IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 298
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 and 26 August 2015 from the Respondents 24 August 2015 from the Applicant	
Date of Determination:	28 September 2015	

DETERMINATION OF THE AUTHORITY
ON PRELIMINARY MATTER No 2

A. **Mr Jonathan Segal was employed by Infor Global Solutions (ANZ) Pty Limited. Mr Segal was never employed by Infor (New Zealand).**

B. **Mr Segal's employment by Infor Global Solutions (ANZ) Pty Limited was at all times governed by the law of the State of Victoria, Australia.**

C. **New Zealand is not a *forum conveniens* to hear Mr Segal's claims against Infor Global Solutions (ANZ) Pty Limited.**

D. **Costs are reserved.**

Application for stay by respondents

[1] In a preliminary determination of the Authority on 20 July 2015[1], the Authority declined the respondents' application for a stay of any further investigation by it as to its jurisdiction to investigate the applicant's employment relationship problems.

[2] The application for stay was made by the respondents pending the Court of Appeal's judgment on appeal in *New Zealand Basing Ltd v. Brown*[2]. The questions of law for determination by the Court of Appeal in *Brown & Sycamore v. New Zealand Basing Ltd*[3] 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 and the law of Hong Kong provides no protection against discrimination.

[3] Counsel for the respondents argued that the questions of law for determination by the Court of Appeal had a direct bearing on the proceedings before the Authority.

[4] The Authority declined the application for stay on the grounds that:

(a) The fact scenario being investigated by it appeared to differ from that in *Brown & Sycamore*;

(b) The Court of Appeal was unlikely to hear the substantive appeal until the first quarter of 2016; and

(c) The Authority's purpose and role is to develop a speedy, cost effective, and non-legalistic resolution service for parties to employment relationship problems.

Employment relationship problem

Mr Segal's claim in the Authority

[5] Mr Segal has filed proceedings in the Employment Relations Authority against the respondents, Infor (New Zealand) [Infor NZ] and Infor Global Solutions (ANZ)

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1 [2015] NZERA Auckland 213
2 [2015] NZCA 168
3 [2014] NZEmpC 229

Pty Limited [Infor Australia], alleging unjustified dismissal and seeking remedies to be awarded by the Authority.

[6] Infor NZ denies employing, and therefore dismissing, Mr Segal. Infor Australia says it employed Mr Segal and his employment was expressly 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. Rather, the dispute is one to be dealt with in accordance with the law of the State of Victoria, Australia.

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

[7] The parties agreed for this preliminary matter as to jurisdiction to be dealt with on the papers, by the Authority. Affidavits were filed on behalf of both parties. Mr O'Brien for Mr Segal sought, and was granted, leave by the Authority to question two of Infor NZ's and Infor Australia's witnesses in respect of their affidavits.

[8] An investigation meeting was held on 1 July 2015 to enable the witnesses to be questioned by the Authority and by counsel for the respective parties. The witnesses questioned were Ms Patrizia De Gori, Senior Regional HR Manager and Ms Jo-Anne Ruhl, Managing Director – Pacific, both employed by Infor Australia.

[9] In investigating the preliminary matter concerning the Authority's jurisdiction, I have considered written and oral evidence, given under oath or affirmation along with relevant documents. The parties had the opportunity to provide written submissions on the issue for resolution by this determination and did so. The submissions have assisted the Authority with its investigation.

[10] As permitted by s.174E of the Act, this determination has not recorded all evidence and submissions received but has made findings of fact and law and expressed conclusions on the issues requiring determination.

[11] The issues for determination by the Authority are:

(a) Was Mr Segal employed by Infor NZ or by Infor Australia?

(b) If Mr Segal was employed by Infor Australia, was his employment governed by the laws of New Zealand or the law of the State of Victoria, Australia?

(c) If Mr Segal's employment was governed by the law of the State of Victoria, Australia, is New Zealand a *forum conveniens* to hear his claim against Infor Australia?

First Issue

Was Mr Segal employed by Infor NZ or by Infor Australia?

[12] Mr Segal was employed by Infor Australia as Senior Manager, Channels from 2 September 2013. In April 2014, Mr Segal moved to New Zealand to join his wife, Mrs Nicola Segal, and his son.

[13] Mrs Segal is employed by Virgin Australia International Holdings Pty Limited (Virgin Australia). On 25 March 2014, Mrs Segal had relocated to New Zealand to take up a new role with Virgin Australia from 31 March 2014 as a Business Development Executive.

[14] On 22 September 2014, Mr Segal's employment was terminated on the grounds of redundancy. Mr Segal says his dismissal was unjustified and seeks to have his unjustified dismissal claim dealt with by the Authority in accordance with New Zealand employment law.

[15] Mr Segal says from April 2014, he was based in New Zealand and was employed from that time by Infor NZ. Therefore, Mr Segal says his employment was subject to New Zealand law. Alternatively, Mr Segal says if he was not employed by Infor NZ from April 2014, his employment by Infor Australia was subject to the laws of New Zealand and New Zealand is a *forum conveniens* to hear his claim.

[16] Infor NZ and Infor Australia say Mr Segal was always employed by Infor Australia and his employment was terminated by it. Infor Australia and Infor NZ say Mr Segal was never employed or dismissed by Infor NZ.

[17] Infor NZ and Infor Australia say that the law of the State of Victoria, Australia applies to the employment relationship between Mr Segal and Infor Australia from the date of his employment to the date of his dismissal. Infor NZ and Infor Australia say that the Authority does not have any inherent jurisdiction to hear and determine an employment dispute governed by a foreign law and in any event New Zealand is not a *forum conveniens* to hear Mr Segal's claim.

Mr Segal's employment

[18] By letter dated 26 August 2013 from Ms De Gori, Mr Segal was offered employment with Infor Australia in the role of *"Senior Manager, Channels or in such other position as may be agreed from time to time"*.

[19] Relevant provisions of the letter include that the parties to the employment agreement were Infor Australia and Mr Segal, employment was to commence on 2 September 2013 (clause 2), regular travel within the Pacific region was required (clause 3), and remuneration was AU$160,000 gross per annum.

[20] Annual leave, personal leave, community service leave, compassionate leave and parental leave were all expressed to be in accordance with the Fair Work Act 2009 (clauses 9, 11, 12, 13 and 14). Long service leave entitlement was in accordance with *"the relevant legislation in the State or Territory in which you work"*. Superannuation entitlement was in accordance with the Superannuation Guarantee (Administration) Act 1992. Particularly, for the purposes of this matter, the clause in relation to the location of Mr Segal's employment stated that he would:

> *... initially be located in Melbourne, Victoria. However you may be required to relocate to another office of the company within Melbourne, Victoria upon being provided with reasonable notice of such relocation with no additional compensation.*

[21] Clause 23, in relation to the applicable law in respect of the employment relationship, stated:

> *Proper law and jurisdiction*
> *(a) This agreement shall be governed by and construed in accordance with the law of the State of Victoria.*

[22] Mr Segal was asked to sign and initial each page of the letter and return it if he accepted the terms and conditions of employment set out in it. Mr Segal did so.

[23] In my view, the terms and conditions of employment set out in the letter from Ms De Gori are consistent with Mr Segal's employment in Australia by an Australian company and subject to Australian laws. This appears to be accepted by the parties in respect of Mr Segal's employment from 2 September 2013 up until 7 April 2014. However, Mr Segal says he requested to transfer to New Zealand because his wife, Mrs Nicola Segal was moving there. Mr Segal says his transfer was agreed to by

Infor Australia and from April 2014 he was employed by Infor NZ in New Zealand. This claim is resisted by Infor NZ and Infor Australia.

[24] I do not accept that the evidence supports Mr Segal's contention that his transfer to New Zealand amounted to a transfer of his employment from Infor Australia to Infor NZ and that from April 2014 he was an employee of Infor NZ.

Discussions about relocating to New Zealand

[25] Mr Segal says he was informed by his wife, Mrs Nicola Segal *"in or around February 2014"* that she had been offered a promotion which would require her to relocate to New Zealand. Mr Segal says he spoke to Ms Ruhl, Country Manager, and then sat down and talked with Ms De Gori, HR Manager, about the financial implications of moving to New Zealand.

[26] Mr Segal's first affidavit does not provide details of when these discussions took place. In his second affidavit Mr Segal says the meeting with Ms De Gori was in March 2014 after Mrs Segal had accepted the role in New Zealand with Virgin Australia. Mr Segal says in his second affidavit that based on his discussions with Ms Ruhl he thought he simply needed to obtain formal approval from Ms Anna Gong, Vice President, Asia/Pacific Channels to relocate to Auckland, New Zealand.

[27] Ms Ruhl says Mr Segal raised the fact that Mrs Segal was considering two job offers, one in New Zealand and one in Australia, for the first time in March 2014. Both offers were for roles with Mrs Segal's employer, Virgin Australia. However, one offer was for a role in New Zealand and the other was for a new role in Sydney where Mrs Segal was currently employed. Ms Ruhl says at the time of the discussion she understood Mrs Segal had not yet accepted the role she had been offered in New Zealand. In fact, Mrs Segal had accepted the role on 28 February 2014.

[28] Mr Segal says that Ms Ruhl told him that she was excited for Mrs Segal and that she would support his move to New Zealand. Mr Segal said that Ms Ruhl told him that he would need to get approval from Ms Gong to transfer to New Zealand.

[29] Ms Ruhl agrees that she was pleased for Mrs Segal and that she told Mr Segal that she would support his decision to move to New Zealand should Mrs Segal decide to take up that role. However, Ms Ruhl says she explained that she was not able to

approve any potential request to transfer to New Zealand. Ms Ruhl also says that it did not matter whether Mr Segal lived in New Zealand or Australia:

> *… his role remained the same once he moved to New Zealand, and his reporting lines remained the same. At all times, Mr Segal remained an employee of Infor Global [Infor Australia], and at all times he was performing services for that company. Mr Segal never performed services for Infor NZ and he was never employed by that company.*

[30] Mr Segal says he discussed the financial implications of the relocation with Ms De Gori and there was discussion about payment of salary in Australian or New Zealand dollars and the respective superannuation schemes in New Zealand and Australia.

[31] Ms De Gori says that on 3 March 2014, Mr Segal came into her office to tell her that his wife had been offered a job in Auckland, New Zealand and that he was considering moving to Auckland with her if she took the job. Ms De Gori says there was no scheduled meeting to discuss Mr Segal's employment or a transfer of employment, rather he simply came into her office and told her about his wife's job offer. Ms De Gori says Mr Segal asked her how he would be paid if he moved to New Zealand, whether in New Zealand or Australian dollars and they also discussed the New Zealand KiwiSaver scheme.

[32] With reference to his meeting with Ms De Gori, Mr Segal in his second affidavit says Mrs Segal had already been offered the role in New Zealand and was relocating on 28 March 2014.

[33] I prefer the evidence of Ms Ruhl and Ms De Gori. Mr Segal's evidence regarding the timing of his discussions with Ms Ruhl and Ms De Gori was vague and inconsistent. Ms Ruhl and Ms De Gori are clear that the first mention of Mr Segal possibly moving to New Zealand with Mrs Segal was in March 2014. This was after Mrs Segal had accepted employment in New Zealand with Virgin Australia.

[34] I find that there was no discussion in March 2014 with either Ms Ruhl or Ms De Gori about a transfer of Mr Segal's employment from Infor Australia to Infor NZ. Discussions were about the possibility of relocating if Mrs Segal accepted the role with Virgin Australia, in New Zealand.

[35] Based on the evidence, I accept the submission made by counsel for Infor NZ and Infor Australia, that the most likely scenario was that Mr Segal had a series of conversations with a number of people at Infor Australia about the possibility of relocating to New Zealand. On a personal level there was support for Mr Segal's move to New Zealand, *"but at no time during these conversations did* [Mr Segal] *request to be employed by the first respondent"*. It is my finding that there was no agreement by either Infor Australia or Infor NZ that Mr Segal would be employed, upon moving to New Zealand, by Infor NZ.

[36] Mr Segal says that he discussed the possibility of relocating to New Zealand with Ms Gong, an old colleague of his and with whom he had consulted prior to accepting the role with Infor Australia.

[37] On 18 August 2014, Mr Segal sent an email to Ms De Gori and copied Ms Gong:

> *... I have asked Anna for approval to have my salary transferred to NZ as its been 4 months now as its costing me a bit to move money internationally. I am sure Anna will approve this, please let me know what you need from me.*

[38] On 20 August 2014, Mr Segal sent an email to Ms Gong:

> *... I was just checking in to see if you have chatted with Pat regarding moving my salary to NZ?*

[39] Ms Gong replied on 26 August:

> *... I sent an email to Pat and Jo on the 18th saying Tim has agreed to the transition. Now this needs to be executed by HR ...*

[40] In an email to the Authority on 2 June 2015, Ms Gong states:

> *All I can say is that* [Mr Segal] *was hired by Infor Australia to work in the Australia Melbourne office. However, his family situation changed and he requested to relocate to NZ and I involved the Country Manager and HR in that decision before approving his move to NZ. The rest of the logistics and paperwork was to be handled by HR. And I don't know from that point onwards.*

Process of approval for relocation

[41] Mr Segal did not ask in the above emails for his employment to be transferred, her referred specifically to his *"salary"*. The process referred to by Ms Gong in her

emails of 26 August 2014 and of 2 June 2015 for Mr Segal to transition to New Zealand was never completed. Mr Tim Moylan, President, Asia/Pacific, says there was never a request for Mr Segal's employment to be transferred from Infor Australia to Infor NZ and there was no such transfer. No transfer documents were ever completed between Infor Australia and Infor NZ and no individual employment agreement was ever signed by Mr Segal with Infor NZ.

[42] Mr Segal moved to New Zealand and, in his words, continued *"running the channel business across both New Zealand and Australia but … was now based in New Zealand"*.

[43] Mr Segal refers to discussions about being paid salary in NZ currency, being provided with a New Zealand mobile phone and to the fact that he had ordered business cards which included his New Zealand phone number as indicative of a transfer of his employment to Infor NZ. I do not accept this to be the case. Mrs Segal had already accepted employment with Virgin Australia in New Zealand before Mr Segal raised with Ms Ruhl and Ms De Gori the possibility of moving with her. At that point, Ms De Gori and Ms Ruhl understood that Mrs Segal was weighing up her options and that no decision had been made.

[44] Mr Segal assumed from his discussion with Ms Ruhl that he was authorised to transfer his employment from Infor Australia to Infor NZ. This was unfortunate. However, as Ms De Gori and Ms Ruhl said at the investigation meeting, there were formal processes to be followed to transfer employment. These processes were not followed or completed.

[45] In the Employment Court decision of *Beal v. Jardine Risk Consultants Ltd* [4], Judge Shaw considered arguments concerning applicable law and *forum conveniens*, in respect of the employment of a New Zealand employee seconded to the United Kingdom. In that decision, Judge Shaw stated at p.59:

> *The issue is therefore whether New Zealand law and the New Zealand contract of employment remains as the base document or whether these have been converted by UK employment law. I find that the New Zealand base document does form the basis for his contract of employment. The principal reason for this is that, whilst the defendant may in hindsight declare that UK law applied, at no stage did it address this point directly with the plaintiff nor does it appear that it even addressed it with its own group of companies. To vary a*

[4] [1999] 2 ERNZ 54

> *fundamental tenet of a contract of employment such as the proper law which applies to it without clear and informed agreement of both parties cannot result in proper variation. At the very best for the defendant it made a unilateral attempt to vary the contract but in fact what occurred has more of the appearance of an oversight. … The plaintiff did not agree to the fundamental variation to the contract. The law of contract remains that of New Zealand.*

[46] The Employment Court decision was upheld on appeal by the Court of Appeal. It is my view, from the evidence, that there was no clear and informed agreement by Infor NZ and Infor Australia that Mr Segal's employment was to transfer from Infor Australia to Infor NZ. There was a series of discussions about the possibility of a transfer after Mrs Segal had already committed to relocating to New Zealand and taking up employment with Virgin Australia.

[47] The answer to the first issue is that Mr Segal's employment never transferred from Infor Australia to Infor NZ. Mr Segal's employment was at all times with Infor Australia.

Second issue

If Mr Segal was employed by Infor Australia, was his employment governed by the laws of New Zealand or the law of the State of Victoria, Australia?

[48] Counsel for Mr Segal refers to *Brown & Sycamore*[5] as authority for the proposition that the Act is an overriding statute when applied to employment relationships based in New Zealand. Counsel goes on to submit that the evidence points to a New Zealand base of employment and therefore any attempt to contract out of s.238 of the Act is *"contrary to Parliamentary intention and beyond the prescribed minimum standards"*.

[49] I have already made a finding that Mr Segal was not employed by Infor NZ, rather he was employed at all times by Infor Australia. Mr Segal argues that even so, once he relocated to New Zealand, his employment was subject to the laws of New Zealand.

[50] I do not accept this argument. *Brown & Sycamore*[6] was briefly considered by me in the first preliminary decision concerning a stay application. In that decision, the law of Hong Kong was prescribed as the governing law clause in the employment

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5 Supra fn 3

6 Supra fn 3

agreements signed by the affected pilots. Hong Kong has no laws protecting against discrimination, unlike in New Zealand. In that case, and in those particular circumstances, the governing law clause in the employment agreements, was held to be an unlawful attempt to contract out of the Act in breach of s.238 of the Act.

[51] I accept the following submission made by Counsel for Infor NZ and Infor Australia, distinguishing *Brown & Sycamore*[7] from the current case:

> *(b) The governing law clause in the employment contract between Mr Brown and New Zealand Basing Limited was negated because it was contrary to public policy, with the consequence that the Court held that the parties' employment agreement was governed by New Zealand law and hence the ERA applied to Mr Brown's employment, thereby allowing him to raise a personal grievance.*
>
> *(c) The governing law clause in Brown was inapplicable because it offended s.238 of the ERA, whereas in the present case s.238 is irrelevant because the ERA does not apply in light of the valid governing law clause in the parties' employment agreement.*

[52] In the current case, Mr Segal's employment is expressly subject to foreign law, namely, the law of the State of Victoria, Australia. Australia is a sovereign nation with its own employment legislation, and its own employment law tribunals, such as the Fair Work Commission in Victoria. New Zealand's Employment Relations Authority does not apply extraterritorially, it is a specialist tribunal established by the Act to resolve New Zealand employment relationship problems. The Authority does not have any inherent jurisdiction to hear and determine an employment dispute governed by a foreign law.

[53] I accept counsel for the respondents' submission that the Act is not an overriding statute with the status of mandatory rules. New Zealand employment statutes which have the status of mandatory rules include the Minimum Wage Act 1983, the Health & Safety in Employment Act 1992 and the Holidays Act 2003.

[54] The answer to the second issue is that Mr Segal's employment was subject to the law of the State of Victoria, Australia.

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7 Supra fn 3

Third Issue

If Mr Segal's employment was governed by the law of the State of Victoria, Australia, is New Zealand a *forum conveniens* to hear his claim against Infor Australia?

[55] At p.59/30 of *Beal*, Judge Shaw considered the principles to be applied in determining a *forum conveniens* argument. Judge Shaw stated:

> *In relation to the* forum non conveniens *argument, the principles agreed are as set out by Wallace J in* Oilseed Products (NZ) Ltd v. HE Burton Ltd *(1987) 1 PRNZ 313, 316, which in summary are:*
>
> *(a) A stay will only be granted where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action.*
>
> *(b) The burden of proof rests on the defendant to persuade the Court to exercise its discretion to grant a stay.*
>
> *(c) The "natural forum" is that with which the action has the most real and substantial connection both in terms of convenience and expense and also the law governing the relevant transaction.*

[56] In the present case, Mr Segal was employed in Melbourne, Australia by Infor Australia to run the channel business across both New Zealand and Australia. Mr Segal's employment was subject to a written employment agreement which expressly stated that the governing law was the law of the State of Victoria, Australia. The natural forum is the country with which the action has the most real and substantial connection, both in terms of convenience and expense and also the law governing the relevant transaction.

[57] It is my finding that New Zealand is not the appropriate or natural forum to hear Mr Segal's claim against Infor Australia. Factors include:

(a) The express terms of the employment agreement regarding governing law;

(b) The fact that Mr Segal performed work in both Australia and New Zealand whilst resident in Australia and following his subsequent relocation to New Zealand;

(c) The Fair Work Commission in Australia is the natural tribunal and is able to determine Mr Segal's claim in accordance with the laws of Victoria;

(d) A number of witnesses in this matter reside in Australia; and

(e) New Zealand and Australia are not too distant for cost to be prohibitive in terms of Mr and Mrs Segal travelling to Australia for the purposes of the hearing of Mr Segal's dispute.

[58] I find that New Zealand is not a *forum conveniens* for the hearing and determining of Mr Segal's claim against Infor Australia.

[59] The result of my findings is that the Authority does not have jurisdiction to investigate and determine Mr Segal's claims against Infor NZ or Infor Australia.

Costs

[60] Costs are reserved. The parties are encouraged to resolve costs between themselves. If this is not possible, Infor NZ and Infor Australia have 14 days from the date of this determination to file a memorandum as to costs. Mr Segal has within 14 days of receipt to file a memorandum as to costs in response.

Anna Fitzgibbon
Member of the Employment Relations Authority