

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 291
3006596
3012673

BETWEEN	A LABOUR INSPECTOR Applicant
AND	SOUTHERN TAXIS LIMITED First Respondent
AND	MAUREEN GRANT Second Respondent
AND	RONALD GRANT Third Respondent

Member of Authority:	Andrew Dallas
Representatives:	Jodi Ongley, counsel for the Applicant Diccon Sim and Gerrad Brimble, counsel for the Respondents
Investigation Meeting:	On the papers
Submissions	13 September 2018 and 20 September 2018 with further information received on 17 January 2019, 24 January 2019 and 14 March 2019
Determination:	17 May 2019

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector lodged proceedings against Southern Taxis Limited (Southern) alleging various breaches of minimum employment standards in respect of taxi drivers: Brian Carnahan, George Kennedy, Gary Powell and Toni Powell (the

drivers). In *A Labour Inspector v Southern Taxis Limited*¹, the Authority made findings essentially that the drivers were not “commission agents” as contended by Southern but were, in fact and law, employees and issued various orders including in relation to arrears of wages and holiday pay as a consequence.

[2] Southern has challenged that determination to the Court. Southern remains on the companies register and in the hands of directors, Ronald Grant and Maureen Grant (the Grants). However, the business assets of Southern have been sold and based on the affidavit evidence of the company’s accountant, it has no further realisable assets and no income.

[3] After discussion with the parties, this determination deals with a further aspect of the Labour Inspector’s proceedings. Given the circumstances of Southern, the Labour Inspector seeks authorisation under s 234 of the Act, as it was then, to join the Grants, as directors, to its primary proceedings in respect of matters occurring prior to 1 April 2016 and leave to join the Grants under s 142W and s 142Y of the Act for matters thereafter. The Grants oppose these applications.

The Authority’s investigation

[4] This aspect of the Labour Inspector’s employment relationship problem with Southern and the Grants was determined, with the agreement of the parties, “on the papers” under s 174D of the Employment Relations Act 2000 (the Act).

[5] This determination does not refer to all submissions advanced by counsel. However, I record to the extent they are not reflected in this determination, I have fully considered them.

Issues

[6] The issues for determination are:

- a) Should authorisation under s 234 of the Act (now repealed) to join the Grants in respect of matters prior to 1 April 2016 be granted; and
- b) Should leave under s 142W and s 142Y of the Act to join the Grants be granted in respect of matters after 1 April 2016.

¹ [2018] NZERA Christchurch 104

The respective position of the parties

The Labour Inspector

Authorisation under s 234 of the Act

[7] The Labour Inspector says authorisation should be granted to proceed against the Grants, as directors of Southern, under s 234 of the Act, now repealed. The Labour Inspector observed, correctly, that s 234 continues to have application to conduct prior to 1 April 2016 by virtue of cl 7 of Schedule 1AA of the Act.

[8] The Labour Inspector referred to *Brill v Labour Inspector*², where the Court of Appeal endorsed an approach to the granting of leave under now repealed s 234 of the Act. The Court of Appeal observed in *Brill* the practical effect of granting leave was to join another party to existing proceedings.

[9] The Court of Appeal stated in *Brill* that once a Labour Inspector, as the original applicant was in that case, had established on the balance of probabilities the company in question was unable to pay the full amount of monies owing, all that needed to be shown was a “tenable cause of action” against a director (or other person) to obtain authorisation to join them to proceedings. Once authorisation is granted, the Labour Inspector must prove on the balance of probabilities an officer, director or agent of a company directed or authorised default in payment of monies owing.³

[10] The Labour Inspector said reasonable grounds existed based on the affidavit provided by Southern’s accountant to believe the company had insufficient assets to pay the arrears of minimum wages and holiday pay in full.

[11] The Labour Inspector further said the Grants, as directors of Southern, directed or authorised the default in the payment of minimum wages and holiday pay because:

- a) they ran Southern on a day to day basis;
- b) they knew what the minimum wage was because they were paying office staff correctly;
- c) Mr Grant said in evidence to the Authority that if Southern paid the drivers an hourly wage the business would be unsustainable;

² [2017] NZCA 169 (CA)

³ Above n2 at para [27]

- d) the Grants knew the drivers were employees and not “commission agents” as they claimed them to be;
- e) and, as a result were making an intentional business decision to pay the drivers less than the minimum wage.

[12] The Labour Inspector said the Grants knew all the “essential facts” that made the drivers employees including that:

- a) Southern controlled the drivers;
- b) They were an integral part of Southern’s business;
- c) Southern knew the drivers were not in business on their own account;
and
- d) the drivers wanted to be employees.

[13] The Labour Inspector said as a consequence of these factors, a basis for granting authorisation for the period of employment prior to 1 April 2016 has been established.

Leave under s 142W and s 142Y of the Act

[14] As part of reforms to the Act in 2016, s 234 was repealed and replaced by a new framework to assess the liability of persons other than employers for breaching minimum employment standards. This framework insofar as it relates to the Labour Inspector’s case against the Grants is set out s 142W and s 142Y of the Act.

[15] Section 142Y of the Act relevantly provides:

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.

[16] “Employment standards” are defined in section 5 of the Act as:

5 Employment standards means any of the following:

- (a) the requirements of any of sections 64, 69Y, 69ZD, 69ZE, and 130 [of the Act];
- (b) the provisions of the Equal Pay Act 1972;
- (c) the minimum entitlements and payment for those under the Holidays Act 2003;
- (d) the requirements of sections 81 and 82 of the Holidays Act 2003;
- (e) the minimum entitlements under the Minimum Wage Act 1983;
- (f) the provisions of the Wages Protection Act 1983.

[17] Section 142W of the Act defines involvement in breaches as:

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;
- (b) a partner if the entity is a partnership;
- (c) a general partner if the entity is a limited partnership;
- (d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership;
- (e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

(4) This section does not apply to proceedings for offences.

[18] The Labour Inspector said leave of the Authority was not formally required because an amended statement of problem had been lodged alleging the actions of the Grants came within the ambit of s 142W(1)(a) and s 142W(1)(c) of the Act.

[19] The Labour Inspector said these provisions were broad and designed to extend liability to not just employers but other decision-makers as well.

[20] In the present case, the Labour Inspector said it was not disputed the Grants were directors of Southern and were the hands and minds of the business. The Labour Inspector also stated that the Grants were responsible for making all the business decisions for Southern and one of the decisions they made was to intentionally pay the drivers less than the minimum wage.

[21] The Labour Inspector rejected the Grants argument that they should escape liability because they were not aware the drivers were employees. The Labour Inspector said based on an analysis of the statutory provisions supporting s 142Y and s 142W, including s 142Z which sets out, where applicable, the “state of mind” requirements for, among others, directors about the conduct of a body corporate (Southern in this case), that “wilful blindness” was enough for liability to flow to the Grants. In that sense, the Labour Inspector said the applicable test was broader than that applying to s 234.

[22] The Labour Inspector stated that as Southern Taxis was unable to pay the arrears of minimum wages and holiday pay, the Grants are liable under s 142W to pay these arrears.

Mrs Grant and Mr Grant

Authorisation under s 234 of the Act

[23] The Grants said they relied on their own personal experience in the taxi industry as to how to operate Southern. They said they were confused about their legal obligations and this was evidenced by the approach they took to deducting PAYE from drivers they regarded as employees after being approached by the Department of Inland Revenue (IRD). The Grants said they were not alerted to any issue with the approach they took by any professional adviser.

[24] The Grants said there was no basis for finding they had any knowledge Southern was in breach of its legal obligations or they deliberately set out to avoid or cause Southern to avoid any such obligations. The Grants said they gave credible evidence about their genuine belief they were operating Southern in accordance with legal obligations and were entirely open about the arrangements in place for the drivers with the Labour Inspector when first approached.

[25] The Grants said the fact that they correctly applied the law to Southern's office staff was actually to their credit because their diligence in this regard demonstrated the genuineness of the belief that the drivers were contractors. They also said this approach was consistent with industry practice.

[26] The Grants said that Mr Grant's evidence that if Southern paid the drivers an hourly wage the business would be unsustainable was supplemented by him to the effect that if they knew the drivers were employees they would have exercised far more control about when, how and where they worked. The Grants said because they did not exercise this additional control, it was again reflective of their honest belief that the way the business operated was consistent with all legal obligations.

[27] The Grants rejected the Labour Inspector's argument that they knew the "essential facts" which made the drivers employees. The Grants said in order to make a "safe finding" that they knew they were breaching minimum standards the Labour Inspector would need to point to specific direct evidence which undermined their credible evidence of their honest belief that the way they were operating Southern was both common industry practice and legally appropriate.

[28] The Grants said the Labour Inspector had not established "anything like the necessary standard that [they] had the required knowledge that [Southern] was in breach of its obligations".

Leave under s 142W and s 142Y of the Act

[29] The Grants said they were not persons involved in breaches of minimum standards within the ambit of s 142W of the Act. They said the key issues were those of knowledge and intention. The Grants argued that while the s 142 provisions sought to broaden the range of parties potential for breaches, the "mens rea" (the intention or knowledge of wrongdoing) elements applicable to s 234 were undisturbed by their enactment.

[30] The Grants said as the Authority had not made findings that they knew Southern was in breach, and for the reasons given in respect of authorisation under s 234 of the Act, that no such finding is now able to be made.

[31] Finally, the Grants rejected the Labour Inspector's argument that "wilful blindness" arising out of s 142Z of the Act was sufficient to satisfy the grant of authorisation and no evidence was referred to in support of this submission.

The Authority's view

Authorisation under s 234 of the Act

[32] Authorisation under s 234 of the Act to join the Grants to the Labour Inspector's proceedings is granted.

[33] Applying *Brill*, the evidence, including that provided by Southern's accountant, given by the Grants during the investigation meeting and provided by them for the purposes of this determination, establishes on the balance of probabilities that Southern is unable to pay the full amount of arrears and holiday pay found to be owing to the drivers. Consequently, the first limb of the test approved by the Court of Appeal in that case for authorisation under s 234 of the Act is met.

[34] As to the second limb, I find the Labour Inspector has established a "tenable cause of action" against the Grants, being the second requirement of the *Brill* test. The reasons for this are clearly apparent when considering whether the Grants directed or authorised the default in payments of minimum wages and holiday pay to the drivers by Southern under s 234(2) of the Act.

[35] I accept the primary submission advanced by the Labour Inspector as summarised in para [11] above. I also accept the Labour Inspector's submission about the Grant's knowledge of the essential facts or characteristics of an employee versus a contractor. To the extent the Grant's advanced an argument that if they knew the drivers were employees they would have exercised more control over them, I reject this as implausible post-fact reconstruction.

[36] Essentially the various arguments advanced by the Grants in rebuttal to the Labour Inspector's application are founded on either their "genuine belief" as to the correctness of the actions taken in respect of the drivers based on their largely historical experiences in the taxi industry and, presumably in the alternative, although perhaps not necessarily, confusion about their legal obligations created in part, it seems, by the IRD.

[37] In its first determination, the Authority found that the actions of Southern, for which the Grants were the controlling hands and minds, taken in respect of the drivers, including providing them with vehicles, issuing payslips, deducting PAYE and KiwiSaver and treating them differently from contractor drivers, who were provided with contractor agreements, provided their own vehicles and paid "depot fees"⁴, significantly undermined any genuinely, if wrongly held, belief that the drivers were "commission agents" or contractors based on industry experience or practice.

[38] The Grants could have also sought the assistance of legal counsel, as they now have done in respect of these proceedings, to advise about the correctness, or otherwise, of the legal position they had taken in respect of the drivers. Fundamentally, ignorance of the correct legal position in respect of the drivers is no excuse.

[39] Further to the extent the IRD or other third parties contributed to "confusion" about the correctness or, indeed, incorrectness, of the legal position adopted by Southern in respect of the drivers, the Grants had access to professional accounting services to which advice about such matters could be readily obtained. That they did not, or if they did and the advice was not followed or was incorrectly given, is a matter for them and to whatever extent, their accountant.

[40] The effect of granting authorisation under s 234 and finding the Grants directed or authorised the default in payments of minimum wages and holiday pay to the drivers means they are jointly and severally liable with Southern for arrears of the same for the period prior to 1 April 2016.

⁴ Above n 1 at para [63]

Leave under s 142W and s 142Y of the Act

[41] At the outset, I accept the Labour Inspector's submission that leave of the Authority was not formally required due to the amended statement of problem alleging the Grant's actions came within the ambit of s 142W(1)(a) and s 142W(1)(c) of the Act.

[42] For the reasons that follow, and also, to the extent applicable in the discussion above in respect of s 234 of the Act, I find the Grant's are liable under s 142W for the arrears of wages and holiday pay to the drivers.

[43] I accept the Labour Inspector's submission, supported by the evidence, that the Grants were the hands and minds of Southern. I also accept the Labour Inspector's submission that the s 142 regime of the Act is broader in compass than that which is, or was, applicable to s 234. As a consequence of accepting that submission, I agree that "wilful blindness" by the Grants to legal realities of the employee/contractor divide is enough for liability to flow to them.

[44] The Grants, on their own evidence, determined the arrangements to apply to the drivers and they said this was based on industry experience, including their own. To the extent this was a "genuine belief", I find it was not one which was reasonably held by the Grants. That the Grants failed to grasp that such industry experience was no longer applicable, if it ever was, is not a viable defence. Certainly, at the very latest, after their discussions with IRD about the deduction of PAYE for the drivers, the Grants were on notice that something was amiss with the arrangements in place. A prudent employer would seek advice if unsure about the correct arrangements to apply.

[45] As to the Grant's other argument, I reject the notion that the Authority did not make any findings in its first determination that they knew Southern was breaching its legal obligations in respect of the driver. The purpose of that determination was to assess what, if any, liability flowed to Southern. The purpose of this determination is to assess what liability may flow to the Grants as a consequence of findings against Southern. It is a fact so notorious it really requires no restating that body corporates, such as Southern, act through a human agent or agents. In this case, that is the Grants. The actions of Southern and the Grants in respect of drivers are effectively indistinguishable but for the "corporate veil" that separates them. The purpose of s 142W is to visit default by the body corporate on human agents, such as to the Grants

in certain defined circumstances. In essence it operates as a limited lifting of the veil to disclose the human agents behind and to apportion liability between them and the body corporate for misdeeds in respect of breaches of minimum employment standards.

[46] To the extent the defences set out in s 142ZD are available to the Grants, they were not raised by counsel. However, I am satisfied that none of these defences, if available, would be applicable in the circumstances of this case.

[47] The effect of s 142Y and the finding the Grants actions fall within the ambit of s 142W means they are jointly and severally liable with Southern for the drivers arrears of wages and holiday pay for the period from 1 April 2016.

Next steps

[48] The following issue is reserved:

- a) Are Southern and Ronald Grant and Maureen Grant liable for the imposition of penalties for the contraventions of the Act, Minimum Wage Act, Wages Protection Act and Holidays Act and if so, in what quantum.

[49] If the Labour Inspector wishes to press these matters, an advisory should be made to the Authority Officer about this and a case management conference will be convened to progress the same.

Costs

[50] Costs are reserved pending disposal of all matters before the Authority.

Andrew Dallas
Member of the Employment Relations Authority