

California before Mr Chini lodged his statement of problem with the Authority, but after he had raised his employment relationship problems.

[4] Open Cloud NZ has declined to respond to Mr Chini's statement of problem due to an alleged lack of jurisdiction, relying on the clause in the employment agreement quoted above, but also noting that Mr Chini's employment agreement provided for at will employment in line with US law.

[5] The issues for determination are:

- Whether the Authority has jurisdiction to determine Mr Chini's claim, including his desire for mediation to be directed, and if so;
- Whether New Zealand is the appropriate (or natural) forum for dealing with Mr Chini's employment relationship problem.

Jurisdiction

[6] The issue of whether the Authority has jurisdiction to deal with Mr Chini's employment by a New Zealand company which took place in the United States, Mr Chini being a United States resident, is rather complex. In particular it requires an assessment of the leading cases of *His Excellency the Governor of Pitcairn, Henderson, Ducie, and Oeno Islands v. Sutton* [1994] 2 ERNZ 492 (CA); *Singapore Airlines Limited v. Rusli* unreported, Judge Joyce, District Court, Auckland, NP 1230/97, 12 November 2007 and *Royds v. SAI (NZ) General Insurance Limited* [1999] 1 ERNZ 820.

[7] Because I have reached a firm conclusion on where the appropriate forum for the hearing for determining this matter is, I will simply assume, for the purpose of addressing the appropriate forum, that the Authority has jurisdiction to deal with matters such as this, without so holding.

Appropriate Forum

[8] There is no doubt that if heard in New Zealand the case would need to be dealt with under the law of California, as that is the law that the parties have specifically chosen. The Authority is able in appropriate circumstances, however, to investigate matters under foreign laws, see for example *Musashi Pty Ltd v. Moore* [2002] 1 ERNZ 203.

[9] The principles for determining the appropriate forum are set out in *Oil Seed Products (NZ) Ltd v. H E Burton Limited* (1987) 1 PRNZ 313 (there a stay application) as follows:

(a) A stay will only be granted where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action.

(b) The burden of proof rests on the defendant to persuade the Court to exercise its jurisdiction to grant a stay.

(c) The 'natural forum' is that with which the action has the most real and substantial connection both in terms of convenience and expense and also the law governing the relevant transaction.

[10] Other factors held to be important are the existence of any jurisdiction clause, the location of the parties, comparative cost and convenience of proceeding in each jurisdiction, the location and availability of documents and witnesses, the law to be applied in the proceeding, the availability elsewhere of the relief sought by the plaintiff, and whether the defendant's application has been brought to obtain practical advantage rather than because it genuinely desires the trial in another jurisdiction (*BR Films Partnership G-38 v Spin Interactive Ltd* unreported, Associate Judge Lang, High Court, Auckland, CIV-2005-404-2295, 25 July 2005).

[11] Mr Chini accepts that the exclusive jurisdiction clause in the agreement and that he carried out his work in California are two factors that might suggest California as the appropriate forum for this matter. He relies on the fact that Open Cloud NZ is a New Zealand company operating in New Zealand, which is where three of its directors are based and where the contract was signed, and that it has no assets in California. He also notes that it is difficult to enforce a judgment in California against a New Zealand company, and that he can not even counterclaim against Open Cloud NZ because the proceedings against him there have been brought by its parent.

[12] He also notes that litigation is expensive in California compared to New Zealand, that he is prepared to come to New Zealand on its own initiative and that the hearing would be easier in New Zealand where many of the Open Cloud NZ directors are based - none of them are based in California. Mr Chini also asked the Authority to draw the conclusion that Open Cloud NZ's behaviour is tactical, particularly as it is just as easy for it to defend in New Zealand and its parent did not issue proceedings against Mr Chini in California until after he had made his claims against it.

[13] Open Cloud NZ submitted that the contract was for employment in California, the work was substantially performed there, Mr Chini is a United States resident paid in US dollars, he is the subject of proceedings there which relate to his employment with Open Cloud NZ and that the contract has an American flavour to it such as termination at will.

[14] In response it was submitted for Mr Chini that the terminology of the contract also refers to New Zealand provisions such as personal grievances, sick and bereavement leave and that the express clauses are not determinative.

[15] It is clear from the jurisprudence that the modern approach to this matter favours dealing with Mr Chini's issues in California, because that is where the work was carried out (see for example *Jardine Risk Consultants Ltd v Beal* [2000] 1 ERNZ 405 (CA)). Furthermore, the contract Mr Chini entered into clearly states that California is where any legal issues should be dealt with. *Musashi* can be distinguished on the grounds that the contract was entered into and performed in New Zealand and involved a New Zealand resident worker, none of which factors are in existence here. Similarly, *Spin Interactive* can be distinguished on the ground that the actions complained of there took place in New Zealand, not Mumbai where the contract stipulated disputes should be dealt with, unlike here where the actions complained of effectively took place in California, where Mr Chini worked.

[16] I do not accept that Open Cloud NZ and its parent's behaviour over this matter can be fairly construed as "tactical". It has an employment agreement with Mr Chini that clearly envisaged problems being dealt with in California and thus it can be seen as simply insisting that the contract be followed.

[17] I have no reason to believe that the Courts of California do not have competent jurisdiction. Rather, from Mr Chini's point of view, New Zealand is a place of convenience. Clearly Californian Courts have the most real and substantial connection with the disputed events. It is thus more convenient for Mr Chini and Open Cloud NZ to deal with their problems in California, although that factor is negated by Mr Chini's preparedness to travel to New Zealand. I am also satisfied that the expense is much greater in California than New Zealand.

[18] Standing back and looking at the matter as a whole, it is clear that the most appropriate forum for dealing with Mr Chini's issues is that provided for by the

parties in the contract, where the work was carried out and the disputed events had their effect. The factors favouring Mr Chini are rather more peripheral by comparison.

[19] I therefore dismiss Mr Chini's application to have the Employment Relations Authority investigate his employment relationship problem with Open Cloud NZ Limited.

Costs

[20] Costs are reserved.

G J Wood
Member of the Employment Relations Authority