

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 227
5452701

BETWEEN SPENCER CLARK
Applicant

A N D HANSEN BROWN AND
ARMSTRONG LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Louise Darroch, Counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: On the papers

Submissions Received: 23 May 2014 from the Applicant
No submissions from the Respondent

Date of Determination: 10 June 2014

PRELIMINARY DETERMINATION OF THE AUTHORITY

Orders:

- A. The law governing Mr Spencer Clark's employment by Hansen Brown and Armstrong Limited (Hansen Brown) in Papua New Guinea, is the law of New Zealand.**
- B. New Zealand is the appropriate or natural forum (that is, a *forum conveniens*) to hear Mr Clark's claim.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Spencer Clark was employed between early 2012 and May 2012 as a project manager for Hansen Brown and Armstrong Limited (Hansen Brown).

[2] Mr Clark's initial duties for Hansen Brown were to manage a building project in Rotorua.

[3] Mr Clark was subsequently employed pursuant to a fixed term employment contract dated 7 April 2012 in the position of Project Manager for a construction project in Papua New Guinea. The fixed term employment contract (fixed term contract) was between Hansen, Brown and Armstrong PNG Limited. Mr Garrick Cocker, Hansen Brown's Operations Manager provided Mr Clark with the fixed term contract. There was no provision in the fixed term contract about which law or jurisdiction applied to it.

[4] Mr Clark commenced employment in Papua New Guinea on 23 May 2012. Mr Clark was based in Popondetta, Papua New Guinea.

[5] Mr Clark's duties involved managing the job site and working with subcontractors to ensure the smooth running of the core construction project. In approximately June 2012, Mr Clark's visitor permit expired and he travelled to Brisbane in order to renew the permit.

[6] While in Brisbane, Mr Clark was contacted by Mr Cocker and was told that Hansen Brown was having funding difficulties and was currently unable to continue to fund the project he was working on in Papua New Guinea. Mr Clark was subsequently contacted by Mr Cocker and instructed to return to New Zealand.

[7] Mr Clark kept in regular contact with both Mr Albert Hansen and Mr Cocker who were responsible for the project in Papua New Guinea and for employing Mr Clark. Both Mr Hansen and Mr Cocker reassured Mr Clark that funding for the project was close to being achieved. However, Mr Clark was never requested to return to the project in Papua New Guinea and subsequently had to find alternative work. Mr Clark obtained employment as a stevedore at the Ports of Auckland.

[8] Mr Clark felt the way in which he was treated by Mr Hansen and Mr Cocker to be unfair and to have caused an unacceptable financial strain on both himself and his family. Mr Clark says he raised personal grievance claims in early July 2012. Subsequently, Mr Clark's Counsel, Ms Louise Darroch, raised a personal grievance with Hansen Brown on 22 October 2013. Ms Darroch requested that the parties participate in mediation using the Mediation Services provided by the New Zealand

Ministry of Business Innovation and Employment (MBIE). No response was received to the letter.

[9] On 20 March 2014, a statement of problem was filed in the Employment Relations Authority on behalf of Mr Clark. Hansen Brown has not responded or filed a statement in reply.

[10] The facts as set in the statement of problem and in Mr Clark's affidavit dated 9 June 2014 raise a preliminary matter as to whether the Employment Relations Authority (the Authority) has jurisdiction to determine Mr Clark's personal grievance claim.

[11] The fixed term contract did not select New Zealand law as the governing law.

Issues

Is the law governing Mr Clark's employment by Hansen Brown in Papua New Guinea, the law of New Zealand or of Papua New Guinea?

[12] Mr Clark commenced employment with Hansen Brown on a project in Rotorua, New Zealand. From 23 May 2012 until 23 June 2012 Mr Clark was employed pursuant to a fixed term contract on a construction project in Papua New Guinea to build schools and houses. Mr Clark says Hansen Brown had a contract with the Government of Papua New Guinea to undertake this construction work. Mr Clark says these duties were similar to the duties he had performed while employed by Hansen Brown in New Zealand.

[13] The amount payable to Mr Clark under the fixed term contract was in New Zealand dollars.

[14] Generally employment disputes are resolved in the jurisdiction in which the work is to be carried out.¹ However, it was noted in *Beale* supra at para[28] that this principle was subject to an exception where the location is temporary. It appears from Mr Clark's affidavit that he was to be temporarily employed in Papua New Guinea pursuant to a fixed term contract to undertake a specific project commissioned by the Papua New Guinea Government. Mr Clark says he expected to return to New Zealand following the completion of that project. This amounts to what is known as a *secondment*.

¹ *Jardine Risk Consultants v. Beale*, CA 208/99

[15] I accept Mr Clark's evidence and Ms Darroch's submissions that despite there not being an express provision as to the governing law in the fixed term contract, all of the above factors indicate the parties intended New Zealand law to apply to Mr Clark's employment by Hansen Brown.

[16] On those facts it is my determination that in regard to the first issue, New Zealand law and not the law of Papua New Guinea applied to Mr Clark's employment by Hansen Brown.

Second Issue

Is New Zealand the appropriate or natural forum (that is a forum conveniens) to hear Mr Clark's claim (under either New Zealand law or the law of Papua New Guinea)?

[17] Although I have determined the law of New Zealand applies to Mr Clark's employment, is New Zealand or Papua New Guinea the natural or appropriate forum for hearing Mr Clark's claims?

[18] The natural forum is the country with which the action has the most real and substantial connections both in terms of convenience and expense and also the law governing the relevant transaction. Factors to be weighed may include where the employment agreement was made, where the employment was performed, the places of residence or business of the employer and employee and the nature of the agreement.

[19] In the present case, I have found the law governing the employment relationship between Mr Clark and Hansen Brown to be New Zealand law. This is one factor to be considered. Mr Clark resided temporarily in Papua New Guinea and performed some of his duties in relation to the construction project for Hansen Brown there.

[20] The nature of the work being undertaken by Mr Clark was as a secondment. In *Royds v. FAI (NZ) General Insurance Company*², Judge Travis found that the New Zealand company had seconded the plaintiff to work for the associated Papua New Guinea company. It could therefore be inferred that the proper law governing the contract was New Zealand law.

² [1999] 1 ERNZ 820

[21] Mr Clark worked for Hansen Brown in New Zealand before being seconded to Papua New Guinea. Hansen Brown is the real employer and it is a New Zealand registered company with whom Mr Clark had all his dealings before leaving for Papua New Guinea.

[22] According to Mr Clark, the reference to Papua New Guinea in the fixed term contract was in order for Hansen Brown to take advantage of the construction project with the Papua New Guinea Government.

[23] All of the witnesses, Mr Clark says, in respect of his claim against Hansen Brown reside in New Zealand and it would be a matter of significant hardship to him to have to travel to Papua New Guinea to have this matter determined.

[24] Hansen Brown is a New Zealand registered company with a large single construction project for the Papua New Guinea Government.

[25] Even if I am incorrect and Papua New Guinea law applies to the contract between Hansen Brown and Mr Clark, it is my view that the other factors referred to mean that New Zealand is the appropriate forum for the determination of the matter, in other words, New Zealand is *forum conveniens*.

[26] Looked at overall, I find New Zealand has the most real and substantial connections with Mr Clark's case as the natural forum for him to pursue any claim.

Costs

[27] Costs are reserved. My view is that this issue is best dealt with upon the conclusion of the personal grievance.

Anna Fitzgibbon
Member of the Employment Relations Authority