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'The Pitfalls of Multi-National Employment'

We live in an increasingly fluid world. People live and work in multiple locations. We email and Skype across national borders. Our information is stored in the clouds. In some instances, where we perform our work knows no national boundary.

The recent Court of Appeal Decision New Zealand Basing Limited v Brown and Sycamore dealt with such a situation. Brown and Sycamore were New Zealand-based pilots employed through a wholly owned Hong Kong subsidiary of Cathay Pacific.

The Employment Contracts required Brown and Sycamore to retire from service at the age of 55. The Contracts also provided for Hong Kong law to apply to the pilots' conditions of services.

In 2009 Cathay Pacific offered all its pilots an opportunity to enter into new contracts in which the age of retirement was increased from 55 years to 65 years but a lower pay scale would apply in the interim.

Brown and Sycamore elected not to transfer because they believed that the 55 year retirement age would inevitably be increased to 65 years without them losing the benefits they had available under their existing contracts.

In 2015 Brown and Sycamore reached the age of 55. Both faced dismissal. However it was agreed to wait for the Court's ruling.

Brown and Sycamore were successful in the Employment Court. Judge Corkill QC ruled that the New Zealand Employment Relations Act applied rather than Hong Kong law and that there would be discrimination on the grounds of age if they were required to retire or resign. He further found that the prohibition on contracting out of the Employment Relations Act overrode the provision in the Contract that the law of Hong Kong applied.

The Court of Appeal overturned Judge Corkill. In doing so it stated that the law chosen by the parties to the contract is the proper law unless a recognised exception applies. The choice of law must be both legitimate and legal, and must also not be contrary to public policy. One of the important factors the Court of Appeal relied on was that the pilots did have a right of redress in Hong Kong if they wished to pursue it.

Whether or not the requirement to retire at the age of 55 is contrary to public policy is very much a matter of opinion. The pilots' lawyers argued that Cathay Pacific's intentions were "outrageous". Cathay Pacific only applies its 'age discrimination policy' in Hong Kong and to those pilots still under the old contracts in New Zealand. In all other jurisdictions it has abandoned its 'discriminatory policies'.

Judge Corkill ruled the requirement to retire at 55 was a violation of the essential principles of justice because it involved a very serious infringement of a basic human right.

However the Court of Appeal ruled that the application of Hong Kong law would need to be contrary to New Zealand's view of basic morality and must violate an essential principle of justice or moral interest. In short, was Hong Kong law wholly alien to the fundamental requirements of justice administered by a New Zealand Court? The Court of Appeal found that it was not.

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In fact it found that the right to be free from age discrimination is not absolute. The treatment of aging persons is linked to and reflects a range of fiscal, social and cultural factors. The Court focussed on what it categorised as the termination of a private relationship in accordance with a clear contractual provision.

One of the objects of our Employment Relations Act is to acknowledge and address the inherent inequality of power in employment relationships. The Employment Court decision emphasised that where foreign law was discriminatory, it should not be followed in New Zealand. Implicit in that decision is the concern that individuals are at a distinct disadvantage when striking a bargain with international corporate entities.

The Court of Appeal focussed more on the rights and freedom to enter into a bargain. Brown and Sycamore agreed to the law of Hong Kong applying and, perhaps even more significantly, gambled on Cathay Pacific increasing the age of retirement from 55 to 65. They lost that bet.

If nothing else, this case highlights the need to carefully consider where the employment relationship is seated and in the event of dispute, where that dispute might be determined and enforced. It is certainly something to ponder as our working relationships continue to span the globe and as we all inch towards our own retirement.

- John Farrow

● **Disclaimer**: The opinions expressed in this article are those of the writer and do not purport to be specific legal or professional advice

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