Globally mobile employees: whose labour laws apply?

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In brief

Businesses are moving more of their employees internationally and in new and different ways. The traditional expat arrangement of living and working in a single country for a few years is being replaced by more flexible arrangements, such as assignments of less than one year, rotational assignments and reverse transfers.

These newer types of mobility arrangements are short term, potentially involve working in multiple countries in a short period and may result in employees leaving residences and families in their home countries while they are on assignment.

When implementing these arrangements, it is important to consider which country's labour laws will apply and whether the terms of the assignment will comply with those laws. Specifying that the law of a particular country will apply in a governing law clause will not necessarily be enforceable if the employment has a sufficient connection with another country.

The issue can be further complicated for this new 'peripatetic' type of employee where the work is performed in multiple countries. However, some recent Australasian cases provide guidance as to the factors to take into account when determining which country's employment laws should apply in such cases.

In detail

If an employment relationship is sufficiently connected with a particular country, the labour legislation of that country will generally apply.

As with the *Fair Work Act* 2009 (FW Act) in Australia, many countries have enacted legislation to provide for minimum employee entitlements and protections. The nature and extent of these laws can vary significantly from country to country. The fact that employees receive mandatory Australian entitlements will always satisfy Australian requirements.

The inclusion of a governing law clause in the terms of the assignment allows the parties to choose the law that will regulate their contractual relationship. However, the parties will not be able to choose the legislated labour laws of country A over the legislated labour laws of country B if:

(a) the reality of the parties' relationship indicates that the employment is connected to country B, or

(b) it is in the public interest of country B to enforce the law of country B.

This application of these principles in cases involving peripatetic employees is illustrated in the following Australasian cases.

Fair Work Ombudsman v. Valuair Limited[1]: Australia, Thailand or Singapore?

This was a test case in which the Fair Work Ombudsman commenced proceedings against Valuair Limited, a Singaporean company, and Tour East Ltd (TET), a Thai company. Both Valuair and TET employed cabin crew to work for Jetstar on its routes from Thailand and Singapore into Australia. The cabin crew were all based in Singapore or Thailand but their duties included flying to and from Australian ports on Jetstar's international services, as well as working on internal flights between Australian ports.

The Federal Court was required to determine whether Australian employment laws (namely the FW Act and the *Australian Aircraft Cabin Crew Award* 2010) applied. If so, there was evidence that Valuair and TET had failed to pay the cabin crew in accordance with these Australian requirements. The court applied the following guiding principles:

(a) a constitutional corporation must have an appropriate and sufficient connection with Australia in order to be considered a 'national system employer' and trigger the application of the FW Act,

(b) in determining whether an employee is covered by the FW Act and a modern award, a court will consider not only the work being performed by the employee, but also the employment relationship as a whole, and

(c) it is possible for an employer to have employees who travel in and out of Australia in the performance of their work who are not subject to Australian employment laws.

To determine whether the employment relationship as a whole had a sufficient connection to Australia the court took into account:

(a) that TET and Valuair were foreign corporations,

(b) the cabin crew were not residents of Australia,

(c) the contracts of employment were made outside Australia and were regulated by the laws of Singapore or Thailand,

(d) wages, and liabilities including tax and social security, were paid outside Australia,

(e) tours of duty commenced and finished at the home bases outside Australia, and

(f) the cabin crew only spent a small proportion of their overall working time in Australia.

Based on these factors, the court concluded the relevant employment contracts and the employment relationships were not 'in and of Australia' and accordingly, neither the FW Act nor the award had any application.

Brown v New Zealand Basing Limited[2]: New Zealand or Hong Kong?

This case also concerned the question of which country's employment laws applied to flight crew.

[1] (No 2) [2014] FCA 759
[2] [2014] NZEmpC 229

Mr Brown and Mr Sycamore (pilots for Cathay Pacific Airways) each entered into an employment contract with New Zealand Basing Limited, a subsidiary of Cathay, registered in Hong Kong. The laws of Hong Kong were specified as the laws governing the employment of the pilots.

Their contracts also provided that they had to retire at 55 years of age. This requirement was lawful in Hong Kong but not in New Zealand. The pilots argued that the laws of New Zealand applied to their employment despite the governing law clause.

The New Zealand Employment Court considered '*the reality of the pilot's employment…not just the contract itself*.' In doing so, the Court had regard to the 'base test' which had been developed and applied in the United Kingdom by the House of Lords in an earlier decision *Crofts* v *Veta Ltd* [2006] UKHL 3 (also involving Cathay Pacific pilots).

Applying the base test, the court had regard to the following:

(a) the 'home base' of both employees was Auckland, New Zealand,

(b) neither employee was a resident of Hong Kong,

(c) the employees' tours of duty began and ended in Auckland,

(d) the employees were paid a salary (in New Zealand dollars) which reflected the lower cost of living in Auckland as compared to Hong Kong,

(e) various New Zealand statutes applied to the employees as a result of their employment (for example, the New Zealand *Income Tax Act 2007*), and

(f) the employees paid New Zealand medical insurance.

The court concluded that the employment of both pilots was connected to New Zealand and New Zealand laws applied. Further, if the court was wrong, there was another basis for reaching the same conclusion. Requiring the employees to retire at 55 years of age was '*a violation of the essential principles of justice because it involves a very serious infringement of a basic human right*.' The court considered discrimination on the basis of age to be inconsistent with '*deeply held values that bear on the very essence of human identity*', and accordingly concluded that the public policy exception should be applied in this case to override the parties' nomination of Hong Kong law as the governing law of the contract.

Holmes v Balance Water Inc. & Ors[3]: Australia or the US?

In this case, Ms Holmes claimed various employee entitlements in the Federal Circuit Court of Australia under the FW Act following the termination of her employment with a US company, Balance Water LLC. Having been employed for approximately five years to work for the Balance Water group's Australian 'start-up' business, Ms Holmes was subsequently employed by the US entity in the group. She worked in the US for almost two months before returning to Australia where she was working when her employment was terminated four months later.

There was no governing law provision in the employment agreement with the US entity but the court found that on the evidence, Ms Holmes had made a deliberate choice to link her employment to the US rather than Australia. Applying the principles from the *Valuair Limited* decision, the court also considered that there was no appropriate connection aligning the employment with Australia or sufficiently linking the employment relationship to Australia because:

(a) the US entity paid Ms Holmes in US currency (at her request) during the employment, and

(b) she recorded her employment address as an address in the US and elected to pay US, rather than Australian, taxes.

[3] (No 2) [2015] FCCA 1093

Notably, the court did not regard the country in which the work had been performed over the six months of her employment as critical. There was never any contractual stipulation as to where she was required to work.

Consequently, the employment relationship had no sufficient connection with Australia and the FW Act did not apply.

Further, given that the US entity was not a national system employer there could have been no transfer of employment under the FW Act when she ceased working for the Australian entity and started working for the US entity.

The takeaway

- When transferring staff internationally, carefully consider which country the employment relationship will be connected to, the legislative employee entitlements that may apply under that country's labour legislation and whether those entitlements will be recognised under the intended assignment terms.
- Ensure that the assignment terms and conditions are clearly documented in an assignment letter and that it appropriately references any underlying home country employment agreement which may remain on foot during the assignment.
- Simply specifying a governing law for international assignees will not avoid the legislative employee entitlements of another country if:
    - the reality is that the employment relationship is sufficiently connected with that other country, or
    - there are public interest reasons for applying the laws of that country.
- Australian employers should also be aware that the FW Act and Fair Work Regulations contain extraterritorial provisions that may apply to Australian employees who are sent by their Australian employers to work for them overseas.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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