

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

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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:	16 and 17 October 2017 in Dunedin
Submissions	22 November 2017, 12 December 2017 and 9 January 2018 with further information received up to, and including, 17 July 2018
Determination:	26 July 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Labour Inspector, David O'Shea says Southern Taxis Limited (Southern) contravened various minimum employment standards as the employer of Brian Carnahan, George Kennedy, Gary Powell and Toni Powell (the drivers).

[2] Ms and Mr Powell drove taxis for Southern between 30 July 2015 and 23 December 2016 and subsequently went to work for the new owners after the business was sold. Mr Kennedy drove taxis for the company between October 2013 and October 2015 and Mr Carnahan between 21 April 2015 and 23 December 2016.

[3] The Labour Inspector alleged in relation to the drivers, Southern Taxis:

- a) failed to provide employment agreements in contravention of s 65 of the Employment Relations Act 2000 (the Act);
- b) failed to maintain wage and time records in contravention of s 130 of the Act;
- c) failed to pay, at least, minimum wages in contravention of s 6 of the Minimum Wage Act 1983;
- d) contravened ss 24 and 25 of the Holidays Act 2003 (payment of holiday pay);
- e) contravened ss 46, 49, 50, 55, 56, 60, 65, 69, 71 and 72 of the Holidays Act (payment, variously, of public holiday pay and for sick leave and bereavement leave);
- f) contravened s 81 of the Holidays Act (failure to keep records);
- g) failed to pay accrued holiday pay on termination of employment in contravention of ss 27(2), 75(1)(b) and 75(2)(a) of the Holidays Act; and
- h) made unlawful deductions from wages owed in contravention of s 5 of the Wages Protection Act 1983.

[4] For these contraventions, the Labour Inspector sought arrears and penalties from Southern and its directors. The directors and shareholders of Southern Taxis are Maureen Grant and Ronald Grant.

[5] In reply to the Labour Inspector's statement of problem, Southern Taxis, through its directors, advised the drivers were independent contractors. It further advised Southern was no longer trading, its assets had been sold and it would not be able meet any orders for arrears and/or penalties.¹ As a consequence, the Labour Inspector lodged further and amended statements of problem seeking authorisation under s 234 of the Act (now repealed) to join Mrs Grant and Mr Grant, as directors, to its primary proceedings in respect of matters occurring prior to 1 April 2016 and leave to join Mrs and Mr Grant under s 142W and s 142Y of the Act for matters thereafter.

The Authority's investigation

[6] During a case management conference, the parties agreed with the Authority that all proceedings should be consolidated and heard together for reasons of ease and litigation efficiency.

[7] During the subsequent investigation meeting, I heard evidence from Labour Inspectors, Mr O'Shea and Jessica Lemon. I also heard evidence from Inland Revenue Community Compliance Officer, Rangi Wharepapa and the drivers. For Southern, I heard evidence from Maureen Grant, Ronald Grant and Rex Johnston. I also received an affidavit prepared by Southern Taxis' accountant, Stephen Dunbar.

[8] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during my investigation of the Labour Inspector's employment relationship problem. While I have not referred to all submissions advanced by counsel in this determination, I record, for completeness, I have fully considered them.

Issues

[9] This issues for determination were:

- (i) Were the drivers employees of Southern?; and
- (ii) If so, are the drivers owed arrears of wages under various provisions of the Minimum Wage Act, Wages Protection Act and Holidays Act?.

¹ A review of the Companies Office website discloses that notice has been given by the Registrar to remove Southern Taxis Limited from the New Zealand Companies Register under s 318 of the Companies Act 1993. The Labour Inspector may, as a consequence of this determination, choose to object to this course and if so, he must, according the website, lodge an objection by 5pm on 13 August 2018.

Narrative

[10] Southern is a registered company, it was incorporated on 13 August 2002. The company has ceased trading but Southern remains in the hands of its directors.

[11] On 30 May 2016 a former driver of Southern, Mr Kennedy contacted the Ministry of Business, Innovation and Employment's contact centre and claimed he had not been paid holiday or public holiday pay during his employment. The Labour Inspector said three complaints had also been directly received by the inspectorate from Mr Carnahan, Ms Powell and Mr Powell. These complaints alleged non-payment of wages and holiday and public holiday pay. The drivers would say they drove cars owned by Southern Taxis on a shift basis.

[12] The inspectorate took statements from the four complainants. Mr Kennedy provided the Labour Inspector with his log book and the other drivers provided schedules of hours worked and remuneration received. The Labour Inspector recorded this information in spreadsheets so as to gain a full understanding of the patterns of work and remuneration.

[13] The Labour Inspector and a colleague, Jessica Lemon visited the premises of Southern Taxis on two occasions. During the first visit on 27 June 2016, they encountered Maureen Grant and a notice requiring the supply of wage, time and holiday records was left with her. On 28 June 2016, the Labour Inspectors returned to the premises to follow up on the notice and this time encountered Maureen and Ronald Grant.

[14] The Labour Inspector said Ronald Grant advised Southern considered the drivers "commission agents" and only maintained records relating to the fare take from which commissions were calculated and paid to the drivers. The Labour Inspector said he was also told Southern Taxis had never provided employment agreements to its "commission agents" but it did provide contractor agreements to its contract drivers, of whom there were four. Ronald Grant provided the Labour Inspector with log books (referred to as "green slips") and a list of current and former drivers.

[15] The Labour Inspector then prepared an investigation report. The findings of the report, in summary, were:

- a) The drivers were employees;
- b) Southern did not provide employment agreements to its employees;
- c) Southern did not maintain wage, time and leave records for employees;
- d) Southern did not pay its employees, at least, the minimum wage but rather paid them 40% commission of gross weekly fare takings;
- e) Southern did not pay employees annual holiday pay, public holiday pay or provide special leave (sickness and bereavement); and
- f) Southern did not gain the consent of the employees to make deductions from wages for the purchase of logbooks.

[16] In deciding the drivers were employees, the Labour Inspector reviewed the information made available during the investigation within the context of s 6 of the Act and relevant case law. The Labour Inspector said the effect of that finding meant Southern had breached various statutory requirements and minimum employment standards.²

Were the drivers employees of Southern Taxis?

[17] This question is central to the matters before the Authority. If it is determined the drivers were not employees, the parties agree the rest of the Labour Inspector's case falls away. The cases of the parties put to the Authority, and the evidence supporting each, are set out below.

The Labour Inspector's case

[18] The Labour Inspector emphasised the requirement under s 6 of the Act was to examine the real nature of the relationship between Southern and the drivers. The Labour Inspector referred the Authority to the Supreme Court in *Bryson v Three Foot Six Limited*³ and identified the relevant tests to be applied: (i) the intention of the parties, (ii) the control test, (iii) the integration test and (iv) the fundamental test.

² Above at [2]

³ [2005] NZSC 34 (SC)

Intention of the parties

[19] The Labour Inspector said the evidence established the drivers, all of whom approached Southern for work, intended to be employees. All drivers had been independent contractors before in the taxi industry and they all knew what that entailed. The Labour Inspector accepted there was no common intention in terms of employment status and the drivers were clear they would be paid 40 percent of the gross fare take (down from 45 percent that some the drivers had previously been paid by Southern). However, Mr Kennedy did request holiday and sick pay and Mr Powell requested ACC payments after he was assaulted. The Labour Inspector submitted that the case law demonstrated the greater knowledge of the employee, the less willing a court would be to adjust the plain bargain between them.

[20] The Labour Inspector said Southern provided the drivers with a vehicle to use as a taxi, for which all expenses were paid. They were not charged a “depot fee” by Southern, which contractors were customarily charged, and had no control over fare settings or takings. They also received payslips, did not file their own tax returns and were not invoiced by Southern for ACC levies.

[21] The Labour Inspector said Southern clearly knew and understood the difference between contractors and employees. It treated its contractors differently from the drivers, who were treated more in line with Southern employees engaged as dispatchers. Southern provided contractors with written agreements, which set out the relationship between them and this group, effectively, operated their own businesses. The Labour Inspector said this group were actually the “commission agents” Maureen and Ronald Powell referred to in their evidence.

The control test

[22] The Labour Inspector referring to *Bryson* said the extent to which Southern exercised control over the drivers was also a consideration relevant to whether they were employees or contractors. The Labour Inspector identified a number of examples from the evidence which demonstrated a significant degree of control over the drivers activities by Southern.

[23] The Labour Inspector said the drivers were on a roster which was prepared by Southern and all drivers said in their evidence they saw it posted on a wall within the company's premises. This was confirmed by Mr Johnston who said the roster was produced every month and recorded the drivers' availability, including leave, to ensure adequate cover.

[24] The Labour Inspector said while the evidence disclosed there was some element of flexibility in rostering, there was a limit to this and the drivers worked regular shifts and were available for cover, as necessary. Uniforms were provided to the drivers. While the wearing of these was optional, it was compulsory to wear the provided necktie.

[25] The Labour Inspector said that drivers logged on and off Southern's computerised system, were monitored by GPS, checked with despatch before taking breaks, notified such breaks, which were recorded by despatch, and recorded times and jobs in their log books, which were all matters relevant to control. The Labour Inspector said the evidence of the drivers was if they were personally non-compliant with relevant taxi regulations they were not allowed on the road. Consequently, their activities were closely scrutinised by Southern to ensure a maximum number of taxis remained on the road.

[26] The Labour Inspector said while Mr Kennedy did not perform as much work as the other drivers as he preferred airport work, he remained "available for work" and would do other jobs if asked by a despatcher.

The integration test

[27] The integration test requires an analysis as to whether a worker is an integral part of an organisation. The Labour Inspector said the drivers were "part and parcel" of Southern. This was so, it was submitted, because Southern had several important contractual obligations including with Southern District Health Board and Dunedin Airport which required it to provide regular services to those entities. These contracts were undertaken in addition to Southern's general obligations to provide taxi services.

[28] The Labour Inspector said Mr Grant's evidence that Southern, by the terms of its licence, had to provide taxi cover twenty-four hours per day, seven days per week basis, demonstrated the integral nature of the drivers to Southern's operation as they were rostered to work and directed to be available during certain hours. Evidence of integration was also drawn from the provision of vehicles by Southern, which were not able to be hired to other drivers or driven for other taxi companies.

[29] The Labour Inspector said Mr Grant conceded in his evidence that if Southern was required to meet minimum employment standards for the drivers, its business model would not have been sustainable.

Fundamental test

[30] The fundamental test requires an examination as to whether the drivers were in business on their own account. In other words, did the drivers assume an element of financial risk as a result of participating in Southern Taxis including in its profit and loss.

[31] The Labour Inspector said the drivers were not in business on their own account because they did not provide their own vehicles and were rostered to meet Southern's contractual and statutory obligations. The Labour Inspector said an analysis of the drivers earnings derived from their log books demonstrated this and the relatively poor earnings they received as a consequence. Mr Kennedy worked for Southern for 99 weeks and achieved the minimum wage on 19 occasions, Mr Carnahan worked for 86 weeks and achieved the minimum wage on 4 occasions, Mr Powell worked for 76 weeks and achieved the minimum wage on 10 occasions and Ms Powell worked for 76 weeks and achieved the minimum wage on 4 occasions.

[32] Conversely, the Labour Inspector said Mr Johnston's evidence was that Southern's contractors could earn good money if they varied their work practices, increased their hours or targeted specific events – for example, cruise ship arrivals. Such options were not open to the drivers.

[33] The Labour Inspector said while the drivers were required to reimburse Southern for their initial taxi float, they were repaid this when their employment ended.

[34] The Labour Inspector submitted that, on the balance of probabilities, the drivers were not in business on their own account.

Taxation issues

[35] The Labour Inspector identified a number of taxation issues which were said to be relevant to an overall assessment as to whether the drivers were employees or contractors. The Labour Inspector pointed to the evidence of Mr Wharepapa about the IRD's treatment of taxation in the taxi industry and the relevant, and different, forms provided to contractors and employees. Mr Wharepapa said a contract driver must register for GST if they earn over a specified amount. The Labour Inspector said the evidence was that none of the drivers had registered but were in past when running their own taxis.

[36] The Labour Inspector said the evidence established that Southern commenced paying PAYE taxation for drivers in response to a direct approach from IRD. The Labour Inspector said Mr Grant said he recalled drivers filling out new tax forms and the commission being adjusted from 45% to 40%. In addition, Mr Grant said Southern paid the employer contribution for KiwiSaver for some of the drivers.

Southern's "industry practice" argument rejected

[37] The Labour Inspector rejected Southern's argument that the industry practise was that the drivers were contractors and pointed to Green Cabs as an example where drivers were employees receiving, at least, minimum wages. The Labour Inspector said there were only two categories of worker in the Taxi industry: contractor or employee. It rejected the notion of a third category called "commission agent" or some other such title.

Southern's case

[38] Southern did not disagree with the Labour Inspector's reliance on *Bryson* or the various tests to be applied in the circumstances but vigorously contested Labour Inspector's preferred outcome. Southern said the drivers were not employees, but independent contractors or "commission agents".

Intention of the parties

[39] Southern said it recognised the absence of a written agreement between it and the drivers made ascertaining the intention of the parties more difficult. However, it was submitted that its intention could be ascertained in other ways, including oral declarations and the context of the commercial environment.⁴

[40] Southern said relevant factors for consideration were: (i) it had a long standing practice of engaging independent contractors, (ii) it was aware of its obligations as an employer and met these in respect of its despatch staff, (iii) it was clear with the drivers about the terms of their engagements as commission only; (iv) it exercised only limited control over the drivers and did not direct them in such a way as to increase their fare yield, (v) the drivers knew the engagement was on a "no work, no commission" basis; (vi) the practice of commission only drivers was common within the taxi industry, (vii) if the drivers were employees another business model would be necessary and, (viii) it made no attempt to conceal the arrangement from the Labour Inspector.

[41] Southern said the drivers were all very experienced in the taxi industry and were familiar with its engagement arrangements. Southern said none of the drivers raised any concerns at the time of accepting the arrangements. Southern said the evidence of Toni Powell, Gary Powell and George Kennedy made it clear that each of the drivers entered into the arrangements freely and fully aware of its terms, including that they were assuming the risk as to how much they earned.

[42] Southern asserted the issue of minimum standards was only raised after it was suggested by a third party. Southern said, in response to the Labour Inspector's submission on this point, the drivers were treated quite differently from the despatchers who were issued with individual agreements, paid hourly wages and were entitled to annual leave, sick leave and public holidays.

⁴ *Muollo v Rotaru* [1995] 2 ERNZ 414

[43] Southern said when having regard to all the facts, including the parties' conduct and the commercial context in which the agreements were made, all parties intended the drivers to be contractors.

The control test

[44] Southern acknowledged it exercised a measure of control over the drivers but said this was because of the requirements of its taxi services licence and in the interests of "maintaining its brand". Southern rejected the view expressed by the Labour Inspector it was required to keep a minimum of taxis on the road at any one time. However, it accepted it maintained a roster to "meet demand" but the mere presence of a roster did not make the drivers employees.⁵ Southern also submitted the maintenance of an airport roster was "good management" practice and not evidence of employment.

[45] Southern said the drivers were placed on, and taken off, the roster based upon their notified availability. Southern further said the drivers had a lot of flexibility within shifts including about where and how they performed their work and there was no requirement to seek the permission of despatch before taking breaks or, on its view of the evidence, despatchers did not prevent drivers from taking breaks.

[46] Southern submitted notifying drivers they were approaching legal limits for driving, suggesting they take breaks and non-allocation of work during breaks was a service provided to all taxi drivers, including its contractors, and was not evidence of actively managing drivers' hours.

[47] Southern said the level of control exercised over the drivers was "minimal" and they were free to determine to a great extent how and where they worked including obtaining other streams of work independent of despatch.

⁵ See, *McGreal v Television New Zealand* (2007) 4 NZELR 345

Integration test

[48] Southern said each of the drivers was a standalone business but none were integral to its business. Southern said it could have exercised more control over the drivers including to work in specific areas and at specific times and could have used other methods of control such as performance management. However, it did not pursue that form of business model because the drivers were contractors and they were free to operate at their own pace.

[49] Southern conceded it provided the drivers with vehicles and paid the running costs of these. It said while the drivers did not provide their main tool of trade (a car), this was by no means determinative.

[50] Southern rejected the notion that the drivers were required to wear a uniform. It characterised the situation as being something more akin to a “dress code” and drivers were free to wear clothing consistent with it. Southern said owner drivers were also required to adhere to the dress code and it was not an indicator of employment.

[51] Southern said it was not the exclusive provider of the drivers’ work and they were free to develop and secure their own work streams to maximise their earnings.

The fundamental test

[52] Southern said despite providing the drivers with cars, they were in business on their own account. The cars, themselves, merely served as removing a barrier to the drivers who could not afford to supply such a tool of the trade themselves.

[53] Southern said Toni Powell, Gary Powell and Mr Carnahan all said in their evidence they provide their own float. Southern also said all drivers accepted they were taking a degree of risk and Mr Kennedy, who it said accepted the commission only arrangement, appeared surprised to learn he may end up being paid the minimum wage as a result of the Authority’s proceedings.

[54] Southern said the drivers, with an exception of one day per week when the day-shift drivers were rostered to start at 5am, largely directed their own work. Southern said while the drivers did not submit invoices to Southern, the “documents kept effectively served the role otherwise fulfilled by invoices”.

[55] Southern said in commencing to pay PAYE for the drivers it was “attempting to do the right thing” rather than accepting the drivers were employees. The evidence established that neither Ronald nor Maureen Grant sought independent or professional advice in respect of this decision,

[56] Southern submitted while there were factors going either way in terms of the fundamental test, on balance, the relationship was one of principal and contractor rather than employer and employee.

Industry practice

[57] Southern said there were a range of engagement practices within the taxi industry and the arrangement chosen by it was common including by owner-drivers who engaged a second driver to keep their taxis on the road.

[58] Southern submitted while industry practice was by no means determinative of the relationship between it and the drivers; it was not irrelevant either. Southern said that in the present case it was a “strong indicator” the true relationship between it and the drivers was principal/contractor.

Tax

[59] Southern did not dispute the evidence of Mr Wharepapa but noted the suggestion that it commence paying PAYE for the employees came from the IRD. Further, Southern submitted, relying on the Authority’s decision in *Hook v JB’s Contractors Ltd*⁶ that while taxation was an indicator of employment status it was “not a defining factor”.

⁶ (2001) 6 NZELC 96,207

Evaluation

[60] Section 6 of the Act requires the Authority to determine the true nature of the relationship between Southern and the drivers, considering all relevant matters including any matter that indicates the parties' intention. Further, the Authority is not to treat as a determining matter any statement by Southern or the drivers that describes the nature of their relationship. The Authority accepts the parties' submissions that *Bryson* is the leading case in this area and the relevant tests and factors they identified are those to be applied. Each of these is addressed in turn below.

Intention

[61] From the outset, it is clear from the evidence there was no written agreement between Southern and the drivers which set out the nature of their relationship. As intention was not apparent from express written terms, intention had to be ascertained from conduct and context.

[62] The Labour Inspector said while there was no common intention between the parties that the drivers were employees, they had all approached Southern with a view to becoming such and believed they would be paid via a fare sharing model whereby they received 40% of the gross fare take. In addition, several drivers sought holiday and sick pay.

[63] Conversely, Southern argued, in effect, there was a common intention and that was the drivers were "commission agents" or independent contractors. Unfortunately, for Southern, its own actions significantly undermined its position in this regard. The evidence clearly established Southern:

- a) had express written agreements with its independent contractors;
- b) provided a vehicle to drivers;
- c) met the running costs of the vehicle;
- d) charged the contractors a "depot fee", but not the drivers;
- e) deducted PAYE from drivers;
- f) issued the drivers with payslips; and
- g) paid some of drivers' employer KiwiSaver contributions.

[64] Southern also relied on industry practice as a means of ascertaining intention and it said the drivers were very experienced in the taxi industry and knew what it was to be commission agents/independent contractors. However, industry practice was not what it was. Southern charged its contractors a “depot fee, but did not charge the fee to the drivers. And, Green Cabs in Dunedin had moved to pay its drivers, at least, the minimum wage. Indeed, the move by Green Cabs may also be evidence of a belated recognition within the taxi industry that aspects of historical “industry practice” actually contravened the law.

[65] While not determinative of the outcome, at this stage of the analysis of the relationship between Southern and the drivers the balance is in favour of the true intention of the parties being that of employer/employee rather than principal/contractor.

The control test

[66] Southern acknowledge a degree of control over the drivers but said this was minimal and was merely directed at meeting the requirements of its taxi services licence and maintaining its brand. Southern accepted it maintained a roster but said, in effect, the drivers were able move on and off and otherwise self-direct the performance of their work. Southern said a roster was not evidence of employment, nor, for that matter, was the monitoring of legal limits for driving or requiring the logging of times and jobs.

[67] However, against this, the evidence of the drivers was clear about the requirements placed on them by Southern in terms of the purpose of the roster, their interactions with despatch, the recording of times and jobs in log books and the close scrutiny of compliance requirements to ensure maximisation of taxi coverage.

[68] While there may have been some element of flexibility over roster arrangements, this seemed to be more a function of the peripatetic nature of the taxi industry and the extent to which, at least, minimum coverage was required rather than for any other reason.

[69] While again not determinative of the outcome, at this stage of the analysis of the relationship between Southern and the drivers the balance remains in favour of the parties being employer/employee rather than principal/contractor.

The integration test

[70] It was clear from the evidence there was a significant degree of integration of the drivers into Southern's business. They were rostered to work. And, they were provided with fully maintained vehicles by Southern, which were not able to be driven by other drivers or driven for other companies. The Labour Inspector also pointed to the provision of uniforms, of which the drivers had to, at least, wear neckties. Southern described this as merely a dress code. However, and in any event, many employers do not require employees to wear uniforms and therefore little, if anything, turns on this point in isolation.

[71] The Labour Inspector submitted the drivers were "part and parcel" of Southern and pointed to its contractual obligations with the Southern District Health Board, Dunedin Airport and its general obligation to provide taxis under its licence. On one approach to the evidence, it could be said the drivers fulfilled all of Southern's contractual and regulatory obligations and its contractors were free to pursue other, and potentially more lucrative, work. In contrast, Southern said it was not the sole provider of drivers' work and they could secure their own additional work. However, it was clear from the evidence they were still accountable to Southern for this and, indeed, performed it in a supplied and fully-maintained vehicle.

[72] Having considered the available evidence with regard to the integration test, the overall balance stills remains in favour of the parties being employer/employee rather than principal/contractor

The fundamental test

[73] As stated above, the fundamental test, often referred to as the "economic reality test", requires an examination as to whether the drivers were in business on their own account.

[74] On the evidence, the drivers did not invest any capital to initiate (or maintain) their relationship with Southern. Further, the drivers did not stand to gain or lose any capital from the relationship regardless of its length. The drivers' relationship with Southern did not result in the creation of tangible and/or intangible – such as, for example, “good will” – business assets. The drivers' only discernible business expense was the purchase of log books. They did not contribute to cost of despatch, pay depot fees or other compliance costs. Southern Taxis made PAYE deductions and paid some employer KiwiSaver contributions. The drivers did not submit tax returns at the end of financial year or claim deductions. The primary tool for performing the work for Southern was a vehicle, which it supplied and fully maintained.

[75] There was nothing particularly entrepreneurial, artistic or novel about the tasks being performed by the drivers. They were not engaged in a profession, trade or distinct calling. The requirements to perform the work for Southern were a driver's licence, an ability to comply with regulatory obligations as a taxi driver and, presumably, taxi driving experience (although this did not seem to be a key requirement). The tasks performed were repetitive and for a single entity: Southern. There is, however, no doubt the drivers took pride in the work they performed and the role they played within Dunedin's public transport system.

[76] It cannot be said, on the evidence, the drivers were operating autonomous businesses. Within the context of the fundamental test, this strongly points to the relationship being one of employment.

[77] The overall balance when applying this test remains in favour of the parties being employer/employee rather than principal/contractor.

[78] While not part of the decision-making process giving rise to the finding about the application of the fundamental test to the facts, I would, at this point, make the following two observations.

[79] The system operated by Southern generated work. Regardless of how the drivers engaged with the system: by roster, by logging on to Southern's despatch system or taking a casual fare; the work generated and required to be performed was the work of driving a passenger from A to B or, perhaps, C. The drivers could legitimately expect on going work because the system, if working correctly, continued to produce it.

[80] On the evidence, even if the drivers were providing their own vehicles to perform the work, I would likely find the drivers were not operating autonomous businesses. While some capital may have been expended by the drivers in this scenario, the end result of such a venture would still be a single realisable business asset of a second-hand vehicle, with probable high mileage. In such circumstances, it would be difficult to differentiate the drivers from any other private citizen trying to sell a vehicle on the open marketplace.

Conclusion about the drivers' status

[81] Having analysed the evidence within the context of the relevant tests and s 6 of the Act and drawing together all the fibres of the case, I find, on the balance of probabilities Mr Carnahan, Mr Kennedy, Mr Powell and Ms Powell were, in fact, and in law, employees of Southern.⁷

Claim for arrears

[82] Having found the drivers were employees of Southern, they are entitled to, at least, minimum wages for all hours worked and also holiday pay. The Labour Inspector calculated arrears of wages, holiday pay and log book expenses owed by Southern to the drivers based on the information disclosed during his investigation. A slight revision was made during the Authority's investigation to take account of an inadvertent mathematical error. The arrears owed to each driver as follows:

Name	Pre 1 April 2016		Post 1 April 2016		Log Book Expenses	Grand Totals
	Holiday Pay	Minimum Wages	Holiday Pay	Minimum Wages		
Brian Carnahan	\$1,750.79	\$7,087.03	\$6,716.75	\$4,349.51	\$81	\$19,985.08
George Kennedy	\$12,912.23	\$19,905.40	–	–	\$117	\$32,934.63
Gary Powell	\$367.28	\$2,722.13	\$5,038.63	\$4,872.08	\$63	\$13,063.12
Toni Powell	\$576.73	\$10,983.32	\$8,426.76	\$11,702.41	\$81	\$31,770.22
Cumulative Total	\$15,607.03	\$40,697.88	\$20,182.14	\$20,924.00	\$342.00	\$97,753.05

⁷ Employment Relations Act, s6(1)(a)

[83] Having considered the Labour Inspector's investigation report, the evidence of the parties at the investigation meeting including the absence of any alternative calculations or other information calling into question, or contradicting, those provided by the Labour Inspector, I find then, on the balance of probabilities, Southern has failed to pay the drivers minimum wages and holiday pay as set out in the table above. I am also satisfied the claim for log book expenses is appropriate and made out.

[84] It is appropriate in all the circumstances of this matter to require Southern to pay arrears of wages and holiday pay and log book expenses to the drivers as calculated by the Labour Inspector under s 131 of the Act.

Claim for interest

[85] The Labour Inspector sought interest on the arrears and other monies owing to the drivers. The awarding of interest under the Act is discretionary but when awarded, it is calculated in accordance with Interest on Money Claims Act 2016. The claim for interest was not resisted by Southern other than via its general defence that the drivers were independent contractors.

[86] It is appropriate in the circumstances of this case to award interest. The Labour Inspector is directed to calculate interest on the amounts payable to the drivers.⁸ The applicable date for the calculation of interest is the date of commencement of these proceedings in the Authority, ending on the date the drivers are paid in full. Southern must pay the interest as calculated by the Labour Inspector.

Summary

[87] In summary:

- a) Mr Carnahan, Mr Kennedy, Mr Powell and Ms Powell (the drivers) were employees of Southern;
- b) The arrears of wages and holiday pay and log book expenses calculated by the Labour Inspector must be paid by Southern to the drivers;
- c) Interest, as calculated by the Labour Inspector, must be paid on the amounts payable to the drivers; and

⁸ The Ministry of Justice has developed a tool for calculating interest: www.justice.govt.nz/fines/civil-debt-interest-calculator/

- d) The effect of the finding the drivers were employees means the issues set out below are now required to be determined by the Authority.

Next steps

[88] The following issues are reserved for further determination by the Authority:

- a) Is Southern 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?;
- b) Should authorisation under s 234 of the Act (now repealed) to join Mrs Grant and Mr Grant in respect of matters prior to 1 April 2016 be granted;
- c) Should leave under s 142W and s 142Y of the Act to join Mrs Grant and Mr Grant be granted in respect of matters after 1 April 2016; and
- d) Whether parties should contribute to the costs of representation of the other(s)?

[89] An Authority Officer will contact the parties shortly to discuss a timetable for a sequential exchange of submissions on those matters.

Costs

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

Andrew Dallas
Member of the Employment Relations Authority