

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 39/09
5148984

BETWEEN LABOUR INSPECTOR
 Applicant

AND WAN A CAB LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Jo-Ann Duff, the Applicant in person
 Kevin Blackledge, Advocate for the Respondent

Investigation Meeting: 3 April 2009 at Wanaka

Determination: 6 April 2009

DETERMINATION OF THE AUTHORITY

[1] This is a claim by a Labour Inspector for holiday pay payable to Alan McComb arising from Mr McComb's employment by Wan A Cab Limited between July 2006 and May 2007. There is also a claim for interest and penalties.

[2] Mr & Mrs Blackledge are the principals of the company that operates a taxi business based in Wanaka. They and another long standing employee explained the arrangement was for Mr McComb to be employed on a salary of \$48,000.00 inclusive of statutory holidays and annual holidays. They feel Mr McComb's complaint to the Labour Inspector about holiday pay and the Labour Inspector's claim on his behalf represents a breach of the agreement with Mr McComb.

[3] The difficulty with the company's position is that it is inconsistent with the law. It is not possible to contract out of the obligation to provide an employee such as Mr McComb with annual holidays and with the benefits of public holidays. Untaken entitlements must be paid at the conclusion of the employment. I accept the

calculations by the Labour Inspector that \$4,904.13 is owed to Mr McComb for public holidays and annual holidays.

[4] The claim for penalties cannot succeed. Any action for the recovery of a penalty must be commenced within 12 months of the cause of action becoming known to the person bringing the action or the date it should reasonably have become known to that person, whichever is earlier. Here, the Labour Inspector's investigation commenced on 28 August 2007. That is the date on which the cause of action should have become known to the Labour Inspector since the breach of the law would have been apparent from Mr McComb's complaint. The present proceedings were lodged with the Authority in January 2009, outside the 12 month opportunity to seek the recovery of a penalty.

[5] There is a claim for interest but the equities of the situation do not support it. From what I heard Mr McComb may be taking advantage of his employer's failure to get advice about and to properly document an arrangement that operated by mutual agreement while the employment subsisted.

Summary

[6] Wan A Cab Limited is to pay to the Labour Inspector for the use of Mr McComb the sum of \$4,904.13 (gross) being arrears of holiday pay.

[7] There was no claim for costs.

Philip Cheyne
Member of the Employment Relations Authority