Employment Court of New Zealand

Brown v New Zealand Basing Limited [2014] NZEmpC 229 (15 December 2014)

Last Updated: 20 December 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2014] NZEmpC 229

EMPC 237/2014

IN THE MATTER OF	proceeding removed from the Employment Relations Authority
BETWEEN	DAVID BROWN First Plaintiff
AND	GLEN SYCAMORE Second Plaintiff
AND	NEW ZEALAND BASING LIMITED of Hong Kong (a wholly owned subsidiary of CATHAY PACIFIC AIRWAYS LIMITED of Hong Kong) Defendant

Hearing:	29-31 October 2014 (heard at Auckland)
Appearances:	G Pollak, counsel for the plaintiffs M Lawlor and C Coup, counsel for the defendant
Judgment:	15 December 2014

JUDGMENT OF JUDGE B A CORKILL

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DAVID BROWN v NEW ZEALAND BASING LIMITED of Hong Kong (a wholly owned subsidiary of

CATHAY PACIFIC AIRWAYS LIMITED of Hong Kong) NZEmpC AUCKLAND [2014] NZEmpC 229 [15

December 2014]

Introduction

[1] Captain Brown and Captain Sycamore are long-serving senior pilots of Cathay Pacific Airways Limited (Cathay Pacific) or its subsidiaries, one of which is New Zealand Basing Limited (NZBL). They are New Zealand citizens whose place of residence is Auckland. Since 2002 they have been employees of NZBL under terms of employment which provide for retirement at age 55. Each will attain that age next year.

[2] The issue in this case is whether they are entitled to the protections of New Zealand law as to age discrimination. They claim they are; NZBL contends they are subject to the laws of Hong Kong since that is what their employment agreements expressly state. Hong Kong law does not provide protections against discrimination on the grounds of age.

[3] Mr Brown and Mr Sycamore filed a joint statement of problem in the Employment Relations Authority (the Authority) on 10 September 2014.1 The Authority removed the proceeding to this Court because it raises important issues as to conflicts of law, and as to the application of laws relating to age discrimination. Also relevant to the removal decision was the need to resolve the matter urgently, given both plaintiffs' impending 55th birthday, and because the decision in the proceeding may impact on other employees.2 Once removed to this Court, the proceeding was timetabled for prompt disposition.

Mr Brown's employment: 1990 to 2002

[4] Mr Brown joined the Royal New Zealand Air Force (the Air Force) in January 1978 as a Trainee Pilot, and eventually qualified and progressed to the rank of Flight Lieutenant. He left the Air Force in 1990 and moved to Hong Kong to take up employment with Cathay Pacific as a First Officer on 24 March 1990.

[5] In 1995, as a result of the introduction of a Basings Policy by Cathay Pacific, Mr Brown was able to accept a basing outside of Hong Kong. He resigned from

1 *Brown v New Zealand Basing Ltd of Hong Kong* [2014] NZERA Auckland 386.

2 At [18].

Cathay Pacific and accepted employment with one of its subsidiaries, Veta Limited (Veta). Although registered in Hong Kong, Veta operated an Australasian base, for which Sydney was the Home Ticketing Port (HTP). Mr Brown, however, resided with his family in Auckland which was designated as his Preferred Ticketing Port (PTP). This arrangement meant that he could be rostered out of or into Sydney or Auckland as the company required, but any travel between either city was at his own expense.

[6] Mr Brown's employment was subject to Veta's Conditions of Service 1994 (CoS94); a copy of this document was unavailable for production to the Court. His letter of offer stated that the employment contract was governed by and would be construed in accordance with the laws of Hong Kong, and stated that the parties submitted to the non-exclusive jurisdiction of the Courts of Hong Kong. The Court has no evidence as to whether the Conditions of Service contained any limitation as to age.

[7] In 1999, Mr Brown was offered the option of returning to Hong Kong or of accepting a reduced salary under new Conditions of Service (CoS99). Mr Brown chose to remain in Auckland thus providing his family stability in both their lifestyle and schooling, and to accept a reduced salary. He accepted this change on

7 June 1999.

[8] CoS99 provided that it would 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). It provided for retirement at age 55.

[9] At the same time, Mr Brown became subject to Veta's Permanent Basing Policy 1999. The policy stated that Cathay Pacific currently had Base Areas in Asia, Australasia, Europe and North America. It defined a Home Base3 as the place where an officer would normally start and end a scheduled duty and at which place under normal conditions, the company was not responsible for the officer's accommodation. Auckland was Mr Brown's Home Base. The intention of the

policy was to provide an option for officers to live in a base area.

3 Formerly known as Home Ticketing Port.

[10] First Officers who took up base appointments would normally be required to return to Hong Kong if they accepted an offer of Command Training, although they could subsequently reapply for a further base appointment, subject to eligibility requirements. Officers could "bid" for base appointments in accordance with the rules of the policy. In October 2000, Mr Brown resigned from Veta and returned to Hong Kong to undertake Command Training. He completed his training and qualified as an A330/A340 Captain, and was then re-employed by Veta from

24 July 2001. From that date he again took up the Australasia basing, with his Home

Base being Auckland as before.

[11] This contractual framework continued until 2002 when he ceased employment with Veta and commenced employment with NZBL.

Mr Sycamore's employment: 1992 to 2002

[12] Mr Sycamore joined the Air Force in 1979 as a Technician and became a Pilot in 1984. He retired from the Air Force and commenced duties with Cathay Pacific as a First Officer on 21 March 1992. A basing policy did not exist at that time. He therefore resided in Hong Kong. He said that flights usually, but not always, commenced in Hong Kong and returned to that point.

[13] In 1996 he applied for, and was awarded an Australasian base. From that point he was employed by Veta under its Conditions of Service 1995 with effect from 1 April 1997. His letter of offer stated that the employment contract would be governed by, and construed in accordance with, the laws of Hong Kong, and that the parties submitted to the non-exclusive jurisdiction of the Courts of Hong Kong. The document provided for a normal retirement age of 55. It stipulated that Cathay Pacific's Basing Policy 1994 would apply. Mr Sycamore's HTP was Sydney, but Auckland was designated as his PTP.

[14] By this time there were approximately five First Officers based in Auckland (two of whom were Mr Sycamore and Mr Brown) and 12 Captains. There was no administrative function based in Auckland.

[15] In 1999, Mr Sycamore was offered a choice of returning to Hong Kong, or accepting new Conditions of Service (CoS99) which provided for a reduced salary. Because Mr Sycamore had family commitments in Auckland, he agreed to be bound by CoS99 with a Home Base in Auckland; he was also subject to Veta's Permanent Basing Policy 1999.

[16] In early September 2001, Mr Sycamore accepted an offer to commence Command Training in Hong Kong for Airbus A330 aircraft. He accordingly returned to Hong Kong for a year although his family remained in New Zealand. Soon after commencing training he was offered a position as a New Zealand-based Captain subject to successful completion of the training. This occurred in December 2001, at which point it was confirmed that he had been allocated (again) a basing in Australasia with a Home Port of Auckland.

[17] This remained the position until 2002, when Mr Sycamore ceased employment with Veta and commenced employment with NZBL.

Establishment of NZBL

[18] Advice of Cathay Pacific's intention to incorporate a wholly owned subsidiary was given to all New Zealand-based Veta crew in February 2000. This was to avoid a potential tax issue. A new basing company would be formed which would solely employ pilots who elected to take up a permanent basing in New Zealand. The company would be a solely-owned subsidiary of Cathay Pacific; it would be a requirement that all crew permanently based in New Zealand were employed by that company. This would necessitate resignation from Veta and employees would be offered new conditions of service.

[19] There then followed a series of meetings between pilots and representatives of management to discuss the proposal to establish a dedicated basing company for the New Zealand based flight crew. Those meetings included tax advisors for Cathay Pacific (KPMG) and a tax lawyer who acted for the affected pilots including Mr Brown and Mr Sycamore, Mr John Hart. The tax issues are discussed more fully below.

[20] The evidence established that the formation of NZBL separated New Zealand from the Australasia base, acknowledged Auckland as a permanent base, regularised tax issues and otherwise established terms of employment on the same basis as applied previously.

[21] Ultimately, formal offers were made to Veta employees. As a result, Mr Brown and Mr Sycamore (as well as other pilots) resigned from Veta, and were employed by NZBL. They were subject to NZBL Conditions of Service 2002 (CoS02), and to NZBL's Permanent Basing Policy which also took effect in 2002. Their employment with NZBL was dependent upon them residing and continuing to reside in New Zealand. Their Home Base was Auckland. If they left New Zealand voluntarily or as a result of a company initiative to take up a Home Base elsewhere, their employment with NZBL would cease.

NZBL's terms and conditions of employment

[22] CoS02 and the NZBL Basing Policy 2002 were derived from, and for material purposes were the same as, the documents which had been in place when Mr Brown and Mr Sycamore were employees of Veta: CoS99 and the Veta Permanent Basing Policy 1999.

[23] Each contract included an application of law clause, in the same terms as had applied previously. It 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).

[24] Each pilot also countersigned a letter of offer which referred to the fact that the relevant law was that of Hong Kong, and went on to provide that the parties would submit to the non-exclusive jurisdiction of the Courts of Hong Kong.

[25] The effect of these provisions was that there was an express choice of law by the parties, the laws of Hong Kong. Issues relating to the employment agreements could be considered either in Hong Kong courts or in other courts, but in either case

Hong Kong law would apply. This permitted a *forum conveniens* issue being raised in a foreign court.

[26] For the purposes of the issues which arise in this case, it is necessary to refer to the laws of both Hong Kong and New Zealand which applied to Mr Brown and Mr Sycamore as employees.

[27] CoS02 included express references to Hong Kong laws. Specifically:

a) Pilots would receive personal accident insurance in accordance with and subject to the provisions of the Employees' Compensation Ordinance of Hong Kong SAR.

b) They were entitled to statutory holidays as provided under s 39 of the

Employment Ordinance of Hong Kong SAR.

c) They were entitled to a sickness allowance in accordance with and subject to the provisions of Part VII of the Employment Ordinance of Hong Kong SAR.

d) Female officers were entitled to maternity leave in accordance with the provisions of ss 12, 13 and 14 of the Employment Ordinance of Hong Kong SAR.

e) NZBL could terminate an officer's employment without notice in

accordance with s 9 of the Employment Ordinance of Hong Kong SAR.

f) Suspension of employment could take place in accordance with s 11 of the Employment Ordinance of Hong Kong SAR.

g) The Operations Manual, which defines the relevant training policy, was based on the Air Navigation (Hong Kong) Order 1995; Cathay Pacific's Air Operators' Certificate was issued under the same order.

[28] Tax arrangements were important to the parties, since it was this issue which precipitated the incorporation of the new company. As NZBL pilots had a permanent

place of abode in New Zealand, they were New Zealand residents for tax purposes, liable for tax on their world-wide income.

[29] Following extensive negotiations the parties, aided by their respective tax advisors, agreed that:

- NZBL would withhold PAYE from the majority of payments that it would make to its employees.

- It was understood the Inland Revenue Department of New Zealand (IRD) had agreed in principle to issue reduced rates and tax certificates which would enable NZBL to deduct PAYE at a lower rate than had applied previously. Without such an agreement, pilots would have to pay tax initially in both New Zealand and Hong Kong, later seeking a refund for overpaid tax from IRD. This would obviously have had unsatisfactory cash-flow consequences.

- For the purposes of this arrangement the parties agreed that the proportion of services performed in New Zealand territory by air crew was 8.3 per cent of all their services.

- The effect of the agreement was that pilots' salaries were fully taxed in Hong Kong at the prevailing rate of approximately 15 per cent, but their salaries were fully taxed in New Zealand at the prevailing rate (39 per cent until 2009) with a credit being given for the Hong Kong tax paid. There was thus an effective "top-up" tax rate in New Zealand of approximately 24 per cent.

[30] This was the position until the Double Tax Agreements (Hong Kong) Order

2011 (Double Tax Order) was made pursuant to s BH 1 of the Income Tax Act 2007 (NZ), being an agreement between the Governments of New Zealand and Hong Kong regulating tax deductions for a range of employees in both countries. Article

14(3) applied to the pilots. For present purposes, its effect was that New Zealand crew would have tax deductions from their income only in Hong Kong. However,

the pilots remained liable for tax in New Zealand on their world-wide income including that obtained from NZBL.

[31] NZBL at all times was liable to withhold and account for Accident Compensation Corporation (ACC) levies in respect of the pilots' employment and service. Such a person would also have cover for personal injuries under the Accident Compensation Act 2001, whether suffered within New Zealand or outside of New Zealand.4

[32] Fringe benefit tax was payable by NZBL to IRD on the taxable value of fringe benefits provided to its employees. NZBL acknowledged that this would cover such benefits as subsidised travel.

[33] The pilots were paid in New Zealand dollars; these payments were credited to a New Zealand currency account in Hong Kong, as a requirement of the employment agreements. This was said to be an arrangement made as a matter of administrative convenience.

[34] In 2006, NZBL established a group medical scheme with Southern Cross Healthcare Group (Southern Cross) for all New Zealand based pilots and their dependants; Southern Cross provides cover for relevant medical events in New Zealand. NZBL reimburses pilots for medical events occurring outside New Zealand.

[35] The pilots are subject to the licensing requirements of the Hong Kong Civil Aviation Department (HKCAD), as the aircraft owned and operated by Cathay Pacific are Hong Kong registered. From time to time the Civil Aviation Authority of New Zealand conducts spot checks of Cathay Pacific aircraft when in New Zealand; one of the matters they check is whether the pilots on Cathay Pacific aircraft hold the appropriate licence, as issued by the HKCAD.

[36] When within the territorial limits of the Health and Safety in Employment

Act 1992 (NZ), both the employer and employee duties of that statute apply. The

4 Accident Compensation Act 2001, s 22.

evidence is that this has practical implications, for instance, with regard to the consumption of drugs and/or alcohol before flights.

[37] The pilots report on operational matters to a Fleet Manager who is based in Hong Kong. The majority of administrative functions are carried out by NZBL in Hong Kong. Ms Carol Hudson, Financial Services Manager of Cathay Pacific based in Auckland, gave evidence that her office provided the following employment- related services for New Zealand based crew:

a) the facilitation of NZHL's payments to the IRD of fringe benefit tax;

b) the processing of ACC levies on behalf of NZBL; and

c. prior to the implementation of the Double Tax Order, the facilitation of payment of PAYE deductions on behalf of NZBL to IRD.

[38] Pilots' duties are allocated by roster; I was told that they consist largely of flying duties, ground5 or reserve duties,6 rostered days off and annual leave. Both Mr Brown and Mr Sycamore are generally rostered for Auckland/Hong Kong/Auckland flights. Occasionally they may be required to fly to other destinations – such as Australia – from Hong Kong and then return to Hong Kong.

[39] When required to work out of New Zealand (including in Hong Kong) they are provided with a hotel room by NZBL, and are paid meal and incidental allowances. Such allowances are not paid to them when they are in New Zealand.

[40] There was some debate between the witnesses as to the correct proportion of services undertaken in New Zealand territory. As already mentioned, 8.3 per cent was agreed for tax purposes. The pilots contended that it was in reality higher, although I was provided with no adequate analysis to support this. Although it is said that this figure was agreed for the particular purpose of tax only and was not

necessarily therefore accurate, it does provide an approximate guide. A substantial

5 Ground duties include activities such as flight simulator training or other ground training in Hong

Kong.

6. This means pilots are required to wait at the New Zealand base on standby, with two hours and 15 minutes notice in the event of a callout.

proportion of the pilots' working time is devoted to flying and related duties which are beyond New Zealand territory.

Events following establishment of NZBL

[41] In 2003 a case involving five pilots employed by Veta (and pilots employed by other related entities) came before the London South Employment Tribunal (the ET). The five Veta pilots (George Crofts and four others) were originally employed by Cathay Pacific in Hong Kong, but later transferred under the Cathay Pacific Basings Policy so that they were based in London. Mr Crofts (at least) was employed under CoS99. All the pilots were dismissed on 9 July 2001. They then filed originating applications in the ET complaining of unfair dismissal and breach of contract.

[42] At issue were the jurisdictional limitations of the Employment Rights Act

1996 (UK). After hearings in the ET and the United Kingdom Employment Appeal Tribunal, the proceedings came before the England and Wales Court of Appeal which by a majority determined:7

a) The place where the contract "bases" international airline pilots throws a clear light on where they were employed. They were accordingly employed in Great Britain.8

b) The ET had correctly concluded that pilots based in England were entitled to claim unfair dismissal.9

[43] Veta appealed with leave from the decision of the Court of Appeal to the House of Lords. The appeal was heard with two others.10 On 26 January 2006, Lord Hoffmann delivered an opinion with which all other members of the House agreed.11 He stated that the question common to the three appeals was the territorial

scope of s 94(1) of the Employment Rights Act 1996, which gave employees the

7 *Crofts v Cathay Pacific Airways Ltd* [2005] EWCA Civ 599, [2005] ICR 1436.

8 At [61] per Waller LJ, and [71] per Maurice Kay LJ.

9 At [63]-[66] per Waller LJ.

10 *Lawson v Serco Ltd* [2004] EWCA Civ 12, [2004] ICR 204; *Botham v Ministry of Defence* [2005] EWCA Civ 400.

11 *Lawson v Serco Ltd, Botham v Ministry of Defence, Crofts v Veta Ltd* [2006] UKHL 3, [2006] ICR

250 [*Crofts*].

right not to be unfairly dismissed by their employer.12 It will be necessary to discuss

Lord Hoffmann's speech later in this decision, but in essence it was held:

a) The application of s 94(1) of the Employment Rights Act 1996 depended upon whether the employee was working in Great Britain at the time of his dismissal.13

b) Pilots such as Mr Crofts were "peripatetic" employees, whose work constantly took them to many different places. While the courts were now more concerned with how a contract was in fact being operated at the time of dismissal than with the terms of the original contract, the commonsense of treating the base of a peripatetic employee as his place of employment remained valid for the purposes of s 94 of the 1996

Act.14

c) The following factual findings of the ET were upheld by the House of

Lords:15

Pursuant to the Basings Policy the Veta applicants were required to resign their [Cathay] employment and did so irrevocably. They were allocated new bases on the footing that they would remain there indefinitely. They were repatriated from Hong Kong and ceased to be resident there. Their tours of duty began and ended in London. Even if a flying circle began elsewhere, the tour of duty began when they reported to London Heathrow for the purpose of being "positioned" to the port from which the flying cycle was to commence. They were paid a salary designed to reflect a lower cost of living than that experienced in Hong Kong. In short, the centre of their operations was, quite manifestly, London.

[44] As a result of the conclusions reached in the *Crofts* case, a comprehensive review was undertaken by Cathay Pacific to assess all local laws which applied to jurisdictions in which Cathay Pacific and its basing companies operated. This

included New Zealand.

12 At [1].

13 At [27].

14 At [29].

15 At [33]-[34].

[45] Cathay Pacific then determined that it would revise its contractual arrangements with overseas-based pilots recognising that they would be governed by the employment law of local jurisdictions, a process referred to as "on-shoring".

[46] A further contextual matter related to the revision of age standards by the International Civil Aviation Organisation (ICAO).16 Since 2006, the ICAO permitted pilots in command up to the age of 65 if the co-pilot is under 60. Retirement at age 65 became the international norm.

[47] On 8 October 2007, Mr Brown, Mr Sycamore, and other NZBL pilots received a document from the General Manager Aircrew, entitled "Conditions of Service and Salary", which dealt with on-shoring. It described discussions which had occurred between the negotiating teams of Cathay Pacific and Hong Kong Airline Officers' Association (HKAOA). Topics which had been discussed included pay, the uniting of first officers' scales, provision for an increase in the retirement age, and integration of certain crew members (freighter crew) on the Cathay Pacific aircrew seniority list.

[48] However, a negotiated agreement had not received the support of the HKAOA's general committee and did not go to a membership vote. NZBL nonetheless proposed to implement aspects of each of the above elements, and would do so by introducing new Conditions of Service in 2008, (CoS08). Thus, for example, all pilots who were recruited after 1 January 2008 would commence on CoS08.

[49] With regard to provisions which would provide for an increase in retirement age above 55, the following made NZBL's intentions very clear:17

A lot has happened since the last time there was a major review of the Cathay package. The bottom fell out of the airline industry in general, but the industry is currently on an upswing. Our own aggressive growth plan requires us to review how we recruit and what packages we offer. *Age discrimination legislation is changing [the] retirement age in many countries and since 65 is now the norm in most countries, we will have no option but to adopt this standard in our Base Areas.*

16 These are described by the Supreme Court in *McAlister v Air New Zealand Ltd* [2009] NZSC 78, [2010] 1 NZLR 153 [*McAlister* (SC)] at [2]-[4].

17 (emphasis added).

...

With age 55 no longer the limit, it is timely to review why we are maintaining a separate Freighter crewing company. An objective of the HKAOA in 1999 was to shut down ASL so that all Cathay Passenger and Freighter aircraft are operated by crew members on the Cathay Aircrew Seniority List. In fact, that is the stated intend of the Freighter Aircraft Crewing Agreement. The lower retirement age at Cathay was the reason behind some ASL crew members choosing not to transfer to Cathay in 2000, and *now that age 65 must become the retirement age in all of our base areas, it is time to revisit this issue and complete the integration.*

...

[T]he current basing structure will have to change to comply with local legislation and all crewing companies will have to go "onshore", starting with the UK in April 2008. Europe will follow shortly after that and the plan is to have every base area onshore in the next two years.

As each base goes onshore, the crewing company will have to comply with the relevant local labour laws. Every country where we have crews based, except Hong Kong, has some form of age discrimination legislation which prevents employers from retiring employees at 55 or reducing employees' terms and conditions on the basis of age. *Once we go onshore, we will have to comply with these laws. This legislation will also require us to increase retirement age from 55 to 65. Therefore, age 65 will be incorporated into each base area's version of CoS.*

We are aware that extending [the] retirement age by 10 years is not universally popular but we have no choice but to comply with the law.

...

Once we go onshore and local labour laws are in effect, crews based in that country will be employed under the local version of CoS and *will be able to continue to work until 65 without any change to their current terms and conditions.*

[50] In 2009, NZBL introduced a Special Leave Scheme (SLS). Pilots were told that this arose as a result of the economic realities facing the company – that is, the global financial crisis. The SLS was described as a salary-sacrifice scheme whereby employees could take up to four weeks' annual leave without pay on a voluntary basis. The scheme would assist Cathay Pacific with its financial challenges. At the same time, pilots were offered the opportunity of transferring onto CoS08. This meant that officers who had joined Cathay Pacific prior to 1 April 1993 would be placed on a lower pay scale, subject to a grace period during which time they would continue to be paid at the level of their previous pay scale until 1 January 2014. However, they would obtain a benefit because CoS08 provided for a retirement age

of 65. If pilots did not elect to transfer to CoS08, they would remain employed under CoS02, which meant no reduction in salary but a retirement age of 55. This was described as a "once only offer" which would not be repeated.

[51] Mr Brown stated that he elected not to transfer to CoS08 because he had been told 18 months previously that the retirement age would be increased to 65. He understood this would occur within a reasonable period; that is, by the end of 2009. The CoS08 proposal was unacceptable to him because the only issues that concerned him personally were, first the proposed salary reduction, and second the retirement age. The issue of retirement age had been dealt with by the proposal advanced by NZBL in 2007, and he did not see why he should have to "bargain my salary in order to work longer". He believed that NZBL would proceed with its stated intentions in respect of age of retirement.

[52] Mr Sycamore gave similar evidence. He said that the reason he did not elect to transfer to CoS08 was because of the assurances that had been given regarding the issue of age being resolved when basing companies went on-shore, commencing with the United Kingdom in April 2008. The proposal made by the company in 2007 would have satisfied "the Human Rights Act of this country", and he assumed he would at that point be under a contract that provided for retirement at age 65. In

2009, when offered the election to transfer, he felt he was being asked to "abrogate my rights under the Human Rights Act of this country by taking a pay cut to be able to work longer and I fundamentally disagreed with that."

[53] He also said that in light of the *Crofts* ruling, pilots such as himself were well aware of the implications for the company regarding

the issue of on-shoring. He assumed that the circumstances were such that the company would have to address the issue properly. Pilots had been told in 2007 that the contractual arrangements were going to alter. This had occurred in the United Kingdom, and he believed it would occur in respect of NZBL.

[54] The onshore conditions of service in respect of other jurisdictions were produced – that is, the United Kingdom, Canada (said to be effective

1 January 2010) and Australia (said to be effective 1 July 2010). In each instance,

local law was elected in the application of law clause; and in each instance the age of retirement was 65. This was full on-shoring.

[55] Full on-shoring has not occurred in New Zealand. CoS02 continues to govern the employment of Mr Brown and Mr Sycamore, as well as a number of First Officers. No evidence was provided to the Court on behalf of NZBL as to why on-shoring has not occurred in respect of its Auckland-based pilots.

[56] Although the election to transfer to CoS08 was stated to be "a once only offer", other pilots have since been allowed to transfer to those Conditions of Service.

[57] In 2013, Mr Sycamore approached Mr Philip Herbert, General Manager

Aircrew, in Hong Kong, and asked if he could now change to CoS08. On 24 January

2014 he was informed that he was not permitted to do so. A similar request was made by Mr Brown and that request has also been declined. Both requests were made within the grace period relating to salary which would have applied had such an election been taken in 2009.

[58] Both Mr Brown and Mr Sycamore now face dismissal from NZBL when they attain the age of 55 – Mr Brown on 4 March 2015, and Mr Sycamore on

24 September 2015.

The pleadings

[59] The claim made by Mr Brown and Mr Sycamore is that:

a) Their threatened dismissals at age 55 are discriminatory and unlawful.

b) The Employment Relations Act 2000 (ERA), the Human Rights Act

1993 (HRA) and the New Zealand Bill of Rights Act 1990 (NZBORA)

would prohibit such discrimination.

c. In the particular circumstances, the laws of New Zealand should apply and not the laws of Hong Kong.

[60] The plaintiffs accordingly seek a variety of declarations to the effect that they should not be discriminated against by being dismissed upon attaining the age of

55 years.

[61] NZBL opposes their claims:

a) It protests jurisdiction by contending the proper law of the employment contracts between the parties is Hong Kong law; and the ERA is not an overriding statute. Accordingly the contracts must be read subject to New Zealand's private international law principles.

b) Conversely, the defendant denies the plaintiffs' contention that it was "not open" to the defendant to stipulate for Hong Kong law and that the defendant is attempting to "hide from" local employment law provisions.

c) The defendant says this is a "conflict of laws" case, where it contends:

- The employment contracts expressly state they are to be interpreted in accordance with the various applicable Hong Kong Ordinances, and the parties have submitted to the non-exclusive jurisdiction of the courts of Hong Kong.

- The selection of the Hong Kong system of law is bona fide and legal; the choice of law is also unsurprising since the defendant's "centre of operations" is Hong Kong, and the material incidents of the plaintiffs' employment have their "closest and most real connections" to Hong Kong law.

- Section 238 of the ERA provides that the Act will have effect despite any provision to the contrary in any contract or agreement; but this section does not apply because the employment contracts were formed in Hong Kong.

- The employer is a Hong Kong company which is not registered in

New Zealand; a significant proportion of the plaintiff's tax

liabilities are incurred in Hong Kong; the plaintiffs are licensed by the Hong Kong Civil Aviation Department; other than the starting and finishing of their duties the majority of Mr Brown and Mr Sycamore's work occurs outside of New Zealand airspace; their training, administration and management occurs in Hong Kong and the form and substance of the past and current employment contracts between the parties reinforces the connection of the employment agreement with Hong Kong rather than New Zealand.

[62] The Court must first determine the proper law of the contracts, but then consider whether there are any applicable limits which would preclude its application. If New Zealand law is to apply, a determination must be made as to whether the provisions of the relevant employment agreements are discriminatory on the prohibited ground of age.

What is the proper law of the employment agreement?

[63] The starting point for this issue is conveniently summarised by *Dicey, Morris*

& Collins on the Conflict of Laws as follows:18

At common law the starting point was that every contract was governed at its outset by its "proper law", a term coined by Westlake. When the parties had expressed their intention as to the law governing the contract, their expressed intention, in general, determined the proper law of the contract, at any rate if the application of foreign law was not contrary to public policy and the choice was "bona fide and legal". When there was no express selection of the governing law, an intention with regard to the law to govern the contract could be inferred from the terms and nature of the contract and from the general circumstances of the case. When the intention of the parties to a contract with regard to the law governing it was not expressed and could not be inferred from the circumstances, the contract was governed by the system of law with which the transaction had its closest and most real connection.

[64] In *Vita Food Products Inc v Unus Shipping Co Ltd*, Lord Wright stated:19

... in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as prima facie presumptions. But where

18 Lord Collins of Mapesbury (ed) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet

& Maxwell, London, 2012) vol 2 at [32-006] (footnotes omitted).

19 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC) at 290.

the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy. ... Connection with English law is not as a matter of principle essential.

[65] Whilst Mr Brown and Mr Sycamore stated that they had no choice but to agree that the Conditions of Service would be interpreted in accordance with Hong Kong laws, the fact is that they did agree to such a provision when they accepted the terms and conditions (CoS02) which were offered to them by NZBL. Plainly, an express choice of Hong Kong law was made.

[66] If the Court concludes that there is no applicable limit on the effectiveness of that choice, New Zealand law will not apply and NZBL's protest to jurisdiction will succeed. However, the parties respective cases have raised issues as to the application of the choice of law clause on these issues:

a) Does s 238 of the ERA apply so as to override Hong Kong law in certain respects?

b) Alternatively, would the application of Hong Kong law in the present circumstances be contrary to public policy, because NZBL's strict reliance on the choice of law clause is morally and ethically wrong, unprincipled, and not in accordance with what most New Zealander's would consider to be fair and just; or

c) Was the choice of law clause bona fide and legal?

Does the ERA have overriding effect?

[67] Before considering the principles which relate to overriding statutes it is first necessary to consider which New Zealand laws potentially apply in this case; the scope of those laws; the question as to where Mr Brown and Mr Sycamore were based; whether the age discrimination protections of New Zealand law apply to them; and if so whether any applicable law has overriding effect.

Which New Zealand laws potentially apply?

[68] It is first necessary to determine which domestic statute or statutes have potential application. There are no other New Zealand cases dealing with circumstances such as the present. It is submitted for the plaintiffs that the Court should determine that the ERA and HRA apply by following the test propounded in *Crofts* by Lord Hoffmann for peripatetic employees, on the basis that the conclusions of the House of Lords are "highly persuasive". For the defendant it is submitted that *Crofts* was determined in a very different statutory context; which included the repeal of a previous provision that had expressly excluded coverage of the statute to those working outside Great Britain; thus it could not be inferred that Parliament intended to extend the normal territorial limitations.

[69] This case involves statutory provisions pertaining to age discrimination under employment agreements. Under the ERA, the scope of analysis must focus on the provisions which define "employment agreement"; "contract of service"; "employee"; and "employer".20

[70] Obviously the provisions relating to age discrimination are also relevant.21

Section 104(1)(c) of the ERA states that an employee is "discriminated against in that employee's employment" if the employer requires an employee to resign by reason directly or indirectly of any of the prohibited grounds of discrimination.22

[71] The ERA refers expressly to the prohibited grounds of discrimination set out in s 21(1) of the HRA.23 It also refers to certain exceptions in the HRA, namely s 24 of that Act (which provides for an exception in relation to crews of ships and aircraft) and s 26 of that Act (which provides for an exception in relation to certain work performed outside New Zealand).24

[72] Section 106(2) of the ERA overrides s 22 of the HRA where a claim is made under s 104, as in this case.

20 Sections 5 and 6.

21 Section 103(1)(c), and ss 104-106.

22 Section 104 was fully analysed in *McAlister* (SC), above n 16.

23 Section 105.

24 Section 106.

[73] The plaintiffs also rely on the NZBORA. However, that statute does not apply because NZBL does not perform a public function, power or duty imposed by law.25 Even if that Act did apply, it would in the present circumstances take matters no further since s 19, which provides for freedom from discrimination, refers to the grounds of discrimination under the HRA.

The territorial limits of the ERA for the purposes of this case

[74] Any declarations in this case will be made under the ERA rather than the HRA because the HRA focuses on hiring practices while the ERA deals with discrimination in employment matters.26 Given that circumstance and the fact that the ERA contains detailed cross-references to the HRA, the issue of territorial limits should focus on the former statute.

[75] The question of territorial limits was considered by the House of Lords in *Crofts,*27 the facts of which have already been discussed at [41]-[43] above. It will be recalled that s 94(1) of the Employment Rights Act 1996 gave employees the right not to be unfairly dismissed. Lord Hoffmann held the question as to the extent of the territorial limits of the provision involved a proper construction of s 94(1) and a determination as to what Parliament may reasonably be supposed to have intended. This involved the application of principles, not the invention of supplementary rules.28 He observed that since the section did not have worldwide application, it

was necessary to give effect to its implied territorial limits.29 The Courts were left to

imply whatever geographical limitations seemed appropriate to the substantive right. Lord Hoffmann then identified three types of case:

a) The first was the standard or normal paradigm case where an employee worked in Great Britain. The terms of the contract and the prior history of the contractual relationship would be relevant to whether the

employee was really working in Great Britain at the time of dismissal.30

25 Section 3(b).

26 *McAlister* (SC), above n 16.

27 *Crofts*, above n 11.

28 At [23].

29 At [24].

30 At [25]-[27].

b) The second example related to peripatetic employees such as Mr Crofts. He again observed that the emphasis should be on how the contract was in fact being operated at the time of the dismissal, rather than at the time of inception of the original contract. He concluded that:31

[T]he commonsense of treating the base of a peripatetic employee as, for the purposes of the statute, his place of employment, remains valid. It was applied by the Court of Appeal to an airline pilot in *Todd v British Midland Airways Ltd* ... where Lord Denning MR said ...:

A man's base is the place where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas. I would only make this suggestion. I do not think that the terms of the contract help much in these cases. As a rule, there is no term in the contract about exactly where he is to work. You have to go by the conduct of the parties and the way they have been operating the contract. You have to find at the material time where the man is based.

Lord Hoffmann concluded that employees of a foreign airline could be based in Great Britain, and that this was in fact the situation for Mr Crofts.32

c) The third category related to “expatriate employees”. It was held that, there, the concept of a base would provide no help.33 It would be unusual for an employee who works and is based abroad to come within the scope of British labour legislation, although some would do so.34 Lord Hoffmann went on to outline factors which might apply in the case of such employees.35

[76] For NZBL, it is submitted that *Crofts* had a particular statutory context and legislative history. That is so, although I observe that the base (or function) test

31 At [29], citing *Todd v British Midland Airways Ltd* [1978] ICR 959 (CA) at 964 per Lord Denning

MR.

32 At [31]-[34].

33 At [35].

34 At [36].

35 At [37]-[39]. Subsequent case law in the United Kingdom has found this category to be difficult:

see *Duncombe v Security of State for Children, Schools and Families* [2011] UKSC 14, [2011] 4

All ER 1020; *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1, [2012] 2 All ER 905; and *Creditsights Ltd v Dhunna* [2014] EWCA 1238. The present case does not involve expatriate employees, and I therefore say no more with regard to that category.

affirmed by Lord Hoffmann was one which had previously been applied by Lord Denning in *Todd* under another statute – para 9(2) of Sch 1 of the Trade Union and Labour Relations Act 1974. That statute provided that the relevant unfair dismissal provisions would not apply to any employment where under the contract of employment the employee “ordinarily works outside Great Britain”. In *Todd,* the

base test was applied to determine where the employee ordinarily worked.36

[77] Turning to the New Zealand position, the ERA has no express territorial limits. As in the case of the two English statutes, the Authority and the Court have been left to determine what constitutes relevant employment for the purposes of the Act, on the basis of the broad definitions of that statute, and to “imply whatever geographical limitations [seem] appropriate to the substantive right”.37 As in *Crofts*, the Court must determine the reality of Mr Brown’s and Mr Sycamore’s employment at the date of the hearing. The focus is on all factors pertaining to that reality, not just the contract itself.38

[78] If the elements of employment in New Zealand are such that it is open to the Authority or the Court – potentially guided by the assistance of a “base test” – to conclude that the employees are working in New Zealand then the statutory provisions of the ERA may apply.

[79] For NZBL it is submitted that an adoption of the principles affirmed in *Crofts* would involve a conclusion that Parliament intended to legislate with extra-territorial effect. As was observed by the Supreme Court in *Poynter v Commerce Commission*, an enactment is to be treated as not having extra-territorial effect unless a contrary intention appears and subject to any relevant rules of private international law. A

legislative proposition is addressed to anyone who is within the territory to which the

36 *Todd*, above n 31, at 964.

37 *Crofts,* above n 11, at [8].

38 By analogy, in establishing the existence of a contract of service under the ERA, s 6(2) requires the Court or the Authority to determine “the real nature of the relationship between them.” As observed by Judge Couch in *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 (EmpC) at [37]-[38], all relevant matters are to be taken into account in this assessment and the parties’ description of their relationship is not to be treated as determinative.

proposition extends, and an enactment will generally apply to things done and people in the territory to which it extends, and no further.39

[80] I do not consider that application of the base test would amount to a conclusion that the New Zealand statutes have extra-territorial application. Rather, it would be premised on a conclusion that, in a case such as the present, the employees are based in New Zealand and therefore subject to laws within its territory.

[81] It was also submitted for NZBL that the employment agreements created more significant connections with the law of Hong Kong than with the law of New Zealand having regard to factors such as where the contract was made, the place of performance, the nature and location of the work, the currency used, the place of residence/business and the form and substance of the contracts.40 As to this:

a) At this stage, the Court is not concerned with the ascertainment of the proper law of the contract at all; rather it is concerned with what law would ordinarily apply in the absence of any conflicts/choice of law issue.

b) The base test, as outlined by Lord Hoffmann, applied to a situation where Mr Crofts was subject to CoS99. The terms of CoS99 are the same in all material respects to the terms of CoS02. Lord Hoffmann applied the base test notwithstanding the connections which existed with Hong Kong law under that document. I find that the same reasoning in respect of the same facts is appropriate in this case.

[82] I conclude that Parliament has left it to the Authority/Court to determine the issue of the application of the ERA, as is appropriate to the substantive right which is in issue. In the case of discrimination, that issue is to be determined in light of the

significant protections which are provided by those statutes, subject to any particular

39 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [36]. See also

Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd [2010] NZSC 49, [2010] 3

NZLR 713 at [22].

40 Reference was made to *Royds v Fai (NZ) General Insurance Co Ltd* [1999] 1 ERNZ 820 (EmpC)

at 829-830; and *Iversen v Directus International Ltd* EMC Auckland AC9/00, 1 March 2000 at 8-

9.

exemptions which Parliament has seen fit to impose. Given the broad language used when referring to employment, the "base test" provides appropriate guidance in respect of peripatetic employees when discrimination is asserted.

Were Mr Brown and Mr Sycamore based in New Zealand?

[83] As I have already mentioned, it was confirmed in evidence that Mr Crofts was employed under CoS99. Mr Brown and Mr Sycamore were employed under the same terms and conditions (CoS02), albeit that the employer was NZBL. The finding upheld by Lord Hoffmann with regard to Mr Crofts applies to Mr Brown and Mr Sycamore, along with other points. Specifically:

a) Pursuant to the Basings Policy, pilots who wished to be employed initially by Veta, and then by NZBL, were required to resign their employment with Cathay Pacific, and to do so irrevocably.

b) Thereafter, their base – described as their "Home Base" – was

Auckland.

c) When taking up the Veta appointment, and maintaining their employment with NZBL they were no longer resident in Hong Kong. It was a specific requirement that they reside and continue to reside in New Zealand. If they wished to take up a Home Base in another country, their employment with NZBL would terminate.

d) Their tours of duty began and ended in Auckland. Even if the flying circle began elsewhere, they would be positioned from Auckland.

e) They were paid a salary designed to reflect a lower cost of living than that experienced in Hong Kong.

f) They were paid in New Zealand dollars, albeit to an account held in

Hong Kong as a matter of administrative convenience.

g) As an overseas company, NZBL should have been registered under Pt 18 of the Companies Act 1993 as a company carrying out business in New Zealand.

h) Various New Zealand statutes apply to the plaintiffs' circumstances as a result of their employment, such as the Income Tax Act 2007, the Accident Compensation Act 2001, and the Health and Safety in Employment Act 1992 (when they are working in New Zealand).

i) The plaintiffs and their dependants are paid New Zealand medical insurance.

j) Tax is now deducted according to a Double Tax Agreement entered into between the Hong Kong Government and the New Zealand Government. This is due to a range of factors taken into account by those Governments, and not because of any negotiation between the parties to this proceeding.

[84] Accordingly, I conclude that Mr Brown and Mr Sycamore are based, for the purposes of their employment, in Auckland. The laws of New Zealand under the ERA and the HRA – subject to any particular exemptions – apply to their employment agreements.

Application of the age discrimination provisions

[85] In *McAlister*, Elias CJ and Blanchard J observed that s 104(1)(c) of the ERA is a straight prohibition on any termination of employment by reason of age and, in particular, abolishes compulsory retirement ages.41 Consequently a mandatory retirement provision is *prima facie* discriminatory for the purposes of New Zealand employment law. It is necessary, however, to consider any relevant statutory exceptions.

[86] The ERA directly invokes the exceptions of the HRA, and I now consider these:

a) Section 24 provides for an exception in relation to crews of ships and aircraft, stating that nothing in s 22 of the HRA shall apply "to the employment or an application for employment of a person on a ship or

aircraft, not being a New Zealand ship or aircraft, if the person was

41 *McAlister* (SC), above n 16, at [26].

engaged or applied for it outside New Zealand". NZBL contend that both Mr Brown and Mr Sycamore fall within the exception, because:

- They are employed on aircraft that are not New Zealand aircraft in that they are owned and operated by Cathay Pacific, a Hong Kong based company.

- They were engaged for employment outside New Zealand.

The section focuses on the place of engagement of the person, rather than on the place where the employment is performed. Given that the purpose of the statute relates to the protection of human rights, it should be construed in a way that will best promote that goal. It is to be

construed "sensibly and broadly", and not "pedantically or rigidly".42

The section should be construed broadly not narrowly. It is appropriate to consider all the circumstances relating to the engagement.

When employed by NZBL, both Mr Brown and Mr Sycamore were employees of Veta, based in Auckland. The genesis of the NZBL employment agreements occurred over a period of two years, and was subject to several meetings in Auckland to discuss the proposed terms and conditions. NZBL was to be incorporated to avoid a potential tax issue which would otherwise arise in New Zealand. The process of recruitment plainly occurred in New Zealand. In terms of the test enunciated by Lord Hoffmann in *Crofts*, I find that at the time the offer was made to Mr Brown and Mr Sycamore they were both employees of Veta based in Auckland and subject to New Zealand laws, for similar reasons as relates to the finding concerning their status as employees of NZBL. Letters of offer were sent to both Mr Brown and Mr Sycamore at their residences in Auckland. Subsequent communications with regard to the timing of any response was sent to the pilots via their personal email addresses. Mr Brown counter-signed his letter of offer,

and sent it by fax from New Zealand to Hong Kong; Mr Sycamore

42 *Coburn v Human Rights Commission* [1994] 3 NZLR 323 (HC) at 335 per Thorpe J, citing

King-Ansell v Police [1979] 2 NZLR 531 (CA) at 537.

cannot now recall where he was when he counter-signed his letter of offer. Although the administrative headquarters of NZBL were in Hong Kong, I find that the engagement of both plaintiffs in these unusual circumstances was in Auckland. I do not consider the engagement occurred "outside New Zealand". Accordingly, the exception in s 24 does not apply.

b) It is also contended by NZBL that the exception in s 26 applies. This provides that a different treatment based on age is permitted if the duties of the position in respect of which the treatment is accorded "are to be wholly or mainly performed outside New Zealand"; and "are such that because of the laws, customs, or practices of the country in which those duties are to be performed, they are ordinarily carried out only by a person ... who is in a particular age group".

It is the case that both Mr Brown and Mr Sycamore were to perform

duties "mainly outside New Zealand".

As to the second limb of the section, the question is whether, because of the laws, customs or practices in the various countries where Mr Brown and Mr Sycamore are required to work which includes Hong Kong and, from time to time, Australia, they are ordinarily carried out by a person within a particular age group. Hong Kong has no law mandating early retirement; nor has any evidence been provided that international pilots are required by the laws, customs and practices of Hong Kong or Australia to retire at age 55. Indeed, the evidence establishes that Cathay Pacific has established subsidiaries for on-shoring purposes, which involves pilots flying to and from Hong Kong, under employment agreements where the age of retirement is 65. And, as mentioned earlier, retirement at age 65 – and not 55 – has become the international norm.

I find that the provisions of s 26 do not apply.

[87] Accordingly, I am satisfied that s 104(1)(c) of the ERA would apply to Mr Brown and Mr Sycamore, were New Zealand law to apply to them rather than Hong Kong law. Under that law they would be discriminated against on the grounds of age if they were required to retire or resign at age 55.

What is the effect of s 238 ERA?

[88] The provision of the ERA which is potentially relevant to the question of whether that statute has an overriding effect in circumstances such as the present, is s 238 which provides:

238 No contracting out

The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.

[89] NZBL submitted the ERA is not an overriding statute, relying on dicta contained in the *Governor of Pitcairn and Associated Islands v Sutton*,43 and in *Clifford v Rentokil Ltd*.44

[90] The plaintiffs' case was not put on this basis; rather it was contended that the choice of law clause should not take effect in the

present circumstances on public policy grounds. Be that as it may, the question of whether the ERA has overriding effect is a significant issue which must be resolved before any alternative analyses can be considered.

[91] If a New Zealand statute, as properly interpreted, having regard to its text and purpose, applies to the case before a court, the statute must be applied even if it has the effect of overriding a relevant conflict of laws rule.45

[92] The following extract from *Dicey, Morris & Collins on the Conflict of Laws*

describes the concept of an overriding statute as follows:46

Overriding statutes. Statutes of the fifth class are those which must be applied regardless of the normal rules of the conflict of laws, because the statute says so. ... Overriding statutes are an exception to the general rule that statutes only apply if

43 *Governor of Pitcairn and Associated Islands v Sutton* [1994] NZCA 277; [1995] 1 NZLR 426 (CA).

44 *Clifford v Rentokil Ltd* [1995] NZEmpC 96; [1995] 1 ERNZ 407 (EmpC).

45 *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [8]. An example of this principle is *Elwin v O'Regan* [1971] NZLR 1124 (SC) at 1129.

46 Collins, above n 18, at [1-053]-[1-054], [1-061].

they form part of the applicable law. One of the main reasons for the overriding character of such legislation is that otherwise the intention of the legislature to regulate certain contractual matters could be frustrated if it were open to the parties to choose some foreign law to govern their contract.

Laws of this kind are referred to as "mandatory rules" or *lois de police* or *lois d'application immédiate.* Where such legislation is part of the law of the forum it applies because it is interpreted as applying to all cases within its scope. Thus in contract cases, United Kingdom legislation will be applied to affect a contract governed by foreign law if on its true construction the legislation is intended to override the general principle that legislation relating to contracts is presumed to apply only to contracts governed by the law of a part of the United Kingdom.

...

[O]verriding statutes ... might be described as crystallised rules of public policy, because they lay down mandatory rules which the parties cannot contract out of, directly or indirectly.

[93] The first case referred to for the defendant is *Sutton*.47 There the Court of Appeal was required to consider whether the employer's representative, the Governor of Pitcairn, was entitled to claim sovereign immunity. The Court observed that although the Employment Contracts Act 1991 (ECA) was broadly phrased, in the absence of an express indication to the contrary by the legislature, the doctrine of sovereign immunity was presumed not to have been displaced. Richardson J

observed that:48

The common law doctrine of sovereign immunity applies unless clearly excluded. It is common for statutes of general application to be expressed in the broadest terms. The Legislature recognises that presumptions, such as the presumption against extra-territorial application and the presumption of sovereign immunity, will apply to qualify the reach of the statute. ... [W]here a presumption as to Parliament's intention favours one construction, an implication favouring the opposing construction can be drawn less easily and needs to be more strongly based. Otherwise, of course almost any general statute would displace well settled doctrines accepted by New Zealand in its international relations.

While the Employment Contracts Act is broadly phrased, it is not expressed to apply extra-territorially or to override sovereign immunity. The absence in its general language of any specific restriction on its application to a foreign sovereign cannot be elevated into an expression of intent to override that important presumption grounded in public policy and the common law.

47 *Sutton*, above n 43.

48 At 438 (citations omitted).

[94] The Court accordingly held that the respondent employee's position involved her in the exercise of Government authority, such that she had placed herself outside the scope of the ECA.

[95] The second case referred to is *Clifford*. There Judge Palmer referred to the dicta in *Sutton* and said:49

Notwithstanding the broadly phrased nature of the Employment Contracts Act, I now re-emphasise it is not an overriding statute but will apply according to standard doctrine in an arguable conflict of laws setting where the particular contract of employment in contention is held by the Employment Tribunal or this Court, as the case may be – but subject to the fundamental caveat, as it were, which I shall shortly refer to – to be governed by New Zealand law as the proper law of contract. The "fundamental caveat" to which I refer is simply that if, in a particular case, the parties to a particular employment contract which clearly, upon analysis, had in its material incidents the closest and most real connection with the employment law of New Zealand, had purported to expressly select as the proper law governing their contract of employment a foreign system of law which had little or no connection with that contract of employment, and thus comprising in substance a contracting out by the parties of the governing application of the Employment

Contracts Act contrary to s 147 of the Act, such a purported contracting out would, I hold, be void and of no effect. Certainly in such circumstances in a conflict of laws setting the proper law of contract could not be determined by such a process of selection.

[96] Section 147 of the ECA was in similar terms to s 238 of the ERA. The Judge in *Clifford* reached the conclusion that the ECA had overriding effect by relying on the dicta in *Sutton,* which concerned sovereign immunity. The significance of the contracting out provision when determining that the ECA had overriding effect was considered to be relevant only where the proper law had "little or no connection"

with the law of New Zealand.50 In my view, the contracting out provision is pivotal

to the threshold issue of whether the domestic law has overriding effect. Its relevance is not limited to the particular example given by the Judge.51

[97] In the context of a *forum conveniens* case, *Musashi Pty Ltd v Moore*, Chief

Judge Colgan referred to s 147 of the ECA and s 238 of the ERA.52 The challenge before him involved a warehouse assistant working in New Zealand where, by

49 *Clifford*, above n 44, at 433-434.

50 At 434.

51 The example referred to in *Clifford* is an illustration of the "bona fide and legal" test, which his

considered later in this decision.

52 *Musashi Pty Ltd v Moore* [2001] NZEmpC 178; [2002] 1 ERNZ 203 (EmpC).

implication, the law of the State of Victoria had been chosen. In that context, he observed:53

Dicey and Morris goes further than highlighting the importance of the jurisdiction in which the work was carried out [when determining a *forum conveniens* issue] ... [T]he authors point out that the provisions of art 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 ... the Authority ... found support for this position in s 238 Employment Relations Act 2000 and its materially identical predecessor, s 147 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.*

[98] In *Mazengarb's Employment Law* the legislative intent of s 238 is described by the learned authors in these terms:54

This provision is intended to ensure that employees are not able to surrender any of their employment protection rights under the legislation, even if they might be tempted to do so during the bargaining process. The important provisions in this respect concern: freedom of association, the bargaining and ratification mechanisms, the statutory force and duration of collective employment agreements, the exclusive jurisdiction of the specialist employment institutions, the measures governing industrial action, the personal grievance jurisdiction and other problem-solving jurisdictions, and Labour Inspectors' powers of inspection and enforcement.

[99] That statement conveniently summarises the minimum legislative standards of the ERA. Parliament clearly intended that the ERA would regulate employment relationships in numerous respects, and this included provisions for the protection of multiple rights and values.

[100] Given that purpose, I consider that s 238 does have overriding effect. Applying the principles outlined in *Dicey, Morris & Collins* at [92] above, were s

238 not to have such an effect Parliament's intention to regulate minimum legislative

standards in respect of employment agreements that fall within the ambit of the ERA

53 At [55] (emphasis added) (citations omitted).

54 *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [ERA238.2].

would be frustrated. That intention is confirmed by the wide language used in the section. A broad interpretation is appropriate.

[101] Applying s 238 as construed to the present circumstances, Mr Brown and Mr Sycamore as peripatetic employees based in New Zealand fall within the ambit of the ERA. The choice of law clause, if applied to the present facts, would provide an outcome that is contrary to the provisions of the ERA. The effect of s 238 is that the choice of law clause does not apply.

Was the choice of law contrary to public policy?

[102] The foregoing analysis provides a proper basis for making declarations of the kind sought by the plaintiffs.

[103] In case I am wrong in reaching that conclusion, but more particularly because the plaintiffs' primary submission was, in effect, that public policy precludes application of the choice of law clause, I now go on to consider that issue. It proceeds on the basis that s 238 of the ERA does not have overriding effect.

[104] In the *Laws of New Zealand*, there is a convenient summary of the public policy reasons for excluding foreign law as follows:55

14 Public policy

Exceptionally, New Zealand Courts will not enforce or recognise a right conferred or a duty imposed by a foreign law when, in the particular case, this would be contrary to a fundamental policy of New Zealand law. The Courts may therefore refuse in certain cases to apply foreign law if to do so would in the particular circumstances be contrary to New Zealand's interests, or contrary to justice or morality. So in cases involving personal status, the New Zealand Courts will refuse to recognise a discriminatory status existing under a foreign law, or a discriminatory incapacity or disability imposed by a foreign law. The Court retains a residual discretion to refuse to recognise a foreign status when, on the facts of the particular case, recognition would be unjust or unconscionable. However this discretion should be exercised very sparingly.

55 *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [14] (footnotes omitted).

The English, Canadian and Australian positions are to the same effect, see *Halsbury's Laws of England* (5th ed, 2011, online ed) vol 19 Conflict of Laws at [332]; *Halsbury's Laws of Australia* (online ed) vol 85 Conflict of Laws at [100]; *Halsbury's Laws of Canada* (reissue, 2011, online ed) Conflict of Laws at [124].

[105] In *Reeves v One World Challenge LLC* the Court of Appeal was required to consider whether enforcement in New Zealand of a foreign judgment would offend local public policy.56 The Court held that enforcement of United States judgments at issue would not amount to an abuse of process of the New Zealand courts, nor would it "shock the conscience" of a reasonable New Zealander, or be contrary to New Zealand's view of basic morality or a violation of essential principles of justice or moral interests in New Zealand.57

[106] The present case does not involve the enforcement of a foreign judgment but it does involve an issue as to whether the Court should enforce or recognise a right conferred by foreign law; the threshold applied by the Court of Appeal is consistent with common law authorities relating to the application of the public policy exception when considering express choice of law clauses.

[107] In assessing this issue, there should be a focus on the nature of the special rights which arise under the HRA, as brought into the ERA.

[108] In *Director of Human Rights Proceedings v Cropp,* the High Court observed:58

[17] The long title of the Human Rights Act records its purpose as

to provide better protection of human rights in New Zealand in general in accordance with the United Nations Covenants or Conventions on human rights.

Those instruments, to which New Zealand has acceded, include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW). For good measure, s 19 of the New Zealand Bill of Rights Act 1990 underlines the right to freedom from discrimination confirmed by the Human Rights Act.

[18] The importance as well as the difficulty of the jurisdiction derives from the fact that, in the end, it concerns the basic right of human dignity to which s 92M(1)(c) makes explicit reference. It is the responsibility of the Commission, the Tribunal and, on appeal, this Court to give full effect to what Thorpe J in *Coburn v Human Rights Commission* called "the special

56 *Reeves v One World Challenge LLC* [2005] NZCA 314; [2006] 2 NZLR 184 (CA).

57 At [67] per Anderson P and O'Regan J and [104] per William Young J.

58 *Director of Human Rights Proceedings v Cropp* HC Auckland AP7-SW03, 12 May 2004 (citations omitted).

nature and purpose of human rights legislation". It is special because it

bears on the very essence of human identity.

[109] It is well recognised that human rights legislation is not to be treated as an ordinary law of general application, but should be acknowledged for what it is, "a fundamental law".59

[110] In the context of its consideration of age discrimination provisions, the Court of Appeal observed in *Air New Zealand v McAlister* that:60

Prohibitions on discrimination reflect two deeply held values – namely, that people are entitled to be treated:

a) Equally, unless there are legitimate justifications for unequal or different treatment; and

b) On their merits as individuals, rather than on the basis of stereotypes based on their gender, race, age or some other similar characteristic.

[111] Parliament has seen fit to include age as a prohibited ground of discrimination as one of a number of deeply held values that bear on the very essence of human identity. In the case of employment, that identity relates to the right to work, which may have a significant and inherent value of its own.

[112] Unlike New Zealand law, Hong Kong law does not provide for protections against age discrimination. Were the law of Hong Kong to apply, Mr Brown and Mr Sycamore would be treated differently on the basis of their age, and not on their merits as individuals. This is unjust given the many years of service each of them have given to Cathay Pacific and its subsidiaries, and to the high degree of expertise they have acquired, and undoubtedly have demonstrated, over that period. No evidence has been provided which suggests they are, on the grounds of age unsuited to continue their chosen occupations beyond age 55. They both wish to be able to continue in the current careers, and to work accordingly. The fact that the only reason they cannot is because, without any justification, a contractual terms says so is a violation of the essential principles of justice because it involves a very serious

infringement of a basic human right.

59 *Insurance Corp of British Columbia v Heerspink* [1982] 2 SCR 145 at 158 per Lamer J, cited in

Coburn, above n 42, at 334.

60 *Air New Zealand Ltd v McAlister* [2008] NZCA 246, [2008] ERNZ 201 at [35]. This analysis was not disturbed on appeal in the Supreme Court: *McAlister* (SC), above n 16.

[113] The potential application of the age discrimination provisions of the ERA is a very significant factor in the present case. It suggests the public policy exception should indeed be applied, since otherwise there would be an affront to basic principles of justice and fairness. This finding alone is sufficient to establish the public policy exception.

[114] However, it is not the only factor, and I move on to consider particular aspects of the present case which also lead to a conclusion that recognition of Hong Kong law would be unjust on the facts of the particular case.61 At issue is whether NZBL attempted to bargain a fundamental human right.

[115] The plaintiffs submit that the way in which Cathay Pacific and NZBL reacted to the conclusions of the *Crofts* decision was fundamentally unfair. The main elements of that chronology may be summarised as follows:

a) Following the *Crofts* decision, a legal review of employment laws at Cathay Pacific bases was undertaken, which included New Zealand laws.

b) In 2007, all pilots, including NZBL pilots, were told in a detailed memorandum that the current basing structure would have to change to comply with local legislation.

c) It was said all crewing companies would go on-shore, starting in April 2008, it being intended that every base would be on-shore within the next two years.

d) When going on-shore, the crewing company would have to comply with relevant local labour laws, and in particular that there would be compliance with age discrimination legislation.

e) The pilots were told that as a result, crews based in a subject country would be able to continue to work until age 65 without any change to

their current terms and conditions.

61 See the *Laws of New Zealand* extract at [104] above.

[116] It was argued for NZBL that this statement was no more than an indication of a “plan”. It is correct that it was planned to have every base area on-shore in two years. I find, however, that the use of the word “plan” related to timing only – it was hoped that on-shoring could be achieved within a period of two years. The balance of the document contained multiple statements that on-shoring would occur, and that amongst other things there would be compliance with local age discrimination legislation in circumstances where the company would otherwise be in breach. This representation from Cathay Pacific to NZBL and other pilots was understood to be in response to the findings made in the *Crofts* decision.

[117] I find that in those circumstances it was logical and to be expected that pilots would rely on the company’s representation, and expect it to rectify its non-compliance with local employment law.

[118] I accept the submission made for the plaintiffs that in 2009 NZBL then attempted to bargain the issue of age discrimination. Pilots were told they could transfer to CoS08 which provided for retirement at age 65; but in the case of senior pilots such as Mr Brown and Mr Sycamore they would have to accept a salary reduction after a grace period which would extend to the end of 2013. Pilots were offered a choice as to whether or not to accept this arrangement.

[119] Mr Brown and Mr Sycamore both believed that NZBL would honour its earlier statement that it would introduce Conditions of Service that rendered the employment agreement subject to local employment laws.

[120] There was no indication in the 2009 statement that Cathay Pacific did not intend to go ahead with full on-shoring, as it had said it would in 2007. Indeed it did so in the United Kingdom, Canada and Australia, although not in the United States. It proceeded as it said it would in respect of three of five bases. Mr Brown and Mr Sycamore were entitled to rely on the statement which had been made to them in

2007 regarding the intentions of Cathay Pacific and NZBL.

[121] As mentioned earlier, NZBL did not in fact proceed with full on-shoring in New Zealand. Although CoS08 provided for a retirement age of 65, it maintained Hong Kong law as the relevant law of choice. Those who were employed on CoS02 were subject to an obligation to retire at age 55. Full on-shoring would have stipulated that New Zealand law was to apply. It would have then required compliance with New Zealand age discrimination legislation. No explanation was given as to why full on-shoring has not occurred in New Zealand when it has occurred in three other jurisdictions. Two Captains chose to remain on CoS02 and a higher pay scale; 11 First Officers chose to remain on CoS02 and a potentially higher pay scale. I infer that because NZBL wished to avoid the financial implications of continuing to employ pilots past age 55 at a higher pay scale, a deliberate choice was made not to proceed with on-shoring, without this being stated clearly to pilots.

[122] Even when Mr Brown and Mr Sycamore applied to their employer to transfer to CoS08 – which occurred at the end of the grace period – they were told the option was no longer available, even although some staff had accepted the CoS08 offer after

2009. In February of this year, when an explanation for so doing was requested, it was said that the factors which led to a decision to no longer permit a transfer to CoS08 on the terms offered in 2009 included:

- The fact that under CoS08 pilots would be expected to retire at age 65.
- The fact that manning levels required in 2014 were based on the

company's Business Operating Plan.

- The fact that such a transfer would impact on promotion prospects for

First Officers.

- Cost implications, including bypass pay for First Officers.

[123] There is no evidence to suggest that these factors were not relevant in 2009 when the original offer to transfer terms and conditions was made.

[124] I also note the evidence of Mr Scott McEwen, Manager, Flight Crew Employee Relations. When asked whether it was acceptable that employees could be dismissed based on age Mr McEwan said that it was acceptable if the contract allowed for it. However, he agreed that it would not be acceptable to discriminate on the grounds of religion or ethnicity; and he also accepted that discrimination on the basis of age was no different.

[125] The evidence establishes that there is no reason relating to health or competence that would justify Mr Brown or Mr Sycamore being required to retire at age 55. The sole ground relied on by NZBL is "that the contract says so". It has taken this position despite its awareness that this is likely to amount to unlawful discrimination on the basis of age – and despite the clear representations it made to its pilots in 2007.

[126] I am satisfied that recognition of Hong Kong law rather than New Zealand law would in the present circumstances be unjust or unconscionable, having regard to the significant importance which should be attached to New Zealand's age discrimination legislation, and to the conduct of NZBL in the particular circumstances.

[127] Accordingly, if the ERA does not have overriding effect, I consider that the choice of law clause in the employment agreements should not apply on public policy grounds, and that the ERA and the HRA should apply.

Was the choice of law bona fide and legal?

[128] NZBL argued that the choice of law was bona fide and legal. The judicial formula which requires that an express choice must be bona fide and legal has been summarised in this way:62

... the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law. If, after having discovered that one particular provision was void under the proper law, they were to try to evade its consequences by claiming that the

62 PM North and JJ Fawcett (eds) *Cheshire and North on Private International Law*, (11th ed, Stevens & Sons Ltd, London, 1987) at 454. See also *Kay's Leasing Corp Pty Ltd v Fletcher* [1964] HCA 79; (1964) 116 CLR 124 (HC) at 143-144.

provision was subject to another legal system, their claim should not be considered as a bona fide expression of their intentions.

[129] The application of this test is different from that which relates to public policy. It applies where a choice of law clause is used to circumvent a domestic statute which could not otherwise be contracted out of, so that it could not be concluded that there was a bona fide or legal expression of intent when the parties entered their contracts. The evidence does not establish that at the time they entered into their employment arrangements the parties deliberately attempted to avoid the provisions of the ERA. There were connections between the employment agreements and Hong Kong law. I find that there was no infringement of the "bona fide and legal" test.

Conclusion

[130] I dismiss the defendant's protest as to jurisdiction, because s 238 of the ERA overrides the express choice of law clause in the relevant employment agreements. Alternatively, the clause should not apply on public policy grounds.

[131] Mr Brown and Mr Sycamore seek declarations. The Court has the jurisdiction to make declarations in respect of employment relationship problems.63

[132] I make an order declaring that the age discrimination provisions of the ERA apply to Mr Brown and Mr Sycamore's employment by NZBL; and that it would be discriminatory for NZBL to require each of those employees to retire on the grounds of age as defined in s 21 of the HRA.

[133] I reserve leave to the parties to apply for any necessary directions with regard to this declaration; such application may be made by either party on 15 working

days' notice.

63 *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] NZEmpC 63; [2007] ERNZ 405 (EmpC) at [13].

[134] I reserve costs. It is hoped the parties can resolve this issue without the assistance of the Court, but if need be any application for costs (supported by evidence) should be filed within 20 working days; and any response (supported by evidence if need be) should be filed 20 working days thereafter.

B A Corkill

Judge

Judgment signed at 2.45 pm on 15 December 2014