IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2020] NZEmpC 169
EMPC 262/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for further orders
BETWEEN	PAUL MORGAN Plaintiff
AND	TRANZIT COACHLINES WAIRARAPA LIMITED Defendant

Hearing:	23 June 2020 (Heard at Wellington)
Appearances:	G Clarke, advocate for plaintiff M Gould, counsel for defendant
Judgment:	14 October 2020

INTERLOCUTORY JUDGMENT (NO 2)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application for further orders)

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[1] The plaintiff has had a long-running dispute with the defendant company in relation to various leave entitlements. The dispute culminated in a judgment of the Court dated 28 May 2019.[1] The outcome of the judgment was a finding that, during the relevant times, the plaintiff was in continuous employment. The argument that he had been engaged on a series of lawful fixed-term agreements was not accepted. It followed that Tranzit Coachlines Wairarapa Ltd (Tranzit) was liable to meet Mr Morgan's resulting leave entitlements. Leave was reserved to apply for further orders

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1 *Morgan v Tranzit Coachlines Wairarapa Ltd* [2019] NZEmpC 66, [2019] ERNZ 200.

in the event that these residual issues could not be resolved between the parties. The parties have not been able to resolve matters. The overarching outstanding issues can be summarised as follows:

- 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?

[2] I deal with each issue in turn.

Entitlement to annual leave

[3] I understood Tranzit's argument to be that it was not required to provide four weeks' annual leave to Mr Morgan because he was never in continuous employment for a period of 12 months as set out at s 16 of the Holidays Act 2003 (the Act). The argument is predicated on an assumption that the 12 months' continuous employment (the timeframe which otherwise triggers the annual leave entitlement within the Act), is reset if a period of unpaid leave exceeding one week is taken during the 12-month period. Tranzit says that cl 7.5 of Mr Morgan's 2015 and 2018 individual employment agreements effectively acted as the circuit breaker. That clause provided:

> 7.5 The legal entitlement to annual leave arises after 12 months continuous employment. The legal definition of "*12 months continuous employment*" under the Holidays Act excludes periods of unpaid leave in excess of one week. Accordingly, with your approximate 10 weeks of unpaid leave per annum you will not achieve an entitlement to paid annual leave. However, at the end of the 4th term of the school year, we will pay you an amount equal to 8% of your gross earnings for that calendar year in satisfaction of any holiday pay entitlements.

[4] On Tranzit's analysis, the periods of unpaid leave provided for in the agreement 'break the chain of continuous employment' and allow annual leave to be calculated using the eight per cent method contained within the Act. This would mean that the calculation of annual holiday pay would see Mr Morgan treated analogously to either an employee whose employment ended within each 12-month period, or as a casual or fixed-term employee under s 28(1) of the Act. That outcome would be at

odds with Mr Morgan's history of continued employment with Tranzit, previous findings of the Court on these issues,[2] and the reasonably regular nature of his work.

[5] I understood Tranzit to submit that an earlier judgment of the Court contained an implied acknowledgment that, if the school holidays had been labelled periods of unpaid leave within the collective agreement, it would have avoided a finding of continuous employment in Mr Morgan's favour.[3] The statement in *Morgan v Tranzit Coachlines Wairarapa Ltd* that the company seeks to rely on is as follows:

> [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. Had it been the intention of the parties to the collective agreement that school holidays were to 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.

[6] The implication Tranzit seeks to draw from Judge Ford's observations is that classification of holiday periods as unpaid leave would prevent 12 months of continuous employment from occurring. This, it is said, would resolve the issues that the company otherwise confronts.

[7] There are a number of difficulties with the argument. The first is that Judge Ford's observations were obiter. The second is that they need to be viewed in context. He did not indicate that, had there been an unpaid leave clause in the agreement, he would have found that Mr Morgan at no point gained an annual leave entitlement. Rather, I read the relevant parts of his judgment as highlighting a perceived flaw in the argument Tranzit was raising as to the classification (or lack of one) that it had given to the summer holiday period, pointing out that it had chosen to label some periods as unpaid leave in the collective agreement, and not others.

[8] Beyond Judge Ford's obiter observations there is, as the parties acknowledged, limited authority on the issue. In *New Zealand Meatworkers' Union Inc v Alliance*

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2 *Tranzit Coachlines Wairarapa Ltd v Morgan* [2013] NZEmpC 175, [2013] ERNZ 638; *Morgan v Tranzit Coachlines Wairarapa Ltd* [2015] NZEmpC 121, [2015] ERNZ 909; *Morgan v Tranzit Coachlines Wairarapa Ltd* [2019] NZEmpC 66, [2019] ERNZ 200.

3 *Morgan v Tranzit Coachlines Wairarapa Ltd* [2015] NZEmpC 121, [2015] ERNZ 909.

Group Ltd,[4] the Court found that seasonal meat workers were not in continuous employment for the purposes of entitlement to sick leave. Their contracts stipulated that their employment was terminated at the end of the season, not suspended; they were not re-employed within a month. The Court did not consider it appropriate to view the meat workers as being currently in work when the majority of them were receiving unemployment benefits or had found other work. The circumstances in *Alliance Group Ltd* differ from those in the present case, the Court having already found that Mr Morgan remained employed during the intervening periods.

[9] In *Turner v Talley's Group Ltd*,[5] the Court found that a worker who had taken a long period of unpaid sick leave had a right to assert continuous employment. The finding was made in the context of determining whether there had been an historical pattern of engagement. The Court did not make any finding as to the effect of the period of unpaid sick leave on the plaintiff's Holiday Act entitlements. In any event, as s 16 of the Act makes clear, unpaid sick leave does not impact on employment continuity.

[10] Returning to cl 7.5, it may conceivably be that the wording arrived at was informed by what turned out to be a misapprehension that the agreements were valid fixed-term agreements. But the key question is whether any annual leave entitlements arising under the Act are satisfied by the payment of eight per cent of Mr Morgan's gross earnings for the calendar year in question. The answer to this question requires a closer look at various provisions of the Act.

[11] Section 16(1) provides that: "After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holiday." Continuous employment is then defined at s 16(2) as including any period during which the employee was on unpaid leave for any reason for a period of no more than a week, but (unless otherwise agreed) does not include any other unpaid leave, other than those specified in s 16(2)(a), (v) and (vi).

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4 *New Zealand Meatworkers' Union Inc v Alliance Group Ltd* [2006] ERNZ 664, (2006) 3 NZELR 345.

5 *Turner v Talley's Group Ltd* [2013] NZEmpC 31, [2013] ERNZ 12.

[12] Relevantly, the requirement to pay eight per cent of gross earnings is found in four different sections of the Act:

- Section 23 - when employment ends within 12 months;
- Section 25 - if employment ends before further entitlement has arisen;
- Section 28 - in the case of fixed-term agreements lasting less than 12 months or cases of "intermittent or irregular" employment; and
- Section 34 - during closedown periods for employees not entitled to annual holidays.

[13] Sections 23 and 25 both require that "the employment of an employee comes to an end" and that less than 12 months of continuous employment have been worked for the purposes of s 16 either since the employee began employment or since the employee's last anniversary. As will immediately be apparent, both provisions explicitly deal with scenarios in which there is no prospect of the continuation of the employment relationship. They do not apply in the circumstances of this case and can be put to one side.

[14] Section 28 is similarly irrelevant in the current context. This section deals with fixed-term agreements and what could be described as casual employment arrangements. This Court has already found that there was a continuing employment relationship, not a series of fixed-term agreements. Mr Morgan's employment went beyond the intermittent and irregular casual agreements of the type referred to in s 28(1)(ii). Nor can it be said, for the purposes of s 28(1)(ii), that it would be impracticable for Tranzit to provide four weeks' annual holidays and I did not understand the company to be suggesting otherwise.

[15] Section 34 requires the presence of a closedown period, a period during which an employer customarily closes operations or discontinues the work of one or more employees, and requires them to take their annual holidays.[6] It allows the eight per

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[6] Employment Relations Act 2000, s 29.

cent calculation to be used when an employee, at the commencement of the closedown period, is not entitled to annual holidays. While the arrangements set out in cl 7.5 do appear, on their face, to mirror a closedown period as described in s 29, s 30 makes it plain that only one such period may occur within any 12-month period. The presence of at least three other school holiday periods throughout the year means there could not be compliance with s 30. The same conclusion was reached by the full Court which considered this same issue in another matter between these parties.[7] The result is that s 34 does not assist Tranzit.

[16] In summary, none of the eight per cent provisions provided for in the Act allows for periods of unpaid leave to be treated in the manner set out in Mr Morgan's employment agreement. They all identify a specific scenario in which the use of the eight per cent method is deemed helpful in ensuring annual holiday entitlements are met. The scenario faced by Tranzit is not one of those identified by Parliament. I conclude that Tranzit cannot claim the benefit of them.

[17] The Act does, however, provide a means of dealing with periods of unpaid leave under s 16(3). That section allows the parties to an employment agreement to choose to include any period of unpaid leave as part of the 12 months of continuous employment. An adjusted formula applies in such circumstances for calculating average weekly earnings, as follows:

> (3) If, for the purposes of subsection (2)(b), an employer and employee agree that any period of unpaid leave of more than 1 week is to be included in the employee's 12 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 1 week that the employee was on the unpaid leave.

[18] As s 16(3) makes plain, there may be circumstances in which parties agree that unpaid leave of more than one week may be included in a 12-month period of continuous employment and when such an agreement has been reached, the applicable formula for calculating holiday pay is a pro-rated divisor (so three weeks of unpaid leave gives rise to a divisor of 50 as there are two weeks greater than the initial one week). The point is that Parliament has made provision for the parties to agree an

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

alternative method of dealing with the issue other than the approach that would otherwise apply under the Act. The fact that Parliament has done so suggests that the parties are not free to adopt some other model of their choosing. The point is reinforced by the absence of any express provision conferring on the parties freedom to devise their own model for calculating holiday pay. Neither the presence of s 16(3), nor the absence of a general empowering provision, is surprising given the base entitlements provided for in the Act; the statutory acknowledgement of the imbalance of power between employers and employees; and the underlying intention of ensuring that employees receive minimum leave and pay entitlements provided for by law. I conclude that the arrangement set out in cl 7.5 is precluded by the applicable provisions of the Act.

[19] For completeness, I note that it might be argued that the timer on the 12 months of continuous employment resets after a period of unpaid leave over one week was taken. Such an interpretation, which was not expressly advanced by Tranzit, would sit uncomfortably with the statutory scheme. In this regard it is most unlikely that Parliament would have intended to create a situation where an obligation to provide annual holidays could easily and cynically be avoided by an employer, particularly in circumstances where a raft of eight per cent provisions has been specifically provided for.

[20] Where, as here, the parties have not agreed to adopt the s 16(3) methodology, it is necessary to decide what the applicable formula should be. The plaintiff suggests that the effect of the unpaid leave is that it shifts the qualification date on which the entitlement to four weeks' annual holidays is achieved. The authors of Westlaw suggest that the following formula, which reflects the plaintiff's submissions, might usefully be applied in such circumstances.[8]

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

[21] This approach has the advantage of simplicity and logic – it treats a period of unpaid leave as having the effect of delaying the employee's anniversary date. It is true that s 16(2)(b) makes it clear that unpaid leave of over one week is not to be

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8 *Payroll and Compliance* (loose-leaf ed, Thomson Reuters) at [4.7.02].

included in the calculation of a completed 12 months of continuous employment. However, it takes a significant leap to extrapolate from the wording of this subsection that an employee's unpaid leave periods of over one week mean that employment is in effect discontinued, that the employer may pay out eight per cent, and that the employee must start building their 12 months again from scratch.

[22] An example may serve to illustrate the point. Can it have been intended that an employee who has taken eight days' unpaid leave falls short of qualifying for minimum entitlements because they took one day over the maximum allowed amount of unpaid leave? The fact that the Act is silent on the point likely reflects the fact that such periods only act as a 'pause' on the accruing of 12 months of continuous employment. Any other result seems unlikely.

[23] The position can be summarised as follows. Where the Act envisages 12 months' continuous employment not to have occurred, or not to be possible, it provides specific provisions for the manner and payment of the eight per cent. It does not do so for periods of unpaid leave because it does not view such leave as equivalent with these other scenarios. Unpaid leave over one week does not contribute to the building up of 12 months' continuous employment, but neither does the Act treat it as a definitive break in this continuity.

[24] I conclude that, absent an agreement under s 16(3), Mr Morgan would accrue an entitlement to four weeks' annual leave every 57 weeks. I have arrived at this figure using the formula at [20], the 10 weeks of unpaid leave being added to the current anniversary date, minus the one week of unpaid leave allowed by the Act. However, I have reduced the 10 weeks of unpaid leave to six, due to the finding made at [32] that annual holidays were taken by Mr Morgan during the relevant summer holiday periods. The consequence of this finding is that four weeks of annual leave 'cancel out' four of the ten weeks of unpaid leave and form part of Mr Morgan's continuous employment under s 16(2)(a)(i), leaving six weeks of unpaid leave. I note that if the annual leave entitlement had been taken during term time (so during a period which would not otherwise have been unpaid leave), the relevant figure would have been 61.

[25] What next? Mr Morgan asks that the clauses from the 2015 and 2018 individual employment agreements are set aside.

[26] Section 6 of the Act provides:

> **6 Relationship between Act and employment agreements**
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> (1) Each entitlement provided to an employee by this Act is a minimum entitlement.
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> (2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.
>
> (3) However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act –
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> (a) has no effect to the extent that it does so; but
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> (b) is not an illegal contract under subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.

[27] Based on the conclusion I have reached that Tranzit's eight per cent construct had no basis in the Act, I do not have any difficulty finding that cl 7.5 "excludes, restricts, or reduces" Mr Morgan's entitlements and therefore has no effect.

[28] That then leads to the next question – if cl 7.5 is ineffective, what stands in its place? Mr Clarke, advocate for the plaintiff, suggested that the answer lies in either the relevant terms of the 2011 collective agreement (cl 13.1) or the Act. Both provide four weeks of annual holidays and so in practical terms it would make no difference which was adopted. The difficulty with substituting provisions of the collective agreement is that it effectively involves the Court varying the terms of the parties' agreement, something the Employment Relations Act 2000 only allows in limited circumstances.[9] In the present circumstances, the appropriate option is the entitlements in the Holidays Act.

[29] I am not satisfied that cl 3.3 falls into the same category. This clause purports to declare Mr Morgan's status during the summer holiday period:

> 3.3 The dates of the school terms vary from year to year, but generally speaking you will have 10 weeks of unpaid leave per annum being the school holidays at the end of the 1st, 2nd and 3rd terms and the period that schools

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[9] Employment Relations Act 2000, s 164.

> are closed from the end of the 4th term to the beginning of the first term in the New Year.

[30] The clause appears to have followed a reference to the desirability of clarification in Judge Ford's 2015 judgment. In and of itself, this clause does not serve to exclude, restrict or reduce Mr Morgan's employment entitlements. The only real issue is the fact that the reference to unpaid leave status is used as a justification for the eight per cent construct in cl 7.5. I have found that cl 7.5 is ineffective. That means that cl 3.3 is otiose in its effect.

[31] After Judge Ford's finding in 2015, Tranzit took steps to require Mr Morgan to take the annual leave he was owed outside of the summer holidays period. They indicated that during this period they would only pay him a 'top-up' of the eight per cent already paid out, to the full rate. This period of required annual leave never came to pass thanks to the advent of the fixed-term dispute. However, Mr Morgan is concerned that, should he be found to have been entitled to 16 weeks of annual leave across this period, Tranzit will again seek to require him to take this leave with the 'top-up' amount as his only source of income during that time. Mr Morgan has asked that, if Tranzit is found to be in breach of the Act with respect to annual leave, that they simply be ordered to pay the difference between the eight per cent paid in 2015, 2016, 2017 and 2018, and the requirements of the Act.

[32] I agree this is the most appropriate method of remedying the breach. Mr Morgan applied for, and was denied, annual leave in December 2015. Tranzit's reasons for the refusal relied on cl 7.5 which I have found has no effect. This was clearly a breach of s 18(4) which restricts an employer from unreasonably withholding consent to an annual holidays request. The company's response led Mr Morgan to believe he would not be entitled to annual leave in the subsequent summer holidays. Tranzit also paid out the eight per cent payments in advance of the unpaid leave period in a manner bearing similarities to the requirements of s 27(1). Their stated intention at the time was to satisfy all holiday pay entitlements. I infer that Mr Morgan's annual holidays were taken during those summer holiday periods.

Is Mr Morgan entitled to paid public holidays?

[33] The public holiday issue is tied to the annual leave issue. A full Court decision in the line of Mr Morgan's litigation dealt with whether a specific public holiday, the 'Mondayised' Christmas Day holiday in 2010, would have otherwise been a working day for Mr Morgan and another defendant.[10] The Court found that it would not have been. However, the Court's decision was made on the basis that annual leave had not been taken and that, because of this, s 40 of the Act was not relevant.

[34] Mr Clarke, advocate for the plaintiff, argues that annual leave can only be taken on what is a working day and that the same is true with unpaid leave. He says that the "rest and recreation" objectives underlying these provisions can only be achieved if those days taken are otherwise working days. Therefore, the Christmas public holidays are days that would otherwise have been worked, s 40 applies and they should be paid. He advocates a tiered approach to s 12 where, if a day is easily identifiable as a working day under s 12(2), the s 12(3) exercise is not necessary.

[35] The difficulty I perceive with this argument is its circularity. It operates on the assumption that annual leave can be scheduled on a public holiday which s 40(1) clearly states is not the case:

> **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.

[36] The argument effectively treats the public holiday as part of the annual leave. This would lead to a somewhat perverse outcome where any person, realising that a public holiday was going to fall on a day that would not have been an otherwise working day for them, could simply gain the benefit of a paid public holiday by scheduling annual leave for that day without any loss to their annual holiday entitlement. The Act clearly precludes such an outcome by dichotomising the way in which annual holidays and public holidays are to be treated.

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

[37] If I am right about the distinction between annual leave and public holidays outlined above, annual leave can effectively be removed from the equation. The question then becomes were the Christmas public holidays 'otherwise working days' for the purposes of s 12? The full Court's analysis in terms of s 12 is helpful in this regard. There it was said:

> [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 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.
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> [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.
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> [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.
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> [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.
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> [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.

[38] Returning to the present case, there is nothing to suggest that any public holidays in the Christmas period would have been days otherwise worked. Mr Morgan's employment agreements, annual work patterns and other relevant considerations have changed little since the original full Court decision and all point away from a requirement to work. It follows that no public holiday pay is owing.

[39] The conclusions I have reached would appear to have very little effect on Mr Morgan. The purpose of s 40 is to ensure that annual leave and public holidays do not cancel each other out by falling on the same day. The presence of public holidays in the midst of Mr Morgan's annual leave simply means, as pointed out by Mr Gould, counsel for the defendant, that if he had taken annual leave over four weeks, and during that time five public holidays occurred, he would only have used three of his four weeks of annual leave. This is of little consequence to Mr Morgan as this would simply mean the annual leave would extend further into his summer unpaid leave period over a period of five weeks rather than four.

Conclusions

[40] I have concluded that the eight per cent payment method for holiday pay provided for in the Holidays Act does not apply to the circumstances of this case and, to the extent that this method is incorporated into the agreement, it is inoperative. The parties could have, but did not, agree to utilise the prorated approach set out in s 16(3) of the Act. The prorated approach accordingly does not apply. Deferral (periods of unpaid leave of over one week delay the anniversary date on which the entitlement would be achieved) is the most appropriate method of calculation in the present case.

[41] The result is that Tranzit is 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. I understood the parties to have reached agreement over the earlier claimed

years. Tranzit indicated at the hearing that any such finding would be honoured in respect of the 2020 summer holidays and any subsequent entitlements.

[42] I have concluded that Mr Morgan is not entitled to paid public holidays for the days claimed. That is because I am not satisfied that they were days otherwise worked.

[43] The plaintiff claimed interest on any amount outstanding. I did not understand Tranzit to be suggesting that interest was not appropriate and it is ordered, calculated in accordance with the Interest on Monies Act 2016.

[44] Costs are reserved. It will be apparent that each party enjoyed a measure of success and it may be appropriate that costs lie where they fall. If the parties cannot agree I will receive memoranda.

Christina Inglis
Chief Judge

Judgment signed at 12.30 pm on 14 October 2020