IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 461/09
5162666

	BETWEEN	U-MARKETING INTERNATIONAL CO (THAILAND) LIMITED Applicant
	AND	ANDREW MACLEOD Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Pamela Chan for Applicant Andrew MacLeod in person
Investigation:	On papers
Submissions received:	24 November 2009 from Applicant 10 December 2009 from Respondent
Determination:	18 December 2009

DETERMINATION OF THE AUTHORITY ON PRELIMINARY ISSUES

Employment Relationship Problem

[1] The substantive employment relationship problem in this case concerns a claim by the applicant employer (UMI) for damages for breach of contract against a former employee, Mr MacLeod. UMI is, I understand, registered in Thailand, while Mr MacLeod is a New Zealand citizen resident in this country at present.

[2] Mr MacLeod was employed to work for UMI, or a subsidiary of UMI, out of a base in Bangkok. He was to conduct UMI's business there as well as in Taiwan and around South Asia generally. There is no dispute that he worked as planned for at least three months in mid 2006. UMI says that he then left abruptly, without notice, causing it losses which are the subject of this claim. No written employment

agreement was executed between the parties, apparently because they were in dispute about the terms of their original oral agreement.

Issues

[3] Mr MacLeod protests the jurisdiction of the Authority in this matter. He cannot understand why it should come before the New Zealand Employment Relations Authority when, as is not disputed, he was engaged by a Thai company to work in Bangkok pursuant to a Thai working visa. This determination deals only with the preliminary issues arising out of his protest. They are as set out in my Minutes of 24 July 2009 and 4 November 2009 (attached) namely:

i. What was the governing law of the agreement;

ii. Whether the Authority has jurisdiction to hear the applicant's claim, and

iii. Whether the Authority is *forum non conveniens.*

(i) What is the proper governing law of the contract?

[4] The proper law of a contract is determined by the express intentions of the parties or, in the absence of an express provision, is the intention to be inferred from the conduct of the parties. If the intention cannot be inferred, the proper law is that with which the transaction had its closest and most real connection.[1]

[5] As already noted, no written employment agreement was executed, and neither of the parties have suggested that there was any oral agreement in relation to the governing law of the employment relationship. There is no express provision, therefore, to which we can turn to find the answer to this question.

[6] The parties' intention has, however been demonstrated with reasonable certainty. UMI says that the proper governing law is the law of Hong Kong, consistent with a draft contract of employment it offered to Mr MacLeod in April 2006. Mr

[1] Clifford v Rentokil Ltd (NZ) [1995] 1 ERNZ 407

MacLeod has acknowledged that this was what UMI proposed. Although he indicated that he was unsure what the governing law was, he has not suggested that he rejected the proposal that it be the law of Hong Kong or that this was one of the terms in contention between the parties. In circumstances where he performed work for a period of at least three months after receipt of the draft agreement I consider it reasonable to infer that he accepted those parts of the draft agreement which were not expressly rejected.

[7] I am satisfied therefore that I can infer an intention that the governing law was to be that of Hong Kong.

(ii) Does the Authority have jurisdiction to hear the applicant's claim?

[8] The Authority derives its jurisdiction from the Employment Relations Act 2000. The application of its predecessor legislation, the Employment Contracts Act 1991, was discussed by the Court of Appeal in *Governor of Pitcairn and Associated Islands v Sutton [1994] 2 ERNZ 426; [1995] 1 NZLR 426(CA).* Although that case is primarily concerned with questions about sovereign immunity, it also includes a brief discussion of the application of New Zealand employment legislation. At p. 506 Sir Ivor Richardson notes:

"While the Employment Contracts Act is broadly phrased, it is not expressed to apply extraterritorially."

[9] This principle was applied in the *Rentokil* decision (supra) where Judge Palmer noted:

"Notwithstanding the broadly phrased nature of the Employment Contracts Act, I now re-emphasise it is not an overriding statute…"

[10] The presumption against extra-territorial application holds in the same way in respect of the Employment Relations Act 2000. It is not an overriding statute. It follows that the Authority does not have jurisdiction over a problem arising out of employment performed in Thailand for a Thai company by the holder of a Thai working visa, where New Zealand law is not the proper law of the contract.

[11] The Authority does not, therefore, have jurisdiction to investigate the applicant's claim.

(iii) Is the Authority *forum non conveniens?*

[12] The natural forum is either that of the law governing the transaction, or that with which the action has the most real and substantial connection both in terms of convenience and expense. As noted by Justice Gault in a decision of the New Zealand Court of Appeal:

"It is increasingly being recognised that employment disputes should be resolved in the jurisdiction in which the work is carried out" [2]

[13] Hong Kong is the forum of the law governing the transaction and Thailand is that with which the action has the most substantial connection. The connection between this dispute and New Zealand is only that one of the parties is a New Zealand national. Even if the first two issues been determined differently, it would remain that the New Zealand Employment Relations Authority is *forum non conveniens* in this matter.

[14] **For all the reasons set out above, the Authority is unable to investigate or determine this employment relationship problem.**

Yvonne Oldfield
Member of the Employment Relations Authority

[2] Beal v Jardine Risk Consultants, [2000] 1 ERNZ 405