Employment Court of New Zealand

Tranzit Coachlines Wairarapa Limited v Morgan [2013] NZEmpC 175 (20 September 2013)

Last Updated: 6 October 2013

IN THE EMPLOYMENT COURT WELLINGTON

[2013] NZEmpC 175

WRC 27/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN TRANZIT COACHLINES WAIRARAPA LIMITED

Plaintiff

AND PAUL MORGAN AND MEI WILSON First Defendants

AND MANUFACTURING AND CONSTRUCTION WORKERS UNION INCORPORATED

Second Defendant

Hearing: 15 July 2013

(Heard at Wellington)

Court:

Appearances:

Judge Couch Judge Inglis Judge Perkins

Mr M E Gould and Ms D H K Falconer, counsel for plaintiff
Mr P Cranney, counsel for defendants

Judgment: 20 September 2013

JUDGMENT OF FULL COURT

Introduction

[1] This is a de novo challenge to a determination of the Employment Relations Authority dated 26 September 2012.[1] The matter came before a full Court because on the face of the determination and the pleadings it was contemplated that new

issues under the Holidays Act 2003 (Holidays Act) were being raised. The decision

of the Court on the matter was perceived to have the prospect of consequences beyond this particular case. No evidence was led at the challenge and factual matters upon which any decision was to be based were contained in a statement of agreed facts. This is the same procedure adopted at first instance in the Authority, although there are variations between the

statement of agreed facts filed in the Authority, and the statement filed in the Court. The Court hearing then consisted of a presentation of submissions and argument by counsel.

Factual background

[2] The factual background to the dispute is as follows. The first defendants were employed by the plaintiff as school bus drivers. Their employment agreements provided that their employment was dependent on the plaintiff's contract with the Ministry of Education to provide school bus services. It was on this basis that the agreements were for a fixed term. During the school term they worked almost every school day. During the school holidays, work was discontinued although their employment with the defendant was continuous. During the seven year period of the first defendant Mr Morgan's employment from 2004-2010, he worked a total of three days during the summer school holidays (December/January). During the period of the first defendant Ms Wilson's employment from 2005 to 2010, she did not work on any day falling in the summer school holidays. Both did work on several days during holidays other than the summer school holidays.

[3] At the end of the fourth school term on 20 December 2010, the first defendants ceased work as usual. At that point the plaintiff concluded, as it had done in previous years, that the defendants had not met the requirement of twelve months of continuous employment and on the basis that they had been on unpaid leave for more than one week, s 16(2)(b) of the Holidays Act applied. The alleged periods of unpaid leave, were the ten weeks of school holidays in the 2010 year during which the first defendants did not work. It has been the position reached by the plaintiff that it paid the first defendants an amount equivalent to eight percent of their gross earnings for the previous year. The plaintiff alleged that the employment was then discontinued and they remained on unpaid leave until commencement of the following first school term in 2011.

[4] In 2010 Christmas Day and Boxing Day fell on a Saturday and Sunday, respectively. Public holiday recognition for Christmas Day was therefore Monday

27 December 2010. If that day had otherwise been a working day for the first defendants then they and their Union, the second defendant, allege that s 49 of the Holidays Act entitled them to payment of their relevant daily pay or average daily pay for that day.

[5] The plaintiff maintains that Monday 27 December 2010 would not otherwise have been a working day for either of the first defendants. This was on the basis that the work patterns for the first defendants' previous years of employment leading up to the day in question show that Mr Morgan, as stated, worked only three days during the summer school holidays and that Ms Wilson had never worked during this break at all. However, it is clear from the evidence available to the Court that during the school holidays the first defendants might be and indeed were required for work. This was confirmed in their respective individual employment agreements.

[6] The statement of agreed facts filed in the Court reads as follows:

1. The defendant Paul Morgan has been employed by the plaintiff as a school bus driver since March 2001.

2. The respondent Mei Wilson was employed by the plaintiff as a school bus driver from November 2005 until December 2010.

3. Ms Wilson and the plaintiff signed an individual employment agreement on or about 25 November 2005 (attachment "A").

4. On or about 14 November 2007 the parties agreed in writing to continue Ms Wilson's fixed term employment for a further 12 months to 31 December 2008 (attachment "B").

5. On or about 13 November 2008 a further extension of the term to 31

December 2014 was signed (attachment "C").

6. The original employment agreement with the defendant Paul Morgan cannot be located. However, he and the plaintiff signed a document on or about 13 November 2008 extending his fixed term employment to 31 December 2014 (attachment "D").

7. On or about 4 June 2004 Mr Morgan signed what appears to be a one page variation to his employment agreement relating to holidays and other leave (attachment "E").

8. Attached are calendars of the 5 years employment of Ms Wilson and

7 years to 2010 of Mr Morgan showing:

a. In red the days on which 5 or more hours were worked;

b. In pink the days on which fewer than 5 hours were worked;

c. In yellow the school holidays;

d. Marked with an "X" the days during the school holidays on

which the first defendants worked.

9. Attached is a printout from the website of the Ministry of Education showing the school term dates for 2003-2011 (inclusive).

10. In December of each year of their employment, the first defendants were paid holiday pay, up to and inclusive of 2006, at 6% of their total earnings for the year, and from 2007 at 8% of total earnings.

11. In 2010, Christmas Day fell on a Saturday. Saturdays are not otherwise working days for the first defendants. Accordingly, section 45(1)(b) of the Holidays Act 2003 ("the Act") applied, requiring the Christmas Day public holiday to be treated as falling on Monday 27 December 2010.

Legal Issue

12. Were the first defendants entitled to payment for 27 December 2010?

(The documents referred to as attachments were contained in a bundle of agreed documents.)

Pleadings

[7] Having set out the factual position, including the relevant provisions of the first defendants' employment agreement, the plaintiff seeks the following declarations in its statement of claim:

a. The school holiday period 20 December 2010 to 30 January 2011 was a closedown period for the First Defendants;

b. The Plaintiff and the First Defendants had not agreed that the periods of unpaid leave taken by the First Defendants during 2010 were included as part of their 12 months continuous employment;

c. The First Defendants were not entitled to annual leave from

20 December 2010;

d. The public holiday transferred to 27 December 2010 would not otherwise have been a working day for the First Defendants;

e. The First Defendants are not entitled to payment from the Plaintiff for 27 December 2010.

[8] The statement of defence consists of a series of admissions and denials. Insofar as the employment agreement for the first defendant, Paul Morgan, is concerned, this cannot be located. However, he admits in the statement of defence that it was in the same form as that of the first defendant, Ms Wilson.

The Authority's determination

[9] The determination consists of a traversal of ss 12, 16, 29, 30, 34 and 40 of the Holidays Act and a consideration of the statement of agreed facts filed in the investigation. The determination correctly states that the issue is a matter of statutory interpretation. The main difference in the statement of agreed facts filed at the Authority's investigation is the following statement, which was not included in the statement filed with the Court:

6. The matter was subsequently referred to the Department of Labour, which determined, inter alia, that:

(a) as at 27 December 2010 the first respondents were on annual leave;

(b) that 27 December 2010 would otherwise have been a working day for them; and

(c) they were therefore entitled to payment for that day.

[10] That statement as to the decision of the Labour Inspector is not a strictly accurate record of her findings. We set out her statements in respect of the first defendant, Paul Morgan, as follows:

The question for Mr Morgan is whether Christmas Day 2010 is an otherwise working day entitling him to payment for that day.

From some of the correspondence that I have been supplied regarding this matter it is suggested that Mr Morgan and other school bus drivers would generally take annual leave at the end of the school year. Unfortunately I do not have the leave records to confirm this outright. I understand that the company does not operate a customary shutdown in accordance with the Holidays Act for school bus drivers however these drivers generally take annual leave at the end of the school term. The records that I have been provided do not show where annual leave was taken other than those days that fell within the school term.

Despite not having leave records my initial opinion is that in order for annual leave to be taken the days must be days that are considered to be otherwise working days for the employees and therefore if a public holiday falls in this

time it must also be considered a day that the employees would have otherwise of worked. This would entitle the employees to payment for these public holidays.

For the 2010 Christmas period both Christmas Day and Boxing day fell on a Saturday and a Sunday. Section 45 of the Holidays Act provides for the Christmas and New Year public Holidays to be transferred to the following Monday and Tuesday if the Saturday and Sunday are not otherwise working days for the employees. For Mr Morgan, neither the Saturday or the Sunday were otherwise working days for him and therefore he was entitled to observe and receive payment for the Christmas Day being transferred to Monday the 27th of December 2010 and also Boxing Day being transferred to the Tuesday the 28th of December.

I would like to be clear however that should the employee had not taken Annual Leave in this period then my opinion would be that the days would not have been days that the employee would otherwise have worked.

...

Paul Morgan: Christmas Day 2010 was not an otherwise working day however if annual leave was taken during this period he is entitled to receive Relevant Daily Pay for the transferred Christmas Day of Monday 27th of December 2010.

[11] Her findings in respect of the first defendant, Mei Wilson were as follows:

The question for Ms Wilson is whether or not Christmas Day is an otherwise working day for her entitling her to payment for that day.

As was the case with Paul Morgan, I do not have holiday records to show whether or not annual leave was taken during the Christmas period however the lack of annual leave taken during school term would suggest that it is taken at the end of the school year as has been suggested already. In terms of entitlement to the Christmas Day my opinion remains the same as for Mr Morgan. As it stands, the Christmas Day where it lay was not an otherwise working day for Ms Wilson as there would have been no reasonable expectation that she would have worked on a Saturday. However if the days leading up to and following the Christmas Day period were taken as annual leave then Ms Wilson has an entitlement to both the transference of Christmas Day and Boxing Day to Monday 27 December and Tuesday 28

December in accordance with Section 45 of the Holidays Act.

...

Mei Wilson: Christmas Day 2010 was not an otherwise working day however if annual leave was taken during this period she is entitled to receive Relevant Daily Pay for the transferred Christmas Day of Monday

27th of December 2010.

[12] As can be seen from the statements of the Labour Inspector they go beyond what is recorded as her findings in the statement of agreed facts presented to the Authority at the investigation.

[13] The Authority pointed out that it has no jurisdiction to consider any challenge to that decision of the Labour Inspector, made pursuant to s 13 of the Holidays Act, which remained binding on the parties. The determination held that the employees in this case were entitled to the public holiday and its increments because 27 December 2010 would have otherwise been a working day for them. The reasons for the Authority's determination were as follows:[2]

a. Both first respondents were employed under fixed term arrangements. Their agreements were extended until 2014 because the school bus contract with the Ministry of Education had been renewed.

b. Their employment agreements provided for work on an as required basis.

c. The employer had an absolute discretion to vary days and hours of work for which the employees were expected to be available.

d. Both first respondents remained as employees throughout and available to meet the requirements of the employer.

e. Their employment was continuous in terms of service requirements and an obligation to work remained at all times.

f. The agreements made provision for annual leave "on completion of each full year's service". Therefore although the entitlement to annual holidays is based on each completed 12 months of continuous employment the employment agreements were not broken and in accordance with s 16 of the Holidays Act the parties included other unpaid leave arrangements. Annual leave fell due at the end of the year.

g. The employment agreements make provision for eleven public holidays.

h. The employment agreements make no provision for split periods of employment, the employment does not cease during the school holidays and there is no provision for calculations for holiday pay, except in accordance with the Holidays Act 2003.

[14] The Authority also held that s 40 of the Holidays Act was relevant because the public holiday in question occurred during the employees' annual leave. It therefore could not be treated as part of annual leave.

[15] Finally the Authority also held that by virtue of s 29 of the Holidays Act, the periods which the first defendants did not work could not be regarded as closedown periods, and therefore s 34 of the Holidays Act was not an appropriate basis to calculate holiday pay. We agree with that part of the determination.

[16] As the determination concentrated on the relationship between the public holiday and annual leave as the basis for its conclusions, no analysis was done of the effect of s 12 of the Holidays Act. Nevertheless, that section was set out in the determination.

Consideration of the annual holidays issue

[17] On the basis of the contractual terms prevailing under the employment agreements there was a clear misapprehension by the parties as to the employees' entitlement to annual leave. The Authority and Mr Cranney, in his submissions before the Court, have focussed on the relationship between annual holidays and public holidays in an effort to provide a resolution favourable to the employees. While there are issues needing revisiting and resolving as to entitlement to annual leave and how that is paid for, these are not issues the Court can resolve in this dispute. The approach taken by the Authority on this point was incorrect. Accordingly, we do not accept Mr Cranney's submissions on this issue on behalf of the first defendants, which effectively reiterated the findings of the Authority and in part those of the Labour Inspectors. In our view, the key to resolution of this matter is contained solely within s 12 of the Holidays Act. It is that section which determines what would otherwise be a working day for these employees. The provisions relating to annual leave have no significance as, for reasons we give later in this decision, the first defendants were not on annual leave on 27 December 2010.

Legal authorities on the point

[18] Mr Gould, in his submissions on behalf of the plaintiff, referred us to three authorities which have given consideration to s 12 of the Holidays Act. They are of assistance as to the approach to be adopted although the context of these cases is different from the present.

[19] The Court of Appeal considered s 12 in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union.*[3] That case involved issues relating to public holidays of a different kind to the present. However, on s 12 the Court stated the following:

[12] Whether a day would otherwise be a working day is an intensely practical question. In the first instance, employers and employees have to try to agree on the answer (s 12(2)). And the factors they are bound to take into account are very open-ended and flexible (s 12(3)). If they cannot agree, then a labour inspector can determine the matter for them (s 13). His or her decision is binding (s 79), except to that extent that, in any proceedings before the Employment Relations Authority, the authority "makes its own determination on the matter". Whether that route to determination is mandatory is not clear at first blush; if it is, it does not appear to have been followed in this case. But since we heard no submissions on that, we shall assume we have jurisdiction to determine this question.

[13] We begin our discussion with some general comments. It is fundamental that a holiday for an employee represents time off work. Different holidays have different purposes (see s 3). In the case of annual leave, it is time off work "to provide the opportunity for rest and recreation". The Act currently provides for a minimum entitlement of three weeks' paid annual holidays. How those holidays are taken is a matter for agreement between the employer and employee, although the employer cannot unreasonably withhold consent to an employee's request to take annual holidays (s 18).

[20] We mention the general comments in paragraph [13] of the decision because they have some relevance to the issue in this case as to whether the employees were, as Mr Gould submitted, on unpaid leave. The fact is that they may merely not have been offered work during the periods when school bus driving work was not available during the school vacation periods. Nevertheless, they were on call if required. This runs counter to the concepts of leave expressed by the Court of

Appeal.

[21] Again in a different context, this Court, in *Progressive Meats Ltd v Meat & Related Trades Workers Union of Aotearoa Inc*, [4] considered s 12. In view of the fact that in that case it was not clear whether the public holiday (Queen's Birthday) would otherwise have been a working day for the workers in question, the Court embarked on a consideration of the relevant factors in s 12(3). On the primary principle, the Court stated:

[36] Whether the Queen's Birthday holiday in June 2004 would otherwise have been a working day for the relevant employees is essentially a question of fact in each case. ...

[22] These decisions were applied by Judge Shaw in this Court in *BW Murdoch Ltd v Horn.*[5] In that decision the conclusion reached on the issue of whether the public holiday would otherwise have been a working holiday for the worker was as follows:

[59] The public holiday for Easter Friday is not as clear cut. The working pattern for the entire 19 weeks shows he did not work consistently every Friday. However, s12(3)(iii) refers to the expectation that the employee would work *"on the day concerned"*. This indicates that the statute intends that each public holiday has to be looked at separately in the light of the work patterns around it.

[23] These authorities confirm the approach the Court is to take in considering the matter. It is to be in the light of the circumstances presented in each particular case. It may well be that the Court is easily able to reach a conclusion as to whether or not the day in question would otherwise have been a working day for the employee involved. If that is not the case then a formulaic approach adopting the criteria specified in s 12(2) and (3) of the Holidays Act is to be adopted.

Issue to be determined

[24] The issue to be determined in this dispute is simply whether the day in question, 27 December 2010, would otherwise have been a working day for the first defendants. That issue is to be determined on a proper application of s 12 of the

Holidays Act which reads:

12 Determination of what would otherwise be working day

(1) This section applies for the purpose of determining an employee's

entitlements to a public holiday, an alternative holiday, to sick leave, or to bereavement leave.

(2) If it is not clear whether a day would otherwise be a working day for the employee, the employer and employee must take into account the factors listed in subsection (3), with a view to reaching agreement on

the matter.

(3) The factors are—

(a) the employee's employment agreement:

(b) the employee's work patterns:

(c) any other relevant factors, including—

(i) whether the employee works for the employer only when work is available:

(ii) the employer's rosters or other similar systems:

(iii) the reasonable expectations of the employer and the employee that the employee would work on the day

concerned.

(d) whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on

sick leave or bereavement leave, the employee would have

worked on the day concerned.

(3A) If the public holiday, alternative holiday, or day on which the employee was on sick leave or bereavement leave falls during a

closedown period, the factors listed in subsection (3) must be taken into account as if the closedown period were not in effect.

(4) For the purposes of public holidays, if an employee would otherwise work any amount of time on a public holiday, that

day must be treated as a day that would otherwise be a working day for the

employee

[25] In our view, on the basis of the agreed evidence and the statutory provisions, it is clear that the day in question would not otherwise have been a working day for these employees. However, in case there is some lack of overt clarity on the position we consider the factors listed in subs (3) of s 12. Section 12(2) requires the parties to take account of these factors "with a view to reaching agreement on the matter". The parties have been unable to do that hence the present proceedings before the Authority and now the Court. In order to resolve the matter it may be appropriate that we reach findings on these factors, which will then assist the parties in reaching agreement.

[26] First, we consider the employment agreements. We have a full copy of Ms Wilson's agreement. The statement of agreed facts confirms the agreement was in force on 27 December 2010. The original agreement for Mr Morgan cannot be located. We are able to infer from the agreed facts and the existence of the one page

variation produced, that Mr Morgan had a written agreement in the same terms as Ms Wilson and that that was in force on 27 December 2010. The pleadings in any event confirm that.

[27] The first schedule, which contains the job descriptions and duties, is in general terms. It does, however, require the employees to assist the plaintiff with any work associated with the normal operation of the employer's business, which may be required, other than driving. While the agreements do not specifically provide that school bus driving duties will mainly be performed during the school term, clearly that must be inferred, not only from the agreements as a whole, but also the manner in which over the years the employees have performed their duties.

[28] Clause 1.2 of the agreements provides that in addition to the duties set out in the first schedule, the employees also agree to carry out any other duty reasonably required by the employer and to assist all other employees as necessary in any part of the employer's business.

[29] Clause 3 of the agreements sets out general provisions relating to the days and hours of work and gives the employer a wide discretion to ensure that the employees work in a reasonably flexible fashion and in accordance with the operational requirements of the business.

[30] Clause 7 of the agreements, which relates to holidays and other leave, is relevant to the issues to be decided in the present dispute. The clause in material respects reflects the provisions of ss 16 and 17 of the Holidays Act except that it refers to "each full year's service" whereas the statute refers to "12 months of continuous employment". Both this clause and the statutory provisions of the Holidays Act demonstrate that the first defendants could not have been on annual leave on 27 December 2010.

7. HOLIDAYS AND OTHER LEAVE

7.1 The Employee is entitled to 11 public holidays per year in addition to annual leave. Where those holidays fall on days that would otherwise be working days for the Employee, the Employee will be paid for those days.

7.2 The Employee acknowledges that he or she may be required to work on a statutory holiday. If so, you will be paid time and a half for the hours worked and receive an alternative holiday in accordance with the Holidays Act 2003.

7.3 On completion of each full year's service, the Employee will be entitled to 3 weeks annual leave. Such annual leave will be taken in consultation with the Employee and at times reasonably convenient to the Employer. Annual leave is to be taken within one year of the entitlement arising. The Employer's written approval must be obtained to carry over leave into a following year.

7.4 Upon completion of six months' service, the Employee is entitled to sick leave and bereavement leave in accordance with the provisions of the Holidays Act 2003. If required by the Employer, the employee will furnish a medical certificate satisfactory to the Employer.

[31] By virtue of these contractual provisions and the factual position presented to us, the employees were part-time employees. While the agreements were for a fixed term, the employees were not required to stand down from employment at the end of the school year with the employment then expiring and being renewed when the employees resumed driving at the beginning of the new school year. In this respect we agree with the determination of the Authority that the periods when the employees were not required to work could not be described as closedown periods. The plaintiff cannot demonstrate in this case that school holiday periods come within the definition of a closedown period under s 29 of the Holidays Act. In any event, with more than one school holiday during a twelve month period there could not be compliance with s 30 of the Holidays Act nor have the conditions of the exception been complied with.

[32] We have been provided with the documents periodically extending the fixed term agreements. The final extension on 13 November 2008 was for a period of six years, due to expire on 31 December 2014. On the day in question, being 27

December 2010, the employees were part-time employees with no suggestion that their employment ceased over the the summer school holiday period to be renewed when the school term began in 2011. They were simply not required to work as school bus drivers during those periods with their employment continuing. They were, however, to be available for other work if required and could, therefore, not have been on leave.

[33] The employees work patterns, which we ascertain from the agreed facts already adverted to, provide assistance as well. Generally the employees drove school buses during school term periods. They were not generally offered work during school vacation periods, but could be offered such work and did on occasions drive buses for the employer during those periods. Under the agreements they were entitled to annual holidays at the expiry of *each full year's service*, but they never in fact took such annual leave because there was never consultation pursuant to cl 7.3 of the agreements. Nor was there compliance with ss 16 and 17 of the Holidays Act requiring an agreement to be reached as to annual leave entitlements and when that entitlement may be met. We note that, because of the historic nature of the agreements, the specified period of annual leave was three weeks. From 1 April

2007 the requirement under the Act was to provide four weeks annual leave.

[34] This issue of annual leave is an area where, in our view, the parties have not acted in accordance with either the contractual or statutory requirements. It is a matter relevant to the present dispute in that our findings must dispose of the submission put forward by Mr Cranney for the defendants that the public holiday in question arose during the course of the first defendants' annual leave. It is also relevant to the reasons upon which we have decided that the determination of the Authority dealing with the primary issue of the entitlement to the public holiday pay is not correct. In any other respect, however, it is not an issue for consideration in this decision. It points to difficulties which exist between the parties as to future resolution of issues on annual holiday leave, but it is a separate question.

[35] We also take into account those additional factors set out in s 12(3)(c) of the Holidays Act. It is clear that the employees in this case only work when work is available. We do not have documents which could be considered as rosters. However amongst the documents produced, there are records confirming the dates actually worked by the first defendants. These documents also relate to and confirm the contractual provisions.

[36] As to the reasonable expectations of the employer and the employee that the employee would work on the public holiday concerned, we can find no evidence of any such expectation. The public holiday in question was in substitution for

Christmas Day 2010. We perceive that this may not be the position for some other public holidays to which the employees would be entitled throughout the year. However, in respect of this particular day, there is no evidence of any such expectation.

[37] Finally, for the sake of completion, we note that s 12(3)(d) would not appear to be a relevant factor applying in this case.

Conclusions

[38] Before turning to the specific declarations sought in the prayer for relief in the statement of claim, we confirm two findings. First, insofar as it is relevant and considering Mr Cranney's submissions in view of our finding that the determination of the Authority is incorrect, the employees were not in the course of taking annual leave when the public holiday on 27 December 2010 occurred. Section 40 of the Holidays Act therefore has no application. Secondly, we do not accept the plaintiff's contention that the periods when the employees were not required to work during school holidays, were closedown periods.

[39] We wish to emphasise that we have only considered the matter in respect of this particular public holiday. There may be circumstances existing where other public holidays throughout the year would otherwise be working days for the first defendants, in which case they would be entitled to the appropriate pay for them. The agreements contemplate that. Depending upon the days when agreement is reached between the parties as to when the first defendants would be on annual leave, the considerations raised by the Authority and Mr Cranney's submissions on this issue may then also apply. However, in respect of the specific questions involved in this case, we are not required to take those considerations into account.

We also note again that the Labour Inspector upon similar considerations to the Authority but subject to reservations has made a determination pursuant to s 79 of the Holidays Act, that the day in question would otherwise be a working day for the employees concerned. Section 79 of the Holidays Act provides that except to the extent that, in any proceedings before the Authority, the Authority makes its own

determination on the matter, such a determination by a Labour Inspector is binding on the employer and the employee. In this case the Authority has made its own determination to the same effect as the determination made by the Labour Inspector. That determination would, subject to challenge, therefore be binding on the employer and employee in substitution for the Labour Inspector's determination because it was in respect of the very same matter. Our decision, which has been made on the basis of a challenge to the determination of the Authority, now, pursuant to s 183(2) of the Employment

Relations Act 2000, sets aside the decision of the Authority and our decision on the matter stands in its place. It seems to us, therefore, that our decision replacing as it does the Authority's determination renders the Labour Inspector's decision unenforceable.

Disposition

[40] Turning, therefore, to the specific declarations sought, we deal with these sequentially as follows:

a. The school holiday period, 20 December 2010 to 30 January 2011, was not a closedown period. On the statement of agreed facts, and the documentary evidence provided, it is clear that the requirements of ss 29 and

30 of the Holidays Act were not met, not the least of which is that the requisite notice period was not given.

b. We are not sure that we need to decide this point. However, we do not accept that the periods when the first defendants were not offered work could be regarded as periods of unpaid leave. They were not periods of leave because the first defendants remained under an obligation to work if required by virtue of the provisions of the employment agreements. To be leave, the periods would need to be unfettered by any such requirement.

c. While, in our view, the first defendants, because of their continued service, are entitled to annual leave, there had been no agreement reached as to when the entitlement would be taken. Until such agreement was reached, or the default provisions were put into effect, the periods when they were on

annual leave could not be ascertained or specified. Certainly they were not on annual leave from 20 December 2010.

d. For the reasons discussed in this judgment the public holiday on

27 December 2010 in substitution for Christmas Day would not otherwise have been a working day for the first defendants. It is our view that this is clear from all of the evidence. However, even applying the factors set out in s 12(3) of the Holidays Act, it could not be said that this day would otherwise have been a working day for the first defendants.

e. We agree that the first defendants are not entitled to payment for

27 December 2010.

Costs

[41] We reserve the issue of costs. It may well be that the parties can reach agreement as to the issue of costs in respect of this challenge. However, if no such agreement can be reached then the plaintiff will have fourteen days from the date of this decision to file a memorandum advising that it seeks costs and containing its submissions. The defendant shall then have fourteen days to file any memorandum in answer. The Court will then decide the issue of costs.

Judge M E Perkins for the full Court

Judgment signed at 2pm on 20 September 2013

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[1] [2012] NZERA Wellington 111.

[2] At [15].

[3] [2006] NZCA 372; [2007] 2 NZLR 356 (CA).

[4] (2008) 5 NZELR 219.

[5] [2008] ERNZ 38.
