Employment Court of New Zealand

Morgan v Tranzit Coachlines Wairarapa Limited [2015] NZEmpC 121 (28 July 2015)

Last Updated: 1 August 2015

IN THE EMPLOYMENT COURT WELLINGTON

[2015] NZEmpC 121

EMPC 284/2014

IN THE MATTER OF proceedings removed in full from the

Employment Relations Authority

BETWEEN PAUL MORGAN First Plaintiff

AND PAMELA SCHOFIELD Second Plaintiff

AND TRANZIT COACHLINES WAIRARAPA LIMITED

Defendant

Hearing: 12 May 2015

(heard at Wellington)

Appearances: P Cranney, counsel for the plaintiffs

M Gould, counsel for the defendant

Judgment: 28 July 2015

JUDGMENT OF JUDGE A D FORD

Introduction

[1] At all material times the two plaintiffs were school bus drivers working for Tranzit Coachlines Wairarapa Limited (the defendant). The defendant had a contract with the Ministry of Education to provide school bus services in the Wairarapa. In December 2013 the plaintiffs applied to take annual leave but their applications were turned down. In its letters rejecting the leave applications, the defendant pointed out that the legal entitlement for annual leave under the Holidays Act 2003 (the Act) arose only after the completion of 12 months' continuous employment. It contended that because the plaintiffs had not been required to work during the school holidays

(four weeks in January 2013 and three periods of two weeks in April, July and

October) they had not completed 12 months' continuous employment and hence had

not achieved their entitlement to paid annual leave.

[2] It was the defendant's case that the school holidays were periods of "unpaid leave", exceeding one week in duration, which, under s 16 of the Act, were to be excluded for the purposes of determining any period of continuous employment. The case for the plaintiffs' was that during the school holidays they had no obligation at all to their employer and, therefore, they

were not on unpaid or any other type of leave. In the alternative, they argued that even if the holidays were "unpaid leave" (which was denied), that would not extinguish their right to annual leave but only delay the date on which their holiday entitlement would arise.

[3] The matter first came before the Employment Relations Authority (the Authority), but in a determination dated 22 October 2014, the Authority removed the employment relationship problem to this Court pursuant to s 178 of the Employment Relations Act 2000, without investigation, on the ground that an important question of law was likely to arise other than incidentally.1 The question of law was identified as "whether or not the [plaintiffs] have met the requirements of completing

12 months continuous employment to entitle them to annual leave under s 16(2) of the Holidays Act."2

[4] The evidence was presented by way of an agreed statement of facts. Although the statement of problem filed in the Authority and the agreed statement of facts described the employment status of both plaintiffs, the position regarding Ms Pamela Schofield was a little more complicated because in about February 2013, she had changed her status from being a part-time variable worker to a fixed term school bus driver, and she had leave entitlements which had accrued from her previous position prior to becoming a fixed term school bus driver. She later resigned her employment in April 2015. It was no doubt for these reasons that the particulars in the statement of claim filed in this Court dealt only with the

employment position of the first plaintiff, Mr Paul Morgan.

1 *Morgan v Tranzit Coachlines Wairarapa Ltd* [2014] NZERA Wellington 102.

2 *Morgan v Tranzit Coachlines Wairarapa Ltd*, above n 1 at [4].

[5] As the case appears to be something of a test case and there is no real difference between the parties in relation to the facts, I propose to proceed on the basis that the principal issue between the parties can properly be considered and determined on the evidence relating to Mr Morgan alone, although I note that by way of relief, the statement of claim seeks a determination that both plaintiffs are entitled to the annual leave which they applied for and were denied in December 2013, and a compliance order requiring such leave to be granted.

Agreed statement of facts

[6] In relation to Mr Morgan, the agreed statement of facts records the following matters as being relevant to the case:

1. The First Plaintiff Paul Morgan has been employed by the Defendant as a school bus driver since March 2001.

2. In March 2011 Mr Morgan became a party to the Defendant's collective employment agreement with the Manufacturing and Construction Workers Union. That agreement expired on 30 April

2012 and Mr Morgan is now employed under an individual employment agreement based on the terms of that expired collective

agreement.

...

6. Both applicants applied for annual leave in December 2013.

7. Mr Morgan's application was rejected with the Defendant stating he had not achieved an entitlement to paid annual leave.

...

9. Neither of the Plaintiffs worked in the school holidays of April, July and September/October 2013. Mr Morgan did not work at all during the 2012/2013 summer school holidays.

10. As "fixed term school bus drivers" the Plaintiffs were required to work during school term times only and were not on call during school holidays. They could be offered work in the school holidays which they were free to accept or decline.

Unpaid leave

[7] As noted above, the significance of the defendant's claim that the school holidays were periods of leave without pay lies in the fact that under s 16 of the Act,

unless there is agreement otherwise, any period of unpaid leave in excess of one week is not included in the calculation of 12 months' continuous employment.

[8] The relevant provisions in s 16 provide:

16 Entitlement to annual holidays

(1) After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays.

(2) For the purposes of subsection (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 the more than one week; but

(b) unless otherwise agreed, does not include any other unpaid leave, being leave other than that referred to in paragraph (a) (v) and (vi).

[9] There was no dispute that periods of unpaid sick leave or unpaid bereavement leave of indefinite duration and periods of unpaid leave for any other reason not exceeding one week in duration are to be included in any calculation of 12 months' continuous employment. The short point at issue in relation to the plaintiff bus drivers is whether during school holiday periods in excess of one week they were on unpaid leave, as the defendant claims.

[10] The collective employment agreement referred to in cl 2 of the agreed statement of facts3 (the collective agreement) contained the terms and conditions of the plaintiffs' employment. It provided that school bus drivers were employed for a

fixed term period which commenced on the date of employment and was to end, "on

3 At para [6] above.

31 December 2014 or until otherwise terminated or varied." The reason for the fixed term was said to be because the defendant's contract with the Ministry of Education was to expire on 31 December 2014, and there was no expectation of ongoing employment. The collective agreement also provided that employees would be entitled to four week' annual leave "on completion of each 12 months' continuous service".

[11] The collective agreement contained a number of references to the term "leave without pay". Thus:

8.3 ...

...

(b) The minimum hours to be worked by the Employee will vary in accordance with business needs and schedules. For instance, when schools are having a "teacher only day" which is not a public holiday this will be *deemed to be a leave without pay day* for the employee. Similarly, if schools are closed due to fire, emergency or teacher industrial action, the employee may be directed by the employer to drive an alternative route or not to work, and be given *leave without pay* or (by agreement and if sufficient accrued available) anticipated annual leave for any whole week lay-off period.

...

8.5 Where the employee is unable to complete part or all of a rostered shift or return leg of a journey due to circumstances beyond the employer's control (such as the employee's sickness on or after the first leg of a trip making the employee unavailable to be at the starting point for the return journey, where sick leave does not apply to the absence (e.g. the employee is now well but the bus has left without them due to their earlier sickness) the shift or day will be treated as a non-rostered day or *leave without pay*. The employer will endeavour to schedule extra time into the employee's roster during the affected pay period or that immediately following the affected pay period, where such hours are available and acceptable to the employee. Where extra hours to "make up" the lost shift are unavailable or unacceptable to the employee, the parties agree the absence will be treated as *leave without pay,* or an alternative holiday may be used if available and agreed between the parties.

...

14.4 If an employee has exhausted their sick leave entitlement it may be appropriate to use another form of leave (such as *leave without pay*, annual leave entitlement or alternative holidays owed)

...

15.2 Where there is no entitlement to Bereavement Leave or the entitlement has been exhausted it may be appropriate to use another form of leave (such as *leave without pay*, annual leave or alternative holidays owed) instead of, or to "top up" a bereavement leave entitlement. ... Such leave will be considered on a case by case basis, and will be allowed at the employer's sole discretion. Such leave would normally be taken as *leave without pay*, unless another form of leave entitlement is available and agreed between the parties.

(Emphasis added)

Submissions

[12] Mr Cranney, counsel for the plaintiffs, submitted that the Court should be slow to adopt an interpretation of the Act which denied workers a right to paid annual holidays. In this regard, counsel referred to the judgment of the full Court in *Labour Inspector v Cook*, where, after referring to art 7 of the International Covenant on Economic, Social and Cultural Rights, ratified by New Zealand on

28 December 1978, the Court made the observation:4

The right to annual holidays on pay is therefore a fundamental human right of employees. ...

[13] Mr Cranney did not refer to any authorities on the issue but he gave a number of practical examples to illustrate his principal submission that during school holidays the plaintiffs were not on unpaid leave but, "like all permanent employees", their employment conditions stipulated periods when they were required to work and when they were not required to work, and school holidays fell within the latter category.

[14] Mr Cranney took the case of "an ordinary Monday to Friday employee" noting that such an employee does not generally work on weekends but, as counsel put it, "such an employee is not normally thought to be on "leave" or "unpaid leave" on the Saturday and Sunday."

[15] Mr Cranney continued:

29. Similarly, an employee may have a job requiring work on every second weekend. He or she is not on "leave" or on "unpaid leave" on the 12 days not worked. Such an employee is entitled to annual

4 *Labour Inspector v Cook* [1994] NZEmpC 234; [1994] 2 ERNZ 473 (EmpC) at 480.

holidays the same as everybody else. The same can be said of a worker who works a shift of say 10 days on and 10 days off, or

14 days on and 14 days off, or 28 days on [and] 28 days off (which counsel noted were common arrangements with seafarers in

particular). All of these workers are entitled to annual holidays. Their

10 or 14 or 28 "off" days [are] not "leave" or "unpaid leave".

[16] In relation to the school holiday periods, Mr Cranney submitted that they "are parts of the year when no work at all is provided and no payments is given. A worker has no obligation at all to the employer, and is not ‘on leave’ or ‘on ... unpaid leave’.”

[17] Counsel for the defendant, Mr Gould, submitted that the school holidays were, "periods of unpaid leave, i.e. periods when the employees were not required to work and were not paid" and as those periods were for more than one week, under s 16 of the Act, they were not to be included in the calculation of 12 months’ continuous employment unless otherwise agreed. Mr Gould submitted that the ordinary and plain meaning of the word "continuous" was "unbroken or uninterrupted" and the plaintiffs' employment was "broken or interrupted by the periods of unpaid leave during the school holidays."

[18] Mr Gould noted that there appeared to have been no judicial decisions in which the term "unpaid leave" had been considered but he sought to rely on dicta from three relatively recent decisions of this Court.

[19] Mr Gould first referred to the decision of the full Court in *New Zealand Meat Workers' Union Inc v Alliance Group Ltd*.5 The issue in that case was whether meat workers who work on a seasonal basis resume work each season as new employees or as continuing employees. The issue was relevant in terms of s 63 of the Act which requires an employee to have "completed six months' current continuous employment with the employer" before becoming entitled to the benefit of sick leave and bereavement leave. After reviewing the relevant authorities, the Court

determined that seasonal meat workers were not employed during the off-season and the period of time during the off-season could not, therefore, be taken into account in

any calculation of the period of "current continuous employment".

5 *New Zealand Meat Workers' Union Inc v Alliance Group Ltd* [2006] NZEmpC 78; [2006] ERNZ 664 (EmpC).

[20] Although the full Court in the *Alliance* case was principally concerned with s 63 of the Act, reference was made in [96] of the judgment to s 16(2) and that is the passage which Mr Gould relies upon. It reads:

[96] Section 16(2) deals with the concept of "continuous employment" for the purposes of entitlement to annual holidays. It defines the required qualifying period of 12 months as including volunteers leave, unpaid sick leave, unpaid bereavement leave or unpaid leave for any other reason for a period of no more than one week. Section 16(2)(b), however, provides specifically that, unless otherwise agreed, any other unpaid leave is not to be taken into account. The provisions of s 16(2)(a) deeming various absences to be included in the 12-month qualifying period suggest that, in the absence of these provisions, such absences would not have been regarded as part of "continuous employment".

[21] The second authority Mr Gould referred to was *Law v Board of Trustees of Woodford House*, which was a case where the plaintiffs worked as matrons or house mistresses at a boarding house at one of the defendant's schools.6 During most of the school holiday periods, of about 10 weeks each year, their services were not generally required. Mr Gould acknowledged that the case was not concerned with entitlements to annual leave but he sought to rely upon the following passage from [217] of the judgment which he submitted supported his contention that school holidays were periods of unpaid leave for the plaintiffs in the present case:

[217] ... In essence, the 10 weeks or so per year (i.e. the balance of a 52 week working year after 38 weeks of work and three or four weeks of annual leave) were in the nature of additional, albeit generous, leave. ... The plaintiffs remained employed by the defendants for each whole year and could be and, in theory and occasionally in practice, were called upon to perform some work when the boarders were away from the schools during school holiday periods and outside the plaintiffs' periods of annual leave.

[22] The final authority relied upon by Mr Gould was the decision of the full Court in *Tranzit Coachlines Wairarapa Ltd v Paul Morgan and Mei Wilson and MCWU*.7 That case has particular relevance in that, apart from Ms Wilson and Ms Schofield, the parties were the same as the parties to the present proceedings. The issue in the earlier case, however, was whether the day in question, namely Monday, 27 December 2010, would otherwise have been a working day for the

defendant school bus drivers for the purposes of determining their public holiday

6 *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, (2014) 11 NZELR 355.

7 *Tranzit Coachlines Wairarapa Ltd v Morgan* [2013] NZEmpC 175, [2013] ERNZ 638.

entitlement. That issue was determined in accordance with the factors listed in s 12 of the Act. The Court concluded that the public holiday on 27 December 2010, in substitution for Christmas Day, would not otherwise have been a working day for the defendants.

[23] Although the case was not concerned with s 16 of the Act relating to entitlement to annual holidays, Mr Gould sought to rely upon the following paragraphs from the full Court's judgment:

[32] ... On the day in question, being 27 December 2010, the employees were part-time employees with no suggestion that their employment ceased over 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.

...

[40] ... 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.

[24] Mr Gould noted that the plaintiffs in the present case were unfettered by any requirement to be available for work. They were not on call and remained under no obligation to work. Counsel submitted that in the final sentence of the above quotation, the Court was holding, "that if periods of school holidays are unfettered by any requirement to work if requested, those periods would have been found to have been leave."

[25] Although the matter was not clarified in argument, it would appear that in the earlier case, the full Court proceeded on the basis that Mr Morgan's employment agreement was the same as Ms Wilson's agreement even though his agreement could

not be located. The Court accepted that the Wilson agreement was the agreement in force at the relevant date, namely 27 December 2010. The agreed statement of facts in the present case confirms that in March 2011 Mr Morgan became a party to a collective agreement which expired in April 2012. This, no doubt, explains how he was available for work if required during school holidays under his earlier

employment agreement but he is under no such obligation under his current individual employment agreement which is based on the terms of the expired collective agreement.

Discussion

[26] As noted above, there was no dispute as to the facts, and counsel were in agreement that the short point in issue was whether the school holiday periods in

2013, each of which was for a period in excess of one week, were periods of unpaid leave which, under s 16 of the Act, could not be regarded as part of an employee's continuous employment.

[27] The obiter authorities referred to by Mr Gould are unexceptionable but the cases were principally concerned with different factual situations and legal issues. Although the full Court judgment in the earlier *Tranzit Coachlines Wairarapa* case touched upon the school holiday situation, the Court found that it did not need to decide that point. It did, however, make the observation that during the school holidays when work was discontinued, the school bus drivers' employment with the

defendant was continuous.8 I respectfully agree with that statement.

[28] There was no dispute about the relevant principles of statutory construction. They are well established and were summarised by the full Court in *Vice-Chancellor of Massey University v Wrigley*.9 I will not repeat them.

[29] In the second passage cited in [23] above, the full Court opined that school holiday periods, when the defendants were not offered work, could not be regarded as periods of unpaid leave because they, "remained under an obligation to work if required and to be leave, the periods would need to be unfettered by any such requirement."10

[30] It seems to me that any consideration of the concept of unpaid leave must involve some consideration of the definition of the word "leave" in an employment

8 *Tranzit Coachlines Wairarapa Ltd v Morgan,* above n 6 at [2].

9. *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138 at [42]- [44].

10 *Tranzit Coachlines Wairarapa Ltd v Morgan*, above n 6 at [40].

context. It is not defined in the Act or the collective agreement. As a noun, it is defined in the Shorter Oxford English Dictionary as: "More fully ***leave of absence***. Permission to be absent from one's normal duties, employment, etc.; (authorized) absence from work etc.; a period of such absence."11

[31] The expression "unpaid leave" was considered by the Industrial Relations Court of South Australia in *Flinders Ports Pty Ltd v Woolford*,12 which was an appeal from a decision of an Industrial Magistrate ordering the appellant to pay the respondent just over $5,000 for unpaid long service leave. The respondent was a casual port worker and there were gaps of as much as a fortnight, and up to a month on one occasion, between his calls to work. The respondent had also been off work

on workers compensation for the last three years of his employment. It is unnecessary to deal any further with the facts of that case – the appeal was dismissed. The Court was concerned, however, with certain provisions of the Long Service Leave Act 1987, s 6 of which has similarities with the provisions in s 16 of the Act.

[32] Section 6 of the Long Service Leave Act dealt with the issue of a worker's continuity of service and provided (relevantly):

(1) A worker's continuity of service is not affected by–

...

...

(e) absence of the worker from work on account of long service leave or annual leave;

(f) absence of the worker from work on any other kind of leave;

[33] In its consideration of the appellant's contention that the word "leave" meant the absence from work by permission, or alternatively pursuant to the terms of the contract the parties had entered into setting the terms of leave, the Court made the following observations:[13]

11 Lesley Brown (ed.) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press Inc, New York, 2002) at 1564.

12 *Flinders Ports Pty Ltd v Woolford* [2013] SAIRC 45.

13 At [44].

Leave does not always involve a permitted absence. In the case of industrial regulation it may not only be the result of a contract but more usually it will be by the terms of an award or enterprise agreement. ... "Leave" in the context of industrial regulation is most often a usage to describe an absence authorised or allowed by the various instruments and legislative provisions attaching to employment.

[34] In the New Zealand employment law context, the reference by the court to awards, enterprise agreements and various instruments would have no relevance but, that apart, I would accept the thrust of the other observations made regarding the meaning of the word "leave". In other words, "leave" in s 16 of the Act means the absence from work by permission or pursuant to provisions in the relevant employment agreement or the Act itself setting the terms of leave.

[35] There is no question in the present case that it was not necessary for the plaintiffs to obtain permission from the defendant to take leave to be absent from work during the school holidays and there were no provisions in the collective agreement indicating that school holidays were to be regarded as periods of leave.

[36] The definition and the undisputed facts thus beg the question, if the plaintiffs were under no obligation to work during the school holidays or to make themselves available for work if required, why would it be necessary for them to obtain leave to be absent from work? In this context, there are obvious similarities with Mr Cranney's analogy of the "ordinary Monday to Friday employee" who is not regarded as being on leave during weekends.[14]

[37] The defendant does have a "Leave Application" form for employees to complete which was produced in evidence. It lists the categories of leave as Annual Leave, Sick Leave, Sick Leave Without Pay, Leave Without Pay, Bereavement Leave, Time in Lieu and Other. The form makes no reference to school holidays.

[38] It is not without significance that the collective agreement provides in cl 8.3 for teacher only days to be *deemed* to be leave without pay days and cl 8.5 provides that certain other absences will be treated as leave without pay days.[15] Had it been the intention of the parties to the collective agreement that school holidays were to

14 At [41] above.

15 At [11] above.

be regarded as periods of leave then it would have been a simple process to provide for that through a similar deeming provision in the collective agreement. That was never done.

Conclusion

[39] For the reasons explained above, I accept that the plaintiffs satisfied the criteria of having completed 12 months' of continuous employment with the defendant and, accordingly, they were entitled to the annual leave they applied for and were denied in December 2013. As the second plaintiff is no longer employed by the defendant it is not appropriate to make the compliance order sought in the statement of claim. Given my conclusions, I suspect that counsel will be able to resolve any outstanding issues in relation to this aspect of the case but, if necessary, leave is reserved to seek further directions from the Court.

[40] Costs are sought but, to the extent that this appears to be a test case, it may be best to let costs lie where they fall. If the plaintiffs wish to pursue this issue, however, then Mr Cranney should file submissions within 28 days and Mr Gould will have a like period of time in which to file submissions in response.

A D Ford

Judge

Judgment signed at 10.15 am on 28 July 2015