

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 192/10  
5302084

BETWEEN                      BEATRICE KATZ  
   Applicant  
  
AND                              MANA COACH SERVICES  
   LTD  
   Respondent

Member of Authority:      G J Wood  
  
Representatives:            Kevin O'Sullivan for the Applicant  
   Darren Mitchell for the Respondent  
  
Investigation Meeting:      On the papers  
  
Submissions Received:      18 November 2010  
  
Determination:              30 November 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Ms Katz claims the sum of \$562.50 from the respondent (Mana), being her legal costs incurred after being charged with careless driving, where she was discharged without conviction.

**The Facts**

[2]     Ms Katz was employed as a bus driver with Mana. On 10 June 2009, she was involved in a bus accident in the course of her employment. According to the Police summary of facts, the bus she was driving cut the corner, crossed the centre line and collided with a car on the other side of the road that had stopped to give way. That car was entirely within its own lane, and had come to a complete stop while waiting to turn.

[3] Ms Katz told Police that she had not seen the vehicle waiting at the intersection, and that she only knew that it was there when she heard the impact. According to the motor accident claim form prepared by Ms Katz *as I approached or got further towards the corner saw a vehicle wanting to turn right into Marton Road when it was too late and hit vehicle.*

[4] Ms Katz was charged with operating a vehicle carelessly, which carries a maximum fine of \$3,000. The result of proceedings was that she was discharged without conviction (which may occur at the Court's discretion where as here a person is found guilty or pleads guilty), which is deemed to be an acquittal. Ms Katz now claims the legal costs of her representation in Court, which totalled \$562.50. Ms Katz claims that Mana is obliged to identify her costs in what she states was a successful defence of the prosecution, because of her acquittal. Mana resists this claim. Despite mediation the matter has not been resolved and it therefore falls to the Authority to make a determination.

### **The Law**

[5] In *Attorney-General v. Jones* unreported High Court Wellington M73/79, 16 June 1981, the High Court relied on Halsbury's Laws of England for the proposition that an employee is entitled to be indemnified for expenses incurred as a result of their work, including in some cases, legal costs in defending cases brought over their activities while at work. In *Jones* the High Court noted, at page 9, that:

*The general rule is that an employee is to have indemnity where he acted in obedience to his orders or in the execution of his authority or in the reasonable performance of the duties of his employment.*

[6] It was held, in a case involving strict liability, and where there was no allegation that Mr Jones had acted in breach of his contract of employment, that his discharge without conviction was deemed to be an acquittal and therefore his employer was required to indemnify him for his legal costs.

[7] In *New Zealand Tramways & Public Passengers Transport Employee's Union Inc. v. Wellington City Transport Ltd* [2010] NZEMPC12, the Court addressed, albeit *obiter*, the issue of whether or not there is an obligation under common law for employers to indemnify employees in such circumstances.

[8] The Court referred to *Halsbury's Laws of England* 4th Ed. Reissue, 2005, Volume 16(1A) Employment at[39] where it states:

*An employer is under an implied duty to indemnify or to reimburse the employee ... in respect of all expenses incurred by the employee either in consequence of obedience to his orders, or incurred by him in the execution of his authority, or in the reasonable performance of the duties of his employment.*

*Notwithstanding the fact that an employee was acting in the course of his employment, he may lose his right of indemnity or reimbursement where the liabilities or expenses did not arise out of the nature of the transaction which he was employed to carry out, but was solely attributable to his own default for breach of duty.*

[9] The Court referred to the Court of Appeal's judgment in *Christchurch City Council v Davidson* [1996] 2 ERNZ 1, and the Court's earlier judgment, involving the unsuccessful prosecution of employees on criminal charges, where the Court had held that:

*The indemnity ... does not extend to cases in which criminal conduct is established.*

*... It is self evident that no one may be indemnified for knowingly committing a criminal act, ...*

[10] In *Davidson* the Court also noted however:

*... there is no reason why an employee or other agent should not be indemnified for the cost of defending herself or himself against an allegation which in the event is never established that he or she committed a crime in the course of the agency or employment. That is not indemnifying for criminal conduct, but indemnifying for the consequences of working in the employer's or principal's interests.*

[11] Finally, the Court of Appeal found, at 24:

*...indemnification... does not extend to expenses incurred in defending an allegation that the person charged did something which he or she did not do and which it was not his or her duty to do. The reason is such expenses were not incurred by the worker as an agent of the employer in the reasonable performance of the vehicle's duties...*

## Determination

[12] The parties' employment agreement does not deal with the issue of indemnification. Therefore this case must be decided, unlike the *Tramways* case, on the basis of the common law of indemnification. A further point for distinguishing the *Tramways* case is that in that case the bus driver successfully defended the charges because they were withdrawn.

[13] *Jones* can also be distinguished, on the basis that there was no issue there about the employee acting in breach of the contract of employment (quite the opposite to here as shown in para 16), and the charge was one of strict liability and thus Mr Jones as the master of a vessel in un-seaworthy condition was the appropriate person to charge.

[14] The reason for the comments of the Court of Appeal in *Davidson* are apparent when one considers the obligation on an employee under common law to pay special damages for breach of the implied term that an employee will exercise due care and diligence in his work, for any such damages suffered by an employer (see for example *F v. Attorney-General* [1994] 2 ERNZ 62 and *Masonry Design Solutions Ltd v. Bettany* unreported Colgan CJ AC30/09 21, August 2009).

[15] As Mr Mitchell alluded to in his submissions, Mana could have claimed all such costs against Ms Katz given that Ms Katz admitted to being in the wrong in the car accident, and thus she was and is exposed to such a claim. If such a claim was made and was successful and Ms Katz was successful in her claim then the illogical situation will have occurred whereby Mana was required to indemnify Ms Katz for her legal costs, but Mana could reclaim those legal costs against Ms Katz because of the breach of her employment agreement.

[16] In this case it appears that Ms Katz admitted liability at the time. She must have either been found or pleaded guilty in order to have been discharged without conviction. Despite this Ms Katz claims that she is entitled to be indemnified by Mana on the basis of her acquittal. I conclude that she is not entitled to be indemnified because of an admitted breach of duty, namely the negligent crossing of the centre line and thus causing an accident. Mana does not employ its drivers to crash into cars on the other side of the road. As noted above the reasonable performance of one's

duties does not extend to this type of negligence and therefore neither does Mana's duty to indemnify. It therefore follows that Ms Katz' claim must be dismissed and I so determine.

### **Costs**

[17] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**