

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 111
5364177

BETWEEN	TRANZIT COACHLINES WAIRARAPA LIMITED Applicant
AND	PAUL MORGAN AND MEI WILSON First Respondents
AND	MANUFACTURING AND CONSTRUCTION WORKERS UNION INC Second Respondent

Member of Authority: P R Stapp

Representatives: Michael Gould, Counsel for the Applicant
Peter Cranney, Counsel for the Respondents

Investigation Meeting: 24 July 2012 at Wellington

Further Information: 6 September 2012

Determination: 26 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] It is common ground that both first respondents were covered by fixed term employment agreements expiring in 2014, when the applicant's contract with the Ministry of Education expires.

[2] The employment agreement for both first respondents provided for work on an *as and when required* basis. The employer had an absolute discretion to vary days and hours of work (document 4A, clause 3.2).

[3] Both employees remained as employees throughout and available to the employer until at least 2014.

[4] Although the work was not continuous, the employment was. In addition the obligation to work remained at all times.

[5] The employment agreement provided for three week's annual leave (now four weeks annual leave) *on completion of each full year's service* (clause 7.3).

[6] The applicant has contended that the first respondents were *not entitled to annual leave* in December 2010. The first respondents and the Union claim that this is not correct, as both the first respondents had completed 12 month's continued employment (or in the words of the contract *a full year's service*). The first respondents and the second respondent claim whether they had work continuously is totally irrelevant (as is s.34 of the Holidays Act 2003). It claims that the relevant section of the Holidays Act 2003 is s.40.

The issues

[7] The issues that the parties have requested the Authority to make a determination on are whether or not the first respondents are entitled to the payment for public holidays which fell outside school terms under the terms of their employment agreements. The pivotal question is whether or not the two first respondents are entitled to pay for a public holiday on 27 December 2010?

[8] The Holidays Act 2003 makes provision for the following:

- 40 *Relationship between annual holidays and public holidays***
- (1) *A public holiday that occurs during an employee's annual holidays must be treated as a public holiday and not as part of the employee's annual holidays.*
- (2) *Subsection (3) applies if-*
- (a) *the employment of the employee comes to an end; and*
- (b) *the employee is entitled to annual holidays; and*
- (c) *the employee has not taken the annual holidays or has taken only some of them.*
- (3) *The employee is entitled to be paid for a public holiday if the holiday would have-*

- (a) *otherwise been a working day for the employee; and*
- (b) *occurred during the employee's annual holidays entitlement immediately after the date on which the employee's employment came to an end.*

12. Determination of what would otherwise be working day

- (1) *This section applies for the purpose of determining and 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 factor listed in sub-section (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 close down period, the factors listed in subsection (3) must be taken into account as if the close down 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.*

16. Entitlement to Annual Holidays

Section (1)A after the end of each completed 12 months of continuous employment (and employee is entitled to not less than [four week's] paid annual holidays.

- (2) *For the purposes of sub-section (1), the 12 months of continuous employment –*

- (a) *includes any period during which the employee was –*
- (i) *on paid holidays or leave under this Act; or*
 - (ii) *on parental leave under the Parental Leave and Employment Protection Act 1987; or*
 - (iii) *[on volunteers leave within the meaning of the Volunteers Employment Protection Act 1973; or]*
 - (iv) *receiving weekly compensation under the [Accident Compensation Act 2001] or former Act as well as, or instead of, payment from the employer; or*
 - (v) *on unpaid sick leave or unpaid bereavement leave; or*
 - (vi) *on unpaid leave for any other reason for a period of no more than one week; but*
- (b) *unless other agreed, does not include any other unpaid leave, being leave other than that referred to in para.(a)(v) and (vi).*
- (3) *If, for the purposes of sub-section (2)(v), and employer and employee agree that any period of unpaid leave of more than one week is to be included in the employee's twelve months of continuous employment, the divisor of 52 to be used for the purposes of calculating the employee's average weekly earnings must be reduced by the number of whole or part weeks greater than one week that the employee was on the unpaid leave.*
- (4) *An employee's entitlement to annual holidays remains in force until the employee has –*
- (a) *taken all the entitlement as paid holidays; or*
 - (b) *been paid out under s.28B for the entitlement in the entitlement year.*

29. Meaning of close down period

*In this section and [sections 12(3A) and 32-35], **Close down period** means a period during which an employer customarily –*

- (a) *closes the employer's operations or discontinues the work of one or more employees; and*
- (b) *requires [the employer's] employees to take all or some of their annual holidays.*

30. Frequency of close down periods

- (1) *For the purposes of ss.31-35 (the employer may have only one close down period in any 12 month period.*
- (2) *However, sub-section (1) does not prevent from an employer and employee from agreeing –*
 - (a) *that the employer may close his or operations and discontinue the work of the employee at other times; and*
 - (b) *on the arrangements that will apply during those times.*
- (3) *If sub-section (2) applies, ss.32-35 do not apply.*

34. Calculation of pay during close down period for employees not entitled to annual holidays

- (1) *This section applies to an employee who, at the commencement of a close down period, is not entitled to annual holidays under s.16.*
- (2) *An employer must, in respect of the close down period pay the employee [8%] of the employee's gross earnings since the commencement of the employee's employment or since the employee last became entitled to annual holidays (as the case may be) less any amount –*
 - (a) *paid to the employee for annual holidays taken in advance; or*
 - (b) *paid in accordance with s.28.*
- (3) *An employee who is paid annual holiday pay calculated in accordance with sub-section (2) is not otherwise entitled –*
 - (a) *to any annual holidays for the period of employment up to the date of the beginning of the close down period; or*
 - (b) *to any remuneration for the period of the closure or discontinuance of the work.*
- (4) *This section does not prevent an employer and employee from agreeing that the employee may take the period of close down as annual holidays in advance under s.20 and be paid for the period in accordance with s.22.*

[9] The first respondents' employment agreements are also relevant. They expire in 2014. The first respondents were employed by Tranzit during the term of their

respective agreements. The employment agreements are the same. In this regard I refer to the following:

3. Days and hours of work

- 3.1 *The Employee's starting and finishing times and days of work will be determined by the Employer in accordance with its operational requirements.*
- 3.2 *The parties expressly acknowledge and accept the Employer's right to vary the days and hours of work.*
- 3.3 *All hours of work must conform with the current Land Transport Safety Authority (or the responsible organisation (driving our regulations and requirements)).*

7. Holidays and other leave

- 7.1 *The Employee is entitled to eleven 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 **four** 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 the 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.*

Agreed statement of facts

[10] The following facts as background to the dispute have been agreed between the applicant, first respondents and second respondent. The agreed facts are as follows:

1. *The respondent Paul Morgan was employed by the applicant from 2004 until February 2011 as a school bus driver.*
2. *The respondent Mei Wilson was employed by the applicant from November 2005 until December 2010, also as a school bus driver.*
3. *Mr Morgan and Ms Wilson worked during school terms only, their work being discontinued during school holidays. Calendars have been provided by the parties for each year of the employment of the first respondents that show:*
 - (a) *In red the days on which they worked five hours or more;*
 - (b) *In pink the days on which they worked less than five hours;*
 - (c) *In yellow the school holidays;*
 - (d) *Marked with an "X" the days during the school holidays on which the first respondents worked.*

There is agreement between the parties on the school term dates for 2003 to 2011.
4. *In December of each year the applicant paid each of the first respondents holiday pay calculated at 8% of their total earnings for the year. The calculations for each of the respondents for 2010, 2009 and 2008 were attached by the parties to this statement of matter (as documents 4d, e, f, h, i and j).*
5. *Proceedings were issued in the Employment Relations Authority seeking a determination on the entitlements of the first respondents and others to payment for public holidays which fell outside school terms.*
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.*
7. *The applicant challenges those determinations as set out in the statement of matter and seeks a determination from the Authority as to whether the first respondents were entitled to payment for 27 December 2010.*

[11] Both parties are seeking costs.

Determination

[12] This is a matter of interpretation. First there is no jurisdiction for an employer dissatisfied with a determination from a labour inspector to challenge the determination. Second the jurisdiction for the matter in the Authority rests on a dispute in regard to the employment agreements and as such is an employment relationship problem. That is the issue of their entitlement to public holidays under the terms of the first respondents' employment agreements with Transit. The Authority has been called upon to make a decision on the issue, and although this can not be a challenge to the labour inspector's determination the Authority's involvement seems to be able to run parallel to that of an inspector making a determination. In this regard the Authority's investigation has been entirely separate to that of the inspector's and investigated on its own merits.

[13] Jurisdiction has not been challenged, although the inspector's determination remains binding.

[14] Transit's approach to the matter is based on the following:

- a) The first respondents had not completed 12 months continuous employment because both of them had approximately 10 weeks where they did not work during the year. They did not qualify for 4 weeks paid holiday (under s 16 of the Holidays Act).
- b) The first respondents were not entitled to annual holidays at the end of the school term in December 2010 that Transit has referred to as a "close-down". They were paid 8% of their gross earnings for the previous year. Transit says they were thus not on annual leave in the period including 27 December 2010.

[15] The first respondents are both entitled to the public holiday because they were on annual leave according to their terms under the employment agreements. This is supported by the employer paying their holidays at the end of the year. The entitlement is provided for a public holiday in addition to annual leave. As such the day would have been an otherwise working day because:

- 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.

[16] In addition I hold that s 40 of the Holidays Act is relevant in that where a public holiday occurs during an employee’s annual leave holidays must be treated as a public holiday and not part of the annual leave. Both the first respondents had completed 12 month’s service (in the words of the contract *a full year’s service*). First this provided them with their entitlement once they had completed 12 months service. Second I agree with the first respondents that it is not relevant that they had worked continuously (as is s.34 of the Holidays Act 2003), but that they had service under a continuing fixed term arrangement. Finally for completeness s 34 does not apply because the period off work is not a close down because the arrangements do

not meet the meaning of s 29 of the Holidays Act. Both first respondents are entitled to the payment for 27 December 2010.

[17] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority