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Centre for Labour, Employment and Work

LEGAL UPDATE: Enforcement of a foreign employment agreement - *New Zealand Basing Limited v Brown* [2016] NZCA 525

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The report on the Employment Court decision was included in **Employment Agreements: Bargaining Trends and Employment Law Update 2014/2015** *(pg 133)*

This case concerns enforcement of a foreign employment agreement. The Court of Appeal overturned the Employment Court judgment and found that the proper law of the employment contracts was Hong Kong law and the contracts were not affected by New Zealand's employment legislation.

New Zealand Basing Limited ("NZBL"), a subsidiary of the Hong Kong airline, Cathay Pacific, appealed against a decision of the Employment Court in favour of two of its employees, Captains Brown and Sycamore (the "pilots").

The pilots are employed as senior captains and are generally rostered for flights between Auckland and Hong Kong. Both are employed pursuant to contracts of employment, which materially include the following provisions

> *This employment contract is governed by and shall be construed in accordance with the laws of Hong Kong and the parties hereto shall submit to the non-exclusive jurisdiction of the courts of Hong Kong.*
>
> *…*
>
> *These Conditions of Service … will in all cases and in all respects be interpreted in accordance with the law … of the Hong Kong Special Administrative Region.*

The contracts also state that the normal retirement age is 55 years of age.

Employment Court decision

The Employment Court declared that the age discrimination provisions of the Employment Relations Act 2000 (ERA) applied to the pilots' employment with NZBL and that it would be discriminatory for NZBL to require the pilots to retire on the grounds of age as defined in the Human Rights Act 1993 ("HRA").

The Court of Appeal

NZBL was granted leave to appeal on two questions:

(a) *If the ERA applies, does it override the parties' agreement that the law of Hong Kong applies to their contract to employment?*

(b) *If the ERA does not apply, would the application of the law of Hong Kong to the contract of employment be contrary to public policy?*

The Employment Relations Act 2000

The Court first considered the question of the application of the ERA, in particular section 238, which states:

> *238 No contracting out*
>
> *The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.*

Referring to private international law principles, the Court noted that, unless a recognised exception applies, the proper law of the contract is the law chosen by the parties, provided that choice is bona fide and legal.

In the Employment Court, Judge Corkill found that the ERA overrode the parties' choice of Hong Kong law. However, the Court of Appeal disagreed.

Judge Corkill's reasoning was largely based on the decision of the House of Lords in *Lawson v Serco Ltd*, *Botham v Ministry of Defence*, *Crofts v Veta Ltd*[1] ("*Crofts*"), which upheld the claims of London-based Cathay Pacific pilots, that the UK Employment Relations Act and a right not to be unfairly dismissed applied to their contract.

The Court of Appeal held that *Crofts* was distinguishable because it had been decided against a very different statutory context. In particular, the Court of Appeal noted that the UK Act was an example of '*overriding legislation which governs the employment relationship notwithstanding that the law of another country would otherwise apply*'[2]. The court found error in Judge Corkill's decision that section 238 of the ERA could be characterised as being of a similar nature.

The Court of Appeal noted further that it cannot have been Parliament's intention that section 238 would apply to override settled rules of private international law. It stated that:

> *Section 238 does not of itself justify the wholesale replacement of carefully drafted transnational bargains with New Zealand's employment regime, even if a court considers the domestic protections more advanced or attractive than those under the foreign law of contract. There is nothing in the ERA's language to suggest that its provisions were intended to apply irrespective of the parties' choice of law.*[3]

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[1] *Lawson v Serco Ltd*, *Botham v Ministry of Defence*, *Crofts v Veta Ltd* [2006] UKHL 3, [2006] 1 All ER 823.

[2] At [54].

[3] At [57].

It referred to the "decisive significance"[4] of the choice of law clause in the pilots' employment contracts and held that the Hong Kong law was the proper law of the contracts.

The public policy exception

Having determined that the ERA did not apply to the pilots' employment agreements, the Court turned to consider the question of whether the enforcement of the law of Hong Kong would offend New Zealand public policy.

The exercise of a court's discretion to refuse recognition of an agreed choice of law in the contract means condemning the foreign law which would otherwise apply. The Court emphasised that, although party autonomy is not absolute, the threshold in relation to this discretion is high. It noted that the fact that a clause of a foreign contract might be contrary public policy in New Zealand would not necessarily make its *enforcement in New Zealand* contrary to public policy. Further, differences in themselves would not constitute sufficient reason for a court to decline to apply foreign law.

The test was:

> *… whether recognition of a foreign law which does not protect against age discrimination would shock the conscience of a reasonable New Zealander, be contrary to a New Zealander's view of basic morality or violate an essential principle of justice or moral interests.*[5]

It held that the pilots' case fell "well short"[6] of satisfying those tests.

The Court held that the right under the ERA and the HRA to be free from age discrimination is not absolute. Rather, it is a flexible concept linked to a number of fiscal, social and cultural factors, and could not be elevated to the level of a fundamental human right able to trump transnational contracting.

The Court further stated that the pilots' contracts must be viewed in their entirety, and that the numerous protections available to the pilots (including favourable tax rates, personal accident insurance, statutory holidays and a sickness allowance under Hong Kong law) could not be divorced from the analysis. The Court would not accept a "selective notion"[7] of public policy and held that this was not a case in which the public policy exception could be applied to defeat the private bargaining of the parties to the contracts.

The appeal was allowed.

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[4] At [58].

[5] At [67].

[6] At [83].

[7] At [77].

Leave to appeal

The Supreme Court has granted the pilots leave to appeal on the question of whether the Court of Appeal was correct to conclude that age discrimination provisions of the ERA do not apply to the employment agreements between the applicants and the respondent.[8]

[8] *Brown v New Zealand Basing Ltd* [2017] NZSC 12.