

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 275
5431722

BETWEEN

JOHN NIEZEN
Applicant

A N D

GREENSTONE GRAZING
GROUP LP
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Scott, Counsel for Applicant
Ani Bennett, Counsel for Respondent

Submissions received: 10 March and 24 June 2014 by Applicant
28 February, 13 March and 14 May and 25 June 2014 by
Respondent

Investigation Meeting: On the papers

Date of Determination: 1 July 2014

DETERMINATION OF THE AUTHORITY (No.2)

- A. The law governing the applicant's, Mr John Niezen's, employment in the State of Georgia, USA, by the respondent, Greenstone Grazing Group LP (Greenstone) is the law of the State of Georgia, USA.**
- B. The State of Georgia, USA is the appropriate or natural forum (that is, a *forum conveniens*) to hear Mr Niezen's claim.**
- C. Costs are reserved.**

Background employment relationship problem

[1] In a Determination of the Authority No.1¹, it was determined that:

- (a) Greenstone was served with Mr Niezen's Statement of Problem;
- (b) Greenstone's application to dismiss Mr Niezen's claim for want of service was declined;
- (c) Costs were reserved.

[2] Determination No.1 recorded that Greenstone had not filed any affidavit evidence in support of its claims that the law of the State of Georgia applies to Mr Niezen's employment contract and that accordingly the Authority does not have jurisdiction to deal with Mr Niezen's personal grievance claim.

[3] The Authority allowed Greenstone a further opportunity to file affidavit evidence in support of its claims. Greenstone was given until 4pm on Wednesday, 14 May 2014 to file affidavit evidence. The Authority recorded that the issue of whether the Authority has jurisdiction to hear and determine Mr Niezen's claim would be determined on the evidence before it. On 14 May 2014, a copy of an unsworn affidavit by Mr Graeme John Henderson for Greenstone was filed in the Authority together with submissions. Mr Henderson's sworn affidavit was filed in the Authority on 15 May 2014. On 24 June 2014, Mr Niezen filed an affidavit in reply and further submissions were filed on his behalf. Counsel for Greenstone also filed further submissions on 25 June 2014.

[4] The Authority is now in a position to determine the jurisdictional issue concerning the law which applies to Mr Niezen's employment contract and the appropriate forum for Mr Niezen's claims to be heard, on the evidence before it.

Employment Relationship Problem

[5] Determination No.1 sets out the background and details of Mr Niezen's employment relationship problem in paras [1] to [6]².

¹ [2014] NZERA Auckland 121
² Supra

Issues

- [6] The following are the issues for determination by the Authority:
- (a) Is the law governing Mr Niezen's employment by Greenstone in Georgia USA, the law of New Zealand or of Georgia USA?
 - (b) Is New Zealand the appropriate or natural forum (that is, a *forum conveniens*) to hear Mr Niezen's claims (under either New Zealand law or the law of Georgia USA)?

First Issue***Is the law governing Mr Niezen's employment by Greenstone in Georgia USA, the law of New Zealand or of Georgia USA?***

[7] Mr Niezen is a permanent resident of New Zealand having been granted permanent residence in 1989. Mr Niezen has worked in New Zealand, Nigeria, USA and is currently employed in Australia.

[8] Mr Niezen's affidavit evidence is that in late 2006, he responded to an advertisement by Greenstone seeking a dairy farm operations manager for its farm located in Georgia USA. Mr Niezen contacted Mr Allan Titchmarsh, one of Greenstone's limited partners, and was directed by him to the Fencepost website to obtain a full job description and application procedures.³ The terms of use in respect of the website refer to New Zealand law governing the website and agreements entered into through the site. Mr Henderson in his affidavit says he assumes these website terms referred to are the 2014 terms of use and not the terms which applied in 2006. Further, Mr Henderson says he has no recollection of seeing the section of the website referring to New Zealand law at the relevant time.

[9] After obtaining the job description and application procedures, Mr Niezen met with Mr Allan Titchmarsh, Mr Kerry Chestnut and Mr Graeme Henderson, all limited partners of Greenstone, living in New Zealand and all of whom operate their own companies in New Zealand. The meeting took place at Hamilton airport in about November 2006. A further meeting between Mr Niezen, Mr Chestnut and Mr Henderson was held at Mr Niezen's home in Morrinsville in early 2007. Mr Niezen

³ <http://www.fonterra.com/fencepost/jobs/>

was subsequently offered and accepted the dairy farm operations manager position. On about 27 May 2007, Mr Niezen travelled to Georgia and commenced employment.

[10] Draft employment agreements were exchanged between Mr Niezen and Greenstone in 2007 and 2008. Mr Niezen says in the employment negotiations he wanted to ensure certain conditions including provision for repatriation to New Zealand as his wife is a New Zealander and he is a permanent resident, increased bereavement leave because of the international location of the position, and an increase in annual leave from 3 weeks to 4 weeks to reflect changes in New Zealand employment law.

[11] Mr Henderson says it was never intended that New Zealand law would apply to the employment contract. Mr Henderson says the employment contract negotiations took place for the most part on the farm where Mr Niezen was working, in Georgia. Mr Henderson says in about 2009, Mr Niezen and his family wanted to apply for permanent residency in the United States and it was because of this, not because he wanted New Zealand law to apply, that Mr Niezen requested additional clauses referred to in clause [10] of this determination, to be included in his employment contract.

[12] The final “Managers Contract” (the Contract) was signed by Mr Niezen and by Mr Titchmarsh on behalf of Greenstone (*“the employer”*) on 25 April 2009 with effect from 1 June 2008. By this time Mr Niezen had been working for Greenstone in the USA for almost two years. During this time Mr Niezen received into his US bank account remuneration in US dollars.

[13] Mr Niezen says he intended New Zealand law to apply to the Contract. Mr Niezen says the Contract, while formulated in New Zealand and agreed in New Zealand was signed in the USA largely because Mr Henderson did not make the requisite changes in a timely manner. Mr Niezen points to clause 2 which states:

This contract is aligned to the individual employment agreement produced by Federated Farmers of New Zealand and is intended to offer similar outcomes for both parties. For any eventualities not covered in this document refer to the intent of the Fed Farmers independent employment agreement.

[14] Mr Henderson says the Contract does not include mandatory clauses required by New Zealand law because the intent was that the law of the State of Georgia, USA

would apply. Mr Henderson says some similar benefits to those provided by New Zealand law were included in the Contract, such as 4 weeks annual leave. However, Mr Henderson says there was no provision to raise personal grievances; these were to be dealt with in the same manner as for other Greenstone employees by filing proceedings in the US legal system. Mr Henderson refers to a restraint of trade provision in the Contract which applied to an area surrounding the farm situated in the State of Georgia and to clause 5 which confirmed that Greenstone had contributed financially in assisting Mr Niezen and his family with their applications for permanent residence in the USA. These, Mr Henderson says, are strong indicators that it was intended that US law was to apply, not NZ law and that Mr Niezen was committed to a long term future in the US governed by US law.

[15] On 22 April 2013, Mr Niezen gave six months' notice in writing to Greenstone of his resignation to take effect on 21 October 2013. Greenstone informed Mr Niezen that he was required to take annual leave of 52 days owing to him from 10 July 2013 because of his "*performance, communication and attitude toward Greenstone ...*". Various reasons were set out for Greenstone's view.

[16] On 6 August 2013, Mr Niezen raised a number of issues concerning his employment including defects in the process in which Greenstone raised performance-related matters with him. On 26 August 2013, Greenstone responded and further recorded that, in its view, Mr Niezen was employed in the USA and that the Contract was not a New Zealand employment contract.

[17] In response to Mr Niezen's Statement of Problem filed in the Authority, Greenstone filed a Notice of lack of Jurisdiction including the following objections as summarised:

- Greenstone is a limited partnership established and maintained in the State of Georgia, USA, it is subject to the laws of that State, not New Zealand law;
- Mr Niezen's employment contract with Greenstone did not select New Zealand law as the governing law and the clauses in the contract do not adopt New Zealand law;

- Mr Niezen was employed in the State of Georgia by a Georgia Limited Partnership, therefore the laws of that State apply and not the laws of New Zealand;
- Greenstone is based in Georgia as are all relevant witnesses, Georgia is therefore the most convenient place for any claim brought by Mr Niezen to be dealt with.

[18] There was no reference to the governing law in either of the draft employment agreements or in the Contract. In the absence of express provision, intention is inferred from the conduct of the parties. If intention cannot be inferred, the governing law is inferred from the circumstances. The place of performance is increasingly recognised as the appropriate location to resolve employment disputes: *Jardine Risk Consultants v. Beale*⁴.

[19] The Contract was for the most part negotiated in the United States and was signed there in 2009. Mr Niezen performed his duties on the farm in Georgia and when he and his family decided to seek permanent residence in the United States, Greenstone assisted financially. Mr Niezen was paid his remuneration by Greenstone into the bank account set up in the USA in USA currency. Greenstone is a Limited Partnership registered in Georgia, USA.

[20] It is my finding that despite there not being an express provision as to the governing law in the Contract, the work being performed by Mr Niezen was in the USA and other factors, including where Greenstone was registered and terms of the Contract, indicate the parties intended the law of the State of Georgia to apply to Mr Niezen's employment by Greenstone.

[21] On those facts, it is my determination that in regard to the first issue, the law of the State of Georgia, USA and not New Zealand law applied to Mr Niezen's employment by Greenstone.

Second Issue

Is New Zealand the appropriate or natural forum (that is, a forum conveniens) to hear Mr Niezen's claims (under either New Zealand law or the law of Georgia USA)?

⁴ [2000] 1 ERNZ 405 (CA) at para.[28]

[22] Although I have determined the law of the State of Georgia, USA applies to Mr Niezen's employment, is New Zealand or the State of Georgia the natural or appropriate forum for hearing Mr Niezen's claims?

[23] 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.

[24] In the present case, I have found the law governing the employment relationship between Mr Niezen and Greenstone to be the State of Georgia, USA. This is one factor to be considered.

[25] Mr Niezen resided in Georgia and performed his duties for Greenstone there. The Notice opposing jurisdiction filed on behalf of Greenstone states that this factor together with the fact that Mr Niezen currently resides in Australia are highly relevant to the question of "*forum*". Mr Chestnut, Mr Titchmarsh and Mr Henderson all live in New Zealand and operate businesses in New Zealand. In Determination No.1, I found that the effect of Greenstone's Partnership Agreement and Operating Agreement is that, subject to certain express provisions in those agreements, GGG Management manages and controls Greenstone's operations and assets. Mr Chestnut, Mr Titchmarsh and Mr Henderson are Managers of GGG Management. They are key witnesses.

[26] Mr Henderson says there were 6-8 employees on the farm during Mr Niezen's employment, all of whom are in Georgia. Greenstone's administrator in particular is relevant as she was responsible for Mr Niezen's employment related payments. I take the question of convenience and expense as a neutral factor, in the present case, favouring neither jurisdiction.

[27] Also to be taken into account is the status of Georgia which has its own government and courts. Georgia also has a statute which codifies its employment laws in the Official Code of Georgia Annotated (O.C.G.A). I understand Mr Niezen would have a fair opportunity for his claims to be brought and heard in the courts of Georgia.

[28] Looked at overall, I find the law of the State of Georgia applies. The State of Georgia has the most real and substantial connections with Mr Niezen's case and is the natural forum for him to pursue any claim, subject to whatever limitation laws may apply in that jurisdiction.

Costs

[29] Costs are reserved. Greenstone may lodge and serve a memorandum as to costs within 28 days of the date of this determination addressing costs in relation to both Determination No.1 and No.2. Mr Niezen has 28 days to file a memorandum as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority