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Centre for Labour, Employment and Work

The Supreme Court rules in two cases

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Two of the cases in the latest edition of *Employment Agreements: Bargaining Trends and Employment Law Update 2016/2017*[1] have been appealed to the Supreme Court and the judgments have been delivered. The New Zealand Basing decision was reversed, while the AFFCO decision was upheld. The cases are summarised below.

Brown v New Zealand Basing Limited [2017] NZSC 139

In the 2017 edition of the Employment Law Update[2], we reported on the Court of Appeal's decision in *New Zealand Basing Limited v Brown*.[3] The case was about the application of New Zealand law to a foreign employment agreement. The matter was appealed to the Supreme Court and the decision of that Court has now been delivered.

The Court of Appeal found that the pilots, who were parties to Hong Kong employment agreements, could not rely on New Zealand law prohibiting age discrimination when they were asked to retire on the grounds of age. The parties' agreement that their employment relationship was to be governed by the laws of Hong Kong was upheld. The right not to be dismissed on the grounds of age did not exist under Hong Kong law and could not therefore be claimed by the pilots. This was despite the pilots being based in Auckland and commencing and finishing their work in New Zealand.

The Supreme Court disagreed with this conclusion, reversing the Court of Appeal and permitting the pilots to make their discrimination claim in New Zealand. The Court considered it significant that the Employment Relations Act 2000 did not have an explicit territorial limitation.

The Court concluded at [71] that it was "*satisfied that the right not to be discriminated against on grounds of age is not limited to employment relationships where the employment is governed by New Zealand law.*"

The Court also noted at [91] that *"Given the statutory purpose, the nature of the rights involved (that is, to be protected from unlawful discrimination) and the indication in the statute of the territorial application, it would be very odd to construe the 2000 Act to allow*

[1] Blumenfeld S., Ryall S. and Kiely P. (2017) *Employment agreements: Bargaining Trends and Employment Law Update 2016/2017*. Wellington, Centre for Labour Employment and Work
[2], ibid. pp 123-126.
[3] *New Zealand Basing Limited v Brown* [2016] NZCA 525.

discrimination in the employment context in relation to persons in the [pilots'] position, solely on the basis of the parties' choice of law" (Hong Kong).

As a result the pilots can bring their discrimination claim in the New Zealand.

Affco New Zealand Limited v New Zealand Meat Workers and Related Trades Union Inc [2017] NZSC 135

In this year's Employment Law Update[4], we also reported on the Court of Appeal's decision in *AFFCO New Zealand Limited v New Zealand Meat Workers & Related Trades Union Inc*.[5] The case was about whether seasonal meat workers were unlawfully locked out of their employment before the start of the new season. The Court of Appeal found that although the employees were terminated during the off-season, they were still locked out unlawfully because they had an expectation of re-employment and were "*employees*" for the purposes of the lock out provisions of the Employment Relations Act.

AFFCO appealed that judgment to the Supreme Court. That Court has now delivered its decision.

The Supreme Court unanimously agreed with the Court of Appeal, and upheld the decision that AFFCO had unlawfully locked out its employees. Even though it agreed that the workers were not employed during the off-season, the Court held that the employer continued to have contractual obligations towards these workers. Unlike ordinary workers who have been laid off, the AFFCO workers were owed a contractual duty of re-hire when the new season started. Therefore they were not "*strangers to the employer*", fell within the definition of employees and were unlawfully locked out.

As the Court explained at [78]:

"It is not the case that an employer who refuses to hire a new employee because the two are unable to agree terms of employment will, for that reason alone, have locked out the potential hire. As we have emphasised, the second respondents in this case were not, in contractual terms, strangers to the employer. Rather, they were people who had previously worked for AFFCO and to whom AFFCO owed contractual obligations, including as to re-hiring, even though their employment had terminated at the end of the previous season and they were seeking to be re-engaged for the new season. That feature of termination plus re-engagement under the umbrella of a number of continuing obligations distinguishes this case. Like the Court of Appeal, we consider that the relationship between AFFCO and the second respondents was sufficiently close to bring the latter within the scope of the word "employees" in s 82(1)(b)."

The Supreme Court therefore dismissed AFFCO's appeal.

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[4] Blumenfeld S., Ryall S. and Kiely P. (2017) pp 170-173.

[5] *AFFCO New Zealand Limited v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZCA 482.