UPDATE
EMPLOYMENT

Balancing contractual intention and legislative rights: The case of the peripatetic pilots

BY **REBECCA SCOTT AND INES SHENNAN**

Pilots win age-discrimination case as the Supreme Court finds that non-discrimination rights are not contractual – *Brown & Anor v New Zealand Basing Ltd* [2017] NZSC 139.

Cathay Pacific's Hong Kong subsidiary, New Zealand Basing Ltd (NZBL), employed two airline pilots. The pilots were ultimately based in New Zealand, although their working activity largely took place outside the country. Their employment contracts had a retirement age of 55 and were expressly governed by Hong Kong law (which does not protect against age discrimination).

When the pilots turned 55, NZBL attempted to terminate their employment, relying on the contract and Hong Kong law. The pilots brought personal grievances based on the anti-discrimination provisions in s 104 of the Employment Relations Act 2000 (ERA), which bar employers from retiring employees by reason of age.

The pilots argued that, despite any contrary provision in the employment contracts, New Zealand law applied in light of s 238 of the Act, which prohibits contracting out. Alternatively, they said that applying discriminatory Hong Kong law was contrary to public policy.

The Court of Appeal essentially applied a conflict of laws framework:

Firstly, to which legal system does the relationship belong?

Secondly, the issue must be characterised, eg, is it contractual in nature?

Thirdly, if a foreign system governs a contract, can the law of the forum override this on public policy grounds or by mandatory rule?

On this analysis, where an employment agreement holds a foreign element, the ERA will apply only where the choice of law process reveals the governing law is that of New Zealand, or public policy grounds, or mandatory rule, may override the governing foreign law.

The Court of Appeal considered the underlying rights as contractual in nature, and that Hong Kong law applied. It was not satisfied that Parliament intended for s 238 ERA to override the parties' choice of law in this case, nor that that freedom from age discrimination is an absolute value or a fundamental requirement of justice.

Overturned

The Supreme Court overturned the Court of Appeal's decision. It affirmed that the right not to be discriminated against is a free-standing right, not contractual, and independent of the employment agreement. The contractual choice of law clause was therefore irrelevant.

The Supreme Court's decision was unanimous, with some different reasoning in two judgments.

William Young and Glazebrook JJ proposed a purposive approach to statutory interpretation, as best serving the task of determining the "territorial reach" of legislation – a "single-step" process. The ERA's personal grievance procedure is a right arising out of statute, rather than flowing from contractual arrangements between employer and employee. To the extent there is an employment agreement in play this merely "provides the context in which the conduct is legislatively addressed" ([2017] NZSC 139 at [68]).

Rights not to be discriminated against apply where the employee is based in New Zealand, even where a different legal system governs the employment agreement, or the employee works partly outside New Zealand.

Elias CJ, O'Regan and Ellen France JJ also confirmed that the appellants were protected by the ERA's age discrimination provisions.

Statutory interpretation

The unique nature of employment law led the matter to being one of statutory interpretation. The object of the ERA is productive employment relationships, emphasising good faith. The ERA includes personal grievance provisions. These link in with s 21(1) Human Rights Act 1993 and s 19 New Zealand Bill of Rights Act 1990, which render discrimination unlawful.

Here there was an Auckland "home base", a specific requirement of the employment that the appellants would reside and continue to reside in Auckland, and salary reflective of the lower cost of living in Auckland than Hong Kong. Coupling these factors with the scheme and purpose of the ERA, the parties' choice of law provision was irrelevant in this case. Construction of the ERA in a manner to allow discrimination in the employment context, solely on the basis of the parties' choice of law, would be "very odd".

Where employees are based in New Zealand, employers cannot contract out of anti-discrimination protections. Sexual and racial harassment are wrong, irrespective of whether they are permitted by an employment agreement. The right not to be discriminated against is correspondingly fundamental. ■

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