Supreme Court of New Zealand
Te Kōti Mana Nui

13 September 2017

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

BROWN AND SYCAMORE v NEW ZEALAND BASING LTD

(SC 145/2016) [2017] NZSC 139

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

This case is about whether the age discrimination provisions of the Employment Relations Act 2000 apply to airline pilots based in New Zealand but undertaking their work predominantly outside New Zealand.

The appellants, David Brown and Glen Sycamore, are Cathay Pacific pilots based in Auckland. Their employer is the respondent, New Zealand Basing Ltd (NZBL), a Hong Kong registered company which is a wholly owned subsidiary of Cathay Pacific. Its only business is to employ New Zealand-based staff.

The employment agreements of Messrs Brown and Sycamore allow NZBL to require them to retire at the age of 55. Both appellants have reached 55 and NZBL has sought to enforce their retirement. The appellants brought a personal grievance claim under the Employment Relations Act on the basis that this enforced retirement is prohibited by the right not to be discriminated against because of age. NZBL argued that the Employment Relations Act does not apply because the employment agreements provide that the law governing the agreements is the law of Hong Kong and the Act is not an overriding statute.

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The Employment Court held that the relevant provisions of the Employment Relations Act are applicable to the employment of Messrs Brown and Sycamore and thus that they cannot be required to retire by reason of attaining the age of 55. The Court of Appeal took a different view concluding that NZBL could require the appellants to retire because the employment agreements provide that the law governing the agreements is the law of Hong Kong and the Employment Relations Act was not overriding.

The Supreme Court granted leave on the question whether the Court of Appeal was correct to conclude that age discrimination provisions of the Employment Relations Act do not apply to the employment agreements between Messrs Brown and Sycamore and NZBL.

The Supreme Court has unanimously allowed the appeal.

Ellen France J delivered a judgment in which Elias CJ and O'Regan J joined. They held that the proper starting point is the interpretation of the Employment Relations Act. Given the statutory purpose, the nature of the rights involved (that is, to be protected from unlawful discrimination) and the indication in the statute of the territorial application, it would be odd to construe the Act to allow discrimination, solely on the basis of the parties' choice of law. Accordingly, they held that the anti-discrimination provisions apply to the employment relationship between the appellants and NZBL.

The concurring judgment of William Young and Glazebrook JJ was delivered by William Young J. They agreed that the legislative scheme could only sensibly be construed to apply to the appellants' claim. That claim invoked the right not to be discriminated against on grounds of age which sits alongside rights (recognised by the Employment Relations Act and Human Rights Act 1993) not to be discriminated on grounds of sex, race, colour and sexual orientation. On the true interpretation of those statutes, the rights they create apply in relation to conduct which occurs in New Zealand and thus to NZBL's conduct towards the appellants given that they are based in New Zealand which is where they commence and conclude their tours of duty.

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