

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA  
ŌTAUTAHI**

**[2020] NZEmpC 124  
EMPC 249/2018  
EMPC 187/2019  
EMPC 191/2019**

IN THE MATTER OF challenges to a determination of the  
Employment Relations Authority

AND IN THE MATTER of proceedings removed in full from the  
Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN SOUTHERN TAXIS LIMITED  
First Plaintiff

AND MAUREEN GRANT  
Second Plaintiff

AND RONALD GRANT  
Third Plaintiff

AND A LABOUR INSPECTOR  
Defendant

Hearing: (on the papers)

Appearances: No appearance for Southern Taxis Limited  
L Andersen QC, counsel for M V Grant and R J Grant  
C English, counsel for the Labour Inspector

Judgment: 17 August 2020

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**COSTS JUDGMENT OF JUDGE B A CORKILL**

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## Introduction

[1] In my judgment of 14 May 2020, I resolved the following issues:<sup>1</sup>

- a) I upheld the Labour Inspector's contention that certain commission drivers were employees.<sup>2</sup>
- b) I accepted the claim made by the Labour Inspector on behalf of those persons that Southern Taxis Ltd (STL) owed those persons particular sums for minimum wages, entitlements under the Holidays Act 2003, and for rest breaks under s 69ZD of the Employment Relations Act 2000 (the Act).<sup>3</sup>
- c) I held that Mr and Mrs Grant as directors of STL were not personally liable for the company's breaches, or for the sums which the company had been ordered to pay.<sup>4</sup>
- d) I reserved costs, noting there had been a mixed outcome. I queried whether costs should lie where they fall. I invited counsel to discuss the issue in the first instance and ruled that either party could apply for costs thereafter if need be.<sup>5</sup>

[2] Mr and Mrs Grant have now applied for costs on a 2B basis, in the sum of \$38,001 together with disbursements of \$246.59.

[3] Mr Andersen QC submitted that full costs should be paid to Mr and Mrs Grant because:

- a) The Labour Inspector had wished to establish whether the commission drivers were employees; he will have obtained benefit from the decision

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<sup>1</sup> *Southern Taxis Ltd v A Labour Inspector* [2020] NZEmpC 63.

<sup>2</sup> At [191].

<sup>3</sup> At [193].

<sup>4</sup> At [195].

<sup>5</sup> At [197].

made by the Court for precedent purposes, but this was at a significant cost to Mr and Mrs Grant.

- b) There had been no conduct by Mr and Mrs Grant that would disqualify them from the normal expectation that a successful party be awarded costs.
- c) They were totally successful in respect of the applications that they be personally liable for money owing by STL, and in respect of the claim they should pay penalties.
- d) They were a retired couple who faced the prospect of losing the whole of their retirement savings and possible loss of their house if the claim against them personally was successful meaning; both had returned to work as a result of the proceedings.
- e) They took a reasonable approach to the litigation and recognised the risk that they faced and would have made an offer to settle (because of the horrific consequences of losing the proceedings) if the Labour Inspector had not advised (through counsel) that no settlement would be contemplated.

[4] In response, Ms English submitted for the Labour Inspector:

- a) He had been successful in all his claims relating to employment status, employment breaches and arrears claimed. He was unsuccessful in respect of the personal liability arguments. Thus, there was a mixed outcome.
- b) The interpretation of s 142W of the Act was a novel question.
- c) The reality of the outcome was that the awards made against the company in favour of the employees would go unsatisfied, as Mr and Mrs Grant had sold the company's assets, and was no longer trading.

- d) After citing relevant authority, it was submitted it would be appropriate to allow a discount on the amount claimed.

## Discussion

[5] Clause 19 of sch 3 of the Act governs the award of costs in the Court. The principles are well known and are set out in Court of Appeal judgments including *Victoria University of Wellington v Alton-Lee*,<sup>6</sup> *Binnie v Pacific Health Ltd*,<sup>7</sup> and *Health Waikato Ltd v Elmsly*.<sup>8</sup>

[6] The primary principle is that costs follow the event.<sup>9</sup>

[7] It is well established that the costs discretion is broad, and one which is able to be exercised in light of the Court's equity and good conscience jurisdiction.<sup>10</sup>

[8] In *Health Waikato Ltd*, the Court of Appeal stated:

[39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.

[9] It was this principle I reflected in the observation I made as to costs in the substantive judgment.

[10] However, as Ms English acknowledged, there are cases where the Court has considered it appropriate to discount costs sought, in light of a mixed outcome.<sup>11</sup>

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<sup>6</sup> *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

<sup>7</sup> *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

<sup>8</sup> *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [17] and [35].

<sup>9</sup> *Victoria University of Wellington*, above n 6, at [48].

<sup>10</sup> *Health Waikato Ltd*, above n 8, at [33] and [45].

<sup>11</sup> As discussed in *Best Health Products Ltd v Nee* [2016] NZEmpC 16, [2016] ERNZ 72 at [7]–[8]. See also *Kaipara District Council v McKerchar* [2017] NZEmpC 102; and *Zhang v Telco Asset Management Ltd* [2020] NZEmpC 9.

[11] I note that there is no dispute as to the calculation quantum of the sum claimed for Mr and Mrs Grant.

### **Conclusion**

[12] Having regard to the factors raised for Mr and Mrs Grant by Mr Andersen, I am satisfied they are entitled to costs; however, these should be reduced to take account of the issues on which they did not succeed.

[13] It is also appropriate to take into account the costs which the Labour Inspector will have incurred in establishing the issues on which he succeeded; these will have been similar to the sums claimed for Mr and Mrs Grant.

[14] Having regard to all the circumstances, particularly considering that Mr and Mrs Grant were successful in their arguments relating to personal liability but unsuccessful on the remaining issues, I consider an appropriate award of costs is 33 per cent.

[15] The Labour Inspector is accordingly ordered to pay Mr and Mrs Grant the sum of \$12,540, and disbursements of \$246.59.

B A Corkill

Judge

Judgment signed 1.00 pm on 17 August 2020