

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 22
5629678 and 5630599

BETWEEN A LABOUR INSPECTOR
Applicant

A N D ALPS TRAVEL COMPANY
LIMITED
Respondent

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LIMITED
Applicant

A N D A LABOUR INSPECTOR
Respondent

Member of Authority: David Appleton

Representatives: Aaron McIlroy and Melinda Geary, Co-Counsel for
Applicant
Rob Davidson and Michelle Hua, Co-Counsel for
Respondent

Investigation Meeting: 6 December 2016 and 25-27 July 2017 at Christchurch

Submissions &
information Received: 15 September & 24 November 2017 and 9 February
2018 from the Labour Inspectorate
3 November 2017, 3 January & 20 February 2018 from
Alps Travel

Date of Determination: 23 February 2018

DETERMINATION OF THE AUTHORITY

- A. Alps Travel Company Limited is to pay to the Labour Inspectorate, for forward payment to Mr Li, the gross sum of \$2,842 in respect of arrears of pay, together with the further sum of \$7,878.76 in respect of unpaid holiday pay.**

- B. A penalty in the sum of \$75,000 is imposed upon Alps Travel Company Limited, payable to the Crown.**
- C. Costs are reserved.**

Employment relationship problem

[1] The Labour Inspector (Ms Eva Belley) seeks the recovery of arrears of wages from Alps Travel on behalf of one of its employees pursuant to an improvement notice dated 7 June 2016. It also seeks the imposition of penalties against Alps Travel for breaches of the Holidays Act 2003, the Minimum Wage Act 1983 and the Wages Protection Act 1983. It also seeks an imposition of a penalty for non-compliance with the improvement notice.

[2] Alps Travel does not accept that arrears of pay are due to the employee in question. It agrees that there have been breaches of the requirement to keep time and wage records and holiday and leave records, and that there were some breaches of the Holidays Act. It submits that a global penalty of no more than \$40,000 should be imposed.

[3] In its action against the Labour Inspector, Alps Travel objected to the improvement notice on the basis of its disagreement in respect of the sums that the improvement notice stated were due to three of Alps Travel's employees.

Background

[4] At the material time Alps Travel ran a coach tour company aimed primarily at tourists from China¹. On 13 October 2015 the Ministry of Business Innovation and Employment received a complaint from an employee of Alps Travel, Li Xuqian, otherwise known as Kelvin, regarding his employment. The complaint was referred to the Labour Inspectorate. Mr Li was, at the time, the branch manager of Alps Travel's Queenstown branch but he also performed the duties of a driver and guide.

[5] The Labour Inspectorate requested, and obtained records from Alps Travel in respect of its employees but concluded that the records by Alps Travel were not accurate, and were not kept as an ongoing practice. In particular, the Labour

¹ It has since had its Transport (Passenger) Service Licence and Transport (Rental) Service Licence revoked by the NZ Transport Agency, with effect from 18 October 2017. It was given a right of appeal to the District Court against the decision.

Inspector concluded that time and wage records did not meet the requirements of s.8A of the Minimum Wage Act (as was then in force) and that it did not keep holiday and leave records as required by s.81 of the Holidays Act.

[6] In November 2015 two other complainants came forward. The common thread of the complaints was that the employees were working very long hours and not receiving the minimum wage in respect of them, and that they did not receive payments for annual leave, public holidays or sick leave. In addition, in relation to the wages the employees received, there was no 8% identifiable component of holiday pay included in their pay.

[7] In addition, during the time that the complainants were working for Alps Travel, Alps Travel would make deductions from the complainant's wages for expenses or other matters relating to their work without Alps Travel having obtained consent from the complainants before making those deductions. In February 2016 a further complainant came forward. This complaint was similar to those of the other three.

[8] On 7 June 2016 the Labour Inspector issued an improvement notice under s.223D of the Employment Relations Act 2000 (the Act) which stated that Alps Travel was failing or had failed to comply with the following provisions of minimum employment standards:

- (a) Sections 4 and 6 of the Wages Protection Act;
- (b) Section 81 of the Holidays Act
- (c) Section 130 of the Act;
- (d) Section 8A of the Minimum Wage Act²;
- (e) Sections 48, 49, 50, 55, 56 and 60 of the Holidays Act;
- (f) Section 28 of the Holidays Act; and
- (g) Section 63 of the Holidays Act.

² This provision was repealed by the Minimum Wage Amendment Act 2016 with effect from 1 April 2016, although clause 2 of Schedule 1AA provided that the amendments made by that Act did not apply to conduct that occurred before the commencement of that Act.

[9] Ms Belley required Alps Travel to take the following steps:

- (a) Calculate and pay arrears to current employees for the past 2.5 years (from 1 January 2014 to May 2016) in relation to failures to pay:
 - i. minimum wage, including unauthorised deductions;
 - ii. Annual leave;
 - iii. Public holidays worked and alternative holidays; and
 - iv. sick/bereavement leave;
- (b) Commence keeping time and wage and holiday records for all employees that comply with the requirements of the legislation, including the 8% annual holiday pay as an identifiable component in the records;
- (c) Rectify business practices to meet the requirements of the Holidays Act in relation to future payments of public holidays and sick leave entitlements; and
- (d) Pay the complainants, to their nominated bank accounts, arrears as per the Labour Inspector's calculations attached to the improvement notice.

[10] The Labour Inspector required the employer to provide certain evidence of the steps taken to comply with the notice and also annexed a calculation setting out arrears that she said were due to three of the four complainants. These were as follows:

- (a) To Mr Li, \$66,611³;
- (b) To the employee known as "Ritchie", \$12,578; and
- (c) To the employee known as "Chris", \$7,225.

³ This figure changed as the proceedings developed, so that, after the investigation meeting, the unpaid arrears that the Labour Inspector claimed were due to Mr Li amounted to \$34,624.89 (\$38,788.59 arrears less two payments subsequently made by Alps Travel).

[11] Alps Travel objected to the improvement notice as it did not agree with the calculations set out in it.

[12] The Authority held an investigation meeting in December 2016 in order to gather more information from the Labour Inspector to enable both the Authority and Alps Travel to fully understand her calculations. On the basis of the information provided during the investigation meeting, Alps Travel agreed to pay to the employees known as Ritchie and Chris the arrears set out in the improvement notice. However, it did not agree with the calculation of arrears set out in the improvement notice in relation to Mr Li.

[13] Alps Travel then engaged the services of a forensic accountant, Ms Sandra James, to calculate the arrears owed to Mr Li and reached a figure significantly less than that calculated by Ms Belley. Ms James adopted three approaches to the calculation and, depending on the method adopted and the source of information relied on, the arrears admitted by Alps Travel ranged from \$4,670 to \$26,733.

[14] The Labour Inspector's calculations of the arrears due has varied over time as the investigation has progressed, with the Labour Inspectorate changing its view of the number of hours that should be included in the calculation, and the pay received by Mr Li. This is as a result of more and more information being provided by Alps Travel to Ms Belley during the course of her investigation, and some inconsistencies in Mr Li's evidence during the investigation meeting.

[15] The latest calculation to be submitted by the Labour Inspectorate in its initial written submissions dated 19 September 2017 estimates that Mr Li was paid a gross sum of \$86,568.60 but was owed \$102,939.88 in terms of the hours worked. In reaching this figure the Labour Inspectorate conceded that hours should be deducted for meal breaks and for days when Mr Li worked outside of the itineraries (known as free days).

The issues

[16] The following issues need to be determined by the Authority:

- a. What arrears of pay are due to Mr Li; and
- b. What penalties, if any, should be imposed upon Alps Travel?

Arrears of pay

[17] In determining arrears of pay the following sub issues need to be determined, which account for the difference in the arrears estimated by Ms Belley and the arrears estimated by Ms James:

- (a) The number of hours that Mr Li actually worked;
- (b) The wages received by Mr Li, including the status of certain payments received by Mr Li;
- (c) The methodology used to calculate the arrears due; and
- (d) Whether rent should be deducted from the arrears owed.

Hours worked by Mr Li

[18] A significant amount of documentation has been lodged with the Authority by the Labour Inspector and Alps Travel over the lifetime of these proceedings, although even at the investigation meeting in July 2017, some materials had still not been put before the Authority, such as Mr Li's driver log books.

[19] A key document was a detailed spreadsheet created by Mr Li showing the hours that he says he worked between 2 October 2011 and 5 October 2015 and the salary payments he says he received. These hours amount to 8,500 in total. Although this is a round number, it has not been rounded up or down deliberately it appears.

[20] The hours estimated by Mr Li varied typically between 8 hours a day to 13 hours a day when he was acting as a driver and/or guide, and 8 hours a day when he was working in the office. On some days the daily hours estimated to have been worked by Mr Li exceed 13 hours, on one occasion being 20 hours.

[21] Alps Travel did not keep accurate time and wage records of Mr Li's work but relies on driver log books, which Mr Li was legally required to complete, and a schedule of daily hours worked compiled by Alps Travel which included, for each day, the hours worked, the trip number and/or the bus number plate and the trip undertaken.

[22] Alps Travel utilised the services of a forensic accountant, Sandra James, to assist them in the calculation of Mr Li's arrears of pay. She adopted five different possible approaches to calculating the hours worked, as follows;

- a. Using Mr Li's hours, but deducting free day activities and lunch break times, resulting in a total of 7,509 hours;
- b. Using the hours recorded in Mr Li's driver log book, resulting in a total of 3,977 hours;
- c. Using the hours which Alps Travel presented to her, which were based on the itineraries, resulting in a total of 5,984 hours;
- d. Adding the log book hours to Alps Travel's estimate of Mr Li's hours spent in the office, which was based on hours not covered by the itineraries, resulting in a total of 5,117.5 hours; and
- e. Adding the log book hours to Mr Li's estimate of his hours spent in the office, resulting in a total of 4,873.5 hours. These final two bases were presented to the Authority on the final day of the investigation meeting.

[23] According to Mr Li's evidence, the driving hours recorded in his log books were often less than the actual hours Mr Li worked. Mr Li said that this under-recording was a policy introduced by Alps Travel, and communicated to the drivers in the team meetings. During the investigation meeting in December 2016, the Authority warned Mr Li about risk of self-incrimination in relation to what appears to amount to an admission of criminal wrongdoing but he has chosen to continue to give evidence in relation to this matter, as did another witness appearing in support of the Labour Inspector's case. The respondent denies it instructed drivers to under-record in their log books, although the evidence suggests that one of the managers did instruct them to do so.

[24] Since the two investigation meetings, it has come to the attention of the Authority that the general manager of Alps Travel Queenstown Branch (who gave evidence to the Authority) has been found guilty of fraud for causing a driver (not Mr Li) to dishonestly use another driver's licence for financial advantage. The driver was

found guilty of dishonestly using another driver's licence, and admitted charges of, inter alia, having a false logbook and making false entries in the logbook.

[25] Method (a) (Mr Li's hours, less free day activities and meal breaks) assumes that Mr Li took a meal break on every single day he worked, which I believe is unlikely. However, the Labour Inspector accepts that proposition.

[26] Method (b) above (just using log books) is questionable, because of the doubtful accuracy of these records. I am mindful of the finding of criminal practice in relation to at least one logbook kept by an Alps Travel's driver by the Christchurch District Court.

[27] It is not clear from Method (c) (Alps Travel's hours based on itineraries) whether it takes into account office hours worked by Mr Li. As the estimate was based on itineraries, that would suggest not, as there was obviously no itinerary issued to him in relation to the time when Mr Li was working in the office. In any event, Mr Zuo said in evidence that the itineraries were just guidelines for the drivers, and were intended primarily for the tourists. I do not believe that it is safe to adopt this approach therefore.

[28] Methods (d) and (e) (log book hours plus office hours) have the same problem as Method (b), in that the log books are of doubtful accuracy.

[29] In summary, I believe that each of these approaches is potentially flawed. If Alps Travel had kept accurate time and wage records, then it would not have been in a position of having had to adopt methodologies in retrospect to assess Mr Li's working hours which are based on secondary sources of hours. Similarly, Mr Li would not have had to have done so.

[30] Section 132 of the Employment Relations Act 2000 (the Act) provides that, where a claim is brought before the Authority under section 131 of the Act to recover wages or other money payable to an employee, the employee may call evidence to show that the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act, and that failure prejudiced the employee's ability to bring an accurate claim under section 131. Where such evidence is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of the

wages actually paid to the employee and the hours, days, and time worked by the employee.

[31] Section 132 does not apply to these proceedings as Mr Li has not brought a claim under s 131 of the Act. However, I believe that the same principle may be applied in the current proceedings, as none of the methodologies adopted by the employer of calculating Mr Li's hours is acceptable. On that basis, I intend to use as a starting point the hours estimated by Mr Li. However, I do not believe they can be accepted wholesale.

[32] At the start of the investigation meeting, there were three areas in relation to the hours that Mr Li estimated he had worked which needed to be resolved. These were:

- a. The accuracy of Mr Li's estimates of the hours he worked during the material period;
- b. Whether meal breaks should be deducted from the hours claimed; and
- c. work by Mr Li on days when the tourists did optional activities outside of the itinerary.

[33] The third issue was potentially quite complex because the drivers and guides were paid commission in different ways during the free days, sometimes directly by the tourists, sometimes by the activity providers and sometimes by Alps Travel. The Labour Inspectorate argued that payments via Alps Travel were wages, but other payments were not. Into this mix is the possible argument that work by the guides and drivers in respect of some of the optional activities was not carried out as employees, as they were not doing so under Alps Travel's control.

[34] As only 260 hours of the 8,500 hours claimed by Mr Li were disputed by Alps Travel by virtue of relating to free day or optional activities, the Labour Inspectorate decided during the investigation meeting to drop its opposition to these hours being excluded. Therefore, the optional activity hours are no longer an issue that needs to be resolved by the Authority, and the starting point in respect of Mr Li's hours is 8,240 (8,500 – 260).

The accuracy of Mr Li's estimate of his hours

[35] Mr Li was a little vague in his evidence as to how he came up with the hours he has stated in his spreadsheet, but I understand that he referred to his log books, his own notes, and details set out in various travel agents' itineraries to see what trip he worked on a given day, and then used his memory and knowledge of the many different trips he would have been involved in to estimate how long he is likely to have worked on that day.

[36] Mr Li gave an example of a trip from Christchurch to Queenstown. He said that trips would last a lot longer than the time that it would take just to drive directly from one place to another, as the tour would stop to allow people to take photos, go to the toilet, buy souvenirs, take part in pre-planned activities, have lunch and so forth. Mr Zuo's evidence was essentially that the itineraries were generous in respect of the time they gave for a leg of any given trip to be completed.

[37] Generally speaking, subject to what I say below, I accept the estimates of the hours that Mr Li says each different trip took.

[38] However, Mr Li does not differentiate between the time when he was acting as a driver and when he was acting as a guide. I believe that a driver would get more free time, as a driver would not have to give the same person to person assistance that a guide does. I therefore believe that the 8,500 hours estimated needs to be pared back to take into account this issue. However, there is no record of when he did act as a driver and when he was a guide, so all I can do reduce the figure by a notional amount.

[39] Ms James' calculated that Mr Li took part in 183 trips. I believe that that added up to 5,984 hours. Mr Zuo's evidence is that Mr Li was a driver 80% of the time. If a driver worked on average two hours less than a guide each trip (this is a guess) that means that the hours should be reduced by 293 hours ($183 \times 80\% \times 2$). Rounding that up to 300 hours, gives a total amount of hours of 7,940 ($8,240 - 300$).

[40] I also doubt that Mr Li never rested when the tourists were doing different activities which were part of the itinerary. For example, I do not accept that, when the tourists were on a boat trip on Lake Wakatipu, or a helicopter trip to the glaciers, or doing bungee jumping, or souvenir shopping, Mr Li would have been there working alongside them each time, all the time, even when he was a guide. I shall reduce the

estimated hours by a notional 5% to take this likelihood into account. That reduces the total to 7,528 ($8,240 \times 95\% = 7,828$, less 300).

Meal breaks

[41] Ms James adjusted the daily hours worked provided by Mr Li for meal breaks. On days when he was not driving she adjusted the time by 30 minutes for a meal break, and on days when he was driving she adjusted the time by one hour for every 5½ hours. This was on the basis that New Zealand Transport Agency requires breaks to be taken by drivers every 5½ hours of driving. Ms James had deducted 731 hours from the 8,500 hours estimated by Mr Li in respect of meal breaks in accordance with his methodology. After the investigation meeting, the Labour Inspector decided to adopt the same approach as Ms James, and agreed that 731 hours should be deducted.

[42] I do not necessarily agree that Mr Li's meal breaks would have amounted to that many hours, but it would not be just to assess Alps Travel's liability as greater than the Labour Inspectorate claims for, unless I believed that the Labour Inspectorate had made an error of calculation or law. I do not believe that to be the case in this instance, and so I accept Ms Belley's concession. Deducting 731 hours from 7,528 gives 6,797.

What should Mr Li have been paid to ensure that the minimum wage legislation was complied with in respect of his 6,797 notional hours of work?

[43] By reducing the total hours across the board as I have done, one cannot simply calculate the minimum wages that should have been due to Mr Li, as the material time spans five different minimum wage rates. These are as follows:

1/4/11 – 31/3/12	\$13 an hour
1/4/12 – 31/3/13	\$13.50 an hour
1/4/13 – 31/3/14	\$13.75 an hour
1/4/14 – 31/3/15	\$14.25 an hour
1/4/15 – 31/3/16	\$14.75 an hour

[44] I therefore shall reduce the hours proportionately (by 20.03%) over the four minimum wage years, and multiply the resultant hours by the applicable minimum wage rate (ignoring fractions).

[45] When calculating the arrears of wages, the Labour Inspector used an overall approach, adding up all hours worked within a minimum wage year, calculating the total wage that should have been paid by reference to the applicable minimum wage rate, and then deducting what she believed he had actually been paid in that period. This was because Ms Belley did not have sufficient information at the time to be confident what Mr Li's pay period was.

[46] However, Alps Travel's forensic accountant adopted a month by month analysis, given that Mr Li was paid monthly from April 2012. The Labour Inspectorate now accepts that this is an appropriate approach and I do not disagree, given the approach approved by the Employment court in *Law v Board of Trustees of Woodford House*⁴

[47] Applying a month by month approach to the above table produces the following result:

Minimum wage year	Original hours	Reduced hours	Minimum wage rate per hour	Wages due
1/4/11 - 31/3/12	1,466	1,180	\$13	\$15,340
1/4/12 - 31/3/13	3,006	2,423	\$13.50	\$32,710
1/4/13 - 31/3/14	1,660	1,338	\$13.75	\$18,397
1/4/14 - 31/3/15	1,680	1,355	\$14.25	\$19,308
1/4/15 -	688	554	\$14.75	\$8,171

⁴ [2014] NZEmpC 25

31/3/16				
TOTAL	8,500	6,850		\$93,926

Wages received

[48] It is now necessary to determine how much Mr Li received in wages during his employment. This was also a matter of major dispute, although the Labour Inspector accepted Ms James' assessment of wages received by the time the investigation meeting had concluded. Therefore, I shall adopt that figure, which is \$86,568.

The arrears due

[49] Having arrived at a likely number of hours worked (6,850) and the total amount of pay received (\$86,568), the shortfall in wages received amounts to \$7,358 gross.

Payment of \$4,000

[50] There is a dispute between the parties regarding the status of a payment of \$4,000 to Mr Li. Mr Li says this was the partial repayment to him of a \$5,000 loan he says he had made to two shareholders of a gift shop, one of whom was Mr Zuo. There was no cogent evidence that Mr Li had paid \$5,000 to these two shareholders, and no cogent evidence that the \$4,000 was a part repayment. On a balance of probabilities I accept that this was a wage payment. I understand that it is already factored into the wages figure referred to above, so no adjustment needs to be made to that figure.

Rent

[51] Alps Travel says that no allowance has been made for rent that was due from Mr Li and his family when they occupied an apartment in Queenstown whilst Mr Li was unwell. Alps Travel says that Mr Li and his family stayed in the apartment for approximately 18 weeks which meant that Alps Travel could not use it for other employees who were in Queenstown on business. Alps Travel rented the apartment for \$380 per week. This sum multiplied by 18 amounts to \$6,840. Alps Travel

therefore wishes to deduct this sum from the arrears of wages that they say are owed to Mr Li.

[52] I do not regard this as a proper deduction from Mr Li's wages. Crucially, there was no specific agreement in place between Mr Li and Alps Travel stating that Mr Li had to pay Alps Travel that sum in rent, or that it could be deducted from his wages. Therefore, any deduction from wages in respect for that arrangement would be unlawful.

[53] Furthermore, I do not accept that the Authority has the jurisdiction to take any such accommodation arrangement into account when assessing whether the Minimum Wage Act has been complied with, as I do not believe that the arrangement between Mr Li and his family on the one hand, and Alps Travel on the other related to or arose out of the employment relationship. In other words, to paraphrase the Court of Appeal in *J P Morgan Chase Bank NA v Robert Lewis*⁵, the existence of the employment relationship was not a necessary component of the argument that is being asserted against Mr Li. The arrangement could have been entered into even if Mr Li had not been an employee.

[54] Apart from the period of 18 weeks when Mr Li was accompanied by his family, he lived in company accommodation during his employment. Mr Li says he was allowed to live in the accommodation rent free, but had to pay for half of the cost of the utilities. Mr Zuo says that \$60 a week was paid by Mr Li towards the rent. No written agreement was entered into by the parties in relation to this accommodation it seems.

[55] The Labour Inspector has included in her calculations the value of lodging provided to Mr Li at 5% of his gross wage, as provided for under s 7 of the Minimum Wage Act. Section 7(1) of the Minimum Wage Act provides:

7 Deductions for board or lodging or time lost

(1) In any case where a worker is provided with board or lodging by his employer, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wage calculated at the appropriate minimum rate by more than the cash value thereof as fixed by or under any Act, determination, or agreement relating to the worker's employment, or, if it is not so fixed, the deduction in respect thereof by the employer shall not exceed such amount as

⁵ [2015] NZCA 255, at paragraph 97

will reduce the worker's wages (as so calculated) by more than 15% for board or by more than 5% for lodging.

[56] Therefore, I believe that this is the most effective way of resolving this issue. Five percent of the gross wages that Mr Li should have received (\$93,926) amounts to \$4,696. That leaves arrears of pay of \$2,842 due under the Minimum Wage Act.

Public Holiday Pay and Alternative Holiday Pay

[57] It appears that these arrears have already been paid by Alps Travel, in the sums of \$1,461 and \$3,097.50 respectively. No further orders are necessary in respect of these elements therefore.

Final Holiday pay

[58] Alps Travel denies Mr Li is owed any holiday pay, but it does not identify what he was paid holiday pay, and when. In addition, Ms James' calculations include final holiday pay due at 8%. Assessing the schedule of payment received by Mr Li as supplied by Alps Travel, it does not appear to include any payments of holiday pay since the records began. I therefore accept the Labour Inspector's conclusion that final holiday pay is due.

[59] This is to be calculated by reference to Mr Li's total gross earnings, including payments for public holidays and alternative holidays. Adopting the Labour Inspector's calculation method, the calculation is 8% of the total of \$93,926, \$1,461, and \$3,097.50. That produces a final holiday payment due of \$7,878.76.

Conclusion

[60] Mr Li is owed the gross sum of \$2,842 by reference to the Minimum Wage Act, together with final holiday pay in the gross sum of \$7,878.76.

Should penalties be imposed upon Alps Travel, and if so, in what amount?

[61] It is agreed that the principles of *Jeanie May Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*⁶ should be applied. As these principles, and the resultant steps for assessing penalties are now very well known, I shall not repeat them here in detail.

⁶ [2016] NZEmpC 143.

Step 1

How many breaches were there?

[62] The Labour Inspectorate submits that there are 30 employees of the respondent in respect of which eight different types of breaches occurred, all of which should attract penalties. The failures relied upon by the Labour Inspectorate comprise the following:

- a. Failures to pay minimum wage under ss 6 and 10 of the Minimum Wage Act;
- b. Failures to keep wage and time records under s 8A of the Minimum Wage Act;
- c. Making unlawful deductions contrary to ss 5 and 13 of the Wages Protection Act;
- d. Failures to pay public holiday pay contrary to s 46 of the Holidays Act;
- e. Failures to pay annual holiday pay contrary to ss 16 and 28 of the Holidays Act;
- f. Failures to pay holiday pay as an 8% component contrary to s 28 of the Holidays Act;
- g. Failures to keep holiday and leave records contrary to s 81 of the Holidays Act; and
- h. A failure to comply with an improvement notice contrary to s 223F of the Act.

[63] The Labour Inspectorate therefore alleges that there have been 240 breaches, each of which should attract a penalty. At \$20,000 maximum per penalty, that makes a theoretical maximum penalty of \$4,800,000.

[64] Counsel for Alps Travel submits that it accepts liability for 162 breaches of the minimum code, rather than 240.

[65] Alps Travel does not dispute that there was a failure to keep compliant time and wage records (30 breaches), a failure to keep holiday and leave records (30 breaches), a failure to pay public holiday pay (30 breaches), a failure to pay annual holiday pay (30 breaches) and a failure to pay holiday pay as an 8% identifiable component (30 breaches).

[66] Alps Travel also concedes that there was a failure to pay public holiday pay to the three representative employees, Chris, Ritchie and Kelvin (3 breaches). It also does not dispute that there was a failure to pay Chris and Ritchie their holiday pay as an 8% identifiable component (2 breaches). I believe that it also concedes that the two sets of record keeping failures affected the three representative employees (6 breaches). The final breach it admits is a failure to comply with the improvement notice.

[67] Alps Travel disputes that

- a. Kelvin and Ritchie were not paid the minimum wage;
- b. annual holiday pay was not paid to Kelvin, Ritchie and Chris; and
- c. unlawful deductions were made from the wages of Kelvin, Ritchie and Chris.

[68] Alps Travel also disputes that it failed to pay minimum pay to 30 employees, that it made unlawful deductions to 30 employees' wages and that its failure to fully comply with the Improvement Notice amounts to 30 separate breaches of s 223F of the Act.

Analysis

[69] First, I agree that there has been presented no cogent evidence that Alps Travel failed to pay minimum pay to 30 employees or that it made unlawful deductions to 30 employees' wages. That reduces the claimed breaches from 240 to 180.

[70] Second, I also agree that a failure to comply with an improvement notice cannot be treated as a separate breach in respect of each employee potentially affected when the breaches referred to in the improvement notice are also being separately counted in respect of each employee. That reduces the claimed breaches to 151. This is largely in line with Alps Travel's concessions.

[71] However, turning to Alps Travel's concession, it appears that there is an element of double counting when it admits to 162 breaches, as it appears to be adding 11 admitted breaches in respect of the three representative employees to the breaches of the same category which it admits in respect of the 30 employees. However, the Labour Inspector does not treat the three representative employees separately, and appears to have bundled them into the 30.

[72] Therefore, in order to avoid the risk of double counting, I believe that it is necessary to remove from Alps Travel's concession the 11 breaches they say have been committed in relation to the three representative employees. That reduces Alps Travel's conceded breaches to 151 (although two will need to be added as I explain below).

[73] First, there needs to be added back to this figure the minimum wage breach that I have found occurred in respect of Kevin (Mr Li). That increases the breaches to 152.

[74] Whilst Alps Travel decided to pay the outstanding arrears which the Labour Inspector found was payable in respect of Ritchie, they deny that it failed to pay him at the correct minimum wage rate. As the payment to Ritchie was agreed to be made before the substantive investigation, the Authority did not enquire into whether there was a breach of minimum wage legislation in respect of Ritchie. It has therefore not made a finding of a breach.

[75] Finally, I have found that an unlawful deduction was made from Mr Li's pay, and so another breach needs to be added to the total, making it 153. Again, no findings were made with respect of the other two representative employees.

[76] Whilst 153 breaches are less than the number that Alps Travel have conceded, the Authority must be satisfied that there is a logical and justifiable approach to counting the breaches.

[77] Having established that there were 153 breaches, resulting in a theoretical total penalty of \$3,060,000, it is necessary to consider whether any breaches should be aggregated, or 'globalised'.

[78] In *Preet*, at [141], the Court said the following about globalising penalties.

Still under Step 1, once the nature and number of breaches have been identified, the Court or the Authority should give consideration to whether global penalties may be appropriate in the particular case. If, for example, there are multiple and very similar breaches such as the repeated non-payment or below-minimum payment of wages to an employee, it may be an appropriate case for the imposition of a global penalty for these. This may include cases where the breaches are part of a consistent pattern of breach of a particular statutory requirement. The Authority or the Court should be careful to ensure that the globalisation of a penalty does not diminish the significance of a repeated and/or long-running series of breaches. Ultimately, this global penalty assessment will be subject to cross-checking and confirmation or potential reconsideration when the Authority or the Court applies what we call the proportionality test under Step 4.

[79] First, it is appropriate to globalise penalties in respect of multiple breaches within each legislative code requirement, but not across them. Such globalisation can take place where there are multiple and very similar breaches, such as the repeated non-payment or below minimum payment of wages to an employee. However, where one is considering a failure to keep adequate records, globalisation is only possible across employees, as one cannot say there have been multiple separate failures to keep records in respect of any given employee. The failure was continuing.

[80] Should there be globalisation across the employees for the failures to keep adequate records? I believe not as, even though there is an originating failure to keep proper records, each employee could have been differently impacted by that failure.

[81] I believe that the same is to be said for the remaining three categories of breach which potentially affected 30 employees (public holiday pay, annual holiday pay and paying holiday pay as an identifiable 8%). Each failure could impact each employee differently. Therefore, I decline to globalise any of the penalties in respect of the five categories of breach where globalisation is possible.

Step 2

[82] This involves assessing the severity of the breaches and whether any ameliorating factors exist. I concur with the submissions of counsel for the Labour Inspectorate that the most concerning breach related to the failure to keep adequate records. The Authority saw first-hand just how hard that failure made it to assess accurately the hours worked and the wages paid. The fact that Alps Travel engaged a forensic accountant to calculate hours worked and payment made is testament to that.

Failing to keep adequate records

[83] Failing to keep adequate records of time, wages, leave and holidays can have a serious impact upon the employer's ability to ensure that employees are being paid correctly. It can also have an impact on the ability of the employee to check that their rights are being honoured. Finally, the Labour Inspectorate and the Authority are similarly encumbered. As counsel for the Labour Inspectorate points out, the failure means that the minimum employment rights of up to 30 employees may have been compromised without rectification being possible.

[84] Counsel for the Labour Inspectorate submits that a reflection of the seriousness of the failure to keep adequate records means that 80% of the maximum available penalty for each breach (60 in all) should be applied.

[85] Mr Davidson contends that Alps Travel's failure to keep adequate records stemmed from ignorance of its requirements and a failure of the Labour Inspector to address non-compliance until recently. With respect, that latter argument is akin to a burglar saying that his criminal activity is the fault of the police for not having arrested him earlier.

[86] Mr Davidson acknowledges that ignorance of the law is no excuse, but I accept his submission that there was no deliberate strategy by Alps Travel not to keep records.

[87] Whilst the failure was serious, I believe that 80% is too high, as it does not acknowledge the inherent difficulty for Alps Travel of keeping track of hours worked by drivers and guides out on the road. I believe that 70% is a fairer starting point. That means that, for the two sets of breaches involving a failure to keep adequate records, the starting point of \$1,200,000 is reduced to \$840,000.

[88] In respect of ameliorating factors, apart from those already discussed, Alps Travel does not propose that there were any ameliorating factors. The Labour Inspectorate accepts that Alps Travel accepted most of the breaches identified by Ms Belley but contends that there was a failure to provide information in a timely and organised manner and inadequate engagement with the Labour Inspector. It proposes that the penalties be reduced by 50% to reflect these mitigating factors.

[89] I suspect that the failure to provide information in a timely and organised manner was due to the inability of Alps Travel to find the documents it needed to. This stems from its failure to keep adequate records, for which it is already being punished. However, I accept that a 50% reduction is appropriate. Applying that to the \$840,000 reached so far for the record keeping failures, results in a penalty of \$420,000.

Failing to pay minimum wage

[90] Turning to the failure to pay Mr Li the minimum wage, that also stems from the inadequate record keeping. I do not believe that there was a deliberate failure to pay minimum wage and, indeed, Mr Li was able to earn considerable income from tips and commissions.

[91] However, there was a breach of a minimum employment standard, which should attract a penalty. The Labour Inspectorate proposes that 30% of the maximum should be imposed (although that is based on the assumption that 30 employees were paid in breach of the Minimum Wage Act). I believe that 25% is a better proportion, but with no reduction for mitigating factors, as I can identify none. That means that a penalty of \$5,000 is imposed at this stage for that breach.

Making unlawful deductions

[92] This was not a wilful breach of the Wages Protection Act in my view, but arose from a misunderstanding of the law in relation to the right to claim rent from Mr Li when his family stayed in the Queenstown apartment. A 25% starting point is therefore appropriate. There is no ameliorating factor to reduce the penalty further, so that results in \$5,000.

Failure to pay public holiday pay

[93] This is a relatively serious failing as it has a direct financial impact on employees. I agree with the Labour Inspector that an appropriate starting point is 30%. That results in an initial penalty of \$180,000. I also agree that a 50% reduction to take into account the fact that Alps Travel made payments of arrears of holiday pay is appropriate. That reduces the penalty to \$90,000.

Failure to pay annual holiday pay

[94] As with the public holiday pay breach, this is a relatively serious breach. I adopt the same approach, therefore. That results in a penalty of \$90,000.

Failure to pay holiday pay as an identifiable 8% component

[95] Again, I adopt the approach submitted by the Labour Inspectorate, with a starting point of 30%, reducing it by 50% to result in a penalty of \$90,000.

Failure to comply with the improvement notice

[96] The Labour Inspector claims a 50% starting point is appropriate with respect of this allegation, but operates from the basis that a failure to comply with an improvement notice equates to 30 breaches, a proposition I have rejected. Alps Travel argues that it did not fail to comply with the improvement notice, but that it could not supply documents that did not exist.

[97] The Labour Inspectorate contends that Alps Travel failed to comply with three sections of the improvement notice which it did not dispute by 6 July 2016. These three sections required Alps Travel to calculate and pay arrears of pay; commence keeping time and wage and holiday records for all employees, and rectify business practices to meet the requirement for the Holidays Act in relation to future payments of public holidays and sick leave entitlements.

[98] Alps Travel did not give any evidence that expressly set out what steps it had taken to comply with these requirements, and I must take it that they failed to do so (although I accept that some of the arrears claimed were in dispute).

[99] I believe that a starting point of 50% is appropriate, with a reduction of 50%. That gives a penalty at the end of step 2 of \$5,000.

Total penalty at the end of step 2

[100] The total penalty at the end of step 2 is \$705,000.

Step 3

[101] Step 3 involves assessing the financial position of the paying party. Since the Authority's investigation meeting, the company has lost its transport passenger service licence and now leases out passenger vehicles.

[102] Ms James presented a set of 'submissions' about Alps Travel's financial position. She had had access to and provided financial statements for the years ended 31 March 2017. They had not been audited. Ms James says that, as at 31 March 2017 the company was in a net liability position. She says that it had a working capital deficit as at 31 March 2017 (although it was a third what it was a year before). All profits were distributed to Mr Zuo as salary.

[103] However, this financial statement is of limited assistance given its age and the change of business activities that have since occurred. Alps Travel is continuing to generate income from its assets and there are apparently 20 vehicles and 3 trailers currently being leased with a number of other vehicles in the possession of the company, presumably also available for leasing. Details of the leasing arrangements, including anticipated annual income, were made available to the Authority which I shall not replicate here, but the anticipated annual income is substantial. The lessee is responsible for all operating costs.

[104] It is clear that, even without precise details of the financial position of the company, which now presumably does not employ many, if any staff, it has a number of significant assets (albeit depreciating ones) and the potential to bring in substantial income without any significant operating costs.

[105] I am satisfied on the information made available that the financial position of the company does not require any reduction in the potential penalty at step 3.

Step 4

[106] The Employment Court in *Preet* stated, at [188]:

Applying the proportionality or totality test to the figures arrived at, this involves assessing the final provisional penalties by reference to all of the relevant circumstances together, to determine whether they are justly proportionate to the seriousness of the breaches and the harm done by them. Potentially, this discretionary final consideration may result in

an increase to that provisional figure, a decrease to it or an affirmation of its appropriateness in all the circumstances.

[107] Having applied the first three steps, the resultant total penalty liability is \$705,000. I need to step back and consider whether this would be a just penalty in all the circumstances in light of the breaches.

[108] Such a penalty would clearly be significantly disproportionate to the severity of the breaches that have been found to have occurred. In *A Labour Inspector v Gengy's Management Limited and others*⁷ the Authority found there were 148 breaches of various sections of the Holidays Act, for which a final penalty of \$78,000 was imposed. There appear to have been no other cases where around 150 breaches were found to have occurred, and the *Gengy's* case is not particularly parallel.

[109] However, it is instructive (although not binding). I believe that the penalty needs to be significant enough to act as a punishment and a deterrent without forcing or encouraging the company into liquidation.

[110] I believe that a penalty of \$75,000 is appropriate. This could be paid by Alps Travel selling one or two of its motor vehicles, if necessary, which would not have a significant impact on its operations.

[111] The steps and outcome are summarised in the annexed table.

Orders

[112] I order Alps Travel Company Limited to make the following payments within 14 days of the date of this determination:

- a. To the Labour Inspectorate, for forward payment to Mr Li, the gross sum of \$2,842 together with the further sum of \$7,878.76;
- b. To the Authority the sum of \$75,000, which will then be paid by the Authority into a Crown bank account.

⁷ [2017] NZERA Auckland 333

Costs

[113] I reserve costs. The parties should seek to agree how costs are to be dealt with. However, if they are unable to agree within 14 days of the date of this determination, any party seeking a contribution towards its costs should serve and lodge a memorandum of counsel within a further 14 days. Any response must be served and lodged within a further 14 days thereafter.

David Appleton
Member of the Employment Relations Authority

**Annex to the Determination of the Authority [2018] NZERA 23
A Labour Inspector v Alps Travel Company Limited – 5629678
Alps Travel Company Limited v A Labour Inspector – 5630599**

Relevant statutory provisions	Step 1 – number of breaches and maximum penalty	Step 2(a) – aggravating factors	Step 2(b) – ameliorating factors	Step 3 – financial position of the payer	Step 4 - proportionality
S 8A MWA	30 = \$600,000	70% = \$420,000	50% = \$210,000	N/A	
S 81 HA	30 = \$600,000	70% = \$420,000	50% = \$210,000	N/A	
S 46 HA	30 = \$600,000	30% = \$180,000	50% = \$90,000	N/A	
S 16 & 28 HA	30 = \$600,000	30% = \$180,000	50% = \$90,000	N/A	
S 28 HA	30 = \$600,000	30% = \$180,000	50% = \$90,000	N/A	
S 223F ERA	1 = \$20,000	50% = \$10,000	50% = \$5,000	N/A	
S 6 MWA	1 = \$20,000	25% = \$5,000	--- = \$5,000	N/A	
S 5 & 13 WPA	1 = \$20,000	25% = \$5,000	--- = \$5,000	N/A	
TOTALs	153 - \$3,060,000	\$1,400,000	\$705,000	\$705,000	\$75,000