IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 351
5552891

	BETWEEN	MICHAEL BLAKE Applicant
	A N D	PROCESSONE SOLUTIONS LIMITED formerly known as PROCESSONE LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	Applicant in person L Holley, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions received:	22 May and 7 September 2015 from the Applicant 26 May and 7 September 2015 from the Respondent
Date of Determination:	11 November 2015

DETERMINATION OF THE AUTHORITY

Orders:

A. Pursuant to Reg.19B of the Employment Relations Authority Regulations 2000 I decline to hear and determine this proceeding. The application is dismissed.

B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] This determination deals with a preliminary issue about the applicable law and whether New Zealand is the forum conveniens for determining this employment

relationship problem. The parties have agreed to deal with this matter on the papers given there is largely consent about the facts and the issues giving rise to this matter.

Facts leading to dispute

[2] The applicant is an Australian resident and during his employment remained resident in Queensland, Australia. He is now resident in Arizona, USA.

[3] The respondent is a company registered in New Zealand. The company address and address for service is in New Zealand. Two of the current directors reside in New Zealand. The remaining director resides in New York. The Respondent subsequently changed its name from Processone Limited to Processone Solutions Limited on or about 22 August 2014.

[4] In September 2011 the respondent purchased part of the business of Ceiba Solutions Limited (Ceiba) located in Australia. The applicant had been employed by Ceiba at the time.

[5] On 15 September 2011 the applicant was offered a permanent position by the respondent company. His job entailed servicing USA based clientele from his base in Australia and travelling to the USA at various times to ensure implementation of the respondent software by clients. It was a term of his employment he demonstrate eligibility for employment in the United States.

[6] The letter of offer and the agreement both provided that this employment would be governed by the laws of the State of New York:

> *5.4 This agreement shall be governed and construed in accordance with the laws of the State of New York without giving effect to the principles of conflicts of law. Each party hereby irrevocably submits to the exclusive jurisdiction of the State and Federal Courts sitting in the State of New York, for the adjudication of any dispute hereunder or in connection herewith or with any transaction contemplated hereby or discussed herein, and hereby irrevocably waives, and agrees not to assert in any suit, action or proceeding, any claim that is not personally subject to the jurisdiction of any such court, that such suit, action or proceeding is brought in an inconvenient forum or that the venue of such suit, action or proceeding is improper. Each party hereby irrevocably waives personal service of process and consents to process being served in any such suit, action or proceeding by mailing a copy thereof to such party at the address for such notices to it under this Agreement and agrees that such service shall constitute good and sufficient service of process and notice thereof. Nothing contained herein shall be deemed to limit in any way any right to serve process in any manner*

> *permitted by law. EACH PARTY HEREBY IRREVOCABLY WAIVES ANY RIGHT IT MAY HAVE TO, AND AGREES NOT TO REQUEST, A JURY TRIAL FOR THE ADJUDICATION OF ANY DISPUTE HEREUNDER OR IN CONNECTION HEREWITH OR ARISING OUT OF THIS AGREEMENT OR ANY TRANSACTION CONTEMPLATED HEREBY.*

[7] On 13 October 2011 the respondent incorporated a company in the State of New York under the name Process One Solutions LLC. During his employment the applicant's salary was paid from Process One Solutions US bank account.

[8] In January 2013 issues arose about the payment of the applicant's salary.

[9] By March 2014 the applicant resigned from his employment. He alleges the respondent breached his employment agreement, duty of good faith and s.130 of the Employment Relations Act 2000 (the Act) by failing to keep wage and time records. He also seeks wages arrears in the form of salary, holiday pay, expenses, superannuation contributions (including tax) and redundancy under the "Minimum Fair Work Australia Conditions".

Issues

[10] The following are the issues for determination:

(a) Is the law governing Mr Blake's employment by Processone Solutions Limited the law of New Zealand, the law of Australia or of the State of New York, USA?

(b) Is New Zealand the appropriate or natural forum to hear Mr Blake's claims under the applicable law determined in issue (a)?

Is the law governing the applicant's employment the law of New Zealand, Australia or of the State of New York?

[11] The applicant submits clause 5.4 of his employment agreement should not be determinative of whether his complaint can be heard by the Authority because the respondent cannot contract out of the Employment Relations Act and its Regulations by inserting a clause into an employment agreement that a law of a different country will apply. It is submitted the clause in the contract is *ultra vires the Act*.

[12] It is accepted Mr Blake signed the offer of employment dated 15 September 2011 and the attached employment agreement dated 19 September 2011. There is an express term in the employment agreement that the laws of the State of New York shall govern the agreement. There is no evidence the parties intended any other law than that expressed in the agreement to apply to their relationship.

[13] Accordingly the law governing the applicant's employment are the laws of the State of New York, USA.

Is New Zealand the appropriate or natural forum to hear Mr Blake's claims under the applicable law determined in issue (a)?

[14] The applicant submits it is appropriate for the matter to be resolved in New Zealand because the parties, witnesses, directors, employees, business infrastructure and other resources are located in or more readily accessible to New Zealand. He was denied access to the Fair Work Australia Ombudsman and National Employment Standards of Australia due to the respondent company not having an Australian Business Number (ABN) and is not considered or permitted to be a legal entity or operating in Australia and under any Australian legal jurisdiction. The New York Labour Department has declined jurisdiction as the work was not done in New York State. To require the applicant to go to the United States to be heard serves no constructive purpose other than to hinder the applicant from obtaining justice by making it legally and financially prohibitive. As a result, New Zealand is the only jurisdiction left. He further submits it is discrimination pursuant to ss.22 and 26 of the Human Rights Act 1993 to prevent automatic access to legal remedies in New Zealand.

[15] The Authority may decline to hear and determine proceedings in which there is an overseas party if it is satisfied that

(a) It is more appropriate for the matter to be resolved in a place outside New Zealand; and

(b) The applicant will have a fair opportunity in the place to make the applicant's case; and

(c) The applicant will receive proper justice in the place; and

(d) The respondent will suffer unfair disadvantage if the proceedings are heard in New Zealand.[1]

[16] An express provision or a decision that an employment agreement is governed by the law of a particular country is not determinative that that country will be forum conveniens, but it is a relevant factor.[2] As determined in paragraph [13], the applicable law is the laws of the State of New York. This does not favour jurisdiction being retained in New Zealand.

[17] It is increasingly being recognised that employment disputes should be resolved in the jurisdiction in which the work is carried out (save where that location is temporary).[3] On these facts the work was not carried out in New Zealand. The work was carried out both in Queensland, Australia and in the United States of America. At best the applicant refers to one trip to meet a respondent director, Mr Rewcastle, in New Zealand.[4] This does not favour New Zealand as the appropriate place for hearing this matter.

[18] I accept the applicant may have no remedy in Australia because there is no respondent company incorporated with the requisite ABN number. However the absence of remedies in other countries is not a basis for this case to be heard in New Zealand.

[19] Allegations of breaches of New Zealand laws such as the Human Rights Act and Crimes Act do not confer jurisdiction over an employment dispute to the Employment Relations Authority in New Zealand. It also does not appear from the evidence I have read that the alleged acts occurred in New Zealand.

[20] There is evidence from the respondent director and chief executive officer, Lindsay Rewcastle, during recruitment the applicant was advised of the intention to incorporate a company in the New York State and that he was to be employed and paid by that company.

[21] The parties disagree who gave the applicant his work instructions – the applicant says Mr Rewcastle. The respondent says Ken Rau, Vice President of

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1 Reg.19B Employment Relations Authority Regulations 2000

2 *Bramwell v The Pacific Lumber Co Ltd* (1986) 1 PRNZ 307 (HC); *Musashi Pty Ltd v Moore* [2002] 1 ERNZ 203 (EmpC) at [61]; *Beale v Houghton* [2002] 2 ERNZ 110 (EmpC) at [32]–[33].

3 *Jardine Risk Consultants Ltd v. Beal* [2000] 1 ERNZ 405, 411 at [28]

4 Affidavit M Blake sworn 2 September 2015 at para 4.

Operations for Process One Solutions LLC based in Albany New York. It appears more likely the work was directed by Mr Rau given his designation as opposed to Mr Rewcastle.

[22] Mr Rewcastle also deposes to various insurances Process One Solutions LLC had acquired to cover the applicant's employment in the State of New York including workers compensation premiums, disability insurance premiums and employment insurance premiums.

[23] Both parties agree the applicant's salary was paid from the Process One Solutions US bank account. It is likely this was from the US bank account of Process One Solutions LLC.

[24] Mr Rewcastle deposes that the company which manages and controls the business assets is Process One Solutions LLC. Any order I make cannot be directly enforced against a company incorporated outside of New Zealand.

[25] The respondent's attorney who incorporated Process One Solutions LLC in the United States, Alisa M Dalton, confirms the applicant has a remedy in the State of New York. The expense to the applicant of bringing an action in the United States from Australia is not a factor in determining New Zealand as the appropriate forum, for hearing his case. I note the applicant now resides in the United States. The only witness outside of the United States would be Mr Rewcastle. I can see no benefit to the applicant in having to travel to New Zealand to progress his case.

[26] I am satisfied it is more appropriate for the matter to be resolved in the United States given the applicable law governing this relationship are the laws of the State of New York, the applicant's work primarily occurred in both Australia and the United States and his salary was paid for and employment arrangements undertaken by Process One Solutions LLC. I am further satisfied the applicant will have a fair opportunity to make his case and receive proper justice given the availability of a remedy in the United States and his current residence in the United States. Finally I am satisfied the respondent will suffer unfair disadvantage if the proceedings are heard in New Zealand because the likely employer is Processone Solutions LLC located in New York. This company controls and manages the business assets.

[27] Pursuant to Reg.19B of the Employment Relations Authority Regulations 2000 I decline to hear and determine this proceeding. The application is dismissed.

[28] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority