

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 213
5525831

BETWEEN	JONATHAN SEGAL Applicant
A N D	INFOR (NEW ZEALAND) First Respondent
A N D	INFOR GLOBAL SOLUTIONS (ANZ) PTY LIMITED Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Michael O'Brien, Counsel for the Applicant
Rob Towner, Counsel for the Respondents

Investigation Meeting: 1 July 2015 at Auckland

Submissions Received: 7 July 2015 from the Respondents
14 July 2015 from the Applicant

Date of Determination: 20 July 2015

**DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY MATTER**

- A. The respondents' application for a stay of any further investigation by the Authority as to its jurisdiction to investigate the applicant's employment relationship problem is declined.**
- B. Costs are reserved.**

Employment relationship problem

[1] The respondents, Infor (New Zealand) [Infor NZ] and Infor Global Solutions (ANZ) Pty Limited [Infor Australia], have made an application that the Authority stay any further investigation by it regarding its jurisdiction to investigate the applicant's, Mr Jonathan Segal's, employment relationship problems.

[2] The application for stay is made pending the Court of Appeal's judgment on appeal in *New Zealand Basing Ltd v. Brown*¹. The questions of law for determination by the Court of Appeal in *New Zealand Basing Ltd* concern the applicability of the Employment Relations Act 2000 (the Act) where parties have expressly agreed that the law of Hong Kong applies to their contracts of employment.

Mr Segal's claim in the Authority

[3] Mr Segal has filed proceedings in the Employment Relations Authority against Infor NZ and Infor Australia alleging unjustified dismissal and seeking remedies to be awarded by the Authority.

[4] Infor NZ denies employing, and therefore dismissing, Mr Segal. Infor Australia says it employed Mr Segal and his employment was governed by the law of the State of Victoria, Australia. Accordingly, Infor Australia says Mr Segal's employment dispute should be dismissed by the Authority because the Authority lacks jurisdiction to deal with it.

Jurisdictional matter to be dealt with as a preliminary matter on the papers

[5] The parties agreed for this preliminary matter as to jurisdiction to be dealt with on the papers by the Authority. Both parties filed affidavits and Mr O'Brien for Mr Segal sought, and was granted, leave by the Authority to question two of Infor NZ and Infor Australia's witnesses in respect of their affidavits. An investigation meeting was held on 1 July 2015 to enable the witnesses to be questioned.

Application to stay Authority's investigation

[6] At the conclusion of the Authority's investigation meeting on 1 July 2015, an application was made orally on behalf of Infor NZ and Infor Australia that the Authority order a stay of any further investigation by the Authority pending the Court of Appeal's judgment on appeal in *New Zealand Basing Ltd v. Brown*.

[7] The grounds advanced for the stay were that the Court of Appeal's decision would have a direct bearing on the Authority's investigation as to its jurisdiction.

[8] Mr O'Brien, for Mr Segal, opposed the application.

¹ [2015] NZCA 168

[9] Mr O'Brien and Mr Towner both filed brief submissions in the Authority on this issue as to whether the current proceedings should be stayed.

[10] On 13 May 2015, the Court of Appeal issued its judgment granting leave to appeal against the judgment of the Employment Court in *Brown & Sycamore v. New Zealand Basing Ltd*².

Brown & Sycamore v. New Zealand Basing Ltd

[11] The Employment Court's decision in *Brown & Sycamore* concerned the employment of two senior pilots by New Zealand Basing Limited (NZBL). Both pilots were about to reach retirement age and brought proceedings in the Employment Relations Authority claiming age discrimination. The Authority removed the proceeding to the Employment Court because it raised important issues as to conflicts of law, and as to the application of laws relating to age discrimination.

[12] The applicable law clause in the employment agreement for the pilots stated:

These Conditions of Service, which form part of the Contract of Employment between the Company and the Officer, will in all cases and in all respects be interpreted in accordance with the law as set out in the various applicable Ordinances of the Hong Kong Special Administrative Region (Hong Kong SAR).

[13] In *Brown & Sycamore*, Judge Corkhill stated that the effect of the provisions in the contract and the letter of offer signed by the pilots was that there was an express choice of law by the parties, the laws of Hong Kong.

[14] The Employment Court in that case dismissed NZBL's protest as to jurisdiction on the grounds that s.238 of the Act overrides the express choice of law clause in the employment contract.

[15] Mr Towner, for Infor NZ and Infor Australia, submits that the questions of law for determination by the Court of Appeal directly bear on the Authority's current proceedings. As the Authority is bound by the decisions of the Court of Appeal, Mr Towner submits the current investigation should be stayed.

[16] Mr Towner expects the hearing of the substantive appeal will most likely occur in the first quarter of 2016.

² [2014] NZEmpC 229

[17] Of course I accept Mr Towner's submission that the Authority is bound to follow Court of Appeal decisions. However, I am not convinced the Authority's current investigation is sufficiently similar to the NZBL case to warrant a stay.

[18] As Mr O'Brien for Mr Segal contends, the question of law to be determined by the Court of Appeal is whether or not the Act applied to the employment relationship in a situation in which the employment agreement stipulated the law of Hong Kong.

[19] In the current proceeding, Mr O'Brien contends that the governing law clause in Mr Segal's employment agreement with Infor Australia was only operative when Mr Segal was employed by it, in Australia. On that analysis, it is contended, Mr Segal's subsequent employment by Infor Australia in New Zealand means the applicable law clause in the contract did not apply.

[20] I accept Mr O'Brien's argument that the Authority is currently bound by the Employment Court's judgment in *Brown & Sycamore v. New Zealand Basing Ltd*. The fact scenario being investigated by the Authority appears to differ from that in *Brown & Sycamore*. The Court of Appeal decision will not necessarily have a direct bearing.

[21] Mr O'Brien further submits in opposition to the application for a stay that the Authority's purpose and role is to develop a speedy, cost effective, and non-legalistic resolution service for parties to employment relationship problems.

[22] I accept that to be the case. The Court of Appeal is not likely to hear the substantive appeal in *New Zealand Basing Ltd* until the first quarter of 2016, if indeed it proceeds to that point. It is important for the Authority to conclude its business in a timely manner.

[23] In all the circumstances the application to stay the proceeding is declined.

Costs

[24] Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority