



# Employment Court of New Zealand

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## Musashi Pty Limited v Moore AC43A/01 [2001] NZEmpC 178; [2002] 1 ERNZ 203; (2002) 6 NZELC 96,453 (9 October 2001)

Last Updated: 5 March 2011

Judgment Number: AC 43A/01 File Number: ARC 5/01

**IN THE EMPLOYMENT COURT**

**AUCKLAND REGISTRY**

**IN THE MATTER** of a challenge to determination  
of Employment Relations

Authority

**BETWEEN** Musashi Ply Ltd

**Plaintiff**

**AND** Clinton Moore

**Defendant**

**Court:** Judge GL Colgan

**Hearing:** Auckland

6 September 2001

**Appearances:** John Rooney, Counsel for Plaintiff

No appearance for Defendant

**Judgment:** 9 October 2001

### JUDGMENT OF JUDGE GL COLGAN

[1] This is the decision after a hearing de novo of Musashi's challenge to a decision of the Employment Relations Authority. The issues for decision are whether:

- Mr Moore's employment was governed by New Zealand law.
- The Employment Relations Authority has jurisdiction to hear Mr Moore's claim of unjustified dismissal.
- New Zealand (and the Employment Relations Authority in particular) is the appropriate place for hearing and determining the matter ("the *forum conveniens* argument").

### Preparation for de novo Hearing of Challenge

[2] Before considering the interesting and important issues raised by the case, a little must be said of the manner in which it has unsatisfactorily come on for hearing.

[3] In an interlocutory judgment delivered on 25 June 2001 I gave directions by consent for the hearing of the case. I directed that Mr Moore must establish that his employment relations problem is properly before the Authority. I directed a simultaneous exchange of affidavit evidence (including copies of documents) four weeks before the hearing with a simultaneous exchange of affidavits in reply two weeks later. There was also a timetable for the filing and service of summaries of argument 14 and 7 days before the hearing under reg 13 [Employment Court Regulations 2000](#).

[4] Mr John Watson, an independent employment relations advocate acting for Mr Moore, then wrote to the Court saying that his client had exhausted all his funds on litigation to date and that Mr Watson was not instructed to attend the hearing. Mr Watson asked that the Court consider, as part of Mr Moore's case, the affidavits given to the Authority and the written submissions made to it at first instance. Although Mr Watson indicated he did not want to withdraw from the case, he was instructed not to participate in this aspect of it. I required Mr Watson to confirm to the Registrar that he had advised Mr Moore of his entitlement to apply for legal aid for representation in the case and, depending upon the outcome of whatever Mr Moore chose to do in this regard, Mr Watson was to advise the Court what proposals there were for Mr Moore's representation at the de novo hearing of the challenge.

[5] In mid August Mr Watson confirmed that he intended Mr Moore's affidavit evidence to be that which had been filed with the Authority previously and that he had been-unable to make contact with his client to advise him of his entitlement to seek legal aid. Mr Watson said that he was aware that Mr Moore did not consider himself capable of representing his case at the hearing.

[6] Mr Moore did not file a summary of his argument and Musashi's was received on 3 September, three days before the hearing. Musashi's affidavit evidence was only filed on 4 September, two days before the hearing.

[7] Despite numerous attempts by the Court's Registry to contact Mr Moore's advocate, Mr Watson, to advise him of my expectation that he would appear at the hearing, contact was not able to be established personally with Mr Watson until shortly after 10 am on the day of hearing. Mr Watson then advised that he would not be attending the hearing because of other business commitments but offered to come at 1 pm. He was told that the case should have started at 10 am and, as it transpired, it concluded at 11.30 am. Nor was Mr Moore present or able to be contacted by the Registry.

[8] Mr Watson considered that his only obligation to the Court and to his client was to tell the Court he had no instructions to appear and ask it to consider affidavits and submissions placed before and made to the Employment Relations Authority. Mr Watson considered that he had no obligation to appear at the hearing because he would not be paid to do so. As must have been clear from memoranda issued by the Court, Mr Watson was obliged to best assist his client. It was for that reason that I directed that Mr Moore be told of his entitlement to apply for legal aid so that he could be represented in what was a technically complex hearing on questions of law, if he was eligible for legal aid. Because he could no longer afford Mr Watson's advocacy services, it may well have been that Mr Moore qualified for legal aid. Despite numerous requests and my wish to have heard from Mr Watson on this issue at the hearing, there is insufficient information before the Court as to whether Mr Moore was made aware of his entitlement to seek legal aid and thereby to be properly and professionally represented at a court hearing affecting his litigation. I do not draw any inferences from Mr Watson's silence on this issue but note that it would have been easy for him to have advised the Court whether (and, if so, how and when) or not he had drawn this matter to Mr Moore's attention and what he understood the outcome of that was.

[9] However, in these circumstances, Musashi was entitled to have its challenge heard. Although Mr Rooney, its counsel, presented very full and balanced submissions as was his professional obligation to both the Court and his client, I have not had the benefit of input from Mr Moore in deciding this issue.

### **The de novo Procedure revisited**

[10] Not surprisingly, when faced with no opposition at the hearing and in view of my direction in the interlocutory judgment of 25 June 2001 that Mr Moore was to go first and establish that his employment relations problem was properly before the Authority, Mr Rooney submitted, in effect, that his client should succeed by default. I declined to decide summarily the case in that way and for these reasons. Although Musashi's challenge was by way of de novo hearing, Mr Moore's complaint of unjustified disadvantage, unjustified dismissal, and for arrears of holiday pay, has not yet been able to be adjudicated upon anywhere on its merits. Mr Moore has the benefit of a reasoned and forthright determination of the Employment Relations Authority that his claims are properly before it. The question of the Authority's jurisdiction turns on not uncomplicated legal argument applied to facts that are largely beyond dispute. It would not be a just disposal of the case to uphold the company's challenge to jurisdiction, in effect simply because Mr Moore had not appeared again to make out his case.

[11] Next, and understandably, Mr Rooney for Musashi addressed the status of the two affidavits filed in the Employment Relations Authority on behalf of Mr Moore. Counsel said, accepting that these affidavits are properly before the Court, he had called for the deponents for cross-examination but they had not appeared. Mr Rooney submitted that in these circumstances the affidavits should not be admitted in evidence. I declined to do so but said that where there were disputes between the deponents for each side, less, little, or even no weight would be given to Mr Moore's account in view of his refusal to make his deponents available for cross-examination. Mr Moore had not called for Musashi's deponent for cross-examination and in these circumstances I am bound to accept the veracity of that evidence. However, to have disregarded the evidence of Mr Moore and his immediate manager at the time the contract was entered into, Eden Stevenson, would have precluded relevant evidence necessary for decision of this issue.

### **The Relevant Facts**

[12] Musashi is an Australian enterprise that manufactures and distributes sports equipment. It has a number of distributorships throughout the world. It employs 49 staff in Australia and New Zealand of whom, at the relevant time, only three were in New Zealand. The Musashi personnel in New Zealand include a divisional manager, a sales person, and a warehouse person. Musashi is an Australian company incorporated under the Companies (Victoria) Code as a proprietary company. It is resident in Victoria where its head office and centre of operations are located. Its registration as an overseas company in New Zealand is for tax and operational reasons. What is known as "Musashi New Zealand" is not a stand-alone business or separate company: rather, it is a small division of the Australian company. Musashi is registered as an overseas company in New Zealand but the Australian company runs the New Zealand arm as a division. It operates its own New Zealand bank account for the receipt and payment out of monies in this country. The New Zealand operation is answerable to Australian management. There is, however, evidence that the plaintiff trades here as "Musashi New Zealand" either instead of or in addition to its proper name, Musashi Pty Ltd. For example, Mr Moore's pay slips were headed "Musashi New Zealand". The plaintiff's facsimile header sheet on which the office manager, Mr Stevenson, provided Mr Moore with an undated reference, refers only to "Musashi New Zealand" and includes details of a post office box and telephone numbers in this country. There is no reference on that stationery to the Australian company or its contact details. Mr Stevenson's affidavit evidence is that the plaintiff's New Zealand bank account was in the name of "Musashi New Zealand".

[13] Mr Moore was originally engaged as a casual warehouse assistant in April 1999. He began working full-time as a warehouse person in early September 1999 and did so until he resigned on 2 November 2000. Mr Moore's hourly rate of remuneration was a little more than \$NZ13. His duties were those of a warehouse assistant. He was recruited in New Zealand and worked exclusively at the company's premises in Auckland. It is safe to infer that Mr Moore's position was at one of the lowest levels in the company hierarchy and he was subject to direction from the New Zealand divisional manager and managerial staff in Australia. There is no suggestion, in spite of the standard form of employment contract allowing for this, that Mr Moore would have worked elsewhere than in, and occasionally from, the company's Auckland premises.

[14] Shortly after Mr Moore began full-time work for Musashi, he signed a form of employment contract entitled "Individual Employment Contract for Non Award Employees". This was a printed standard form of employment contract containing a number of blank spaces for completion in handwriting appropriate to the details and circumstances of the employee. It was Musashi's standard form of employment contract for all employees irrespective of whether they were in Australia or New Zealand.

[15] Notable unusual features of the agreement (from a New Zealand employment perspective) include the following:

■ The amount of salary or wages and the *"applicable currency"* were said to be set out

in Appendix A to the contract and were said to *"not fall below the minimum rate/s as specified in the ... award"*. No amount of salary or wages or the applicable currency were set out in the appendix. It is a matter of public record that awards had not been a feature of employment in New Zealand since the passing of the [Employment Contracts Act 1991](#).

- The contract provided for the provision to the employee of an *"Employment Separation Certificate"* in the event of redundancy. That is not a concept known to New Zealand employment relations.
  - The contract provided that annual leave would be in accordance with the Employee Relations Act of Victoria providing for four weeks (152 hours) of paid leave.
  - Public holidays were to include New Year's Day, Australia Day, Labour Day, Good Friday, Easter Monday, Anzac Day, Queen's Birthday, Melbourne Cup Day (Victoria only), Christmas Day and Boxing Day. Four of these holidays are either not celebrated in New Zealand or celebrated on different dates in each country.
  - Parental leave was to be dealt with in accordance with the Employee Relations Act of Victoria and a specific code within the contract.
  - The employer was to provide the employee *"... with superannuation cover in accordance with legislative requirements"*. There was, of course, no legislative requirement that New Zealand employers provide their employees with superannuation cover, at least in the private sector in which this employment took place.
  - The contract contained a Dispute Settlement Procedure providing for arbitration initially by a more senior manager or, subsequently, a solicitor or other arbitrator but with no express right of statutory appeal. A "dispute" was not defined.
  - The employee agreed to undertake any training including that *"... \_required by the employer to perform their duties in particular in relation to GMP & TGA regulations and practices"*. These are not acronyms with which New Zealand employment practitioners are familiar.
  - The contract was subject to *"... any provision set down under a Federal or State Award which would be deemed to apply to the employee ..."* in relation to salary and wages.

[16] Mr Moore 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.

[17] Appendix A was completed only with Mr Moore's name, the fact that he worked in the New Zealand "DEPARTMENT", his position, the name of his supervisor or manager, and his commencing date. Left blank were details of his rates of pay, whether "LEAVE LOADING [was] PAYABLE" at the rate of 17.5 percent, "SUPERANNUATION", the "APPLICABLE AWARD FOR MINIMUM RATE OF PAY" and other similar details.

[18] At the same time, Mr Moore signed two further brief employment related agreements. The first one was said to be a "CONFIDENTIALITY AGREEMENT" This was signed by Mr Moore and appears to have been signed by Musashi's New Zealand office manager, Eden Stevenson. The second document was a "NON-DISCLOSURE AGREEMENT". This was similarly signed by Mr Moore and Mr Stevenson and related to the confidentiality of information the property of the Australian company Musashi Pty Ltd. This agreement was said to be "... governed by the laws of the State of Victoria, Australia".

[19] Mr Moore claims that in August 2000 he was given a formal employment warning over a number of matters that he disputed and/or for which he had explanations. He claimed that the first thing he knew about these complaints against him was when he was presented with the warning. He raised a personal grievance through his advocate, Mr Watson, alleging unjustified disadvantage and claiming confirmation of the withdrawal of the warning, an unreserved written apology for allegations of theft of stock, and compensation of \$5,000 for distress. It appeared that private use of its vehicle had also been withdrawn by the company and Mr Moore added to his personal grievance asking for reinstatement of that term and condition of the contract. Musashi withdrew the letter of warning and reinstated Mr Moore's private use of the vehicle. Other remedies were not agreed to and Mr Moore subsequently resigned, claiming that Musashi's conduct towards him amounted to his unjustified constructive dismissal. He invoked a further personal grievance (relating to his alleged dismissal), claiming wages lost from 3 November 2000 and further compensation of \$25,000 for loss of dignity, injury to feelings, and humiliation. When Mr Moore filed a statement of problem in the Employment Relations Authority, there was a further claim to arrears of holiday pay although Mr Rooney, counsel for Musashi, told me that a cheque had been paid to Mr Moore and he anticipated this would not remain in issue between the parties.

[20] It is relevant for this aspect of the case that Musashi's counsel, Mr Rooney, told me that when it first formally warned Mr Moore and unilaterally withdrew his private use of the company vehicle, it did so in reliance upon what it understood was the relevant law of Australia. Mr Rooney told me:

*They did not go through the process that would be required in New Zealand of seeking an explanation before making a decision. Mr Moore was called in to a meeting and was given a warning and was handed a letter with that warning in it. The use of the company van was also taken off him at that time. Subsequently after the warning was challenged, on the basis that the van should not have been taken off him rather than anything else, the company rescinded the warning ...*

[21] So the matter before the Employment Relations Authority is two personal grievances, statutory complaints now under the [Employment Relations Act 2000](#), seeking monetary compensation also provided for by the New Zealand statute. Depending whether he accepts Musashi's payment to satisfy his claim to arrears of wages, there may remain Mr Moore's statutory claim to these.

### **Victorian and New Zealand Employment Law compared**

[22] At my request, Mr Rooney kindly provided me with a large amount of material about how claims such as Mr Moore's are dealt with under Victorian employment law. These included a general (although detailed) information booklet from the Australian Industrial Relations Commission, a User Guide: To Practice and Procedure in the Australian Industrial Relations Commission, the Table of Provisions of the Workplace Relations Act 1996, Sections 170CE and 170CK and Part XV Workplace Relations Act 1996, the Table of Contents of the Australian Industrial Relations Commission Rules and the Table of Contents of the Workplace Relations Regulations. Apart from the following, there was no analysis of the operation in practice of these statutory procedures in a case such as Mr Moore's. Mr Rooney told me that his advice from employment Law experts in Australia is that under Part XV Workplace Relations Act 1996 a claim for unjustified dismissal in the State of Victoria is governed by the Federal Workplace Relations Act and not, as the contract contemplates, the Employee Relations Act 1992. In Part XV Workplace Relations Act the State of Victoria ceded to the Commonwealth the jurisdiction to deal with claims for unjustified dismissal. Accordingly, Mr Rooney submitted, the appropriate statute for consideration is the Workplace Relations Act under which Mr Moore's complaint would be dealt with by the Australian Industrial Relations Commission. Counsel submitted that such a claim would first be referred to compulsory conciliation and, in the event this was unsuccessful, would be referred to the Commission for arbitration. Counsel submitted that the arbitration process in the Commission "... follows the usual procedure for an arbitration, ...", that is with evidence on oath and cross-examination of witnesses.

[23] Although Mr Rooney submitted, accordingly, that the procedure for personal grievances in Victoria and in particular the way in which the Commission operates is markedly different from the Employment Relations Authority, I do not think that is so. Although perhaps not what New Zealand employment law calls mediation, conciliation in terms of the Australian legislation has many features common to mediation in this jurisdiction. As

the cases establish (see, for example, *David v Employment Relations Authority & Anor*; *David v AE Tilley Limited & Anor*, unreported, full Court, 29 May 2001, WC16A/01), evidence may be and is usually taken by the Employment Relations Authority on oath and parties are entitled to cross-examine witnesses.

[24] As this judgment was being finalised, the Minister of Labour announced her intention to introduce legislation to alter the effect of the full Court's judgment in *David* dealing with cross-examination in the Employment Relations Authority. Leave has recently been granted to the Attorney-General to appeal against the full Court's judgment and what I may have said in this case would be subject to whatever the Court of Appeal might decide about cross-examination. Legislative change is likely to be sooner and more certain than the outcome on appeal, although the detail of the amending bill is still not available at the time of delivering this judgment. Nor is detail of what is to happen to existing cases such as this that are part-heard. Therefore, rights of cross-examination in the Employment Relations Authority are subject to impending legislative change.

[25] Further analysis (by the Court's research clerk Rebecca Denmead that I adopt) of these materials provided by Mr Rooney discloses the following.

[26] Under the Workplace Relations Act, the Australian Industrial Relations Commission deals at first instance with employment problems including alleged unfair termination of employment. One of the functions of the Commission, a federal body, is "to conciliate claims for relief in relation to termination of employment, and if necessary to arbitrate whether a termination is harsh, unjust or unreasonable": Australian Industrial Relations Commission — General Information, Australian Industrial Registry, August 1999, p4.

[27] Under Part XVA Division 3 of the Workplace Relations Act, claims may be brought to the Commission in relation to two different sorts of termination of employment: "harsh, unjust or unreasonable" termination (often referred to as "unfair dismissal") and, second, "unlawful" termination. The terms "Harsh, unjust or unreasonable" in relation to termination of employment are not defined in the Workplace Relations Act. Usually, claims for "unfair dismissal" are made to the Commission. In determining, for the purposes of arbitration, whether a termination is unfair, the Commission must have regard to:

■ Whether there was a valid reason for the termination related to:

– the capacity of the employee; or

the conduct of the employee; or

the operational requirements of the employer;

• Whether the employee was notified of that reason;

■ Whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and

- if the termination related to unsatisfactory performance, whether the employee had been warned about that unsatisfactory performance before termination; and
- Any other matters the Commission considers relevant.

(Workplace Relations Act 1996 s170CG(3))

[28] My researches do not disclose any procedure in the Workplace Relations Act for

what New Zealand employment law knows as unjustified disadvantage in employment: s27(1)(b) [Employment Contracts Act 1991](#) and now s103(1)(b) [Employment Relations Act 2000](#). My impression that all available procedures relate to actual termination of employment but do not extend to unjustified actions during a continuing employment relationship is affirmed by the volume of Halsbury's Laws of Australia dealing with employment and, in particular, "*Duration and Termination*" (Butterworths Australia Ltd):

*A fundamental change of the terms of the employee's contract of employment, for example, by demotion, might amount to termination. Demotion and continuation of work may result in termination of the contract of employment but no termination of the employment relationship, leaving the employee with no remedy under the (CTH)*

*Workplace Relations Act 1996.*

[29] Although the New Zealand Employment Relations Authority differs from the Commission in appearance in that the ERA is said to determine matters by investigation rather than adversarial contest, the bodies are similar in many ways. Both have the power to take and call for evidence, to make orders (including interim orders), to give directions necessary for hearings, and cross-examination is permitted: Compare s1 1(1) Workplace Relations Act (Australia) and s160 Employment Relations Act (New Zealand).

[30] Importantly, also, all applications under the Workplace Relations Act are dealt with at

first instance by conciliation by the Commission (s170CF): compare the mandatory mediation processes under the [Employment Relations Act \(ss143 and 159\)](#). Where the Commission forms the view that the matter will not settle it may issue a written certificate stating the grounds on which conciliation has failed and assessing the merits of the case. That is unlike mediation under the [Employment Relations Act](#). The Commission may recommend that an applicant not pursue a particular ground or grounds of an application: s170CF(2). Where conciliation has failed, an applicant may proceed with a claim in the Commission. The Commission may proceed to an arbitration if a certificate is issued and the applicant has elected to proceed: s170CG(1). If an applicant proceeds to arbitration and a notice of election is filed and served on the employer, the matter is then set down for a formal hearing and determination by the Commission which may issue formal orders.

[31] The conciliation process is designed to help the parties to agree on terms for settling matters quickly and inexpensively. A conciliation conference is a private, confidential meeting between the parties, chaired by a Member of the Commission. The conciliation meeting may be informal or semi-formal but there is no transcript or record taken of the proceedings except where the matter is settled by agreement of the parties and it is practicable to reduce the terms of settlement to writing: User Guide to Practice and Procedure in the Australian Industrial Relations Commission pp44-45,

[32] The Victorian conciliation process may be compared with the New Zealand mediation process. The mediation service provided by the Employment Relations Service may respond to an employment relationship problem in the way it thinks most appropriate and most effective in helping to solve the problem quickly. A mediator may bring the parties together (usually in an informal manner) to help them work through the issues and may do so by telephone, fax, e-mail and other modern means. If the parties reach a settlement they can ask a mediator to sign it. Such a settlement then becomes final and binding. If parties cannot reach a settlement, a mediator may be asked to make a decision which becomes final and binding or, alternatively, the problem can be taken on to the Employment Relations Authority.

[33] Turning to remedies, if the Commission in arbitration finds a termination of employment harsh, unjust, or unreasonable, it may make orders for remedies having regard to all the circumstances of the case: s170CH. Such circumstances include the effect of the order on the viability of the employer's undertaking, length of service, remuneration the employee would have been likely to have received had employment not been terminated, efforts to mitigate, and other relevant matters. Specific remedies able to be ordered by the Commission include reinstatement where appropriate, orders concerning continuity of employment, orders for lost remuneration, and orders for a sum of money in lieu of reinstatement: Workplace Relations Act s170CH(3), (4)(a), (4)(b) and (6). There does not, however, appear to be any provision under s170CH of the Workplace Relations Act allowing for payment of compensation for humiliation, loss of dignity and injury to feelings: s123(c)(i) [Employment Relations Act 2000](#).

[34] The Commission may order costs in limited circumstances. These include where an application is regarded as vexatious or without reasonable cause; or if a party to arbitration has acted unreasonably in failing to discontinue a matter; or to agree to terms of settlement; or if an application was discontinued after an election to arbitrate when it was unreasonable not to discontinue early. That position is to be contrasted with the discretion to award costs in the Employment Relations Authority that is largely unfettered and the practice (certainly of the former Employment Tribunal apparently continued by its successor) of costs following the event.

[35] Importantly, any application to the Commission must be made within 21 days after the day on which termination of employment took effect. An application that is lodged out of time must include a statement of the reasons why it would be unfair for the Commission not to accept the application. If the commission is satisfied that it would be unfair not to accept the application, an extension of time may be granted: s170CE(7) (a) and (8).

[36] Although there are many similarities between the respective jurisdictions, there are two signal differences that would necessarily narrow, rather than enlarge, Mr Moore's entitlements under Victorian employment law as opposed to what he may be entitled to claim in New Zealand. The first is that there does not appear to be a recognised wrong equivalent to the statutory personal grievance of unjustified disadvantage in employment in New Zealand. Mr Moore's claims are to both unjustified disadvantage in employment and, subsequently and separately, to unjustified dismissal from it. Second, the legislative regime in Victoria does not appear to allow for what might be called distress damages as does the Employment Relations Authority in New Zealand, Although it is not possible to determine the extent to which Mr Moore may be entitled to such a remedy, he does, nevertheless, claim that he suffered non-economic losses from his treatment during employment and arising out of his unjustified dismissal.

## Decision of the Challenge

[37] An overseas company registered in New Zealand does not thereby become a New Zealand company, that is, a

legal entity in the same way as are other private limited liability companies registered in New Zealand: [s2\(1\) Companies Act 1993](#). Unlike a domestic New Zealand company ([s192\(1\) Companies Act 1993](#)) an overseas company is not required to have an address for service in New Zealand. Rather, as here, the register discloses the name and address of a person authorised to accept service on behalf of the overseas company: [s336\(2\)\(f\) Companies Act 1993](#). So it follows that Musashi, as an overseas company, retains its foreign flavour and identity in the conduct of its business including in its employment of staff. That is not conclusive of the issues in this case: rather, it is one factor to be taken into account.

[38] As to a determination of the proper law governing an employment contract, the law was stated in this jurisdiction in *Royds v FAI (NZ) General Insurance Company Ltd* [\[1999\] 1 ERNZ 820](#). The Court accepted as applicable to New Zealand employment law the commentary in 8 Halsbury's Laws of England (41h ed) that dealt with the position in the United Kingdom before the adoption there of the [Rome Convention](#) setting out three ways in which the proper law may be determined. These are, first, by express selection by the parties; second, by inferred selection from the circumstances; or, failing either of these, by judicial determination of the system of law with which the transaction has the closest and most real connection.

[39] To determine whether the parties have expressly selected the law of Victoria, a preliminary decision needs to be made whether the express reference to this effect in one of the contract documents amounts to an expression of it in the others. As already noted, one of the three documents signed by Mr Moore at the time of taking up his employment was the non-disclosure agreement. This was expressed to be governed by the laws of the State of Victoria. Mr Rooney for Musashi argued that the employment contract was an amalgam of the three documents signed at about the same time and affecting Mr Moore's employment, so that the express adoption in one of these of the law of Victoria governing that contract must necessarily extend to the whole of the employment agreement. In support of this contention, Mr Rooney relied on the statement in the old English case of *Manks v Whitely* [\[1912\] UKLawRpCh 46; \[1912\] 1 Ch. 735,754](#):

*Where several deeds form part of one transaction and are contemporaneously*

*executed they have the same effect for all purposes such as are relevant to the case as if they were one deed.*

[40] Mr Rooney pointed out that the three agreements were executed by Mr Moore at the same time and two of them, on behalf of the company, a day later. Counsel submitted that both the confidentiality agreement and the non-disclosure agreement are referred to in the body of the employment contract. He said it would be nonsensical (and by implication could not have been intended) that the non-disclosure agreement was to be governed by a different body of law to the principal employment contract.

[41] The contrary argument is, of course, that (these being Musashi's standard forms of employment contract drawn up by it) the employer intended only the non-disclosure agreement to be governed by the laws of the State of Victoria and either elected to leave questions arising in the other two agreements for determination by courts of competent jurisdiction elsewhere as well as in Victoria, or even that such issues would not be dealt with according to the law of Victoria. In this regard it is significant to note that Musashi operates throughout Australia and, in the field of employment in particular as well as generally, there are separate state and federal systems of employment law. As in this country, employment law in the states in Australia, and federally, changes according to the political hue of the elected government in power, so that it would be both understandable and legitimate for an employer to deliberately not specify the law applicable to its employment contracts to preserve a degree of flexibility in the event that it might seek to enforce the contract. I do not make that as a finding in this case. Rather, it is a logical and tenable explanation why a party to an employment contract may have intended to specify that one element of it should be subject to the laws of one state without imposing the same restriction necessarily on other parts.

[42] It is noteworthy, also, that what is said to be governed by the laws of the State of Victoria is "*This agreement*", not these agreements or disputes about the employment. When the detail of the non-disclosure agreement is examined, it does not impress as being either a part of a contract of individual employment or otherwise consistent with such a contract, certainly one with a warehouse person in a foreign division. It speaks of the employee as "*The Recipient*" who '*wishes to receive ... certain trade secrets, confidential and proprietary information in the form of computer reports, verbal information, formulas, pricing structures, and other business documentation ...*'. Although I presume that Mr Moore, even as a warehouse person, may have had access to such information, it is difficult to see how that it could be said that he wished to receive it. A recipient wishing to receive confidential information is more likely to have been a distributorship of Musashi's products rather than a warehouse person involved only in the physical acts of distribution of them.

[43] One of the obligations upon Mr Moore as recipient was not to "*... disclose any portion of the information to any person, except those of its (sic) employee's (sic) having a need to know for the purposes stated above ...*". Even reading "*its*" as meaning "*his*", that is consistent with an obligation of non-disclosure upon a distributorship but is hardly appropriate for a warehouse person. It is to be contrasted with the other agreement, the confidentiality agreement signed by Mr Moore that recognises his status of an employee and is otherwise unexceptional as a part of an employment contract. Indeed, it is not difficult to reach the conclusion that the contents of the non-disclosure agreement add nothing, in Mr Moore's circumstances, to the contents of the confidentiality agreement.

[44] I agree, therefore, that the confidentiality agreement is to be read as part of the employment contract but find the non-disclosure agreement to be independent of it. It follows that the express reference to the laws of Victoria governing the non-disclosure agreement does not extend to the employment contract.

[45] There being no express selection by the parties of the relevant law, I turn next to whether they can be said to have selected the law of Victoria by inference in all the circumstances.

[46] I accept Musashi's contention that, by implication, the parties chose that the law of the State of Victoria would govern their contract. The following of its contents confirm this:

■ Clause 10 refers to "*an Employment Separation Certificate*".

- Clause 12 states that annual leave holidays are to be in accordance with the Employee Relations Act of Victoria although, in practice and it was common ground, that New Zealand holidays legislation was applied.

■ Clause 18 refers to "*Federal or State Award*".

■ The form of contract is an Australian rather than a New Zealand employment contract form.

■ The terminology used in the contract is distinctly Australian. The contract contains express reference to the laws of Victoria.

[47] Further, the subsequent conduct of the parties including the application of the Victorian practice of "*LEAVE LOADING*" is indicative of their intention that the law of Victoria be applied. So too is the parties express choice of law in a related transaction between them.

[48] For the foregoing reasons I accept Musashi's submission that, by implication, the parties intended that the law of the State of the Victoria in Australia would apply to the employment contract. In this aspect of the case, the Employment Relations Authority's decision that the parties intended New Zealand law to apply to the contract, was wrong.

[49] I now turn to the plaintiff's second principal argument, that the Employment Relations Authority has no jurisdiction to hear Mr Moore's claim. The grounds for this were brief and consisted of a submission that the Employment Relations Authority is a unique judicial body, investigative by nature and unfettered by most of the rules and procedures required of courts and tribunals in New Zealand and Australia. Accordingly, Mr Rooney submitted, it would be illogical, impractical and unworkable for the Authority, acting in its investigative capacity, to apply Victorian law which is intended to be applied by courts in the State of Victoria adhering to quite different sets of rules and procedures.

[50] I do not agree. Although the Employment Relations Authority may employ investigative techniques to resolve employment problems, it is nevertheless a judicial body required to comply with the principles of natural justice: see *David v Tilley*. It determines cases and is obliged to give reasons for its determinations. These are able to be challenged in the Employment Court and, if the hearing of the challenge is a hearing de novo (see s179) conventional adversarial litigation techniques apply. It is also open to the Authority, on statutory grounds, to either state a question of law for determination by the Employment Court or to remove the hearing of a matter at first instance to this Court on grounds including that important questions of law are for decision.

[51] Other than to submit that the Employment Relations Authority's investigative procedures would make it an illogical, impractical and unworkable forum in which to apply the law of Victoria, Mr Rooney made no other submission under the head of "*Jurisdiction*" of the Authority. Parliament has determined that in most instances, the Employment Relations Authority is the first port of call for employment disputes in New Zealand and has given it very broad statutory powers to resolve such problems. I am not satisfied that the Authority would be without jurisdiction to investigate and determine Mr Moore's claim that he was unjustifiably disadvantaged in his employment and unjustifiably dismissed.

[52] Finally, Mr Rooney submitted that if the Authority has jurisdiction to hear Mr Moore's claim, his proceedings there should be stayed or dismissed because the Authority in particular and New Zealand courts in general are what lawyers call *forum non conveniens*. Rather, Mr Rooney submitted, the courts of the State of Victoria in Australia have competent jurisdiction and are the more appropriate forum for the claim to be heard in the interests of all parties and of justice. Where both a New Zealand judicial body and that of another country have jurisdiction to hear and determine a proceeding, the *forum conveniens* is the forum in which the proceeding could be more suitably tried in the interests of the parties and for the ends of justice: see the Laws of New Zealand Vol 7 (*Conflict of Laws: Jurisdiction on Foreign Judgments*) para 26.

[53] I accept that the relevant principles in determining whether to order a stay were set out in *Oilseed Products (NZ) Ltd v H E Burton Ltd* [1987] NZHC 341; (1987) 1 PRNZ 313 (followed in this jurisdiction in *Beal v Jardine Risk Consultants Ltd* [1999] NZEmpC 146; [1999] 2 ERNZ 54) and are as follows:

■ A stay will only be granted where the Court is satisfied that there is some other available forum having competent jurisdiction, which is the appropriate forum for the trial of the action.

The burden of proof rests on the defendant to persuade the Court to exercise its jurisdiction to grant a stay.

■ The "natural forum" is that with which the action has 'the most real and substantial' connection both in terms of convenience and expense and also the law governing the relevant transaction.

[28] It is increasingly being recognised that employment disputes should be resolved in the jurisdiction in which the work is carried out (save where that location is temporary). The 1991 European Convention Regarding the Law Applicable to Contractual Obligations (art 6) and the English Employment Rights Act (ss 196 and 204) reflect this. See also Dicey & Morris, *The Conflict of Laws* (13th ed), London, Sweet and Maxwell, 2000, r 182, and Gamillscheg & Franzen, "Conflicts of laws in employment contracts and industrial relations", in Blanpain & Engels (eds), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (6th ed), Kluwer Law International, 1998.

[55] Dicey and Morris goes further than highlighting the importance of the jurisdiction in which the work was carried out. At para 33-050 at p1304 the authors point out that the provisions of Article 6 of the [Rome Convention](#) are driven by the need to secure "more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship". It notes that wide freedom of choice of law could have the effect of depriving an employee of the protection of the mandatory rules designed to protect employees which, as a matter of social policy, ought nevertheless to apply. In this regard, and although not referred to by Mr Rooney in argument, the Authority nevertheless found support for this position in s238 [Employment Relations Act 2000](#) and its materially identical predecessor, [s147 Employment Contracts Act 1991](#) in force when the contract was entered into. These sections provided that the legislative regime may not be contracted out of. Although they do not go so far as to govern the position in this case absolutely, they are indications of the legislature's intent that employment contracts entered into in New Zealand and performed in New Zealand should comply with the minimum legislative standards provided in those Acts.

[56] I find that on balance it will be more convenient and just for Mr Moore's complaints to be dealt with by the New Zealand legal system than by that of the State of Victoria in Australia. Mr Moore is a New Zealand resident who was engaged for work and worked exclusively in New Zealand. Musashi has chosen to operate in New Zealand and for that purpose has an established commercial presence in this country. Musashi therefore has both regular and necessary commercial dealings in New Zealand. I infer from the evidence that Musashi representatives travel to New Zealand from time to time for the purpose of conducting its business here.

[57] Mr Moore was a warehouse assistant paid about \$13 per hour. I infer this reflects his ability to obtain remunerative employment at this level. As I have already noted and accept, Mr Moore has exhausted his funds on representation in this litigation at a relatively early stage of it and certainly before the merits of his claim can even be mediated, let alone adjudicated upon at first instance level. Both the Mediation Service and the Employment

Relations Authority are forums in which a party may elect not to be professionally represented. Experience shows that unrepresented parties can and do have access to justice so that the merits of their cases are dealt with.

[58] I do not think the same could be said if Mr Moore's claims before the Employment Relations Authority were to be stayed. To have the merits of his complaints considered and decided, he would be obliged, at the very least, to instruct and pay for representation in Victoria and then to travel to Australia to both prepare and be present at the hearing of his claim. It is at least possible that any witnesses he may wish to call will likewise be in New Zealand and he will face the difficulties of both persuading such witnesses to travel to Australia and the substantial costs of paying for them to do so. I conclude that the reality of staying the proceeding in New Zealand will be the death knell of any further attempt by Mr Moore to obtain justice according to law.

[59] I do not discount the costs and practical difficulties faced by Musashi in having Mr Moore's complaints dealt with in this country as opposed to the State of Victoria. However, before any investigation by the Employment Relations Authority, the matter should be the subject of mediation, an even more informal and flexible process than an Authority investigation. That should not require more than the presence of one Musashi

representative. Mr Moore could not object to a date for mediation being arranged to coincide with what must be periodic visits by Australian based managerial personnel of Musashi to Auckland. The same considerations would apply to an Employment Relations Authority investigation if the matter was not able to be settled in mediation as the [Employment Relations Act 2000](#) says should be attempted first.

[60] Nor do I discount the necessity for evidence to be placed before the Employment Relations Authority (or perhaps this Court if the matter is removed for hearing here) about the employment law of Victoria. Although traditionally this has been done by an appropriately qualified and independent expert witness giving evidence, that need not necessarily be the way in which the Authority could familiarise itself with the law of Victoria. Its procedures are sufficiently informal and flexible for other less costly but nevertheless authoritative and precise methods to be employed.

[61] Although I agree that it is generally preferable for the law of a jurisdiction to be applied by the courts of that jurisdiction (see *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216), that is only one consideration in determining the balance between competing jurisdictions. There is no suggestion that Mr Moore

would not receive justice if his case was to be heard and determined in Victoria. More fundamentally, however, I consider it very unlikely indeed that if his proceeding here were to be stayed, he would ever be able to bring proceedings in Victoria.

[62] Although Mr Rooney invited me to consider that the jurisdiction in which any judgment will be enforced will be a consideration in favour of the company, counsel did not elaborate on that. I assume Mr Rooney meant that if Mr Moore obtained a decision for monetary compensation in New Zealand, he would have to enforce this in Victoria. That is not necessarily so, at least as I read the [Companies Act 1993](#).

[63] [Section 342](#) expressly incorporates the Act's [Part XVI](#) ('Liquidations') to overseas companies registered in New Zealand. [Part XVI](#) includes, in addition to commonly recognised liquidations, statutory demands under [s289](#). When determining the jurisdiction in which a case should be heard, consideration should be given to where a judgment may ultimately be enforceable. In *Crane Accessories Ltd v Lim Swee Hee* [\[1988\] NZHC 520](#); [\[1989\] 1 NZLR 221](#) the High Court applied the principles in *The Spiliada* [\[1986\] UKHL 10](#); [\[1986\] 3 All ER 843](#). In *Crane Accessories* the Court found that even if judgment was obtained in New Zealand there would have to be litigation in Singapore to enforce the New Zealand judgment in the foreign jurisdiction. The defendants resided and traded in Singapore and had no connection with New Zealand. That is to be contrasted with the present case where the defendant has a commercial presence and assets in this jurisdiction. I find, on balance, against Mr Rooney's submission that a judgment obtained against the defendant as an overseas company cannot be enforced in New Zealand.

[64] So it does not follow, necessarily, that any recovery would have to be undertaken in Victoria. The amounts at issue in the case are relatively modest and there is no suggestion that Musashi is intending to cease trading in New Zealand for whatever reason.

[65] Mr Rooney invited me to assess the strength of Mr Moore's case and, by implication at least, to find this to be a factor in favour of granting a stay. Even when both parties are represented in a matter such as this, assessing the strength of a claim at this stage is a difficult exercise. Here, the exercise is even more difficult because I do not have Mr Moore's account of what happened to him (other than in his statement or problem filed in the Authority) on which to make such an assessment. Although it may be, as Mr Rooney submitted, that any compensation Mr Moore may recover is likely to be modest, that is not the same thing as saying he has a weak case for any compensation. I decline to make such a finding at this stage.

[66] For all the foregoing reasons I conclude that, on balance, New Zealand is not *forum non conveniens* and decline to direct a stay of the claim in the Employment Relations Authority.

[67] Although, understandably, Musashi was not prepared to attempt to resolve this matter by mediation in view of its claim of lack of jurisdiction, mediation should now be arranged as soon as practicable (bearing in mind my remarks about the availability of a Musashi representative to attend) and before the Authority's investigation continues.

[68] Given the Registry's inability to make contact with Mr Moore personally and because of the necessity for him to know of the result of this challenge, a copy of this decision should now be sent to Mr Watson at his address for service. Mr Watson should both ensure that Mr Moore receives a copy of this decision and should confirm in writing to the Registrar of the Court that this has occurred.

[69] The formal result of the challenge to the Employment Relations Authority's determination is that it fails and is dismissed. In the circumstances there will be no order for costs.



GL Colgan Judge