

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 426/08
5122101

BETWEEN CHRIS WATKINS
 Applicant

AND ANZ NATIONAL BANK
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Rodger Pool, Counsel for Applicant
 Andre Lubbe, Counsel for Respondent

Investigation Meeting: On the Papers

Determination: 15 December 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Watkins was initially employed by ANZ Banking Group (NZ) Limited on 10 January 1983. That company was the predecessor of the respondent.

[2] In 2004 Mr Watkins was approached and asked if he would be interested in undertaking a secondment to work for ANZ's branch office in London. ANZ Banking Group (NZ) Limited was at that time a company incorporated in New Zealand which was wholly owned by its Australian parent company. The London office was registered in the United Kingdom pursuant to the relevant legislation of that country as a subsidiary of ANZ Group in Australia.

[3] The secondment was for an initial fixed term of 15 months to cover an English employee's parental leave and saw Mr Watkins take on the role of Manager, Trade Service Delivery in London.

[4] During his employment in England Mr Watkins' employment was terminated and he now seeks to have that matter heard in New Zealand under the Employment Relations Act 2000.

[5] This case just deals with the preliminary issue which is concerned with two matters. They are:

- (a) What is the proper law that governed the terms of Mr Watkins' employment while he was on secondment;
- (b) Is the Employment Relations Authority forum conveniens irrespective of the proper law of the employment agreement?

[6] Central to the secondment was the letter of offer dated 13 September 2004. The secondment letter was signed by Bill Froggatt, Head of Trade and Transaction Services, UK/Europe/Middle East, to whom Mr Watkins was to report in London. The letter of offer is on Australia and New Zealand Banking Group Limited letterhead. It reads:

Dear Chris

I am writing to confirm my recent discussions and to set out the basis of your secondment in London.

You were offered a secondment to London, which is expected to be for a period of up to 15 months in order to cover the maternity leave of the current incumbent, Alison Moyes, the position of Manager Trade Services and will report to myself.

For the duration of this secondment the terms and conditions of this agreement will apply specifically to the secondment. Your current New Zealand employment agreement will continue to govern your ANZ employment terms and conditions including amongst other things resignation, re-deployment and retrenchment, retirement and long service leave.

This offer is conditional upon the Bank obtaining a work permit for you for that position. Subject to that requirement being met, it is anticipated that you will take up your role in London towards the end of October 2004.

The following sets out the local employment conditions applicable to your position in London.

[7] The local employment conditions were then listed. It was noted that Mr Watkins would remain a member of the NZ Superannuation Contribution Scheme,

although he would be on leave of absence; and that he could continue his contributions if he wished.

[8] The letter also provided that the company would pay for, inter alia, business class airfares from Auckland to London at the commencement of the assignment and on return to New Zealand, reasonable costs of transportation of personal effects from and to New Zealand, storage of personal effects in New Zealand for the duration of the secondment, transit accommodation of up to four weeks in London, assistance with rental costs in London, transfer allowance and a direct route economy class airfare for Mr Watkins and his family to their home city to be taken halfway through the assignment once only. At the conclusion of this assignment Mr Watkins was to return to a role within his home business unit in New Zealand commensurate with his skills.

[9] The letter then states:

We are also required to provide additional information regarding the disciplinary and grievance procedures. Please note that these are not contractually binding on the parties. The attached booklet outlines the principles of ANZ UK disciplinary and grievance procedures.

[10] Mr Watkins signed this letter on 4 October 2004. He remained in the UK until his dismissal in February 2007.

Selection of law

[11] The rules for determining the proper law of a contract are:

- (i) By express selection;
- (ii) By inferred selection from the circumstances; or
- (iii) By judicial determination of the system of law with which a transaction has the closest and most real concern.

[12] There is no express statement regarding the applicable law. The secondment letter identifies the local employment conditions that were to apply during the secondment only.

[13] I accept the submission that the secondment letter was not intended to replace or form the entire contract of employment and was merely a temporary variation to some of the terms of Mr Watkins New Zealand employment agreement. It expressly deals with the balance of the applicant's terms and conditions i.e. those terms and conditions that were not local employment conditions by specifying that:

Your current New Zealand employment agreement will continue to govern your ANZ employment terms and conditions ...

[14] Mr Pool said that the respondent claimed that the secondment letter was from the ANZ UK. The letterhead states that the company is Australia and New Zealand Banking Group Limited. This is an Australian company. The secondment letter was not written by the UK company. There was no suggestion that the applicant was employed by the Australian company. It was consistent with the natural and ordinary meaning of the word "secondment" that he continued to be employed by the New Zealand company.

[15] In *Clifford v Rentokil Limited* [1995] 1 ERNZ 407 the Court said:

"Secondment" and "to second" in an employment setting are, I conclude, words which are well understood and precisely meaningful. ... Upon a plain words/meaning approach, that is to say" the golden rule of construction" that words usually mean what they say, "second" means "transfer an official or worker temporarily to other employment or to another position".

[16] A secondment does not constitute the severing of employment or contractual links with the primary employer. Mr Watkins' secondment to London was a temporary transfer. The service with the respondent was unbroken and the respondent remained his primary employer. The obligation to return Mr Watkins to a position in New Zealand acknowledged his ongoing relationship with New Zealand. An independent UK entity could not make a commitment and nor could it commit the New Zealand business unit to the various terms and conditions discussed in the letter.

[17] The continued accrual of service based entitlements was inconsistent with a break in service or even a suspension of service. This was a strong factor supporting the assertion New Zealand employment continued and that New Zealand law was applicable.

[18] The respondent claims that Mr Watkins reporting line was in London. However Mr Watkins had a dual reporting role. He reported to both Peter Smith, CEO in London and Tim Utama, Head of Trade Services in Melbourne. Tim Utama was also Mr Watkins' line manager in his role in New Zealand. That reflects the global nature of the ANZ business model. He was paid by the London branch of the ANZ during his secondment but that was simply a function of the accounting requirements of the business. There was nothing on the letterhead of the secondment letter to indicate to the applicant that a change in company was intended or that a change in the applicable law was intended. The secondment letter was not the entire contract.

[19] Mr Lubbe said that the secondment letter was clearly at the initiative of ANZ in the United Kingdom and the secondment was not driven by ANZ in New Zealand. While that may or may not be the case, a secondment could not have taken place without the agreement of the respondent.

[20] The secondment letter is clear that the New Zealand employment agreement would continue to cover Mr Watkins' terms and conditions. Mr Watkins' employment agreement with his New Zealand employer continued. His employment agreement, subject to the agreed variations for the secondment period, was with the respondent despite the fact that it was performed in the United Kingdom. Palmer J noted at p434 of *Clifford v Rentokil* (supra) that the place of performance of a contract did not in any sense determine the proper system of law applicable to a contract as a matter of rule.

[21] Although there were variations to the employment agreement they did not render the applicable law the law of the United Kingdom. Given that the secondment letter expressly provided that the New Zealand employment agreement would continue to govern Mr Watkins' terms and conditions, there was no express change to United Kingdom law and there were no provisions that contradicted the continuation of New Zealand law as the governing law, New Zealand law continued to apply.

[22] The system of law with the closest and most real connection with Mr Watkins' employment is New Zealand law.

[23] The inference I draw from the statement in the secondment letter that that the New Zealand terms and conditions were to continue to apply is that New Zealand was to apply.

[24] I have considered the reference to the UK disciplinary procedures. The letter states that these are not contractually binding. In the ANZ's introduction to the procedures it states "*This document is non-contractual and, save in relation to its relevant statutory obligations, will be exercised by ANZ as a matter of policy only*". This statement is insufficient to displace New Zealand law.

[25] New Zealand law is the applicable law.

Forum Non Conveniens

[26] The factors which apply to an application for forum non conveniens are as follows:

- (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 and substantial connection both in terms of convenience and expense and also the law governing the relevant transaction.*

[27] Mr Pool submitted that the respondent has the burden of proof. An important factor was the relative resources of the parties. The ANZ is a global business with substantial resources. Mr Watkins was a private individual with relatively insignificant resources. The cost of the case in the UK would be prohibitive and would effectively bar him from access to justice.

[28] The respondent argues that apart from Mr Watkins the witnesses are all in the UK. It is unlikely that there would be more than two or three witnesses required. The ANZ can afford to bring them to New Zealand for a one day investigation meeting.

[29] Mr Pool also said the technological facilities for video conferencing was perfectly adequate for taking evidence in this situation and the applicant would raise no objection of the use of such facilities.

[30] Mr Lubbe says that the United Kingdom had a detailed grievance procedure. It also has a specialist tribunal created to hear employment disputes. It was not a situation where Mr Watkins had no forum available to him, or whether the forum that is available to him is not in a position to deliver justice.

[31] As for the next two factors, the United Kingdom provides the appropriate forum within which Mr Watkins' claim may be heard for the following reasons:

- (a) The proper law of the secondment agreement is the United Kingdom law;
- (b) There is no connection with New Zealand other than that Mr Watkins is now resident in this country;
- (c) Apart from Mr Watkins all witnesses are in the United Kingdom and to bring them to New Zealand would be hugely disruptive for ANZ UK's operations. Their senior managers have commitments and obligations that would make it virtually impossible to gather in New Zealand at one time;
- (d) Although there is an option provided by technology such as video conferencing facilities these avenues are very much second best and would unduly prejudice the respondent;
- (e) The cost of proving UK law before the Authority in New Zealand may well prove more than the cost of an individual applicant such as Mr Watkins returning to the United Kingdom to pursue a claim.

[32] Considering the matter overall, and given the availability of videoconferencing, the matter should be heard in New Zealand.

[33] The parties may now wish to mediate.

Costs

[34] If the parties are unable to resolve the issue of costs which was reserved, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority