Determination Number: AA 158/06
File Number: AEA 875/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Nick Baker (Applicant)
AND	OSI International Foods (Australia) Pty Limited (Respondent)
REPRESENTATIVES	Anthony Russell for the applicant Nikki Dines for the respondent
MEMBER OF AUTHORITY	James Wilson
INVESTIGATION MEETING	28 March 2006
DATE OF DETERMINATION	8 May 2006

DETERMINATION OF THE AUTHORITY

The issue for Determination

1. The single issue for decision in this determination is whether the Authority has jurisdiction to investigate Mr Baker's claim that he was unjustifiably dismissed by OSI International Foods (Australia) Pty Ltd or whether, as argued by OSI, he was employed in Australia and any claim he has should be heard in Australia, under Australian law and by the appropriate Australian judicial authority.

Background

2. Mr Baker was employed by Glover Food Processors Ltd (Glover's) on 15 January 2001. At that time he held the position of Plant Manager and was subsequently promoted to the position of General Manager of Glovers. Glover's is a wholly owned subsidiary of OSI International Foods. However, there is no dispute that in his positions with Glover's Mr Baker was employed in New Zealand, and under New Zealand employment law.

3. In April 2004 Mr Baker accepted the position of Regional Manager, Pacific Region, with OSI International Foods (Australia). In a letter dated April 8, 2004 Mr Baker was advised, among other things, that:

- You will base salary will be 141,000 A$ per annum.
- The company will pay superannuation: Per Australian Labour Law and company practice.

Mr Baker relocated to Brisbane but, by agreement, his partner and child remained in Auckland so the child could complete the school year and on the understanding that they would join him at the end of 2004. A letter dated 16 June 2004 confirmed his conditions of employment. In the new position Mr Baker was responsible for Glovers in New Zealand as well as OSI's Australian operations. He reported to Mr Frank Latimer, OSI International Foods Asia Pacific Zone Manager.

4. During the latter half of 2004, Mr Baker says, his relationship with Mr Latimer was extremely difficult. He says he made several attempts to address his concerns including directly approaching Mr Latimer's Manager, Mr David McDonald. (OSI's Senior Executive Vice President, based in Chicago)

5. While in Auckland with his family over Christmas 2004 Mr Baker received an e-mail from Mr Latimer saying, in part:

> *As discussed previously by phone…..*
> *The message from the top is very clear: we cannot continue these massive losses and we must figure out a way to fix it ASAP. …*
> *…..…*
> *Therefore, after the first week as previously discussed, you focus must change to Glovers, Steggles and the McD' business where we cannot afford any more hiccups…*

The import of this e-mail was that Mr Baker was too relinquish his responsibilities for the Brisbane operations (Eagle Farm) and concentrate on managing the other parts of the OSI business and, in particular, Glovers in New Zealand.

On 3 January 2005 Mr Baker responded:

> *I am stunned. …*
> *…*
> *This has not been a Good New Years present. I would have expected a face-to-face. Could this is not have waited until we met, rather than receive this by e-mail?*
>
> *The disruption in 2004 to my family was bad enough and I have now discussed these latest changes with Linda and we have decided that Linda and Jason will remain in Auckland. This has caused tremendous inconvenience at home. A little more consultation and consideration would have been gratefully appreciated by all my family.*
>
> *It looks like I now have to spend some time in Auckland with Glovers, so there is no point in Linda being in Brisbane.*

Mr Baker's letter then went on to defend his performance and point out that much of the financial problem was not within his control. He also set out his travel arrangements over January 2005.

6. During January 2005 there where numerous communications between Mr Baker, Mr Latimer and Mr Macdonald. During this time Mr Baker says that Mr Latimer, without consultation occupied his, (Mr Baker's) office in Brisbane, instructed him not to use his company car in Brisbane and instructed Mr Baker to remove his furniture and effects from the company's Brisbane apartment which he had been occupying.

7. On 20 January 2005 Mr Macdonald wrote to Mr Baker. In that letter he apologised for the timing of the various decisions saying:

It is unfortunate that all this happened around the holidays; however there was no time to wait and the changes needed to be made. I do regret that it was done in e-mail form, as I believe there is a better medium for communicating of such a sensitive issues.

And by way of summary:

At the conclusion of our discussion, I told you that my recommendation was that you reconsider your position that you cannot work for (Mr Latimer). I have asked you to give this some thoughtful consideration. My solution is to have you focus on Glovers and the McDonald's relationship for the short term until the performance and acquisitions take place.

You have stated to me that your wife will no longer consider a move to Australia. For the time being, I believe it is best to focus on your personal situation as well as the needs of the Company and having you return to Glovers seems to be the best way to do that. When the performance of Glovers and Eagle Farm get to a reliable and satisfactory position, and we have made the acquisitions as we have discussed, we will go through the consolidation strategy, which will dictate where personnel need to be located. Until that time I do not believe any further action is required.

8. In 25 January 2005 Mr Baker wrote a lengthy letter to Mr Macdonald setting out in some detail his concerns regarding the management of OSI in Australia, his relationship with Mr Latimer, and the way in which events of the last a few months had unfolded. At the conclusion of this letter Mr Baker said:

In summary to your letter, I do not accept that your proposal is an effective solution to the issue. I cannot accept that I must wait to find out if I have some form of suitable employment until the acquisitions and strategy for the region are complete. I also do not accept that my family has to be told to wait in abeyance for weeks or months to know what is happening. Furthermore, I would respectfully request that more serious consideration be given to this issue. However, I am, as always, willing to continue in a dialogue to find a solution that meets both the company's requirements as well as my personal requirements. I am requesting that some urgency be put into this and a conclusion be provided by the end of this week. After all you cannot honestly expect me to continue with such turmoil in the family and work environment.

9. Following further discussions Mr Baker came to the conclusion that he needed some formal representation to assist him in his relationship with OSI. On 23 February 2005 Ms Rachel Drew, of MacCrossans Lawyers in Brisbane, wrote to OSI on behalf of Mr Baker, summarising Mr Baker's employment history with OSI and going on to say:

On 1 January 2005 our client was informed by e-mail that OSI did not intend to comply with the agreed terms of the new contract. Our client was informed that he must relocate to New Zealand to oversee the Glover's New Zealand operations. This decision was made unilaterally by the employer. Our client did not agree to revoke the new contract, he did not agree to revert to the Glovers contract and he did not agree to vary the new contract to provide that his employment would be located in New Zealand.

The letter went on to reserve Mr Baker's right to pursue breaches by his employer of the *Workplace Harassment Advisory Standard 2004* and concluded:

> *To resolve all the issues arising from our client's employment with OSI, taking into account the considerable distress caused to our client and his family arising from the breach of contract, harassment and the prospects of finding alternative employment, our client agrees to accept payment of 18 months salary in return for his resignation.*

10. In the early March Mr Baker went on sick leave and after further correspondence between the party's solicitors Phillips Fox, on behalf of OSI, wrote to Ms Drew saying:

> *We understood that Mr Baker had told Mr McDonald on 22 February 2005 but Mr Baker was resigning from his employment. However your firm's letter of 5 March 2005 denied that a resignation took place despite Mr McDonald's clear recollection to the contrary. For the record, we can affirm that OSI accepted your client's resignation. However, in order to avoid any confusion, OSI confirms that your client's employment is to cease.*

Mr Bakers Claim and OSI's response

11. In August 2005 Mr Baker filed a *statement of problem* in the Authority alleging that he had been unjustifiably dismissed by the respondent and seeking compensation for lost wages, hurt and humiliation, loss of employability, and costs.

12. Shortly after being served with Mr Baker's statement of the problem, OSI filed an objection to the Authorities jurisdiction to hear Baker's grievance, arguing that at all material times Mr Baker's employment was subject to Australian (Queensland) law, that the Authority does not have jurisdiction to hear Mr Baker's claim and that Queensland is the appropriate forum in which to hear and determine his application.

Summary of arguments

13. Mr Baker's argument in respect to the Authority's jurisdiction to hear his claim can be summarised as follows:

> 1: Mr Baker's contract of employment with the Glover's in New Zealand continued in force as the foundation agreement and was revived when Mr Baker was directed to return to New Zealand in January 2005. Mr Baker argues that the April 2004 agreement may be viewed as a variation to the original employment agreement as there was no written employment agreement between the parties until June 2004 and this did not explicitly remove the operation of the original employment agreement. The operation of the 2004 agreement may therefore otherwise have been subject to the foundation employment agreement.
>
> 2: References in the 2004 contract to Australian legislation etc were to facilitate the operation of the agreement rather than indicating what jurisdiction that agreement was subject to.
>
> 3: The action of his employer in divesting Mr Baker of his responsibilities for Eagle Farm in Brisbane and directing him to return to New Zealand, terminated Mr Baker's contract in Australia and created a new employment agreement, subject to New Zealand law, from January 2005 until the applicant's termination in March 2005.

14. In his submissions in support of Mr Baker's position, Mr Russell canvasses at some length the law relating to the appropriate way to determine which system of law should be applied in cases such as this and argues that New Zealand is the appropriate forum governing the terms (and the termination) of Mr Baker's employment relationship.

15. Mr Russell also argues that even if Australian law is the appropriate law under which Mr Baker's application should be considered, New Zealand, and the Authority, may well be the appropriate forum. In support of this argument he cites the New Zealand Employment Court case *Musashi Pty Ltd v. Moore* (2002) 1 ERNZ 203. In that case the Court held that Mr Moore's case should be heard in New Zealand, by the Authority, but with the application of Australian law.

16. OSI argues that the employment contract agreed between Mr Baker and OSI in April/June 2004 clearly spelt out that he was to be employed in Australia, and in terms of Australian employment law. The contract was expressed to be paid in Australian dollars, Mr Baker was to pay the appropriate Australian superannuation, Australian tax etc. OSI did not create a new contract by requiring Mr Baker to work in New Zealand and to concentrate on the management of Glovers. Mr Baker's employment was as Manager of the Pacific region and the management of Glovers was a part of the region. The removal of the Eagle Farm responsibilities was temporary and designed to allow him to concentrate on areas of most concern. Ms Dines also canvasses the case law relating to the appropriate way in which to determine which law should be applied in cases such as this. Ms Dines submits that the appropriate laws to be applied are the laws of Queensland

17. Ms Dines also argues that Mr Baker's proceedings should be stayed or dismissed on the grounds that the Courts of Queensland are the appropriate jurisdiction and forum for the claim to be heard in the interests of all parties, and in the interests of justice. She argues that none of OSI's witnesses are based in New Zealand, the documents relevant to Mr Baker's employment are located in Australia, OSI would need to engage an expert in Australian law to give evidence in the Authority and any determination of the Authority would have to be registered in Queensland under the Commonwealth Foreign Judgements Act, which OSI would be entitled to oppose. All these factors, Ms Dines argues, mean that OSI would be an unfair disadvantage if this matter were to be heard in New Zealand.

Discussion and determination

18. I have read the documentation provided to me including the various employment "contracts" agreed by Mr Baker. When he accepted the 2005 contract with OSI in Australia it was clearly envisaged, by both parties, that Mr Baker was relocating to Brisbane to take up a new position. If the subsequent difficulties had not arisen, and had he not been required to return to New Zealand, he would have continued to be employed in Australia and under Australian law. In other words Mr Baker, by accepting the 2004 contract, agreed to be employed by OSI in Australia and under Australian law.

19. Mr Baker has provided me with a good deal of evidence about how he was treated by OSI. If Mr Baker's outline of events is accepted, then OSI's actions would appear to have been far from ideal. It is possible that Mr Baker could successfully convince an Australian Court that his contract had been unilaterally and unlawfully terminated, or the Employment Relations Authority that he had been unjustifiably dismissed. It may be that by requiring Mr Baker to relinquish responsibility Eagle Farm and (whether temporarily or not) concentrate on the New Zealand business, OSI could have been said to have been terminating his 2004 contract. Whether this is so or not, is not the question I am required to determine at this point.

20. Mr Baker argues that by requiring him to relocate to Auckland OSI in effect created a new contract - a contract of employment in New Zealand and governed by New Zealand law. I cannot accept this argument. Mr Baker, through his representative, specifically rejected the changes OSI sought to impose. Ms Drew, in her letter of the 23 February 2005 said that Mr Baker *did not agree to revoke the new contract, did not agree to revert to the Glovers contract* and *did not agree to vary the new contracts to provide that his employment be located in New Zealand*. Mr Baker continued to be employed by OSI Australia, albeit spending a good deal of time in Auckland, until his employment was terminated. There is no evidence to indicate that a new contract was formed.

21. Mr Baker was employed in Australia under Australian law. It is this contract which was terminated and any claim he has against OSI is most appropriately pursued in terms of the Australian employment law.

22. I do not accept Mr Baker's argument that, even if the appropriate law is that of Australia, his application should be heard by the Authority. OSI have pointed out that their witnesses in any such case are not based in New Zealand and that to defend Mr Baker's application in New Zealand would be expensive and extremely inconvenient. It would seem that Queensland employment law may not provide the same level of access or remedies to Mr Baker as he may have under New Zealand law. However this is not of itself sufficient reason to determine that he should therefore be able to pursue his claims in New Zealand. While it may be inconvenient for Mr Baker to pursue his case in Brisbane, he is not financially impecunious and there is no evidence that he does not have the financial resources to pursue his claim in Queensland should he wish to do so.

23. In summary, Mr Baker's 2004 employment contract with OSI applied at the time of the termination of his employment in March 2005. The law governing that contract is that of Queensland, Australia. The Authority does not have jurisdiction to hear Mr Baker's claim. The Queensland Courts are clearly competent to hear Mr Baker's claim and taking into account factors such as the location and availability of witnesses, the location of the parties and where any judgement would be enforced, the Queensland Courts are the appropriate forum to determine Mr Baker's claim**. The Authority has no jurisdiction to investigate Mr Baker's claim. Mr Baker's application is dismissed.**

Costs

24. Costs are reserved and the parties are urged to settle this matter between themselves in the first instance. If they are unable to do so OSI may file and serve a submission in respect to costs within 28 days of the date of this determination. Mr Baker will be given 14 days in which to respond.

James Wilson
Member of Employment Relations Authority