

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Martin White (Applicant)
AND Fellow Travel Inc (Respondent)
REPRESENTATIVES Martin White In person
No appearance for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 9 June 2005
DATE OF DETERMINATION 28 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Martin White worked for Fellow Travel Inc from about 1990 until the employment ended on 31 October 2003. In his statement of problem, Mr White claims compensation for an allegedly unjustified dismissal that occurred on 31 October 2003 when Fellow Travel Inc did not continue his employment beyond the date specified in a signed written agreement. There is a second grievance claim by which Mr White seeks compensation for allegedly unjustified disadvantageous actions, being a failure by Fellow Travel Inc to increase Mr White's salary by 10% from 1993 until 2003 as agreed and the unilateral imposition by Fellow Travel Inc of reductions in Mr White's salary at different times between October 2001 and October 2003. There is a claim for holiday pay for the period of 6 years ending on the date proceedings were commenced, on the basis of Mr White's claim that he did not receive holidays or holiday pay at any time during the employment. Mr White is concerned that he may have repaid more than the required principal and interest in respect of a loan he received from Mr Toshihiko Tanaka, the president of Fellow Travel Inc. He seeks an accounting for his repayments.

[2] Fellow Travel Inc appears to be a business incorporated in Japan. When the statement of problem was lodged, Fellow Travel Inc was contacted and it requested that the documents be sent by post to its head office in Tokyo, Japan. The documents were sent but no statement in reply was lodged. However, in correspondence with Mr White's solicitor before the proceedings were commenced, Fellow Travel Inc questioned whether New Zealand law applied and whether any dispute should properly be heard in Japan.

[3] In the circumstances, I referred a question of law to the Employment Court to determine whether the Authority had jurisdiction to serve documents such as the statement of problem and a notice of investigation meeting outside New Zealand. The Employment Court's judgment confirmed that the Authority did not have that jurisdiction. However, the Employment Relations Act 2000 was amended in December 2004 which, together with the Employment Relations

Authority Amendment Regulations 2004, gives the Authority jurisdiction to grant leave for documents to be served overseas. By leave, Mr White's statement of problem and form 8 was served on Fellow Travel Inc at its head office in Japan on 1 February 2005. Form 8 is intended to explain to an overseas respondent what it may do in response to proceedings such as Mr White's. Fellow Travel Inc did not lodge a statement in reply nor an objection to the Authority's jurisdiction. I am satisfied from the file that the notice of investigation meeting was served on Fellow Travel Inc on 19 April 2005. In response to that notice, Fellow Travel Inc sent a fax to the Authority again asserting that Japanese law is applicable and that the matter should be heard in Japan. I will treat that correspondence as an objection to jurisdiction, even though Fellow Travel Inc did not appear at the investigation meeting.

Objection to Jurisdiction

[4] Regulation 19B of the Employment Relations Authority Regulations 2000 empowers the Authority to decline to hear and determine proceedings in which there is an overseas party if four conditions all apply. They are if it is more appropriate for the matter to be heard outside New Zealand, if the applicant will have a fair opportunity in that place to make their case, if the applicant will receive proper justice in that place and if the respondent will suffer unfair disadvantage if the proceedings are heard in New Zealand. In the present case, there is no reason to doubt that Mr White would receive *proper justice* and would have a *fair opportunity* to make his case if it was to be heard elsewhere. However, it cannot be said that the respondent would suffer an *unfair disadvantage* if the proceedings are heard in New Zealand. Mr White resides in New Zealand while his employer is based in Japan. Fellow Travel Inc would be inconvenienced by having to travel to another country to defend Mr White's claims but that disadvantage is not *unfair* in the circumstances of this matter. Accordingly, Regulation 19B (1) does not empower the Authority to decline to hear and determine the proceedings.

[5] Regulation 19B (2) says that *This regulation does not limit any rule of law*. There are well developed rules of law for determining jurisdictional issues such as the present matter. I should also note that effective service of proceedings is not necessarily sufficient to establish jurisdiction: see *Beale v Houghton* [2002] 2 ERNZ 110. In *Clifford v Rentokil Ltd* [1995] 1 ERNZ 407, the Employment Court held that the rules for determining the proper law of a contract are first by express selection, secondly by inferred selection from the circumstances or thirdly by judicial determination of the system of law with which the contract has the closest and most real connection.

[6] Mr White's job was to act as a guide and instructor for Fellow Travel Inc clients on skiing and snowboarding holidays at the Queenstown and Wanaka ski fields between June and October and to perform similar work at Canadian ski fields between December and May. His work in Japan between each season was administrative or promotional activities related to the New Zealand and Canadian based work. The work required Mr White to be competent in the Japanese language, the nationality of most of the clients. Mr White performed his work pursuant to a series of written agreements. By the time of the last agreement, Mr White had become a New Zealand permanent resident. Fellow Travel Inc paid for the cost of travel between the different countries where Mr White worked.

[7] Mr White provided me with a number of the written agreements applicable between specified dates. The terms and format generally are similar. They are one or two pages long on Fellow Travel Inc letter head. While expressed in English and generally understandable, the text does not read as if written by someone whose first language is English. The last of the agreements is expressed to apply from 01NOV.2000-31OCT.2003. It is signed by Mr White and Mr Tanaka and dated 23 June and 22 June 2000 respectively. Mr White was in Japan working at the head office of Fellow Travel Inc when the agreement was signed. It provides for Mr White to work between June

and October in New Zealand, between December and May in Canada, with two weeks in Tokyo in May or June and another two weeks in Tokyo in November each year. It provides for Mr White to be paid a salary in NZ dollars for 5 months between June and October and Canadian dollars between November and May. Paragraph 7 sets out times of work as follows:

Working hours and holidays is the following condition.

At New Zealand and Canada : Starting Time – finishing time at the day, 4days off per month. No time off is allowed during OBON-season 01AUG-19AUG and X'mas and New years period.

At Tokyo office : 09.30am-06.00pm Sunday and Japanese national holiday are off. In case of holding Fellow events, it will be starting time-finishing time at the day.

[8] The agreement does not expressly select the applicable system of law. I turn to whether the parties' intention as to the applicable law can be inferred from the terms of the agreement. The only indication that New Zealand law should apply is the arrangement for payment of 5 month's salary to be paid in NZ dollars and for a similar proportion of the work to be performed in New Zealand. The form and language of the agreement do not reflect either New Zealand laws, such as the Holidays Act 1981, or the typical contents of New Zealand employment contracts made under the Employment Contracts Act 1991. As between Canadian and New Zealand law, the most that can be said is that the agreement provides for more work to be done in Canada than in New Zealand. If it was necessary to determine which system of law applied, the strongest theme is that the terms of the agreement are shaped by events in and the law of Japan. However, it is unnecessary to go beyond a finding about whether New Zealand law applies. I am satisfied that it cannot be reasonably inferred from the terms of the agreement that the parties intended it to be subject to New Zealand law.

[9] In some circumstances, even if foreign law applies to a contract, it may be in the interests of justice to require the proceedings to be heard and determined in this country although by applying foreign law: see the *Beale* case. Mr White is able to pursue any remedies he has under either the law of Canada or Japan (whichever applies) in that country. While it would no doubt be inconvenient for him to travel to (say) Japan to pursue his rights, it is no different to the assessment earlier about the disadvantage that Fellow Travel Inc would have suffered by coming to New Zealand to defend a claim properly subject to New Zealand law. It no doubt constitutes an advantage to litigate where one ordinarily resides, but not an unfair advantage affecting the interests of justice in the present circumstances.

[10] In *Beale* the Court noted other recent decisions pointing to a trend that disputes should be resolved in the jurisdiction where the work is performed. In the present case, that would not necessarily support the conclusion that the dispute should be resolved in New Zealand because more work was performed in Canada and some work was performed in Japan.

[11] There is nothing about the case that would make New Zealand on balance a more suitable venue for both parties. In presenting his substantive case, Mr White was the only witness. On the basis of the matters canvassed in his evidence, it is likely that the respondent would only need to have Mr Tanaka give evidence.

[12] Another relevant factor is that Fellow Travel Inc has no assets in New Zealand to satisfy any award if Mr White succeeds with any claim.

[13] For the above reasons, the interests of justice do not demand that the case be heard in New Zealand.

Conclusion

[14] Given the conclusion that the agreement is not subject to the laws of New Zealand and that the interests of justice do not support the Authority hearing the case and applying foreign law, it is not necessary to go into any further detail about the nature of Mr White's claims.

Philip Cheyne
Member of Employment Relations Authority