



# Employment Court of New Zealand

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## Morgan v Tranzit Coachlines Wairarapa Limited [2021] NZEmpC 106 (8 July 2021)

Last Updated: 15 July 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2021\] NZEmpC 106](#)

EMPC 262/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for a compliance order and penalties
BETWEEN	PAUL MORGAN Plaintiff
AND	TRANZIT COACHLINES WAIRARAPA LIMITED Defendant

Hearing: 13 May 2021

Appearances: G Clarke, advocate for plaintiff  
M Gould, counsel for defendant

Judgment: 8 July 2021

INTERLOCUTORY JUDGMENT (NO 3) OF CHIEF JUDGE CHRISTINA INGLIS

(Application for a compliance order and penalties)

[1] The applicant, Mr Morgan, has been involved in a long running series of disputes with Tranzit Coachlines Wairarapa Ltd (Tranzit) over his entitlement to annual holidays and paid public holidays.

[2] The first was a judgment of the full Court dealing with a ‘Mondayised’ public holiday.<sup>1</sup> A further dispute arose over Mr Morgan’s entitlement to annual holidays. The Court found that the criteria of 12 months’ continuous employment had been met

<sup>1</sup> *Tranzit Coachlines Wairarapa Ltd v Morgan* [\[2013\] NZEmpC 175](#), [\[2013\] ERNZ 638](#).

PAUL MORGAN v TRANZIT COACHLINES WAIRARAPA LIMITED [\[2021\] NZEmpC 106](#) [8 July 2021]

and that Mr Morgan was entitled to annual holidays.<sup>2</sup> Issues then arose about reliance on the “fixed-term” labelling of the employment agreements in order to support paying out eight per cent as a bulk sum at the end of the year rather than the full entitlements of the [Holidays Act 2003](#) (the Act).

[3] This resulted in a judgment dated 28 May 2019 in which the Court found that, at the relevant times, Mr Morgan was in continuous employment.<sup>3</sup> Tranzit’s argument that he had been engaged on a series of lawful fixed term agreements was not accepted. As a result, Tranzit was liable to meet Mr Morgan’s leave entitlements. Leave to apply for further orders was reserved in the event these entitlements could not be resolved between the parties.

[4] No such resolution could be achieved. In a judgment dated 14 October 2020, the Court issued a further judgment dealing with the following two questions:<sup>4</sup>

- Did Mr Morgan achieve an entitlement to annual leave in spite of the periods of unpaid leave that formed a part of his employment arrangements?
- If so, was Mr Morgan entitled to paid public holidays over the Christmas holiday period?

[5] The Court concluded that Mr Morgan did achieve an entitlement to annual leave, with the periods of unpaid leave having a deferring effect. Based on the 10 weeks of unpaid leave provided for in the employment agreement, this meant that Mr Morgan would achieve an entitlement every 57 weeks. Transit was ordered to pay Mr Morgan the difference between the eight per cent paid in 2015, 2016, 2017, 2018 and 2019, and the requirements of the Act. It was also found that Mr Morgan was not entitled to payment for the public holidays falling in the Christmas holiday period.<sup>5</sup>

[6] Interest was ordered in any amount outstanding, calculated in accordance with the [Interest on Money Claims Act 2016](#).<sup>6</sup>

2 *Morgan v Transit Coachlines Wairarapa Ltd* [2015] NZEmpC 121, [2015] ERNZ 909.

3 *Morgan v Transit Coachlines Wairarapa Ltd* [2019] NZEmpC 66, [2019] ERNZ 200.

4 *Morgan v Transit Coachlines Wairarapa Ltd* [2020] NZEmpC 169, [2020] ERNZ 429 at [20].

5 At [41]–[42].

6 At [43].

[7] The judgment did not order specific amounts or establish a fixed anniversary date. The parties have been unable to reach agreement on the amount owed and the next anniversary date. It is these two issues that are currently before the Court.

[8] Mr Morgan has applied for:

(a) Declarations that:

- Transit has breached its statutory duty of good faith in responding to the orders made in the October 2020 judgment;
- Transit is in breach of the Court's orders;
- the sum owed by Transit for the years 2008 to 2014 is \$2549.19;
- the next anniversary date will be 1 February 2021; and
- that the anniversary date is 57 weeks after the preceding anniversary.

(b) A compliance order with the Court's judgment of 14 October 2020;

(c) A penalty for breaches of the Court's order payable to Mr Morgan within seven days of judgment; and

(d) Costs.

### **Anniversary date**

[9] It was clear at the hearing that the primary dispute between the parties relates to where Mr Morgan's anniversary date now falls as a result of the Court's judgment and what, if any, entitlement he had during the 2020-2021 summer holidays. As the judgment notes in relation to the then upcoming holiday period, Transit had indicated

at the hearing that any "finding would be honoured in respect of the 2020 summer holidays and any subsequent entitlements."<sup>7</sup>

[10] Mr Morgan applied for annual leave on 25 November 2020. He applied for 20 days' leave commencing on 10 December 2020. He did not provide a return to work date. It can be inferred that he wished the leave to cover the earliest available days.

[11] Transit did not reply to this request until 23 December 2020, well after the date that Mr Morgan had proposed to commence his leave. That response, which the company has since resiled from, claimed that Mr Morgan would have no leave entitlement until 2024 as he had been taking leave in advance since 2002. Another alternative option was provided which used 2007 as a starting point; it offered to offset the alleged overpayment against the amounts ordered by the Court in the October 2020 judgment. It was submitted on Transit's behalf that a correct reading of the Court's judgment leads to the conclusion that Mr Morgan has taken some leave in advance of his entitlements.

[12] The 14 October 2020 judgment concluded that the most appropriate way of dealing with the issue created by the unpaid leave period was deferral; periods of unpaid leave over one week would have a delaying effect on entitlement to annual holidays, shifting the applicable anniversary date. A formula to this effect was set out:<sup>8</sup>

Current anniversary date + Length of unpaid leave in days including weekends – seven days

[13] Applying this formula, the contract allowed for 10 weeks of unpaid leave. One week was subtracted, as well as the four weeks of annual leave which would have been owing. The result was that it would take 57 weeks for Mr Morgan to achieve an entitlement.

[14] A finding was also made that annual holidays had been taken in the years 2015, 2016, 2017, 2018 and 2019. The finding was made at the invitation of Mr Morgan's

7 At [41].

8 At [20].

representative, Mr Clarke, as there was concern that Tranzit would require him to take any unpaid annual leave days whilst only paying him the top-up amount (it had tried to do so in 2014). In addition, the judgment referred to requests made by Mr Morgan for leave around those times, the fact that Tranzit paid the 8 percent as a bulk sum prior to the summer holiday period, and the fact that Mr Morgan had not been required to work and could enjoy the rest and recreation intended by the Act.<sup>9</sup> Tranzit was ordered to pay the difference between the eight percent already paid, and the full entitlement for that period.<sup>10</sup>

[15] Mr Clarke submits that earlier judgments of this Court suggested that in order for annual holidays to be taken, the employee must apply to take them, and this request must be granted by the employer.<sup>11</sup> I agree that this is the general rule however, and as noted in the judgment, it was inferred that Mr Morgan had sought leave, and that Tranzit had impliedly granted it by paying the bulk sum and not requiring him to work.

[16] I do not consider it appropriate to revisit the Court's conclusions on the current application. More generally, it would have significant consequences in terms of the '57 week finding' as part of this calculation was predicated upon a finding that four weeks of annual holidays had been taken in each year which 'cancelled out' four weeks of the unpaid leave. Mr Morgan has staunchly defended that 57-week period in other aspects of his application. If annual leave was not taken, the period between entitlement dates would extend to 61 weeks.

[17] As a result, I decline to adopt the entitlement date of 1 February 2021 as suggested by Mr Clarke.

[18] Mr Gould, counsel for Tranzit, submits that if there was a 57-week period between anniversary dates, Mr Morgan has been taking leave in advance of his entitlement since 2016. It is further submitted that the company chose to "put a line

<sup>9</sup> [Holidays Act 2003, s 3\(a\)](#).

10. While Mr Clarke made reference to the Court's findings having been made absent any application, it is notable that a submission filed on behalf of Mr Morgan on 5 June 2020 records that: "The Plaintiff each year had the time off between the end of the fourth school term and the start of the first term of the year. He was paid holiday pay, albeit an incorrect amount. He applied for annual leave. In the Plaintiff's submission the Court should confirm this was annual leave taken and simply require the Defendant to pay the Plaintiff correctly."

<sup>11</sup> See for example *Wilson v ABC Developmental Learning Centres (NZ) Ltd* [\[2010\] NZEmpC 159](#).

in the sand" at 24 December 2018 and calculate the anniversary date from that point. Mr Gould says that this date was chosen because this was the end of the 2018 school year and given "the inference of holidays having been taken from 2015-2018". The result of that calculation was an entitlement arising on 6 May 2021. However, the date selection rationale was at odds with the finding in the judgment that annual holidays had also been taken in the 2019 summer holiday period. No evidence was before the Court which would otherwise support the adoption of 24 December 2018 as the anniversary date. The judgment also dealt with the 2019 summer holiday period, finding that annual holidays had been taken there.

[19] Both parties have failed to establish a workable or well-reasoned basis for setting an anniversary date. The result is the Court must endeavour to set one on the basis of the information before it.

[20] I agree that given the finding that annual leave had been taken in the relevant summer holiday periods, by implication, Mr Morgan had taken a number of these periods in advance due to the 57-week period between entitlements. I do not think this finding is incompatible with [s 20](#) which allows leave to be taken in advance by an employee only with the employer's agreement. The same logic applies by which it was inferred the parties had agreed to leave being taken in those years.

[21] I note that an inevitable outcome of the 57-week period agreed between the parties is that, at some point, a summer holiday period has arisen, or will arise, in which Mr Morgan does not have an entitlement to annual holidays.

[22] Judge Ford's earlier judgment in 2015 found that under the employment agreement as it was at the time, Mr Morgan was not on unpaid leave and fulfilled the requirements of 12 months' continuous employment. He had applied for annual leave from 20 December 2013 and was entitled to that leave. He was eventually paid the difference between the amount already paid and his full entitlement. This is the most recent point at which it appears Mr Morgan received his annual

holiday entitlements and provides a starting point from which the later anniversary dates can be calculated.

[23] The “fixed term” employment agreement on which Mr Morgan was engaged was said to expire on 31 December 2014. Mr Morgan would have achieved another entitlement to annual holidays by at least 20 December 2014. A new employment agreement was signed on 17 December 2014 which came into force on 26 January 2015 and contained the unpaid leave clause responsible for the 57-week period between entitlement dates.

[24] However, I find it more likely than not that this would not have prevented Mr Morgan achieving a further 12-months of continuous employment on or about 20 December 2015. No evidence has been given as to any mid-year school holidays that were treated as unpaid leave in that year. It was only after the annual holidays taken in December 2015 that the ‘57-week effect’ of the new employment agreement kicks in.

[25] An exercise of adjusting the anniversary date leads to the following results:

- 22 January 2017 (annual holidays taken in advance in December 2016);
- 25 February 2018 (annual holidays taken in advance in December 2017);
- 31 March 2019 (annual holidays taken in advance in December 2018);
- 3 May 2020 (annual holidays taken in advance in December 2019); and
- 4 July 2021 (no annual holidays were allowed or taken in December 2020, so this entitlement remains in force).<sup>12</sup>

[26] As can be seen, this means that Mr Morgan was not entitled to paid annual holidays in December 2020. Nor is there any basis for inferring that leave was taken in advance. It also avoids an outcome which would have lengthened the period between each entitlement date to 61 weeks.

12. The formula was adjusted to 61 weeks given no annual leave was taken in December 2020. See above at [12] and [16].

[27] The formula provided for in [s 16\(3\)](#) of the Act may provide an option for the parties to adopt going forward. That is, of course, a matter for them.

#### *The ‘57-week period’*

[28] All of the calculations here were done using the 57-week period set out in the judgment of 14 October 2020. There was some suggestion on Tranzit’s part that the periods of unpaid leave are actually 12 weeks, not 10 as estimated by the contract and that this should affect the calculation of the anniversary date.

[29] No evidence was provided by Tranzit in support of this. I see no basis for displacing the 10 weeks as set out in the contract.

[30] I note that the relevant clause of the employment agreement does qualify the period of unpaid leave as only “generally” being 10 weeks and does make it clear that the specific periods are the school holidays occurring at the end of the first, second and third term, as well as the period between the end of the fourth term and the start of the first term in the New Year. In the future, should the relevant school holidays be either longer or shorter than 10 weeks, the clause is sufficiently flexible to adapt to such an occurrence. In such a case, use of the formula set out at [12] will allow the correct next anniversary date to be determined.

#### **Compliance orders and penalties**

[31] Mr Morgan has sought compliance orders as well as penalties for breaches of the Court’s orders. This application is procedurally problematic. While the Court may make a compliance order when an order has not been complied with, [s 140](#) of the [Employment Relations Act 2000](#) only allows for penalties to be imposed where a compliance order has been made and further non-compliance has occurred. Section 144AA provides an exception specifically allowing Labour Inspectors to apply for such sanctions without a compliance order; the fact such an exception exists is a clear indication there is no general ability to order sanctions for non-compliance without first having a compliance order.

[32] As a result, no penalty can be awarded against Tranzit for any alleged non-compliance.

[33] In terms of compliance orders, the matter is now largely moot. It has been established that Mr Morgan had no entitlement to annual holidays in December 2020 so there was no non-compliance. I understand that payment of the outstanding holiday pay has now been made for the years 2015 to 2019 as well as interest on those amounts. While the company’s delay is unexplained, and regrettable, it does not trigger the jurisdiction to issue a compliance order, the non-compliance having (belatedly) been remedied.

[34] No order for compliance is made.

#### **Breach of good faith**

[35] Parties to an employment relationship owe a mutual obligation of good faith to one another. Whether a party has breached their obligation of good faith and, if so, whether a penalty is appropriate, requires a staged approach.

*Step 1 – What is the alleged breach?*

[36] The alleged breach relates to a failure to respond in a timely way to the Court's October 2020 judgment.

*Step 2 – Do the circumstances in which the alleged breach has occurred attract the duty of good faith?*

[37] In this regard it is notable that the obligation of good faith is not expressed to apply exhaustively to every corner of an employment relationship. Rather, the obligation of good faith arises in certain circumstances. Some of those circumstances are expressly referenced, including where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment;<sup>13</sup> some are not. As [s 4\(5\)](#) of the [Employment Relations Act](#) makes clear, the circumstances referred to in [s 4](#), including those listed in [s 4\(4\)](#), are not exhaustive.

<sup>13</sup> [Section 4\(1\)\(c\)](#).

[38] The circumstances in which the alleged breach occurred in the present case plainly attract the duty of good faith – they fall within [s 4\(4\)\(bb\)](#): “any matter arising under or in relation to an individual employment agreement while the agreement is in force.”

*Step 3 – Does the alleged breach amount to a breach of good faith?*

[39] The answer at this stage of the inquiry is arrived at by working through a number of differently formulated statutory provisions which set out:

- Non exhaustive examples of when the duty of good faith *will* be breached (such as [s 4\(6\)](#);<sup>14</sup>
- Non exhaustive examples of what is required in order to *comply* with the duty of good faith (such as [s 4\(1A\)\(b\)](#));
- Non exhaustive examples of when the duty of good faith is *not* breached (such as [s 4\(1B\)](#)).

[40] In the present case, the statement of what is required to comply with the duty of good faith contained within [s 4\(1A\)\(b\)](#) is applicable. It provides that the duty of good faith requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. The allegation is that Transit was neither responsive nor communicative, essentially ignoring a request by Mr Morgan to deal with a request for annual leave following the Court's judgment until just before Christmas.

[41] The documents before the Court disclose the following. Mr Morgan's annual leave request was made to Transit on 25 November 2020, the Court's judgment having been issued on 14 October 2020. The company failed to provide any response until 23 December 2020. When the response was provided it was problematic. It included

14. Namely where an employer has advised, or does anything with the intention of inducing, an employee to not be involved in collective bargaining or not be covered by a collective agreement.

claims that Mr Morgan had taken leave in advance since 2002 and would not achieve another entitlement to annual leave for a number of years. That assertion was plainly at odds with Judge Ford's 2015 judgment, which the company was well aware of.

[42] The company says that in order to comply with the Court's judgment it was required to engage in complex mathematical exercises. Even if that was so, the recent proceedings and Court judgment had put Transit on notice that Mr Morgan would apply for leave in that period. Irrespective of its views as to Mr Morgan's entitlement at the time and the stage it was at in assessing it, it was incumbent upon it to offer some form of response in a timely fashion, even if that was to simply inform him that it was still in the process of assessing his entitlement and why that was so.

[43] Instead the company chose to delay, without explanation, until just before the Christmas break and well after Mr Morgan's intended period of leave would have begun. The company's inactions, and actions, amounted to a failure to be communicative and responsive. It took place in the context of an ongoing employment relationship dispute and Transit could have been under no illusion that its inaction would serve to aggravate matters.

*Step 4 - Should a penalty for breach of good faith be imposed?*

[44] [Section 4A](#) provides that:

#### 4A Penalty for certain breaches of duty of good faith

A party to an employment relationship who fails to comply with the duty of good faith in [section 4\(1\)](#) is liable to a penalty under this Act if-

- (a) The failure was deliberate, serious, and sustained; or
- (b) The failure was intended to-
  - (i) ...
  - (ii) undermine an employment agreement or a collective agreement; or
  - (iii) undermine an employment relationship.

[45] As the cases make clear, the “deliberate, serious, and sustained” threshold provided for under [s 4A\(a\)](#) is a high one.<sup>15</sup>

[46] While I am satisfied that the way in which Tranzit dealt with issues following the Court’s judgment amounted to a breach of good faith, I am not satisfied based on the material before the Court that a sufficient basis has been made out for the imposition of a penalty. In particular, I am not satisfied that the failure was sustained in the sense required by [s 4A\(a\)](#) or that the requisite intention has been established for the purposes of [s 4A\(b\)\(i\)](#), (ii) or (iii).<sup>16</sup>

*Step 5 - Should a finding of breach be made in the absence of a penalty?*

[47] A penalty is not the only bow to the good faith armoury. A finding of breach is, in itself, a remedy open to the Court and one which, in my view, ought not to be reserved for cases in which it is coupled with a penalty. That is because Parliament has conferred a pivotal role on good faith as a guiding duty to be complied with by all parties to employment relationships. A finding that a party has failed to comply with their good faith obligations represents a formal condemnation by the Court that they have fallen short of the required standard, and a formal acknowledgment of the wronged party’s right to be treated in a manner consistent with good faith obligations. In a more general sense, a finding of breach (whether or not accompanied by a penalty) highlights and upholds the value and importance of the statutory duty of good faith within the context of employment relationships.

[48] Whether or not a penalty is imposed, a party who has been found by the Court to have breached their obligation of good faith can be expected to sit up and take notice and take steps to ensure future compliance.<sup>17</sup> The reality is that a finding of breach is, in itself, a sanction. And it should not be forgotten that a finding of breach may well have relevance beyond the immediate proceedings, informing (for example) the seriousness of any future breaches involving the same party.

15. *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 112, [2016] ERNZ 733 at [120].

16 *Bourne v Real Journeys Ltd* [2011] NZEmpC 120.

17. See, for example, the discussion in Christina Inglis “Defining good faith (and Mona Lisa’s smile)” (paper presented to the Law @ Work Conference, Auckland, 30 July 2019) at 15.

[49] I have already found that the company breached its obligations of good faith to Mr Morgan. For completeness, while I accept that the fact that Mr Morgan has been found not have an entitlement to annual leave as asserted is a mitigating factor, that falls well short of absolving Tranzit in the circumstances. It is appropriate that a declaration of breach be made to mark out the Court’s disapproval of the company’s actions in this case.

[50] Tranzit breached its statutory obligation of good faith to its employee, Mr Morgan, by its failure to be responsive and communicative in circumstances where it ought reasonably to have engaged with him in a timely and constructive manner.

#### Interest

[51] In the Court’s judgment of 14 October 2020, interest was awarded on “any amount outstanding” calculated in accordance with the [Interest on Money Claims Act 2016](#). Interest was not paid on the amounts due for the years 2008, 2009, 2010, 2011, 2012, and 2014 as Tranzit believed that, having agreed to pay these amounts, they did not fall under the ambit of the Court order. Mr Morgan disagrees and seeks a compliance order in this regard.

[52] At the time of the judgment, the top-up amounts remained outstanding for the relevant years. Tranzit had accepted they were outstanding but undertook before the Court to make payment. As a result, the order for payment of interest was applicable to these amounts.

[53] Transit is ordered to comply with the Court's order and to pay interest on the amounts due for the relevant years pursuant to the [Interest on Money Claims Act 2016](#). The amount is to be paid in full within 14 days of the date of this judgment.

## Conclusions

[54] There is a finding that Transit has breached its duty of good faith by failing to be responsive and communicative in dealing with Mr Morgan's leave request made on 25 November 2020.

[55] Mr Morgan's most recent anniversary date was 4 July 2021. The timing of his next anniversary date will be dependent on if his current annual holidays entitlement is used and the number of weeks of unpaid leave.

[56] There is no fixed period of 57 weeks between future entitlement dates. The length of the period is dependent on a number of factors such as the extent of the unpaid leave that year, and how much of Mr Morgan's annual holidays entitlement has been used.

[57] No other declarations are made in relation to this application.<sup>18</sup>

[58] No penalties are ordered for failure to comply with the Court's judgment of 14 October 2020.

[59] Transit is ordered to comply with the order made in respect of interest for the years 2008, 2009, 2010, 2011, 2012, and 2014. Payment is to be made to Mr Morgan within 14 days of this judgment.<sup>19</sup>

[60] I am inclined to the view that, in light of my findings, costs should lie where they fall. I will however receive memoranda if either party wishes to pursue an application. If so, any application should be filed and served within 14 days, with any reply within a further seven days.

Christina Inglis Chief Judge

Judgment signed at 4.20 pm on 8 July 2021

<sup>18</sup> I note that Mr Morgan's application sought a declaration that sum owed by Transit for the years 2008 to 2014 is \$2549.19. No records have been provided in evidence that would make me comfortable in making such a declaration.

<sup>19</sup> I note that the 2013 holidays were the subject of Judge Ford's judgment and the amount was paid in 2015 – therefore it was not outstanding at the time of the 2020 judgment.