BUDDLE FINDLAY

Choice of law not guaranteed in cross-border employment relationships

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Employment relationships commonly cross the Tasman and other international borders. When they do, legal issues can arise regarding which country's law applies and which country has jurisdiction to hear a claim. Issues arise particularly in situations where a contractual provision breaks the laws of one country, but not another. While courts in New Zealand have been influenced largely by the parties' express choice of law, a number of other factors can influence which country's law apply.

A recent decision of the New Zealand Employment Court, *Brown v New Zealand Basing Limited of Hong Kong* [2014] NZEmpC 229, demonstrates how other factors can override parties' contractual choice of law and in particular how public policy factors may play a role where human rights or other important protections are involved.

In this case, Mr Brown and Mr Sycamore were Senior Captains for Cathay Pacific Airways. They were employed by New Zealand Basing Limited (NZBL), a wholly owned subsidiary of Cathay Pacific. Their employment agreements contained a compulsory retirement age of 55 and expressly stated that the laws of Hong Kong applied. Mr Brown and Mr Sycamore were nearing the age of 55 and issued proceedings in New Zealand against NZBL, claiming that being forced to retire at 55 was discriminatory and unlawful.

A key issue was whether the laws of Hong Kong or New Zealand applied. The compulsory retirement age was lawful under Hong Kong law, but would not be lawful or enforceable under New Zealand law.

Which country's law applies?

While the parties had expressly agreed to Hong Kong law, that was not the end of the matter. In New Zealand, as in other countries, the courts look to the surrounding circumstances to determine the true intention of the parties and the 'reality' of their employment, in accordance with established conflict of law principles. Taking into account the surrounding circumstances, and guided by the 'base test' applied by the UK House of Lords in *Crofts v Veta Limited* [2006] UKHL 3, [2006] ICR 250 (which considered the same issue in relation to five Cathay Pacific pilots based in London), the Court determined that New Zealand law applied. The following circumstances were relevant:

- Mr Brown and Mr Sycamore had home bases in Auckland, New Zealand
- 'Tours of duty' began and ended in Auckland
- They were paid in New Zealand dollars and provided with New Zealand medical insurance
- Their employment was subject to New Zealand income tax, ACC payments and health and safety requirements
- If they wanted to take up a home base in another country, their employment with NZBL would terminate
- They were paid a salary designed to reflect a lower living cost than in Hong Kong
- NZBL should have been registered under the Companies Act 1993 as an overseas company carrying out business in New Zealand.

The Court also determined that, even if its factual analysis was wrong and the parties' express choice of law applied, the choice was contrary to public policy and invalid. This was based on an established conflict of law principle (noting that English, Canadian and Australian positions are the same) that courts may refuse to apply foreign law if it would be contrary to New Zealand's interests, or contrary to justice or morality.

The Court focused on human rights legislation (including the right to work and not be discriminated against on the basis of age) being 'fundamental law that bears on the very essence of human identity'. Because Hong Kong law does not protect employees against age-discrimination, the Court said applying that law would have been a very serious infringement of the pilots' human rights and a violation of the essential principles of justice. This, paired with the approach Cathay Pacific had taken in other countries to ensure compliance with local employment laws (including a higher retirement age), led the Court to find that applying Hong Kong law would be unjust.

What to take from this decision

The decision demonstrates how human rights and other statutory protections will be relevant to determining which country's law applies to an employment relationship. Even if the surrounding circumstances and the reality of the relationship had been in favour of Hong Kong law, it is likely that public policy would have prevailed.

The decision has been appealed to the Court of Appeal and the outcome of the appeal will be welcomed by practitioners and organisations conducting business in New Zealand and abroad, particularly by those in current disputes involving conflict of laws issues (there is a claim currently in the Employment Relations Authority for instance involving Chinese workers who temporarily relocated to New Zealand to complete warranty repairs on KiwiRail trains).

Cross-border employers and employees ought to be mindful when drafting 'choice of law clauses' that their choice is not guaranteed. They will need to determine not only the law they want to apply but whether the surrounding circumstances support that choice. Further, it is clear in New Zealand, and in some other jurisdictions, that a choice of law provision is likely to be scrutinised more closely where human rights and other important protections are involved. Broader considerations of justice, morality and public policy may sometimes outweigh the important public policy considerations that support freedom of contract.

This article was written by Hamish Kynaston (partner) and Jen Howes (solicitor) for the Australasian Lawyer magazine (Issue 3.1, February 2016). Hamish and Jen specialise in all aspects of employment and health and safety law.

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