 1990 protects the freedoms of expression, peaceful assembly, and association. Employers are advised to take advice if you have any concerns over worksite picketing.

Certain public transport services

As noted above (under Lawful Strikes and Lockouts) the Employment Relations Act 2000 makes distinctions between non-essential services, essential services, and certain public transport services.

It may be helpful to note here that essential services include:

- The operation of a service for the carriage of passengers or goods by water between the North Island and the South Island or between the South Island and Stewart Island.

- The operation of an air transport service, being a service by aircraft for the public carriage of passengers or goods for hire or reward (but excluding an air topdressing service).

- The reason the Act distinguishes between non-essential services and certain public transport services is to protect the public's interest in the maintenance of public transport, which in these provisions means road or rail passenger services.

A lawful strike or lockout in these circumstances is:

- One that is not unlawful (as above); and

- One in which the employee's union (or unions) or the employer, has given notice in writing, to the employer or the employee's union (or unions), notifying it of the intention to strike or lockout, and the notice specifies:
  - The period of notice which must be not less than 24 hours; and
  - The nature of the proposed strike or lockout, including whether or not it will be continuous; and
  - The particular passenger road service or passenger rail service that will be affected by the strike or lockout; and
  - The date on which the strike or lockout will begin; and
  - In the instance of a lockout, the names of the employees who will be locked out; and the notice is
  - Signed by the employer or its representative, or a representative of the employee's union; and
  - In the instance of a strike, specifies the names of the employees on whose behalf the notice is given, unless it is given on behalf of all employees who:
    - Are members of a union that is a party to the bargaining; and
    - Are covered by the bargaining; and
    - Are employed in the relevant part of the passenger road service or passenger rail service.

An employer engaged in providing certain public transport services, which intends to lock out or which is given notice of a strike, must take all practicable steps to ensure that the public who are likely to be affected are notified of the lockout or strike, as soon as possible.

An employer or union who fails to comply with any of these provisions is liable to a penalty imposed by the Employment Court.

Records

Section 98 of the Employment Relations Act 2000 stipulates that the employer of employees either participating in a strike or affected by a lockout must keep a record (in the prescribed form) of the strike or lockout, and, within one month after the end of the strike or lockout give a copy of the record to the Chief Executive of the Ministry of Business, Innovation and Employment.

Breaking the impasse

The Mediation Service of the Ministry is alerted to strikes and lockouts in essential services and is required by the Act to ensure that mediation services are provided as soon as possible to the parties to the proposed strike or lockout for the purpose of assisting the parties to resolve the issues between them so as to avoid the need for the action planned.

There is no such imperative under the Act in relation to strikes and lockouts in non-essential services and certain passenger transport services.

Injunctions may be sought in the Employment Court in relation only to unlawful strikes or lockouts.

Union Rights

Unions' rights to represent their members' interests and to have access to workplaces apply to strikes and lockouts as they do to any other time.

In *Carter Holt Harvey Ltd v National Distribution Union Inc* 2002 1 ERNZ 239; the Court of Appeal agreed that the union representatives' rights to enter the workplace during strike action, for a purpose related to the employment of the union's members, included the monitoring of the company's compliance with section 97 of the Act (which restricts the ability of employers to employ or engage other people to perform the work of striking or locked out employees).

In this case the Court of Appeal upheld the Employment Court's imposition of a penalty against the company for the deliberate breach of the Act in refusing the representatives of the union access to the workplace, having those representatives arrested, and refusing to disclose the true reasons for denying access which amounted to a breach of good faith.

Conclusion

Much of the law as it relates to strikes and lockouts is complex and technical and the situations in which strikes and lockouts occur are often inflammatory and contentious. We recommend employers take formal advice in relation to strikes and lockouts. Our Consultants and Lawyers can provide assistance to members as required.

Remember

- Always call AdviceLine to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our lawyers or consultants to assist your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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