IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2020] NZEmpC 63
EMPC 249/2018
EMPC 187/2019

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
BETWEEN	SOUTHERN TAXIS LIMITED First Plaintiff
AND	MAUREEN VALERIE GRANT Second Plaintiff
AND	RONALD JAMES GRANT Third Plaintiff
AND	A LABOUR INSPECTOR Defendant

EMPC 191/2019

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	SOUTHERN TAXIS LIMITED First Defendant
AND	MAUREEN VALERIE GRANT Second Defendant
AND	RONALD JAMES GRANT Third Defendant

Hearing: 3 and 4 December 2019, 25 and 28 February 2020

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

Judgment: 14 May 2020

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Southern Taxis Limited (STL) operated a taxi business in Dunedin from 2002 to 2016. In the main, it employed drivers who it described as commission drivers. They were paid a flat commission of 40 per cent of the takings obtained whilst driving vehicles owned by the company. It also had contract arrangements with owner-drivers who retained their takings in full, but who paid a depot fee and drove a branded car so as to be associated with the STL operation. For a limited time, STL employed drivers to undertake airport shuttle work, when it had a contract for this work with the relevant airport authority.

[2] The Labour Inspector alleges that four commission drivers were in fact employees; and that in many instances they were not paid the minimum wage, holiday pay, sick leave or rest breaks. The Labour Inspector accordingly says that minimum standards have been breached, and that the sums involved should be paid to the affected drivers. Because STL sold its business and ceased trading in late 2016, the Labour Inspector says its two directors, Ron Grant and Maureen Grant, should now be liable for the unpaid entitlements as well as penalties.

[3] The Labour Inspector's claims were investigated by the Employment Relations Authority. After its first investigation meeting, it determined that the drivers were employees.[1] Following a second investigation meeting, it determined that Mr and Mrs Grant should be personally liable for the sums involved.[2]

[4] Mr and Mrs Grant brought de novo challenges to these determinations. Then, the Authority removed to the Employment Court the issues that remained before it,

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1 *A Labour Inspector v Southern Taxis Ltd* [2018] NZERA 104 Christchurch, (Member Dallas).
2 *A Labour Inspector v Southern Taxis Ltd* [2019] NZERA 291 (Member Dallas).

relating to penalties and costs which had been reserved when the earlier determinations were issued.[3]

[5] The parties agreed that all matters that were before the Court should be the subject of evidence and submissions at a single hearing. The issues considered at that hearing were:

a) Were the commission drivers employees?

b) If so, what arrears are owed by STL to those persons for minimum wages, entitlements under the Holidays Act 2003 (HA), and for rest breaks under s 69ZD of the Employment Relations Act 2000 (ERA)?

c) Should Mr and Mrs Grant be personally liable for these payments, given the financial circumstances of STL? These issues require consideration of the criteria contained in s 234 of the ERA, for the period until 1 April 2016 when the section was repealed; and thereafter under the provisions of pt 9 of that Act.

Key facts

Relevant background

[6] On 3 March 2000, Mr and Mrs Grant commenced a partnership, operating a taxi business known as Southern Taxis. Six cars were operated. Mr and Mrs Grant owned four of the vehicles and paid those who drove them a commission based on 45 per cent of fares taken, which Mr Grant said was the going rate in the Dunedin taxi industry at the time. The remaining two vehicles were owned by a private driver. The arrangements for that person were not described.

[7] On 13 August 2002, STL was incorporated, and all the assets of the partnership and the taxi business were thereafter transferred to the company.

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3 *A Labour Inspector v Southern Taxis Ltd* [2019] NZERA 359 (Member Dallas).

[8] In 2005, STL obtained a contract for airport shuttle work, for which drivers were employed. Mr Grant said it was not possible for them to be employed on a commission basis because of the long hours they would spend waiting at the airport; consequently the drivers were paid on an hourly rate, together with holiday pay and sick pay. STL subsequently lost the contract for this work, but it obtained an entitlement to use a taxi rank at the airport. Some shuttle drivers changed to driving taxis. Mr Grant said those persons ceased to be employees and became commission drivers.

[9] In either 2005 or 2006, Mr and Mrs Grant were contacted by Inland Revenue (IR), who said that the company should make tax deductions from the taxi drivers' commission earnings. They were told that IR was concerned at the lack of tax payments being made by or on behalf of drivers throughout the industry, apparently because receipts for cash payments were not always available. From then on, STL deducted PAYE. Both Mr and Mrs Grant said they deducted PAYE and not withholding tax because that is what they thought they were being asked to do.

[10] In September 2007, Mr and Mrs Grant's lawyers prepared a document, styled as a contract *for* taxi driving services. Curiously, it showed the principal as being Mr and Mrs Grant, trading as Southern Taxis, and not STL. The four drivers whose circumstances were considered by the Court did not sign this document, but its contents were said to reflect the arrangements under which they in fact operated.

IR guidance

[11] In April 2009, IR issued a document entitled "Taxes and the taxi industry".[4] Since it is a relevant document, I set out its contents in detail. It stressed that it was important for a taxi driver to know whether he or she was self-employed, or was an employee, as it affected the driver's tax situation and the returns which that person had to file. It explained that employees had PAYE tax deducted from their wages before they were received, that they did not have to keep business records, or account for GST. The employer would do this for them. By contrast, a self-employed person had to keep his or her own business records and account for their own tax. Such a person

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4 Inland Revenue "Taxes and the taxi industry" (IR 272, April 2009).

may have to register for GST and could claim the expenses of running the taxi business.

[12] Reference was then made in the document to several scenarios, each of which considered the status of an entity or person under the provisions of the Land Transport Act 1998 (LTA). It referred to a person holding either a Passenger Service Licence (PSL) or a Class C licence. These references were to authorisations given under Part 4A of the LTA, which governs the licencing of transport services;[5] and as to the definitions of work time and requirements to maintain logbooks, under Part 4B.[6]

[13] The document referred to these arrangements, which it said were common:[7]

a) An owner of a taxi holds a PSL and a Class C licence. The owner is the only person who drives the taxi and is thus self-employed for tax purposes.

b) The owner holds a PSL but does not drive the taxi. A driver with a Class C licence does so. The owner would be self-employed for tax purposes, and the driver's tax situation could be one of the following:

- If the driver is paid a set wage and has little control over the hours worked, that person is an employee, and PAYE must be deducted.

- If the driver pays a fixed lease to the owner for the use of the taxi, the driver is most likely self-employed.

- If the driver pays the owner a percentage of takings, usually calculated excluding GST, the situation is not so obvious. If the driver takes the risk of a loss, paying the running costs, pays the fixed costs (such as

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5 Land Transport Act 1998, pt 4A subpt 3 ss 30J–30R.

6 Part 4B subpts 1–2 ss 30ZB–30ZH; and see also the Land Transport Rule: Work Time and Logbooks 2007 which "applies to all persons subject to the work time requirements under *Part 4B* of the [LTA]": r 1.3(1). This Court has already found that, in situations where employees are governed by provisions under the ERA and also under regulatory legislation (such as in the aviation or transport industries with respect to work breaks), those provisions should coexist as much as operatively possible: *Derbie v Tranzurban Hutt Valley Ltd* [2019] NZEmpC 37.

7 I have reordered these points for ease of reference.

insurance) and controls the use of the taxi, then the driver is most likely self-employed. If the owner takes responsibility for most or all of these things the driver is most likely an employee.

c) The owner holds a PSL and a Class C licence and drives the taxi but takes on someone else to assist. In that instance, the owner would be self-employed for tax purposes; how the driver was paid, however, would depend on the conditions explained above.

d) A taxi organisation owns taxis and employs drivers. The person who owns the business holds the PSL, and the drivers have Class C licences. The owner/operator would be self-employed for tax purposes, and how the drivers are paid tax would depend on the conditions explained above.

e) A taxi organisation has a pool of part-time drivers available for taxi owners to use as replacements when required. The person in charge of the taxi organisation must hold a PSL, and so must the individual owner/operators or drivers as employees. The taxi organisation and the independent owners would be self-employed for tax purposes. The relief driver's tax situation depends on the conditions explained above.

The arrangements which affected persons had with STL

[14] George Kennedy worked for the company between October 2013 and October 2015. Previously, he had operated his own taxi for Mosgiel Taxis; then be became a dispatcher for City Taxis.[8] Next, he was contacted on behalf of STL to see if he wished to work for the company. After speaking with Mr Grant, he decided he would do so focusing on airport work. It was agreed he would be paid 40 per cent commission. This arrangement was not documented.

[15] He said that previously, when working for Mosgiel Taxis, he owned his own car, paid all the costs associated with it, and retained his takings. By contrast, when

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[8] Mr Kennedy, and other witnesses, did not confirm whether third-party entities were incorporated; in the absence of evidence verifying that fact, I have not assumed they were.

working for STL he drove its vehicle. The company paid all running costs such as petrol, insurance and repairs.

[16] He maintained a logbook, in which he recorded his start and finish times, as well as the fares he took. A copy of the relevant pages of the logbook was submitted to the company along with fares taken when he attended the depot weekly. He believed tax was then deducted, and 40 per cent of the takings would be credited to his bank account weekly. He paid for the logbook, which was supplied by STL, by deduction from his commission.

[17] As agreed, he concentrated on airport work. He had regular customers who booked him for transport to and from the airport. On picking up a customer, he would turn on his radio telephone, and it would be noted by dispatch that he was logged on. He would then drive to the airport. He would wait there for a new customer. Whether he was able to obtain an unbooked customer would depend on the time of day, and the position he had on the airport rank, if any.

[18] Upon returning to the city, his practice varied. Sometimes he would wait in town if a customer needed a return trip to the airport. Sometimes he would seek work at a taxi rank; or he would wait at the Waterloo Tavern, which was near his home, where he could obtain a cup of tea or a meal. From time to time, he was asked by a dispatcher to undertake work within the city. He would be contacted either on the car radio, or by mobile phone. He said he was always available, unless he was logged off and taking a rest period.

[19] He noted rest periods in his logbook. These were times when he was not driving, so the period did not count towards his driving hours for compliance purposes.

[20] He said he considered himself an employee because he undertook work he was required to perform by Mr Grant or Mrs Grant. He did not take holidays, because drivers were only paid for the fares that were taken. Sometimes he took time off, unpaid, to play in snooker tournaments; this was sponsored by the Waterloo Tavern.

[21] He had an accident when driving an STL vehicle in 2014. The car was damaged. He was shaken and asked Mr Grant for time off but was told that the company did not pay sick pay. Accordingly, he kept working.

[22] Brian Carnahan worked for STL between April 2015 and December 2016. Previously he had driven his own taxi for City United Taxis for some 23 years.

[23] He learned that STL was seeking drivers. At the time he was bankrupt, so he applied for work. Mr Grant asked him if he wished to run his own vehicle; he said he did not because he had entered into voluntary bankruptcy.

[24] It was verbally agreed he would drive a STL vehicle, would not pay the associated costs, and would receive 40 per cent of fares obtained. No written agreement was signed.

[25] He said the work he undertook was organised via the STL dispatcher and allocated by radio. He generally started at 5.00 am, working for about 10 or 12 hours daily. He had been informed there was some choice as to which days of the week he would work; he told Mr Grant he wanted Sundays and Mondays off, and to work five shifts each week. That is what happened in practice. He could not recall ever changing his days but would need to have discussed such a possibility with either Mr Grant or Mrs Grant if he wished to.

[26] He commenced work when he was available to accept a fare; he recorded this in a logbook and logged on with the dispatcher. He signed off for breaks, according to New Zealand Transport Agency (NZTA) requirements.

[27] He obtained work not only via dispatch, but also by attending taxi ranks such as at supermarkets, where customers could be obtained.

[28] He said he was very clear as to the difference between being a contractor and an employee. Because he was an undischarged bankrupt, he could not be a contractor. He understood that the arrangement he entered into was therefore as an employee. That arrangement contrasted with the previous arrangement he had as an owner-driver.

[29] He, too, purchased his own logbooks from STL. He handed in takings weekly, and included dockets, EFTPOS receipts as well as cash, and green slips showing daily fares.

[30] He knew that the arrangement with STL was "no work, no pay". When he was ill, he did not ask about sick pay as he knew the company would not pay it.

[31] Toni Powell and Gary Powell worked for STL from July 2015 to December 2016. Mrs Powell gave evidence on behalf of herself and her husband, as his health did not allow him to attend the Court to give evidence.

[32] Mrs Powell worked for STL on two occasions prior to the dates just mentioned. Initially, she worked for STL on a commission basis. Then she worked for another company where she operated her own taxi, and was responsible for her own costs, including running the car, depot fees and taxes. In about 2010, she ceased that association, and drove a taxi with Mr Powell under the name Mosgiel Taxis for a period.

[33] In 2011, she worked for STL for a few months, before then working for two other entities until 2015.

[34] In mid-2015, Mrs Powell encountered engine problems with her taxi, so she and her husband approached Mr and Mrs Grant to obtain work by driving a STL vehicle.

[35] When she and her husband recommenced work, she said they worked according to a roster. She worked a dayshift, 5.00 am to 5.00 pm, and Mr Powell would work the nightshift. They shared a STL car. They would meet briefly between the two shifts.

[36] She explained that she would sign on by radio at the commencement of her shift and received work via the dispatcher. She worked primarily in Dunedin, although she would travel to the airport if she had a booking or picked up a customer in the city who wished to travel there.

[37] The company provided logbooks, although she and her husband paid for these. The amount would be deducted from their remuneration. At the end of each day, she would tear out a green slip from the logbook and place it with all receipts and dockets in a clear plastic moneybag, together with cash. She would complete a tally sheet showing anything else that had occurred in the day (for example, expenditure on the vehicle) and provide it daily to Mr Grant at the depot. The green slip specified her driving hours.

[38] Expenses for the vehicle were paid by STL, although drivers had to pay their own speeding tickets. These would be issued to Mr and Mrs Grant who would advise the prosecuting authority of the identity of the driver, which would lead to the ticket being reissued in the driver's name.

[39] Mrs Powell said she always considered herself as an employee and not a contractor. She knew the difference based on her previous experience. She confirmed she did not pay GST and noted that PAYE was deducted from her wages.

[40] She said there were other drivers at STL who were indeed full contractors. They worked on a different basis, in that they retained all fares earned, took care of the operating and servicing of their own vehicles, and paid depot rent to the company.

[41] Mrs Powell felt that she and her husband were not free to come and go as they pleased. She worked to a roster and was told when she was allowed to start and stop. She did not agree that she, as a driver, established the hours within which she would work on a roster. It was not possible, she said, to refuse to answer a call from dispatch, once signed on. When ill or otherwise unavailable, she would not be paid, because of the no-work-no-pay arrangement.

[42] No payments were made if the vehicle was not operated due to sickness, or in the case of her husband, a serious assault which occurred on one occasion; again this was because of the no-work-no-pay arrangement which Mr and Mrs Grant operated.

[43] She said that she and her husband worked hard to try and get by. At times she was financially stressed; she said she always hoped for a good week to try and catch

up. If through low takings she was short of grocery or petrol money, she would ask Mr and Mrs Grant for an advance from remuneration for the following week; that would be deducted from her next pay and was recorded as a loan on a payslip.

Mr and Mrs Grant's evidence

[44] After explaining the history of the company as described earlier, Mr Grant amplified the arrangements that applied in 2015–2016. He said that while there was a requirement for STL to have enough cars available to meet demand, that was a flexible requirement and there was no specific number of vehicles which it needed to have on the road at any time. Because of that, and because many of the company's drivers were paid on a commission basis, he did not monitor the hours they were working.

[45] He said all taxi drivers were employed on a commission or contract basis, and in neither case were considered to be employees. STL had paid a 45 per cent commission at one stage, but it was reduced to 40 per cent as the higher rate was not sustainable. He said if drivers had been paid on an hourly basis, STL would have needed to change its business model.

[46] Mr Grant said that having regard to the business model which had in fact been adopted, he did not undertake any check of hours worked when preparing commission pay because it was immaterial. Public holidays were generally quieter, and drivers could decide if they wished to work those days or not. He said no one was asked to work on a public holiday, but if they chose to do so, he or she would receive commission at the usual rate.

[47] Mr Grant considered that if STL had to pay a minimum hourly rate for hours worked, it would have needed to make these changes:

a) Subject to meeting its modest licence requirements of having sufficient cars to meet demand, STL would have allowed drivers to work only at times when the company could be confident the exercise would be profitable.

b) Fewer cars would be on the road during quiet times.

c) Drivers' activities and income would have to be monitored to maximise fares when on duty.

d) It is unlikely drivers would have worked statutory holidays; he and Mrs Grant could have met reduced demand on those days, as it would have been uneconomic to pay the necessary entitlements.

[48] Mr Grant also said that paying drivers an hourly rate was quite unusual in the taxi industry in Dunedin. He referred to examples of companies that had endeavoured to do so, which proved to be unsustainable. Drivers, he said, could control when they worked subject to the requirement to notify STL, so it could operate its roster. He described rostering arrangements as being flexible. Generally, dayshift drivers would have one early start each week, because the company needed cars on the road from 5.00 am. Apart from that, he said, drivers could work the hours they wanted to and decide how hard they wished to work. They could come and go as they pleased, take breaks when they wished to, and finish work as they wished. That said, sometimes the company would ask them to stay on if demand required it. However, Mr Grant said they were not obliged to do so if requested. He said all that was asked of drivers was to let them know when they were clocking off for a break or ceasing work for the day, so that the dispatcher could keep track of how many available cars it had. He did not think that STL had authority to instruct drivers to work at particular times.

[49] On the topic of logbooks, Mr Grant said drivers were required to maintain these to meet legislative and regulatory requirements. Copies of the green slips were submitted to the company, as it provided a convenient method of establishing the commission due to each driver. He did not, he said, see any significance attached to the words "Duplicate Employer's Copy" in small letters on the side of each page. He said some taxi drivers used a form of logbook that did not have any space for fares received, and these would be listed on a separate piece of paper without any details as to time worked. He confirmed that the regulations required logbooks to record start and finish times, as well as rest breaks, to ensure that the regulated driving hours were not exceeded.

[50] Mr Grant then provided comments on the evidence given by drivers to which reference will be made later when relevant.

[51] Mrs Grant confirmed this evidence. After referring to the early history of the company as already described, she also emphasised that the company operated a shift arrangement, with at least one driver starting at 5.00 am, the dayshift concluding at 5.00 pm, although drivers could work longer if within their hours. A nightshift then operated for the following 12 hours.

[52] She said that within the shifts, drivers were generally free to manage their own time. It was their responsibility to make sure they were taking rest breaks and not working excessive hours. If they wished to take longer breaks, or if they had to clock off for a period during a shift for some reason, or if they decided to finish early, they were free to do so. STL asked that drivers advise when they were not available, to ensure coverage at all times.

[53] Referring to the form of contract which was drafted by lawyers for STL, Mrs Grant said that all commission drivers new to the industry signed such a contract. She said that drivers who were experienced and had worked on commission elsewhere such as the four subject drivers in this case, did not. Experienced drivers like them understood the basis of commission payments.

The Labour Inspectorate's investigation

[54] The documentary evidence shows that the above four drivers contacted the Labour Inspectorate's Dunedin office, and MBIE's service centre, asserting that they had not been receiving minimum entitlements as employees, particularly holiday and leave payments. Mr Carnahan and Mr Powell filed written complaints; I find that the complaint lodged by Mr Powell was on behalf of himself and his wife. Mr Kennedy's similar concerns were raised via MBIE's service centre. Statements were then taken from each of those persons, and documentation to support their respective positions were provided by each.

[55] After an initial examination of this material, Labour Inspectors Jessica Lemon and David O'Shea attended the Southern Taxis depot, serving a notice to supply wages, time and holiday records on 27 June 2016. Mrs Grant was present, but Mr Grant was not. The next day, they were both present and an interview was conducted, with Labour Inspector Lemon taking notes of what was said. Copies of documents relating to the work undertaken by the commission drivers were provided by Mr and Mrs Grant.

[56] Mr Grant advised the Labour Inspectors that the drivers in question were commission drivers and that records were accordingly maintained only in respect of fares taken. From these figures, the company calculated commission.

[57] When asked to provide employment agreements, Mr Grant had said that drivers did not have them, and that "a lot of them are part time that only work a couple of hours a week".

[58] He said that STL had four owner-driver contractors; then there were approximately 20 drivers receiving remuneration derived from 40 per cent of gross fare take.

[59] The four contractors had contractor agreements. Asked why the commission drivers did not have employment agreements, Mr and Mrs Grant are recorded as agreeing that they had never done that, because the commission drivers worked on commission. Mr Grant also stated that if those persons were regarded as employees, the company would not be in business.

[60] Then followed a discussion as to the nature of the records that were kept, including green slips submitted by drivers which were retained for 12 months, and a record of fares received as recorded in a Collins PAYE book.

[61] It was explained that the contractors paid $850 per month to the depot to cover dispatch costs.

[62] The circumstances of both contractors and commission drivers were then discussed. Mr Grant confirmed that annual holiday pay was not being paid, as the arrangement was "no work, no pay".

[63] Although full-time dispatchers had employment agreements, a part-time dispatcher did not.

[64] Monthly PAYE schedules submitted to the IR showed Mr and Mrs Grant as the employer, but no payments were made to staff from their personal bank accounts.

[65] In due course, an investigation report was prepared, summarising the information that had been obtained, and the conclusions drawn by the Inspectorate. After analysing orthodox tests as to employment status, they concluded it was more likely the drivers were employees, and as such were entitled to statutory entitlements; these included at least the adult minimum wage for hours worked, and holiday and leave payments. It was explained that driver logbooks had been used to obtain an accurate record of time worked, which enabled relevant calculations to be made.

First issue: were the commission drivers employees?

Submissions for the Labour Inspector

[66] Ms English, counsel for the Labour Inspector, submitted in summary:

a) Reference was made to key cases relating as to the interpretation and application of s 6 of the ERA.

b) Counsel's analysis of relevant factors began with a consideration of the parties' intentions. None of the commission drivers signed a written agreement; the document which had been drafted by lawyers for the company was not utilised. The drivers had relevant experience in the taxi industry, both as employees and independent contractors. They understood the distinction, and all had their own reasons for wanting to be employees at this stage of their working lives. Their expectations as employees were evidenced from time to time by their behaviour. For

example, Mr Kennedy had requested holiday and sick pay, and Mr Powell had requested ACC after he was assaulted. The directors of STL clearly understood the difference between contractors and employees. They retained employees (dispatchers) and independent contractors (owner-drivers) and treated these groups differently. They had sufficient business knowledge to understand the distinction. The various aspects of the work arrangements were more consistent with employment status.

c) Turning to the control test, STL exercised a significant degree of control over the commission drivers. It set rostered hours which the drivers were required to work. This amounted to set hours worked on particular days of the week and work patterns which did not change. Mrs Powell's evidence that non-commission drivers who paid a depot fee were not consistently on the roster was emphasised. The commission drivers worked more than "full time" each week, and rarely took time off work, as such work would have been unpaid. In effect, their full-time work for STL meant they were not able to carry out other work, as they did not have the time or available driving hours to do so.

When the commission drivers commenced work on a shift, they logged on with dispatch, and when they finished they logged off. Breaks were radioed into dispatch. Records were kept by dispatch, at least on a temporary basis, and by the commission drivers in their logbooks as log-in and log-off times. A GPS system was operated, so that the company always knew at all times where a vehicle was. STL directed the wearing of a uniform, being a tie and white shirt, at all times; it directed drivers on its expectations as to how the shirt would be laundered, and as to the shirt's expected size. There was, in effect, a mandatory uniform requirement. STL set the fares to be charged to customers from the local District Health Board, meaning that commission drivers were not free to exercise control over their takings in such instances by charging a metered fare, or agreeing another fare rate. They were required to remit

all monies and accompanying log records on a daily or weekly basis. All these factors showed there was significant control of the drivers.

d) Turning to the integration test, the commission drivers were part and parcel of the STL organisation and were integral to its business. It had contractual and legal obligations to the workforce it retained, the majority of which were commission drivers; they assisted in the discharge of its obligations. The business operated by supplying vehicles, establishing rosters and other protocols in relation to airport work, and by maintaining standards of dress and conduct.

e) Dealing with the fundamental test, it was submitted the commission drivers were not in business on their account. They did not have the freedom to earn better earnings by varying their work practice and increasing their hours, by working for a more lucrative period such as a Saturday night, or by targeting particular fares such as by collecting customers at the train station or taking the elderly home from a supermarket. They were required to work to a roster which was set by the company, and which ensured STL's obligations were met. As noted, some fares were set by STL. Drivers did not own their own cars, which meant they could not take advantage of tax-deductible costs; or mitigate those costs by subcontracting as they were required to provide personal services. The commission drivers were selling their labour only, and STL was in control of what it would pay for their service.

f) Commenting on the evidence of industry practice which was given by Mr and Mrs Grant and by the two witnesses they called on that topic, it was submitted there was no consistent evidence of an overriding industry practice which would allow a clear conclusion that the drivers were not employees. This was a case where industry practice was not necessarily helpful in establishing the common intention of the parties. In fact, industry practice tended to suggest that other taxi organisations employed owner-drivers on an independent contracting basis, and that there was another category of commission drivers, who worked on a

different basis in that they did not own their own cars and received only a proportion of fares taken. In the present case, PAYE was deducted at source. Industry practice suggested that commission drivers operated on a different and more controlled basis than did independent contractors.

g) Drawing these points together, the commission drivers were properly characterised as being employees.

[67] Mr Andersen QC, counsel for Mr and Mrs Grant, submitted in summary:

a) There was no dispute about the law relating to the question of status under s 6 of the ERA. The difficulty in the case, however, related to the fact that there were indicators pointing both ways, which suggested that a clear conclusion of employee-status could not be reached.

b) Factors that went to the heart of the matters in dispute were:

- There is a widespread industry practice in Dunedin that taxi drivers are either owner-drivers paying fees who keep their earnings, or commission drivers provided with a vehicle, and who are paid 40 per cent of the fares received.

- The business model operated by STL was based on commission drivers choosing their hours of work; there would have been a very different model if they were employees being paid on an hourly rate, because the company would have had to operate differently to ensure profitability, for instance by controlling the hours of work.

- The differences in the day-to-day operation of owner-drivers and commission drivers are limited to the basis of remuneration, with all other matters including dress code and rostering being the same for both groups.

- STL had no control over the hours of operation of any drivers apart from the setting of the rosters, which were set based on drivers' willingness to work.

- There were up to 30 drivers working for STL at any time, and it was significant that only four disaffected drivers had complained. No attempt had been made by the Labour Inspector to consider the position of current taxi companies operating on a commission basis. Remuneration by commission suited drivers who may not have been interested in a large income but who wanted the freedom of choosing their own work hours and how hard they wished to work.

- It was unfair that the four complainants had been free to choose their own hours, and now claimed retrospectively for minimum rates for hours worked, when it would have been obvious they could not have been employed on both an hourly rate and free to choose their hours if they were employees.

- The commission drivers were not required to account for their hours of work; they were required to account only for fares received; the hours of work had no relevance to the payment in fact made.

- Although there was no particular form of agreement used when the four drivers commenced work, there was one that was generally used for commission drivers, and it reflected the arrangements of the four drivers.

- The drivers were not required to work set hours and days of the week because, although they broadly worked in accordance with the roster set by STL, that roster was dependent on the individual driver's availability; drivers were not put on the roster unless they were indeed available.

- It was not accepted that drivers were required to wear a "uniform" in the sense of special and identifiable clothing. It would be more accurate to say there was a dress code of a white polo shirt or a white shirt with tie, dark trousers and black shoes, with Dunedin Airport imposing an obligation to wear a tie for those working there.

- There was no obligation on the part of taxi drivers to submit their logbooks showing the work performed; they could have provided details of the fares in some way other than providing their logbooks, such as by way of recording fares taken on a separate piece of paper.

c) Mr Andersen then analysed each of the tests pertaining to a determination of the real nature of the relationship. The terms of the commission drivers' relationship with STL were clear; a 40 per cent commission would be paid, with no entitlement to sick pay or to holiday pay; drivers were not monitored, nor directed to work locations, nor directed in their driving practices, and not directed how and when to work within the rostered hours; there was no obligation to provide or accept work; and there was no day-to-day control exercised over the drivers.

d) Regarding the intention test, Mr and Mrs Grant acted in a manner consistent with a belief that the drivers were independent contractors. The payment of PAYE was not a defining factor.

e) With reference to the control test, the same level of control applied to owner-drivers as applied to commission drivers; there was virtually no control over their day-to-day activities. The mere fact of a roster did not alter that reality and did not indicate an employee relationship.

f) In considering the integration test, commission drivers were no more an integrated part of the business than the owner-drivers, and they enjoyed the same degree of freedom.

g) On the fundamental or economic reality test, drivers determined how much they earned over any driving period, what hours they would work, and when they were available without any real day-to-day control over the work practices exercised by Mr and Mrs Grant. The business model was based on commission drivers being free to determine their hours of work, and how hard they chose to work. The financial risk they took related to their earnings. They were not guaranteed any income at all, and the extent of their earnings was dependent on the effort they were prepared to put into the work, and their skill in obtaining fares.

Legal principles

[68] Section 6 of the ERA, which is central to the issue before the Court, relevantly provides:

> **6 Meaning of employee**
>
> (1) In this Act, unless the context otherwise requires, **employee**—
>
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
>
> …
>
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
>
> (3) For the purposes of subsection (2), the court or the Authority—
>
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
>
> (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.
>
> …

[69] In the leading authority, *Bryson v Three Foot Six Ltd (No 2)*, the Supreme Court held that the Court must consider all relevant matters, which include:[9]

a) The written and oral terms of the contract which will usually contain indications of common intention as to status.

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9 *Bryson v Three Foot Six Ltd (No 2)* [2005] 3 NZLR 721, [2005] ERNZ 372 (SC) at [32].

b) Any divergences from or supplementation of those terms and conditions, evident from the way in which the relationship operated in practice; what is important is the way in which the parties have actually behaved in implementing their contract.

c) The reference to "all relevant matters" also requires consideration of features of control and integration, and whether the contracted person has been effectively working on his or her own account (the fundamental test), all as determined at common law.

d) But it is not until there has been an examination of the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the real nature of the relationship in light of the control, integration and fundamental tests.

[70] As Judge Perkins observed in *Clark v Northland Hunt Inc*, none of the common law tests individually will necessarily be conclusive, although respective weight will be placed upon them depending upon the overall factual matrix.[10] What is important is an overall impression of the underlying and true or real nature of the relationship between the parties.[11]

[71] An "intensely factual" analysis may be necessary to determine the real nature of the relationship.[12]

[72] Counsel referred to other authorities, to which reference will be made where necessary.

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10 *Clark v Northland Hunt Inc* (2006) 4 NZELR 23 (EmpC) at [224].

11 *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA) per McGrath J dissenting, this approach being undisturbed on appeal to the Supreme Court.

12 *Franix Construction Ltd v Tozer* [2014] NZEmpC 159, [2014] ERNZ 347 at [44].

Analysis

Common intention

[73] As the Supreme Court explained in *Bryson*, the written and oral terms of the contract between the parties usually contain indications of their common intention concerning status.

[74] In the present case, however, there were no written agreements, and there is little evidence of oral discussions other than the fact that it was agreed the drivers would be paid an amount equal to 40 per cent of fares obtained.

[75] That said, there was a clear understanding about several other matters of usual practice. Each driver would operate a vehicle owned by STL, and the company would meet the expenses of so doing; logbooks would be maintained and pages from that book would be submitted each week showing start and finish times, rest breaks and fares taken; PAYE tax would be deducted; identified clothing would be worn; drivers would operate according to a roster; and they would operate under a P endorsement,[13] rather than a TSL which was the approval held by the company.

[76] Of these indicia, two were expressly consistent with employment status; the payment of the deduction of PAYE at source, and the operating of the taxi under a P endorsement. The remaining factors are ambiguous indicators of intention.

[77] The evidence from Mr Kennedy, Mr Carnahan, and Mrs Powell was consistent as to the understanding they held as to these arrangements. They all believed, particularly in light of previous work arrangements where they were owner-drivers, that they were operating under a wholly different regime for STL; and that they were employees. However, it may have been that it was not until issues arose as to whether they would, for example, be paid whilst on sick leave that the question of status assumed importance and their views crystallised.

[78] For their part, Mr and Mrs Grant were adamant that they believed the drivers were not employees, a belief they assert was supported by the legal document prepared

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[13] Passenger endorsement.

for them by a lawyer in 2007. They said that although this document was not signed by any of the subject drivers, the thrust of their evidence was that the document reflected the actual arrangements which were entered into. As already noted, the document was described as a contract *for* services. It expressly recorded that the principal was not obliged to grant holidays, sick leave or other benefits under the HA, since the document was one for services only. It referred to a deduction for tax but did not describe the type of tax.

[79] Focusing on that topic, Mr and Mrs Grant told the Court that they had been advised by IR that it was concerned at the lack of taxes paid by drivers throughout the industry, which led to a request to deduct taxes from commission in order for the issue to be dealt with. Mr Grant said he thought this assisted the drivers. As a result, PAYE was deducted, because he understood that was what the company was being asked to do. He and Mrs Grant said that withholding tax should have been deducted but that they did not know this at the time and were never told it was incorrect.

[80] As I shall elaborate later, Mr and Mrs Grant were not challenged on several statements they made confirming their belief that drivers were not employees, or that they must have known that payment of PAYE was not the correct procedure for a person who was not an employee. In the absence of an appropriate challenge to this consistent evidence from Mr and Mrs Grant, the Court has to accept that they believed the commission drivers were working under contracts for services.

[81] As a result, the Court must conclude that although there was common ground between the parties as to various elements of the work arrangements, it could not be said that there was a common intention as to status. The four commission drivers believed one thing, and the two directors of STL believed another.

[82] It is accordingly necessary to go on and consider other common law tests to determine the real nature of the relationship.

Control test

[83] The Court is to have regard to the control test, which was explained in *Clark* as involving:[14]

> ... an assessment of the manner in which the person providing the work exercises and assumes supervision and control over the person performing it. The greater the level of control, the more likely the Court will be prepared to find that a contract of service exists.

[84] There are several elements of the work arrangements which require discussion for the purposes of this test.

[85] Each of the commission drivers operated under a roster which was prepared and maintained by STL. It was common ground that by this means it was agreed and known in advance what days of the week a given driver would work and broadly which shift that driver would work, although different start times applied. Once agreed, the drivers were required to work these days and hours, and their work patterns did not change from week to week. Those arrangements suggest a degree of control, because what had been agreed was expected to be maintained.

[86] Thereafter, there was a divergence as to the extent to which the roster was a means of control. Mr and Mrs Grant said that the drivers were free to operate as they saw fit within those confines, and that there was no particular expectation as to where drivers might operate. Some had preferences. Mr Kennedy, for example, preferred airport work. Mrs Powell, by contrast, chose to work mainly within Dunedin city.

[87] A witness called by Mr and Mrs Grant, Mr Johnston, said that the point of the commission arrangement was that there was flexibility. On bad days, the fact he was being paid by commission encouraged him to go and look for work, which could be found if a driver knew where to go and was prepared to undertake small jobs.

[88] Against that evidence, however, must be placed the evidence that the primary means of organising the work of the commission drivers on any given day was via the dispatcher. Drivers had to log in and log off; and maintain radio or cell phone contact

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[14] *Clark,* above n 10, at [30].

with the dispatcher. The dispatcher would then allocate a particular job to a driver; although in theory the driver could decline the work, the reality was that there was no choice if the driver wished to be remunerated. The central role of the dispatcher was emphasised by Mrs Powell who explained that if at the end of a particular town job a customer enquired about a possible return ride, they would have to be told to ring the company rather than get in touch directly with the driver. The drivers understood their work was largely allocated by the company's dispatcher.

[89] When undertaking airport work, there was a process for obtaining a position on the applicable rank; this was as directed by the company. Fares for customers from the local District Health Board were prescribed by the company; as mentioned earlier, in that instance drivers were not able to charge according to a metered rate, or by agreeing a fare with a customer.

[90] Finally, the evidence is that owner-drivers had greater flexibility in several respects. In unchallenged evidence, Mrs Powell said that owner-drivers who paid a depot fee were not consistently on the roster; they were therefore free to work such hours as they saw fit and could, for example, utilise the services of a subcontracted driver.

[91] In summary, I find the working arrangements for commission drivers were more proscribed than those of independent contractors.

[92] I note that both classes of driver were required to wear stipulated clothing. Each party asserted that this factor supported the respective cases. In my view, it is a neutral consideration. It was a common requirement in the industry, as verified, for example, by the dress code required by the airport authority. It does not indicate the status of the person wearing that clothing.

[93] Other elements of control are demonstrated by the fact that commission drivers were required to submit completed pages from their logbooks either including, or along with, details of fares taken. This was for two reasons. First, it enabled STL to receive all takings, and then carry out the necessary calculation to credit the commission drivers' proportion of fares to their personal bank accounts having

deducted tax. Secondly, because the company held a TSL, and the commission drivers were operating under P endorsements, STL was required to hold the necessary paperwork for 12 months, which it did. Each of the commission drivers were required by STL to provide this information.

[94] Standing back, the extent of control exercised over the commission drivers points to employee status.

Integration test

[95] Under this test, if a person is employed as part of the business and his or work is done as an integral aspect of it, there is a contract of service. This is not the case if the work, although done for the business, is not integrated into it but is only an accessory to it.[15] In *Challenge Realty Ltd v Commissioner of Inland Revenue*, the Court of Appeal said that an element of this assessment is whether the person was part and parcel of or integrated into the enterprise of the work operation.[16]

[96] Ms English submitted that given the contractual and legal obligations STL had, it needed to be able to direct a portion of its work force to meet those obligations. STL did that by organising rosters and directing commission drivers to be available at particular times.

[97] Mr Andersen submitted that the use of a roster was not an indicator of employee status; he said that a commissioned driver enjoyed the same freedoms as did an owner-driver.

[98] In my view, STL operated a taxi business for which it needed drivers to operate the branded vehicles which it owned for the purposes of operating an economic taxi business.

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15 *Stephenson, Jordan and Harrison Ltd v MacDonald & Evans* (1952) 69 RPC 10 (CA) per Denning LJ at 22.

16 *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42 (CA) at 65 quoting Adrian Merritt "'Control' v 'Economic Reality' – Defining the Contract of Employment" (1982) ABLR 105 at 118.

[99] In the main, STL relied on the availability of commission drivers for its business operation. While owner-drivers were also part of the company's workforce, they operated under very different arrangements. Comparing the two classes of workers does not lead to a conclusion that commission drivers, who were retained on significantly different terms to those of the owner-drivers, should also be regarded as contractors.

[100] I am satisfied that the integration test supports a conclusion those drivers were employees.

Fundamental or economic reality test

[101] The final common law test has been variously described as either the "fundamental test", the "economic reality test" or whether the person was in business on his or her own account.[17] The test requires consideration of factors such as whether the worker assumes any element of financial risk, for example by providing capital; or whether the worker participates in profits and losses.[18]

[102] Ms English submitted the roster arrangements limited the times at which a driver could choose to work; she said that even if such a person wished to increase their income by working additional hours, they would receive only 40 per cent of fares thereby obtained.

[103] She emphasised that commission drivers did not own their own vehicles and could not therefore take advantage of any deduction of costs for operating them.

[104] Mr Andersen submitted that the structure allowed the drivers to organise their own working regime, both within and outside of the company's rosters. He argued that the drivers carried a risk as to their earnings. There was no guaranteed income at all, as any remuneration was dependant on personal effort.

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17 *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, [2010] ERNZ 61 at [40]. See also Gordon Anderson, John Hughes and Dawn Duncan *Employment Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2017) at [5.35]–[5.37].

18 Anderson, Hughes and Duncan, above n 17, at [5.35].

[105] In my opinion, it is clear these drivers were not in business on their own account. They did not own their own vehicles or pay any of the not insubstantial running costs involved, including maintenance; nor could they obtain a return by subcontracting.

[106] Taxation arrangements can be a relevant consideration but may not be determinative.[19] Here, the commissioned drivers were not responsible for making personal tax payments to IR, because PAYE was deducted by STL. They were not registered for GST and did not render invoices. Given the absence of a common intention as to the status of the drivers, it is appropriate to evaluate this factor from an objective standpoint. The taxation arrangements point to employee status.

[107] Under the roster arrangements, a driver had an element of choice as to volume of work. To that extent, such a driver bore a risk as to the extent of his or her remuneration. However, many employees work on a commission basis, a fact which is recognised by the definition of wages in the ERA. Such employees may be rewarded for effort, as here.

[108] These economic facts strongly support a finding of employee status.

Industry practice

[109] Evidence of industry practice may, or may not, be useful in establishing the intentions of the parties.[20] The reliability of any such evidence, and the weight to be attributed to it, is a matter of assessment for the Court.

[110] Ms English submitted that the industry practice evidence given in this case was not helpful. She said that there was little information as to actual arrangements entered into by other companies. It emerged there was a tradition that some drivers were employed by taxi companies as "true" independent contractors. Other drivers were not so described but were labelled as commission drivers; but they were retained on different terms.

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19 *Singh v Eric James and Associates* [2010] NZEmpC 1 at [17].
20 *Bryson,* above n 9, at [16] and [35].

[111] Mr Andersen submitted that there was an established industry standard of taxi drivers working on a commission basis. The business model for the commission drivers applied equally to contract drivers. Both classes of driver exercised choice and decided what hours they would work.

[112] In his evidence, Mr Grant said that the way STL operated was the "usual practice" in Dunedin. Some contractors were owner-drivers carrying a responsibility for all their costs and paying a depot fee, with the ability to engage a second driver to keep their car on the road as much as possible. Others were employed on a commission basis, and were not, he said, considered employees.

[113] Ross White was called to give expert evidence on this topic. He said he had driven taxis in Dunedin from 1978 to 2019. During that period, there had been three categories of taxi drivers: those who owned their own taxis and who were shareholders in the taxi firm for which they worked as he had been; those who owned their own taxis and who made a payment to a taxi company to work for that entity by way of depot fees; and those who did not own their own taxis who worked on a commission basis.

[114] He said that drivers had worked for him on a commission basis, including Mr Grant for a short period. For a period the commission rate had been 45 per cent but was now 40 per cent. He did not consider any of the drivers that he paid were employees, because those persons had freedom to decide when and how they worked, and holiday pay or sick pay was not available. The drivers referred to by Mr White also paid their own tax.

[115] In summary, the evidence given as to industry practice establishes that other taxi companies employed drivers or contractors who owned their own vehicles, met the relevant outgoings, and kept the fares they obtained. They also engaged another class of drivers who operated vehicles owned by that company or contractor, were paid a percentage commission fee but were responsible for their own tax.

[116] The Court has not been provided with any contracts or other documents which may have provided an accurate description of all the terms and conditions that applied to other entities operating a taxi business in Dunedin.

[117] At its height, the evidence suggests that a similar business model was adopted by other taxi operators in Dunedin; and that in one case, the external operator considered such a worker was an independent contractor. If other taxi operators also held this view – on which the evidence is at best vague – it does not follow those entities had a correct understanding about the legal status of commission drivers.

[118] I also note this evidence must be assessed against the guidance given by the IR in its publication of 2009. That document described various arrangements which were said to be common. The document stated that arrangements such as pertained here were most likely those as being between an owner and an employee, as no risk is assumed by any of the drivers.[21] No evidence was given as to what, if any, consideration was given by other taxi operators to this material.

[119] Finally, there was an underlying assumption that as a matter of common sense, a driver who was not paid on an hourly basis, but who was paid commission, should be regarded as a contractor. But as already noted the ERA recognises commission payments can fall within the definition of wages paid under a contract of services.[22] The payment of commission within a particular industry does not mean the worker cannot therefore be regarded as an employee.

[120] In summary, industry practice is not a useful indicator for present purposes. Significantly, none of the affected drivers understood that the use of the commission model by other companies meant they were independent contractors when working for STL.

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21 See above at para [13](b).
22 Employment Relations Act 2000, s 5.

Real nature of the relationship

[121] Standing back, there were several significant distinguishing features between those persons who operated their own taxis for STL, and those who did not but were paid commission.

[122] The Court's conclusion cannot turn on a simple comparison between the two classes of drivers. The focus has to be on all the circumstances as they pertain to the commission drivers. The parties did not have a common understanding as to the legal effect of their arrangements. In practice, the drivers were subject to significant control, they carried modest risk and they were part and parcel of STL's business operation.

[123] That remuneration was based on commission, and not on hours worked, is not determinative.

[124] Balancing all relevant factors, I am well satisfied that the real nature of the relationship between STL and the commission drivers was that of employer and employee.

What arrears are owed for minimum wages, holidays, and rest breaks?

[125] The Labour Inspector seeks minimum wage arrears, annual leave and public holiday entitlements not paid, rest break entitlements, and reimbursement in respect of unlawful deductions for logbooks. Attached to this judgment is a schedule providing a summary of these claims. The Labour Inspector also provided very detailed schedules to verify the relevant calculations.

[126] Mr and Mrs Grant critiqued these schedules, which led to submissions being presented on several issues as to the correct approach when calculating the drivers' entitlements.

[127] The main point of contention relates to the correct calculation of annual holiday pay. Mr Andersen submitted that where the minimum payment requirements of the Minimum Wage Act 1983 (MWA) were met in any week, it should be concluded that holiday pay had been incorporated into the commission paid. That is, holiday pay

should be regarded as having been included as weekly income, under s 28 of the HA. He also argued that where a commissioned driver earned more than the minimum wage, the sum involved should be deducted from the overall amount claimed by the Labour Inspector for annual holiday pay.

[128] Ms English submitted that the prerequisites of s 28 were not met. She also said that amounts that had been calculated to establish a minimum wage entitlement could not be co-opted for the purposes of a calculation as to annual leave entitlements. She said that wages were a discrete entitlement calculated with regard to the provisions of the MWA; and annual leave was a separate entitlement calculated with regard to the provisions of the HA.

[129] Section 28 of the HA relevantly provides:

> **28 When annual holiday pay may be paid with employee's pay**
>
> (1) Despite section 27, an employer may regularly pay annual holiday pay with the employee's pay if—
>
> (a) the employee—
>
> (i) is employed in accordance with section 66 of the Employment Relations Act 2000 on a fixed-term agreement to work for less than 12 months; or
>
> (ii) works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual holidays under section 16; and
>
> (b) the employee agrees in his or her employment agreement; and
>
> (c) the annual holiday pay is paid as an identifiable component of the employee's pay; and
>
> (d) the annual holiday pay is paid at a rate not less than 8% of the employee's gross earnings.
>
> ...

[130] Plainly, the commission drivers did not work on a fixed term agreement for less than 12 months. Equally clearly, they did not work on an intermittent or irregular basis so that it was impracticable to provide the employee with four weeks' annual holidays under s 16.

[131] There was no agreement between the parties as to payment on this basis – indeed what the drivers were all told was "no work, no pay". When the subject of annual leave was raised, Mr Grant would confirm there was no provision for such entitlements. It follows that annual holiday pay was not an identifiable component of the employees' pay.

[132] In short, the commission payments could not as a matter of law have included annual holiday entitlements.

[133] Turning to the question of whether, for the purposes of calculating annual holiday pay entitlements, STL is entitled to a credit in respect of those weeks where commission payments exceeded the minimum wage, it is necessary to analyse the details of the Labour Inspector's calculation. These were undertaken with close regard to the provisions of ss 24, 25 and 26 of the HA.

[134] The starting point was to assess the correct amount for each week of work. In those weeks where commission did not meet minimum entitlements under the MWA, annual leave was calculated on the basis of the minimum wage. In those weeks where commission did meet minimum entitlements under the MWA, annual leave was calculated on commission paid, plus an allowance for rest breaks based on that commission.

[135] I interpolate that the approach adopted regarding the calculation of rest breaks is in accordance with applicable case law.[23]

[136] Having established each weekly amount, the Labour Inspectorate then calculated "ordinary weekly pay" and "average weekly earnings" for the purposes of s 24, and "gross earnings" for the purposes of s 25 of the HA.

[137] I am satisfied that the calculations conducted for each week of work of an employee were based on the minimum wage in those weeks where that is appropriate,

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[23] See *Ovation New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2018] NZEmpC 151, [2018] ERNZ 455 at [27] applying *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 495, [2017] 2 NZLR 234, [2016] ERNZ 381.

and on the commission payment where there is no issue as to minimum wage entitlements. Accordingly, no further adjustment is necessary.

[138] Mr Andersen also submitted that the arrears of minimum wage in respect of Mr Powell could not be accepted, since he did not give evidence to confirm the accuracy of his logbooks. Reference was made to evidence given for the company that he would often not respond to RT calls, and "this would be because he was going off to do his own thing." Mr Andersen argued that this meant the Court could not be satisfied his logbooks correctly record the time he worked. No particular examples were given.

[139] Mr Powell's summary of time worked, and commission received, were checked by the Labour Inspectorate against nine logbooks and associated wage receipts. When questioned as to the accuracy of Mr Powell's recording of breaks during individual shifts, Ms Lemon said that the recorded information suggested Mr Powell had been quite careful in considering the time he took away from work and was not available to take a fare.

[140] Also relevant are the provisions of the ERA relating to record keeping. Section 130 requires an employer to maintain a wages and time record, which apart from particulars relating to certain personal circumstances of each employee, requires a record to be maintained of the number of hours worked each day in a pay period as well as the pay for those hours; and the wages paid to the employee each pay period and the method of calculation. The totality of logbook information, PAYE records and wage receipts does not amount to being a wage and time record.

[141] Section 132 of the ERA provides that where an employer has failed to keep or produce a wages and time record in respect of an employee as required by the ERA, and if that failure prejudices the employee's ability to bring an accurate claim for arrears of wages, then all claims made by the employee in respect of wages actually paid and hours, days and time worked may be accepted, subject to the employer proving that the claim is incorrect.

[142] Section 228(3) confirms that these sections apply, with all necessary modifications, to actions commenced by a Labour Inspector such as the present one for recovery of moneys under the HA and MWA.

[143] These provisions therefore apply here. In short, the onus was on Mr and Mrs Grant to prove that schedules submitted by Mr Powell in support of his claim for arrears of wages were not correct.

[144] On the totality of the evidence before the Court I am not satisfied that Mr Powell's information has been shown by Mr and Mrs Grant to be wrong. I accept Ms Lemon's assessment as to accuracy.

[145] I conclude that the calculations made by the Labour Inspectorate are both reliable and correct. It follows that STL as employer is liable for the sums claimed as set out in the schedule annexed to this judgment.

Are there qualifying breaches for which Mr and Mrs Grant should be personally liable?

The position prior to 1 April 2016

[146] Prior to 1 April 2016, s 234 of the ERA applied and stated:

> **234 Circumstances in which officers, directors, or agents of company liable for minimum wages and holiday pay**
>
> (1) This section applies in any case where a Labour Inspector commences an action in the Authority against a company to recover any money payable by way of minimum wages or holiday pay to an employee of the company.
>
> (2) Where, in any case to which this section applies, the Labour Inspector establishes on the balance of probabilities that the amount claimed in the action by way of minimum wages or holiday pay or both is, if judgment is given for that amount, unlikely to be paid in full, whether because—
>
> (a) the company is in receivership or liquidation; or
>
> (b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full,—
>
> the Authority may authorise the Labour Inspector to bring an action for the recovery of that amount against any officer, director, or agent of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both.

> (3) Where, in any action authorised under subsection (2), it is proved that the officer, director, or agent of the company against whom the action is brought directed or authorised the default in payment of the minimum wages or holiday pay or both, that officer, director, or agent is with the company (and any other officer, director, or agent of the company who directed or authorised the default in payment) jointly and severally liable to pay the amounts recoverable in the action and judgment may be given accordingly.
>
> (4) In this section,—
>
> **company** has the meaning given to it by section 2(1) of the Receiverships Act 1993
>
> **holiday pay** means any amount payable under the Holidays Act 2003 to an employee as pay for an annual holiday or public holiday
>
> **minimum wages** means minimum wages payable under the Minimum Wage Act 1983.
>
> (5) Nothing in this section affects any other remedies for the recovery of wages or holiday pay or other money payable by a company to any employee of that company.

[147] Despite its repeal, the section continues to apply to proceedings brought in relation to conduct that occurred before 1 April 2016, regardless of whether or not the proceedings were brought before that date.[24]

[148] All but one of the elements of the section are met in this case.

[149] First, it is established on the balance of probabilities that minimum wages and holiday pay are owed.

[150] Second, the evidence before the Court is that STL is unable to pay these sums. It has not done so, and Mr and Mrs Grant say it has no ability to do so. But for an objection to do so from the Labour Inspector, STL would by now have been placed in liquidation. Whether a liquidator of the company, if appointed, could have access to recovery options which could lead to unpaid workers being prioritised under sch 7 of the Companies Act 1993, can only be a matter of speculation at present.

[151] The Labour Inspector is accordingly authorised to bring the action for recovery of the directors of STL, Mr and Mrs Grant.

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[24] Employment Relations Act 2000, sch 1AA cl 3(7).

[152] Next, I must consider the requirements of s 234(3) of the ERA, which requires the Labour Inspector to prove that Mr and Mrs Grant "directed or authorised the default in payment of the minimum wages or holiday pay or both".

[153] This statutory requirement was considered by the Court of Appeal in *Brill v Labour Inspector*.[25]

[154] The Court of Appeal emphasised that s 234 was intended to apply only as a last resort where there was evidence of personal and deliberate avoidance of a company's obligations.[26]

[155] The Court accordingly concluded that:[27]

> [A] Labour Inspector "must prove the officer, director or agent knew the payment was in default of the company's obligations under the [MWA] or the [HA]. The relevant knowledge may be proved by direct evidence or by inference".

[156] It is worth mentioning that the Court also stated that there is no justification for importing a concept of constructive knowledge.[28]

[157] These conclusions led the Court of Appeal to allow an appeal from a majority judgment of a full Court. Since it had been held by the majority that it was not necessary for the Labour Inspector to prove that actual knowledge that the payment was in default, the appeal was allowed.

[158] Ms English referred this Court to a determination of the Authority, *A Labour Inspector v Freemind Enterprize Ltd,* in which it was concluded that the director in question knew what his employees were being paid, and that he was "deemed to have known what should have been paid."[29] Because the determination relied on the

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25 *Brill v Labour Inspector* [2017] NZCA 169, [2017] ERNZ 236.
26 At [21].
27 At [27(ii)].
28 At [25].
29 *A Labour Inspector v Freemind Enterprize Ltd* [2016] NZERA Auckland 165 (Member Campbell) at [99].

overturned majority judgment of the full Court as just described,[30] the statement made by the Authority in *Freemind Enterprize* cannot be relied on.

[159] Ms English went on to submit that it was plain Mr and Mrs Grant were the human actors responsible for running of STL. She argued that they established the rosters, operated the payroll and knew what all drivers were earning and also knew that they were paying those persons less than the minimum wage. It was submitted that they were well aware of the requirement to pay the minimum wage, since office staff were being paid correctly. Accordingly, an inference could be drawn that the decision not to pay an hourly rate was an intentional business decision to ensure STL was profitable.

[160] Mr Andersen submitted that what had to be shown was that Mr and Mrs Grant knew they were acting in default of STL's obligations. He said this was not established because they did not believe the drivers were employees.

[161] He said their belief was based on several factors. They had sought legal advice as to the form of agreement to be used for commission drivers. They had told the Court that many drivers signed such an agreement, although more experienced drivers such as the four complainants did not do so because they were already aware of the basis upon which commission payments were made.

[162] Mr Andersen submitted that at no point had consideration been given to paying hourly rates at or above the minimum wage, and/or topping up the commission payment to the minimum wage; neither Mr Grant nor Mrs Grant understood the payment of PAYE was not the correct procedure. In short, their unchallenged evidence was that they did not know these drivers were employees, and it cannot therefore be concluded there was deliberate avoidance of the company's obligations.

[163] Ms English invited the Court to draw an inference from some aspects of the history that Mr and Mrs Grant must have known the drivers were in reality employees. She referred, for example, to the fact that PAYE was being deducted with the company completing employer deduction schedules, and that the green slips submitted by

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30 *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157, [2015] ERNZ 1091.

drivers with an indication of their start and finish times and fares taken, had endorsed on them the words "Duplicate Employers Copy". She also referred to the evidence that when Mr and Mrs Grant responded to a notice requiring them to supply a copy of wages, time and holiday records to the Labour Inspector, they had provided copies of documents relating to the commission drivers, but not to owner-drivers.

[164] The difficulty with the submission made for the Labour Inspector is that none of the factors which might have indicated Mr and Mrs Grant did have the requisite knowledge was put to them in cross-examination, a point which was taken by Mr Andersen and which he was entitled to make.

[165] Whilst, of course, the Court can draw legitimate inferences in a credibility case of this kind, there is nonetheless a duty to cross-examine witnesses on significant matters that are relevant and in issue because of contradictory evidence of the witness, if that person could reasonably be expected to be able to give admissible evidence on the point.[31]

[166] As a result, it is not appropriate, nor fair,[32] to draw a strong adverse inference regarding the apparently contradictory factors relied on by Ms English, when the witnesses were not expressly challenged as to their stated belief the drivers were not employees.

[167] The beliefs as to status held by Mr and Mrs Grant were on the face of it naïve, particularly in light of the fact they deducted PAYE. However, such an understanding was consistent with the fact that lawyers had drafted a contract for taxi driving services in 2007, which made it clear commission drivers were not retained under a contract of services. As already noted, the document stated that the principal was accordingly not obliged to grant holidays, sick leave, or other benefits under the HA. In that context,

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31 Evidence Act 2006, s 92. Though not bound by the Evidence Act, this Court has confirmed the policy reasons for allowing a party to state its case, and to respond to a case put forward to it, are fundamentally those of fairness: *Hallwright v Forsyth Barr Ltd* [2013] NZEmpC 202, [2013] ERNZ 553; and *Wilson v Bruce Wilson Painting & Decorating Ltd* [2014] NZEmpC 83, (2014) 11 NZELR 712.

32 *Hallwright*, above n 31, at [7] affirming the Court of Appeal's assessment in *R v Soutar* [2009] NZCA 227 at [27]. Though that judgment deals with issues of criminal law, the policy behind s 92 of the Evidence Act as described by the Court of Appeal has general application.

tax, ACC, any child support or student loan deductions would be made. The nature of the tax was not specified.

[168] As summarised earlier, IR published material describing issues as to status of workers in the taxi industry. But Mr and Mrs Grant were not questioned as to whether they knew of this material, which might have been relevant to the significance of their practice in deducting PAYE, as well as to their belief as to status; nor were they about the significance of the language used on the printed green forms; nor as to the significance of the LTA classifications.

[169] It is plain they did recognise some workers were employees, such as STL's dispatchers, and at an early stage those who drove airport shuttles. But that evidence is open to an inference which supports their belief. The commission drivers worked under wholly different arrangements from the dispatchers and airport shuttle drivers.

[170] I do not regard the fact that Mr and Mrs Grant provided documents to the Labour Inspectors which related to commission drivers, but not to owner-drivers, as being significant. The notice requiring them to supply copies of wages, time and holiday records of all current employees, and a "former employee", Mr Kennedy. Given the way the request was put, the status of the commission drivers was potentially in issue. Unsurprisingly, the first topic raised by Mr and Mrs Grant when interviewed by the Labour Inspectors was that they considered drivers who were supplied vehicles were commission agents, that is, not employees. An in-depth conversation as to their terms and conditions followed, as summarised earlier. There was no concession that these workers were employees.

[171] On the basis of the evidence before the Court, I must accept Mr and Mrs Grant's evidence they did not believe the affected drivers were employees. I find they did not therefore know the payments they were making were in default of STL's obligations under the MWA or the HA.

[172] It follows that they cannot therefore be personally liable under s 234 of the ERA.

The position from 1 April 2016

[173] With effect from 1 April 2016, s 234 was repealed and replaced with the provisions of pt 9A of the ERA. As noted by Ms English, those provisions are wider and allow for the recovery of all outstanding monies payable to employees, rather than simply minimum wages and holiday pay.

[174] Section 142Y states:

> **142Y When person involved in breach liable for default in payment of wages or other money due to employee**
>
> (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
>
> (a) there has been a default in the payment of wages or other money payable to the employee; and
>
> (b) the default is due to a breach of employment standards; and
>
> (c) the person is a person involved in the breach within the meaning of section 142W.
>
> (2) However, arrears in wages or other money may be recovered under subsection (1) only,—
>
> (a) in the case of recovery by an employee, with the prior leave of the Authority or the court; and
>
> (b) to the extent that the employee's employer is unable to pay the arrears in wages or other money.

[175] Several of the criteria in s 142Y are not, at this point, in issue. There has been a default in the payment of wages or other money payable to the four employees from 1 April 2016; this was due to a breach of "employment standards" as defined in s 5 of the ERA; and STL is unable to pay the sums involved.

[176] The sole issue under the section is whether Mr and Mrs Grant are persons involved in the breach under s 142W. That section relevantly provides:

> **142W Involvement in breaches**
>
> (1) In this Act, a person is ***involved in a breach*** if the breach is a breach of employment standards and the person—
>
> (a) has aided, abetted, counselled, or procured the breach; or
>
> (b) has induced, whether by threats or promises or otherwise, the breach; or
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or

(d) has conspired with others to effect the breach.

(2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.

(3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:

(a) a person occupying the position of a director of a company if the entity is a company:

...

[177] The Labour Inspector claims that Mr and Mrs Grant were persons involved in breaches of employment standards, in the respects described in s 142W(1)(a), and/or (b), and/or (c). Ms English submitted it was not necessary to find that the directors intended to breach employment law obligations; rather, she said it had to be shown they intended the acts which constitute the alleged breaches, such as paying wages at less than the minimum wages, or by not providing leave entitlements.[33]

[178] Again relying on the assertion that Mr and Mrs Grant did not know the drivers were employees, Mr Andersen submitted that the criteria of this subsection could be made out, since the language used shows that actual knowledge of the fact of a breach is required for liability to be established.

[179] The legal submission raised by Ms English requires a careful analysis of the criteria of s 142W(1). The meaning of the provision must be ascertained from the text, and in light of its overall purpose.[34]

[180] On the face of it, the language used in each of the listed criteria of the subsection suggests deliberate involvement in a breach. All the words used denote intentional action.

[181] It is clear from the objects provision of pt 9A that the suite of sections contained in that part are intended to promote more effective enforcement of employment standards, especially minimum employment provisions, by providing for a Labour

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[33] Ms English relied on an Authority determination to this effect: *Gibson v Crane* [2018] NZERA 360 at [43], where this legal point was referred to. The Authority does not appear to have been provided with submissions as to the legal effect of the criteria in s 142W(1).

[34] Interpretation Act 1999, s 5(1).

Inspector to apply to the Court for serious or persistent breaches.[35] Section 142W must be construed in that context. A breach is more likely to be regarded as serious if it involves deliberate qualifying conduct.

[182] Part 9A contains provisions describing statutory defences. One such is s 142ZD. A person such as a director of a company may have a defence if that person can prove that the involvement in the breach was due to reasonable reliance on information supplied by another person; or that person took all reasonable and proper steps to ensure that the primary duty-holder complied with a minimum entitlement provision. That a provision of this kind was enacted is consistent with the premise that the rigour of a high threshold may be mitigated in these defined circumstances.[36]

[183] Parliamentary history is relevant. As Judge Perkins noted in *A Labour Inspector v Sampan Restaurant Ltd*,[37] the strengthening of culpability of directors and other persons defined in s 142W in the ERA as persons involved was explained in a Cabinet paper that led in due course to the Employment Relations Amendment Act 2016.[38] There it was stated by the Minister:

> [42] It is well recognised that deterrence is enhanced if individuals who aid and abet law-breaking can also be held accountable. When that law-breaking relates to the actions of a corporate entity, increasing individual accountability can also promote corporate compliance. There are currently only limited provisions in the Employment Relations Act that permit actions to be taken against a director or other individuals: under section 234, labour inspectors can (with the Authority's approval) seek arrears under the Minimum Wage and Holidays Acts from certain individuals when a company either has insufficient assets or is in liquidation or receivership (if the original case was commenced before those proceedings started).
>
> [43] I propose that accessorial liability provisions be introduced into the employment legislation to hold persons other than the employer to account *if they are found to be knowingly involved in a breach of employment standards*. These provisions are found in the Australian employment legislation – the Fair Work Act 2009 – and in a number of pieces of New Zealand legislation, most recently the Financial Markets Conduct Act 2013.
>
> (Emphasis added)

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35 Employment Relations Act, s 142A.

36 See *Brill,* above n 25, at [16].

37 *Labour Inspector v Sampan Restaurant Ltd* [2018] NZEmpC 69, [2018] ERNZ 196.

38 Hon Michael Woodhouse *Strengthening Enforcement of Employment* Standards (Ministry for Workplace Relations and Safety, 2015)

[184] In introducing the Employment Standards Legislation Bill 2015, the Minister for Workplace Relations and Safety stated the purpose of the accountability provisions:[39]

> ... [means] that persons other than the employer will no longer be able to avoid sanctions if they are *knowingly and intentionally* involved in committing breaches of employment standards.
>
> (Emphasis added).

[185] The Minister reiterated the same point in the second reading.[40]

[186] The Bill was then divided into various other Bills, the pertinent one being the Employment Relations Amendment Bill 2016. The purpose of the new enforcement provisions was explained in debate as being:[41]

> The provisions ... make it harder for individuals or other third parties to hide behind corporate structures of the employer and evade responsibility when they are *knowingly and intentionally* involved in breaching employment standards.
>
> (Emphasis added).

[187] In light of these various considerations, I am satisfied that proof of intentional purposeful actions on the part of the person accused of being involved in a breach is required. I note that the same conclusion was reached by Judge Perkins in *A Labour Inspector v Sampan Restaurant*, albeit for different purposes.[42] I respectfully agree with his conclusion.

[188] Turning to the facts of the present case, the position of the parties as to whether or not Mr and Mrs Grant held the requisite knowledge is essentially as already considered for the purposes of the s 234 analysis.

[189] It is unnecessary to repeat the earlier submissions or reasoning. In short, I am not satisfied that the Labour Inspector has proved that Mr and Mrs Grant knew the commission drivers were employees; it follows that the necessary prerequisite for

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39 (8 September 2015) 708 NZPD 6354.
40 (3 March 2016) 711 NZPD 9394.
41 (10 March 2016), 711 NZPD 9608.
42 *Sampan*, above n 37, at [46].

liability, being proof of intentional and purposeful actions in breach of the relevant minimum standards in any of the respects described in s 142W(1), is not made out.

[190] Accordingly, I find that in respect of the period from 1 April 2016, Mr and Mrs Grant cannot be held liable for the established breaches of minimum standards.

Conclusion

[191] I declare that the four commission drivers were employees.

[192] The Labour Inspector seeks judgment against SLT for unpaid entitlements. For two reasons this is appropriate. First, these were sought at first instance, and the Authority made orders against SLT; however, they will not stand as this judgment replaces the Authority's determinations. Second, options for enforcement against the company of the sums owing to the four employees, whether before or after its liquidation, should not be denied to the Labour Inspector.

[193] I declare STL owes the following sums in respect of unpaid entitlements:

a)	Mr G Kennedy	$13,165.21
b)	Mr B Carnahan	$20,367.21
c)	Mrs T Powell	$32,745.10
d)	Mr G Powell	$13,589.55

[194] The Authority also dealt with the topic of interest, directing the Labour Inspector to calculate the sum due to the drivers as from the date on which proceedings were commenced in the Authority, up to the date of payment. STL was ordered to pay the amount so calculated.[43] I repeat that direction and order in respect of the amounts referred to above.

[195] Mr and Mrs Grant are not personally liable for the breaches, either prior to 1 April 2016, or from that date.

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[43] *A Labour Inspector v Southern Taxis Ltd*, above n 1, at [86]–[87].

[196] The challenge to the first determination of the Authority as to status is dismissed. The challenge to the second determination as to personal liability of Mr and Mrs Grant is allowed. As noted, this judgment stands in place of those determinations.

[197] I reserve costs. There has been a mixed outcome. It may be that costs should lie where they fall. However, the issue should be discussed between counsel in the first instance. If any party chooses to make an application for costs, that application should be made within 28 days of this judgment, and a response given in a like period. I note these would be considered on a Category 2, Band B basis. Submissions regarding the costs issue as removed by the Authority are to be filed and served according to the same timetable, if the parties cannot reach agreement on that topic.

B A Corkill

Judge

Judgment signed at 2.00 pm on 14 May 2020

Schedule A[44]

Claim made for Mr G Kennedy for period 15 October 2013 to 26 October 2015:

a)	Minimum wage arrears	$488.54*
b)	HA entitlements	$10,398.92*
c)	Rest break entitlement	$2,170.46*
d)	Unlawful deductions for logbooks	$108.00*
	TOTAL ARREARS	**$13,165.92**

Claim made for Mr B Carnahan for period 25 March 2015 to 20 December 2016:

a)	Minimum wage arrears ($7,087.03* and $4,349.51)	$11,436.54
b)	HA entitlements	$8,752.52
c)	Rest break entitlement	$97.15
d)	Unlawful deductions for logbooks	$81.00
	TOTAL ARREARS	**$20,367.21**

Claim made for Mrs T Powell for period 30 July 2015 to 31 March 2016:

a)	Minimum wage arrears ($10,704.51* and $11,981.22)	$22,685.73
b)	HA entitlements	$9,955.28
c)	Rest break entitlement	$23.09
d)	Unlawful deductions for logbooks	$81.00
	TOTAL ARREARS	**$32,745.10**

Claim made for Mr G Powell for period 30 July 2015 to 20 December 2016:

a)	Minimum wage arrears ($2,722.13* and $4,872.08)	$7,594.21
b)	HA entitlements	$5,654.94
c)	Rest break entitlement	$277.40
d)	Unlawful deductions for logbooks	$63.00
	TOTAL ARREARS	**$13,589.55**

[44] All sums payable for the period prior to 1 April 2016 are marked with an asterisk (*); the remainder are payable for the period from 1 April 2016.