**IN THE EMPLOYMENT COURT OF NEW ZEALAND**
**CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA**
**ŌTAUTAHI**

**[2022] NZEmpC 164**
**EMPC 38/2022**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | THEO ZINK<br>Plaintiff |
| AND | BOARD OF TRUSTEES OF SOUTHLAND BOYS HIGH SCHOOL<br>Defendant |

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| Hearing: | 12 July 2022<br>(Heard at Invercargill) |
| Appearances: | P Cranney, counsel for the plaintiff<br>J Copeland and J Greenfield, counsel for the defendant |
| Judgment: | 7 September 2022 |

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**JUDGMENT OF JUDGE B A CORKILL**

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## Introduction

[1] The issue for determination is whether Mr Theo Zink, who was employed at all material times by the Board of Trustees of Southland Boys High School (SBHS) as a chef in a boarding hostel, was entitled to be paid for four public holidays which occurred during a particular Christmas term break, when the school was closed down.

[2] The days which are primarily in issue are Christmas Day and Boxing Day 2020, and New Year's Day and 2 January 2021.

[3] The legal question is whether the four days are to be regarded as working days for which wages should be paid under the provisions of ss 12 and 49 of the Holidays Act 2003 (the HA).

[4] A late amendment was made to the statement of claim which required the Court to also consider whether the public holidays which fell during the Easter term break of 2021 were days that would otherwise be working days.

## Key facts

[5] The main facts are not in contention and may be briefly stated.

[6] SBHS owns and operates a boarding hostel in Invercargill for boys in Years 7 to 13. The hostel does not accommodate any students during term breaks. However, groups may charter the hostel in those periods, and where this occurs, any work performed by Mr Zink is undertaken by agreement.

[7] Mr Zink has been employed in the hostel's kitchen for approximately 14 years. For the first seven years, he worked for Spotless Facility Services Ltd (Spotless), a company which ran the cleaning and food catering operation of the hostel.

[8] Until then, Mr Zink was always paid the Christmas and New Year public holidays.

[9] SBHS took over running all aspects of the hostel in 2015. Shortly before that happened, Mr Zink was offered employment with the school, and his employment was transferred under pt 6A of the Employment Relations Act 2000.

[10] Mr Zink signed an individual employment agreement (IEA) with SBHS on 17 December 2014, commencing work for it on 26 January 2015. I will analyse the provisions of the IEA shortly.

[11] The payroll responsibilities of the hostel were outsourced to Findex (NZ) Ltd (Findex). The evidence for SBHS is that it relies on Findex to administer the payroll correctly.

[12] For the first two years of employment under SBHS, all public holidays were paid, along with annual leave.

[13] In 2017 and 2018, Mr Zink was paid eight per cent of his salary as entitlements under the HA; he was not paid for the public holidays which fell during the term four break.

[14] Accordingly, Mr Zink raised an issue as to whether SBHS's approach was correct. However, after mediation, the matter appeared to have been successfully resolved.

[15] In the 2019/2020 Christmas period, Mr Zink was paid for the four Christmas public holidays. SBHS says the payment was made in error by its payroll provider, Findex.

[16] On 14 October 2020, the Chief Judge issued an interlocutory judgment in *Morgan v Tranzit Coachlines Wairarapa Ltd*.[1] The case, which I will describe more fully later, involved the question of whether a school bus driver who drove mainly in term time, was entitled to payment for Christmas Day.

[17] SBHS regarded the case as being applicable to its employment arrangements with Mr Zink. In reliance on its conclusions, he was not paid for the four Christmas public holidays over the 2020/2021 Christmas period. The view was taken that, for the purposes of the HA, these days were not days that would otherwise be working days justifying payment.

## Employment Relations Authority determination

[18] Mr Zink then raised an employment relationship problem which came before the Authority.

[19] In its analysis of the IEA and associated Schedule, the Authority confirmed that the four Christmas public holidays fell on days that would not otherwise be working

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1 *Morgan v Tranzit Coachlines Wairarapa Ltd* [2020] NZEmpC 169, [2020] ERNZ 429 [*Morgan*].

days for Mr Zink.[2] It determined that these fell in term breaks, during which work was not guaranteed; nor could the prospect of work in the term breaks be treated as a regular event.[3]

[20] It went on to conclude that Mr Zink had not worked on the four Christmas public holidays, but that was because they fell outside school terms, and not because they were public holidays.[4]

[21] The Authority also concluded that this Court had held in *Morgan* that there was nothing in the employment agreement, work patterns, and other relevant considerations for a school bus driver, principally employed to work during school terms, to suggest that the Christmas public holidays would otherwise be working days. Consequently, this aspect of Mr Morgan's claim had been dismissed. There was no basis for reaching a different conclusion in Mr Zink's case.[5]

[22] The final relevant conclusion of the Authority was that the closedown provisions, as referred to in s 12(3A) of the HA did not apply to Mr Zink. This was because SBHS is required to observe school terms as prescribed by the Education Act 1989 (EA).[6]

## Relevant provisions of the HA

[23] It is convenient at this point to set out the main provisions of the HA which are relevant to the issue before the Court.

[24] Section 3 describes the purpose of the HA, which is to promote balance between work and other aspects of employees' lives, and to that end to provide employees with minimum entitlements. These include annual holidays to provide the opportunity for rest and recreation, and public holidays for the observance of days of national, religious, or cultural significance.

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2 *Zink v Board of Trustees of Southland Boys' High School* [2022] NZERA 11 at [24] (Member Cheyne).
3 At [24].
4 At [25].
5 At [26]–[27].
6 That Act has now been replaced by the Education and Training Act 2020.

[25] Section 12 is a key provision for present purposes, and reads:

> **12 Determination of what would otherwise be working day**
>
> (1) This section applies for the purpose of determining an employee's entitlements to a public holiday, an alternative holiday, to sick leave, to bereavement leave, or to family violence leave.
>
> (2) If it is not clear whether a day would otherwise be a working day for the employee, the employer and employee must take into account the factors listed in subsection (3), with a view to reaching agreement on the matter.
>
> (3) The factors are—
>
> (a) the employee's employment agreement:
>
> (b) the employee's work patterns:
>
> (c) any other relevant factors, including—
>
> (i) whether the employee works for the employer only when work is available:
>
> (ii) the employer's rosters or other similar systems:
>
> (iii) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.
>
> (d) whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave or family violence 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 or family violence leave falls during a closedown period, the factors listed in subsection (3) must be taken into account as if the closedown period were not in effect.
>
> (4) For the purposes of public holidays, if an employee would otherwise work any amount of time on a public holiday, that day must be treated as a day that would otherwise be a working day for the employee.

[26] Closedown periods are provided for in ss 29 and 30, which state:

> **29 Meaning of closedown period**
>
> In this section and sections 12(3A) and 30 to 35, **closedown period** means a period during which an employer customarily—
>
> (a) closes the employer's operations or discontinues the work of 1 or more employees; and
>
> (b) requires the employer's employees to take all or some of their annual holidays

> **30 Frequency of closedown periods**
>
> (1) For the purposes of sections 31 to 35, the employer may have only 1 closedown period in any 12-month period.
>
> (2) However, subsection (1) does not prevent an employer and employee from agreeing—
>
> (a) that the employer may close his or her operations and discontinue the work of the employee at other times; and
>
> (b) on the arrangements that will apply during those times.
>
> (3) If subsection (2) applies, sections 32 to 35 do not apply.

[27] The determination of what would otherwise be a working day falls for consideration, because of the effect of s 40 of the Act, which relevantly provides:

> **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.
>
> ...

[28] Finally, I refer to pt 2, sub-part 3 of the HA, which deals with public holidays. At the relevant time, s 43 stipulated that the purpose of the sub-part was, amongst other things, to provide employees with an entitlement to 11 public holidays if the holidays fell on days that would otherwise be working days for the employee.[7] Section 44 defines public holidays, which includes Christmas Day, Boxing Day, New Year's Day and 2 January.

## Mr Zink's individual employment agreement

[29] There are several provisions of the IEA, as signed between SBHS and Mr Zink in 2014, which are relevant for present purposes.

[30] Clause 1.1 notes that the agreement has effect from the date in which it is signed by the employee, "and replaces all previous employment contracts, terms, conditions, agreements, understandings, between SBHS and the Employee and may be varied in writing by mutual agreement".

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[7] Now 12 public holidays with the addition of Te Kāhui o Matariki from 12 April 2022.

[31] Clause 4.1 states that the "Employee will be employed during the school term only, for the days and hours of work as set out in the Schedule".

[32] The clause went on to stipulate that the employee could, from time to time, be requested to work additional hours to meet the demands of the business, for example, preparation and set-up prior to the start of each school term, and/or hostel bookings for external clients during school holidays. In such instances, SBHS was to consult with the employee and give as much notice as was reasonable in the circumstances. Additional hours were not guaranteed and were not to be treated as a regular event unless both parties specifically agreed to this in writing.

[33] Clause 7 deals with annual holidays in respect of a permanent employee, which Mr Zink was. The clause relevantly stated that for an employee who had completed 12 months of continuous employment, they would be entitled to four weeks' annual holidays, "to be taken at the end of Term 4 or otherwise as mutually agreed between the parties."

[34] Clause 8.1 dealt with public holidays. The 11 days provided for in s 43 of the HA were set out, along with a statement that they would be "paid public holidays if they fall on a day that would otherwise be a working day for the Employee".

[35] The Schedule referred to in the IEA confirmed Mr Zink's position as chef; that he worked permanently during school term only; that he was to work 40 hours per week Monday – Friday between the hours of 8.00 am to 4.30 pm, with a half-hour break; that he was required to be available during term holiday breaks for outside accommodation group hire; that holidays were to be taken during the term holiday break; and that he was a waged employee.

## Parties' submissions

[36] The primary submission made for Mr Zink is that his claim turns on a proper interpretation of s 12 of the HA, which provides that an employee's entitlement to a public holiday is determined by resolving whether the day would otherwise be a working day. Mr Cranney, counsel for Mr Zink, submitted there must be a primary focus on whether the public holiday fell during a closedown period. If so, the statutory

analysis would proceed on the basis that the closedown period was not in effect: s 12(3A).

[37] Here, the Christmas break was a qualifying closedown period in the circumstances, which meant that the various factors outlined in s 12 had to be taken into account as if the closedown period was not in effect. Thus, the public holidays fell on days that were deemed not to be holidays but working days.

[38] Mr Cranney's secondary point is that alternatively, an analysis of the various factors described in s 12(3) would produce a similar answer.

[39] Ms Copeland, counsel for SBHS, submitted in summary that the Authority had reached a correct conclusion. The terms of Mr Zink's IEA, and the previous IEA which operated when he was a Spotless employee, were clear and unambiguous. There was no requirement or expectation for him to work outside of the school terms, and there was no contractual requirement for him to work on the four Christmas period public holidays.

[40] An analysis of work patterns from 2018 to 2021 pointed away from a requirement or expectation to work on the claimed days. In practice, Mr Zink predominantly worked term time only.

[41] Ms Copeland submitted that the conclusions reached in *Tranzit Coachlines Wairarapa Ltd v Morgan*[8] and *Morgan*, were both correct and directly applicable. Thus, there was no expectation that Mr Zink would work on the public holidays concerned.

[42] She also referred to s 40 of the HA, which provides that a public holiday that occurs during an employee's annual holiday must be treated as a public holiday and not as part of the employee's annual holidays. Relying on dicta in *Morgan*, this meant that the four public holidays were unpaid because they were not otherwise working days, and the timeframe over which Mr Zink took his four weeks' paid annual leave was "extended out" by four days.

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

[43] Finally, the closedown provisions of the HA did not apply because school terms are prescribed by the Education Minister under the EA.

## Issues

[44] It follows from an analysis of counsel's submissions that the issues the Court is required to resolve are:

(i) What is the correct interpretation of ss 12(3) and 12(3A) of the HA?

(ii) Was there a closedown period at SBHS in 2020/2021?

(iii) Were each of the days in question those that "would otherwise be a working day" for Mr Zink?

## Issue one: the correct interpretation of s 12(3A) of the HA

[45] It is convenient to commence with reference to the majority decision of William Young P and Chambers J in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*, which discussed the relevant provisions of the HA.[9]

[46] When considering the mechanics of s 12, the Court said:[10]

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

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9 *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] 2 NZLR 356, [2006] ERNZ 1109.

10 At [12].

[47] I observe that the Labour Inspector has not been involved in Mr Zink's case, but as no submission has been made suggesting that this means neither the Authority nor the Court has jurisdiction, I proceed on the same basis as did the Court of Appeal.

[48] The next material case is *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v SCA Hygiene Australasia Ltd*.[11]

[49] There, the Court found that there was a closedown period which covered 14 days at Christmas, the employer having adopted this practice for many years. It required its employees to take annual holidays during the closedown. No employee was required to work during that period, and rostered arrangements were suspended.

[50] The Court applied s 12 (as it then was) and concluded that on the face of it, none of the 14 days of the closedown period had otherwise been working days. The customary closedown was in accordance with a longstanding practice, the employees were not required to work and the roster was suspended. The Court therefore concluded that the employees did not have an entitlement to be paid for those days.[12]

[51] Soon after, the Holidays Amendment Bill 2010 was introduced which provided for the enactment of what was to become s 12(3A); the amendment appears to have been a response to the reasoning adopted in the *SCA Hygiene* case. In introducing the third reading of the Bill, the Minister of Labour stated:[13]

> A provision to take effect this December clarifies employees' entitlements during a customary close-down period such as Christmas. It makes it clear that employees are entitled to be paid for public holidays, alternative holidays, sick leave, and bereavement leave falling during a customary close-down period if they would otherwise be working days for the employees. This does not change current practice, but is in response to a recent Employment Court decision, and ensures the legislation reflects the original policy intent.

[52] Subsequently, the new subsection was enacted to take effect on 27 November 2010.[14]

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11 *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v SCA Hygiene Australasia Ltd* [2010] NZEmpC 73, [2010] ERNZ 162.
12 At [25]–[28].
13 (23 November 2010) 669 NZPD 15674.
14 Holidays Amendment Act 2010, s 7(2).

[53] The result of the clarifying subsection confirmed that in assessing s 12(3) factors, it was necessary to proceed "as if the closedown period were not in effect".

[54] Thus, as Mr Cranney submitted: each of the factors described in s 12(3) must be taken into account as if the closedown were not in effect.

[55] I accept his submission that this means a hypothetical situation falls for consideration. The s 12(3) analysis should proceed as if no closedown was in effect.

**Issue two: was there a closedown period at SBHS in 2020/2021?**

[56] The next step in the chain of reasoning is to consider whether the closedown requirements of s 29 of the HA apply.

[57] There are two considerations. The first arises under s 29, where there must be a consideration of the customary practice as to closures. The second arises under s 30 of the HA where – unless there is an agreement to the contrary – an employer may only have one closedown period in any 12-month period.

[58] It is evident that SBHS customarily closes the hostel operation at the end of the final term of the school year and requires Mr Zink to take his annual holidays in that period.

[59] This is evident from the IEA. Clause 7.1(b) states that his four weeks of annual holidays are to be taken at the end of Term 4, or otherwise as mutually agreed.

[60] The Schedule also stipulates, as one of the special conditions of employment, that "holidays [are] to be taken during term holiday break". That special condition means, read in conjunction with cl 7.1(b), that annual holidays are to be taken either at the end of Term 4 or as otherwise are mutually agreed, in which case they could be taken during another term holiday period.

[61] I now turn to s 30(1) of the HA which provides that the employer may have only one closedown period in any 12-month period.

[62] Ms Copeland submitted that in this case there were in effect four closedown periods, that is, at the end of each school term. In each instance, Mr Zink was not required to work. That was because he was employed during school terms only, as just discussed.

[63] However, as Mr Cranney submitted, he was not required to take annual leave in any term break other than that covering the Christmas term break, there being no evidence that the parties agreed to the contrary.

[64] Ms Copeland also relied on a finding about closedown periods in a school setting in *Morgan*.[15] She submitted this was the most recent case in the line of several decisions concerning Mr Morgan's circumstances as a school bus driver who was not required to work in school breaks. She said the findings supported the proposition that s 29 of the HA applied.

[65] In my view, there are in fact two judgments to which reference should be made in that litigation. The first is a decision of the full Court in 2013, *Tranzit Coachlines Wairarapa Ltd v Morgan*.[16]

[66] Mr Morgan and Ms Wilson worked almost every day during school terms, but during school holidays, work was discontinued. Then, there was a dispute as to whether at the end of a fourth school term in 2010, Mr Morgan and Ms Wilson had, by ceasing work as usual at that point, not met a requirement under their employment agreements of continuous employment. This gave rise to a question about whether they were then on unpaid leave for some 10 weeks.[17]

[67] The Court was required to consider whether Christmas Day, once Mondayised to 27 December 2010, would or would not otherwise have been a working day.[18]

[68] The Court found that the employees were not in the course of taking annual leave when that public holiday occurred;[19] thus, the requirements of ss 29 and 30 of

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15 *Morgan*, above n 1.
16 *Tranzit Coachlines Wairarapa Ltd v Morgan,* above n 8.
17 At [3].
18 At [4]–[5].
19 At [38].

the HA were not met,[20] not least because a requisite notice period had not been given under the closedown period.

[69] I observe that a further reason which would have supported the same conclusion was that the employees had not been required to take annual leave, the Court finding that they were not in the course of doing so. The employer must customarily require the employee to take all, or some, of their annual holidays in a closedown period before the closedown provisions apply under s 29(b).

[70] *Morgan* involved one of those drivers, Mr Morgan. Following a determination that Mr Morgan had not been engaged on a series of lawful fixed-term agreements,[21] Chief Judge Inglis considered whether Mr Morgan had achieved an entitlement to annual leave in spite of periods of unpaid leave that formed part of his employment arrangements, and if so, whether he was entitled to paid public holidays over the Christmas holiday period.[22]

[71] In the course of dealing with the first of these issues, the Court focused on a provision of Mr Morgan's IEA, which it was asserted broke the chain of continuous employment and allowed annual leave to be calculated using the eight per cent method allowed for when employment ends within 12 months.[23]

[72] The Court was required to consider the various provisions of the HA dealing with the eight per cent method. One of these was s 34, which deals with payment to an employee who, at the commencement of a closedown period, is not entitled to annual holidays.

[73] It was in this context that Chief Judge Inglis observed that the arrangements set out in the material clause of the IEA appeared, on the face of it, "to mirror a closedown period as described in s 29" but then went on to say that s 30 of the HA made it plain that only one such period could occur in any 12-month period.[24] She

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20 At [40].
21 *Morgan v Tranzit Coachlines Wairarapa Ltd* [2019] NZEmpC 66, [2019] ERNZ 200.
22 *Morgan,* above n 1.
23 At [3]–[4]; Holidays Act 2003, s 23.
24 *Morgan*, above n 1, at [15].

found that the presence of at least three other school holiday periods throughout the school year meant there could not be compliance with s 30. Thus, s 34 could not assist the employer.

[74] Once analysed, it is clear that Mr Morgan's circumstances were fundamentally different to those of Mr Zink. That is because Mr Morgan's annual leave arrangements were quite unlike those of Mr Zink. In the case of the former, there is no evidence that Mr Morgan was required to take all, or some, of an annual holiday entitlement at the conclusion of Term 4. In the case of Mr Zink, there was such a requirement under his IEA.

[75] Accordingly, I consider that the decisions relating to Mr Morgan do not apply for present purposes, and in particular, do not rule out the conclusion that the statutory tests relating to a closedown period potentially applied to Mr Zink's circumstances.

[76] Finally, with regard to this issue, I refer to Ms Copeland's submission that the closedown provisions do not apply because the Minister of Education describes school terms under s 65B(1) of the EA.[25]

[77] That section provides that the Minister is required each year to prescribe by reference to specific dates, specified days, the number of half days, or any two or more of those means, the terms that schools must observe during the next year, or a means for ascertaining or determining those terms.

[78] Ms Copeland argued that this meant that the Minister's stipulation would also relate to the hostel in which Mr Zink was employed as a chef, since it would not operate if students were not required to attend the school for instruction.

[79] Reference should also be made, however, to s 65C of the EA,[26] which deals with holidays. It provides that every school board must ensure that the school it administers is closed on certain days, which include public holidays.

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25 Now the Education and Training Act 2020, sch 21 cl 2.
26 Now the Education and Training Act 2020, sch 21 cl 3.

[80] In my view, it is plain that the EA is dealing with arrangements for instruction. Section 65B deals with days when instruction is to be given. Section 65C deals with days when instruction may not be given.

[81] The EA does not purport to deal with HA entitlements for persons employed by a school board. The two statutes deal with different topics. I do not consider the provisions relied on for SBHS are of assistance in determining whether there is a closedown period affecting the minimum entitlements of relevant employees.

[82] It is also significant that having referred specifically to the question of public holidays, when enacting the provisions of the EA, Parliament did not see fit to override the closedown provisions of the HA.

[83] I conclude that there was a closedown period at SBHS at the conclusion of Term 4 in 2020. That is because Mr Zink's work was customarily discontinued at this time and he was required to take annual leave.

## Issue three: would each of the subject days "otherwise be a working day" for Mr Zink?

[84] The third step requires the intensely factual analysis referred to by the Court of Appeal in the *Fire Service Commission* case.[27]

[85] In light of s 45 of the HA, which deals with the transfer of public holidays over Christmas and New Year, I note that Christmas Day 2020 and New Year's Day 2021 fell on Fridays, so the observance of those public holidays were not transferred.

[86] Boxing Day 2020 and 2 January 2021 fell on Saturdays. Under Mr Zink's IEA, the agreed days and hours of work were "regular fulltime days/hours" described as being Monday to Friday. Saturday was not, in terms of s 45(1)(a) of the HA, an otherwise working day for Mr Zink. Accordingly, these last two days must be regarded

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[27] *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*, above n 9; see also the discussion of the full Court as to the correct approach in *Tranzit Coachlines Wairarapa Ltd v Morgan*, above n 8, at [18]–[23].

as falling on the following Monday, 28 December 2020 and Monday, 4 January 2021: s 45(1)(b).

[87] In the result, the question is whether the two Fridays and the two Mondays would otherwise be working days.[28]

[88] In light of my earlier conclusion with regard to the effect of s 12(3A) of the HA,[29] I proceed on the basis that the exercise must be undertaken as if the closedown were not in effect. That means the assessment requires consideration of whether the days (which were not worked) were otherwise working days and, if that is not clear, then s 12(3) factors.

[89] For the purposes of this assessment, it is necessary to identify the correct comparator. Is it, as Ms Copeland argued, the period at the end of Term 4 when the hostel did not generally operate, so there could be no working days for Mr Zink? Is it, as Mr Cranney argued, the term time weeks when Mr Zink unquestionably worked? Is it term breaks other than the Christmas break? Or is it some other period in light of the various s 12 considerations?

[90] I have concluded that in this instance, the effect of s 12(3A) of the HA is to rule out consideration of the Christmas break.

[91] This is because the enactment of the subsection proceeded on the basis that the approach adopted in *SCA Hygiene* was not the correct approach. Consideration of the position in a Christmas break during which the relevant public holidays fell was regarded as being incorrect.

[92] A s 12(3) analysis must proceed as if the closedown period was of no effect. The Christmas break must be put to one side.

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28 Holidays Act 2003, s 49.
29 At [56].

[93] Taking into account the range of factors required in s 12(3), in my view the analysis must focus on the balance of the year, to discern Mr Zink's work patterns in practice.

[94] In their submissions, counsel addressed practices both when Spotless was Mr Zink's employer, and later after he was transferred on parallel terms and conditions under pt 6A of the Act, when SBHS became his employer. I proceed accordingly.

[95] As his IEAs made clear, during term time Mr Zink was required to, and did, work on Mondays to Fridays.

[96] Turning to the position in term breaks other than the Christmas break, Mr Zink's unchallenged evidence was that when employed by Spotless he always worked in the first and third term breaks, and occasionally, in the winter breaks. He remained available for such work after his employment transferred to SBHS in 2015. I infer the work which was performed on these occasions included weekdays, and thus Mondays to Fridays.

[97] Standing back and looking at the facts, Mr Zink normally worked, and was normally available for work, on Mondays and Fridays. Thus, putting aside the closedown period, the four public holidays were days that would "otherwise be a working day".

[98] Turning to s 40 of the HA, Mr Zink's annual holiday entitlements are not required to be utilised on a public holiday. Although Mr Zink was required to take four weeks' annual leave after Term 4 when 2020 ended, the application of ss 12 and 49 of the HA show that the days would otherwise have been working days for Mr Zink and that he is entitled to have them paid as public holidays.

[99] The foregoing analysis has focused on s 12(3A) and the factors in s 12(3), for the purposes of Mr Zink's claim in respect of public holidays that fell in the Christmas period 2020 – 2021. Accordingly, it is not necessary to consider Mr Cranney's alternative argument which focused on s 12(3), to the exclusion of s 12(3A).

[100] Late in the hearing, an issue arose as to whether Mr Zink's claim should be extended to cover certain days over the Easter break in 2021. Leave was granted for Mr Zink's statement of claim to be amended to include reference to these days. He then gave evidence stating that they had fallen during a term break, so he had not been paid.

[101] Plainly, this break was not part of a closedown period. Thus, the foregoing analysis regarding the effect of the closedown cannot apply to these days. Turning to a consideration of s 12(3) factors, Mr Zink's evidence fell short of showing that each of the days would otherwise be a work day.

## Result

[102] The challenge is allowed.

[103] I find that Mr Zink was entitled to be paid for the public holidays of Christmas Day and Boxing Day 2020 and New Year's Day and 2 January 2021.

[104] In his statement of claim, Mr Zink also sought a compliance order. However, Mr Cranney confirmed to the Court that a declaration only would suffice at this stage. I assume the parties will now be able to resolve the issue of payment without the necessity of such an order being made.

[105] I reserve costs, which the parties should, in the first instance, seek to resolve. If necessary, I will receive memoranda.

B A Corkill
Judge

Judgment signed at 12.15 pm on 7 September 2022