

[3] In relation to the issue of the identity of the employer the statement of reply provides:

It [the respondent] does not accept that Associated Insulation Materials Limited was the applicant's employer, but says the trustees of Wirex Pty Ltd in Australia were latterly his employer.

[4] A preliminary issue exists between the parties as to the identity of the employer. If the issue is resolved in favour of the Australian registered company, then the respondent raises a further preliminary issue as to whether the law of New Zealand governs proceedings between the parties. These are the issues this determination deals with.

Identity of the employer

[5] I received evidence from Mr Hellyer. No witnesses gave evidence for the respondent.

[6] Mr Hellyer says when he signed his employment agreement he did not notice that Tycab Australia Pty Ltd was named as the employer party. He says further that, in any event, AIML is his employer because:

- he was employed to manage AIML;
- his primary place of work was AIML's Onehunga offices;
- AIML employed all other staff;
- the Australian head office only provided administrative support for the payment of staff pay, including his own. AIML paid the salaries from its New Zealand bank account;
- his pay slips were headed "Associated Insulation Materials Limited";
- the employment agreement provides for holidays to be governed by the relevant New Zealand legislation.

[7] Mr Hellyer signed the agreement including acknowledging that he had read and fully understood the conditions of employment and that he accepted them. The document was not signed or otherwise executed by the employer.

[8] I am satisfied, on Mr Hellyer's evidence and the documentary evidence, including the employment agreement, that the employer is Tycab Australia Pty Ltd.

[9] The respondent says the letter of 15 June 2006 is notice to Mr Hellyer that his employment relationship will transfer to the Trustees of Wirex Pty Ltd. I do not agree. The letter is notice that the reporting relationship will change from Tycab to Wirex and that all other terms and conditions will remain the same.

Governing law

[10] There is no express selection by the parties of the relevant law.

[11] By implication I find the parties selected that the law of New Zealand would govern their employment agreement. The contents of the agreement confirm this:

- the document is entitled an "individual employment agreement", distinctly New Zealand terminology¹;
- express selection of New Zealand holidays legislation; and
- there are no features of the employment agreement which would indicate it was to be governed by law other than New Zealand or specifically Australian law.

[12] The agreement was entered in New Zealand. The employment agreement was sent to Mr Hellyer in New Zealand where he signed and returned it to the NSW Tycab head office.

[13] There is no evidence that the subsequent conduct of the parties indicated an intention to apply Australian law. Mr Hellyer performed his duties in New Zealand and was dismissed in New Zealand.

¹ The Australian equivalent is an Australian Workplace Agreement per the Workplace Relations Act 1996.

Forum non conveniens

[14] The respondent has a commercial presence in New Zealand. The Tyree Group owns assets here. I do not accept that there is any inconvenience to the respondent which would outweigh this matter being heard in its natural forum, New Zealand.

Costs

[15] My view is that this issue is best dealt with upon the conclusion of the personal grievance. If the parties' view is different or the personal grievance does not proceed then a timetable for costs can be set.

Marija Urlich

Member of the Employment Relations Authority