IN THE SUPREME COURT OF NEW ZEALAND

SC 145/2016
[2017] NZSC 139

BETWEEN	DAVID BROWN First Appellant	
	GLEN SYCAMORE Second Appellant	
AND	NEW ZEALAND BASING LIMITED Respondent	

Hearing:	13 June 2017
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	P G Skelton QC, G M Pollak and S C I Jeffs for Appellants A H Waalkens QC and M G Lawlor for Respondent A S Butler and M W McMenamin for Human Rights Commission as Intervener
Judgment:	13 September 2017

JUDGMENT OF THE COURT

A **The appeal is allowed and the judgment of the Employment Court is restored.**

B **The order for costs made in the Court of Appeal is set aside.**

C **The respondent is to pay the appellants costs in respect of the Court of Appeal hearing, to be fixed by that Court, and in respect of this appeal costs of $25,000 and reasonable disbursements. We certify for two counsel.**

REASONS

William Young and Glazebrook JJ [1]
Elias CJ, O'Regan and Ellen France JJ [75]

WILLIAM YOUNG AND GLAZEBROOK JJ
(Given by William Young J)

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The appeal

[1] Part 9 of the Employments Relations Act 2000 (the 2000 Act) provides for a personal grievance procedure which creates, somewhat indirectly as we will explain, various statutory rights associated with employment. These include the right not to be discriminated against on grounds of age.[1] This is provided for in part by reference to the related provisions of the Human Rights Act 1993 (HRA) and is subject to certain exclusions.[2]

[2] 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.[3] NZBL's letters of offer to Messrs Brown and Sycamore and Conditions of Service 2002

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1 Employments Relations Act 2000 [the 2000 Act], ss 104–105.

2 See ss 105(2) and 106.

3 Although, we note that the respondent submits that at the "time of Employment Court hearing, there was at least one New Zealand based pilot who did not live in New Zealand and would have to commute to Auckland … to commence their duties."

(CoS02), which collectively form the employment agreement between the parties, provide that the governing law of the agreements is that of Hong Kong and empowers NZBL to require them to retire at the age of 55. Hong Kong law not prohibiting discrimination by reason of age, NZBL has sought to exercise this power. Messrs Brown and Sycamore challenge the lawfulness of NZBL's attempt to exercise that power and, in doing so, rely on pt 9 of the 2000 Act. If the right not to be discriminated on grounds of age is applicable, they cannot be required to retire until they reach the age of 65.[4] They say the 2000 Act is applicable; this on the basis that they are based in Auckland which is where they live and start and finish work. NZBL contends to the contrary, maintaining that, because the proper law of the agreements is the law of Hong Kong, the right not to be discriminated on grounds of age provided for by the 2000 Act is inapplicable.

[3] The Employment Court held that the relevant provisions of the 2000 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.[5] The Court of Appeal disagreed.[6]

The issues in the case: an overview

[4] In a section headed "Statutes and the conflict of laws" the authors of *Dicey, Morris and Collins on the Conflict of Laws* divide statutory provisions into six categories, describing the first five in this way:[7]

> (1) those which lay down a rule of substantive or domestic law without any indication of its application in space;
>
> (2) those which lay down a particular or unilateral rule of the conflict of laws purporting to indicate when a rule of substantive or domestic law is applicable;
>
> (3) those which lay down a general or multilateral rule of the conflict of laws purporting to indicate what law governs a given question;

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4 As we understand it, it is common ground that being under 65 is a genuine occupational qualification for international pilots: see Human Rights Act 1993 [HRA], s 30(1).

5 *Brown v New Zealand Basing Ltd* [2014] NZEmpC 229, [2014] ERNZ 770 (Judge Corkill) [*Brown* (EC)].

6 *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 (Harrison, Miller and Winkelmann JJ) [*Brown* (CA)].

7 Lord Collins (gen ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) vol 1 at [1-036] (formatting edited).

(4) those containing a limitation in space or otherwise which restricts the scope of a rule of substantive or domestic law (self-limiting statutes);

(5) those which apply in the circumstances mentioned in the statute, even though they would not be applicable under the normal rules of the conflict of laws (overriding statutes) … .

Of the statutes in the first category the authors observe:[8]

> (1) *Statutes with no indication of their application in space.* Statutes of this kind are of course by far the most common. They are frequently expressed in general terms without any limitations of space and purport to apply e.g. to "every will," "all contracts," or "any married woman." Obviously, they cannot be read literally, because the Parliament of the United Kingdom does not legislate for the whole world. …
>
> A court, when confronted by a statute of its own law … which is expressed in general terms … could use one of two methods to determine its scope. The first is to interpret the statute in the light of its purpose and background so as to read into it the limitations which the legislature would have expressed if it had given thought to the matter. This is an artificial method, and perhaps a dangerous one, because *ex hypothesi* the legislature gave no thought to the matter—if it had done so it would have expressed the limitations. The second method is to apply general principles derived from the conflict of laws—i.e. first characterise the question …, and then apply the relevant conflict rule to the question so characterised.

Of statutes in the fifth category, they comment:[9]

> (5) *Overriding statutes*. Statutes of the fifth class are those which must be applied regardless of the normal rules of the conflict of laws, because the statute says so. … Overriding statutes are an exception to the general rule that statutes only apply if they form part of the applicable law. One of the main reasons for the overriding character of such legislation is that otherwise the intention of the legislature to regulate certain contractual matters could be frustrated if it were open to the parties to choose some foreign law to govern their contract.
>
> Laws of this kind are referred to as "mandatory rules" or *lois de police* or *lois d'application immédiate.* Where such legislation is part of the law of the forum it applies because it is interpreted as applying to all cases within its scope. Thus in contract cases, United Kingdom legislation will be applied to affect a contract governed by foreign law if on its true construction the legislation is intended to override the general principle that legislation relating to contracts is presumed to apply only to contracts governed by the law of a part of the United Kingdom.

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8 At [1-037]–[1-040] (footnotes omitted).

9 At [1-053].

[5] The categories identified are – unsurprisingly, given the subject matter of the text – described very much by reference to conflict of laws principles which the authors see as excluded only by express language (in the case of categories (2) and (3)) or, exceptionally, in the case of mandatory overriding statutes. The categories do not contemplate, as a starting point, an orthodox "text and purpose" interpretation of a statute to determine the extent of its application. The authors consider that such an exercise would involve reading into a statute "the limitations which the legislature would have expressed if it had given thought to the matter" and, for this reason, as "artificial" and "perhaps … dangerous".

[6] The approach of the Court of Appeal in this case closely followed that proposed in *Dicey, Morris and Collins*. It considered that the statutory provisions relied on by Messrs Brown and Sycamore should be characterised as contractual in character and thus applied: (a) in respect of employment agreements where the proper law is that of New Zealand; and (b) more generally only if they could be construed as operating as mandatory overriding rules. On this approach there are two distinct questions: (a) is the right relied on by Messrs Brown and Sycamore contractual in character? And, if so (b) do the provisions of the 2000 Act operate as mandatory overriding rules?

[7] Mr Skelton QC, who appeared for Messrs Brown and Sycamore, contended that the 2000 Act applied to employees who worked within the territorial limits of New Zealand. We will refer to this as the "single step interpretation approach". His arguments also addressed – and in rather more detail – the reasoning of the Court of Appeal, and in particular, whether the relevant provisions in the 2000 Act operated as mandatory overriding rules (along with a closely related issue whether their application was required by public policy). Mr Waalkens QC, for NZBL, in his submissions closely followed the approach of the Court of Appeal. Mr Butler for the Human Rights Commission, which intervened, focused primarily on the single step interpretation approach.

[8] We propose to adopt the single step interpretation approach contended for by Messrs Skelton and Butler rather than that proposed in *Dicey, Morris and Collins*. Primarily this is because we see the territorial reach of legislation as best determined

on the basis of a purposive interpretation of the statute in question, as required by s 5(1) of the Interpretation Act 1999.[10] It follows that the case turns on a single issue: whether the relevant provisions in the 2000 Act apply to the relationships between Messrs Brown and Sycamore on the one hand and NZBL on the other. As will become apparent, we are satisfied that they do so apply. We see this conclusion as justified on the basis of the legislative scheme as a whole, including the text and purpose of the statutory provisions which make it clear that the right not to be discriminated against is not confined to conduct which occurs in the context of an employment agreement governed by New Zealand law.

[9] Against that background, we propose to discuss the case primarily by reference to three questions:

(a) Did the Employment Court have personal jurisdiction over NZBL?

(b) Did the Employment Court have subject matter jurisdiction over the employment agreements between NZBL and Messrs Brown and Sycamore?

(c) Do the provisions of pt 9 of the 2000 Act (particularly those relating to age discrimination) apply to the conduct of NZBL towards Messrs Brown and Sycamore?

But before we answer these questions, it is necessary to review the facts in a little more detail, provide an overview of the legislative scheme and explain the approaches adopted by the Employment Court and the Court of Appeal.

The facts in a little more detail

[10] Messrs Brown and Sycamore started flying for Cathay Pacific in the early 1990s. Initially they were employed directly by Cathay Pacific and both lived in and worked from Hong Kong. From the mid-1990s until 2002, they were employed by Veta Ltd, a subsidiary of Cathay Pacific. During this time they started and finished

[10] This subsection provides: "The meaning of an enactment must be ascertained from its text and in the light of its purpose".

each tour of duty in either Sydney or Auckland and lived in Auckland with travel between Sydney and Auckland being at their expense.

[11] From 2002, Messrs Brown and Sycamore have been employed by NZBL. As noted, this employment has been in terms of CoS02 and the letters of offer from NZBL under which the proper law of the agreements is the law of Hong Kong and the retirement age is 55. Pursuant to these arrangements Messrs Brown and Sycamore start and finish their tours of duty in Auckland, which is where they continue to live, but their working activities take place largely outside of New Zealand. They are thus what has been referred to in the cases as "peripatetic employees".

[12] In 2003 a number of Cathay Pacific pilots issued proceedings in the England and Wales Employment Tribunal alleging unfair dismissal.[11] Some, including a Mr Crofts, were employed by Veta and the agreements between them and Veta stipulated the law of Hong Kong as the law of the contracts. The basis upon which they were employed was substantially the same as that applying to Messrs Brown and Sycamore save that they were based in the United Kingdom rather than New Zealand. At issue was the territorial scope of s 94(1) of the Employment Rights Act 1996 (UK) (the UK Act), which creates a right for employees not to be unfairly dismissed. An appeal in this case was one of three decided in a judgment reported as *Lawson v Serco Ltd* (*Crofts*). In this judgment, the House of Lords held the right under s 94(1) not to be unfairly dismissed was engaged.[12]

[13] As a consequence of *Crofts*, Cathay Pacific reconsidered the basis upon which pilots based outside Hong Kong were employed. This was with a view to putting in place contractual arrangements governed by the employment law of the base jurisdictions. Another problem addressed at the same time was the necessity to limit expenditure. As a result of this necessity, Cathay Pacific was looking to reduce pilot remuneration.

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11 The background to the litigation is discussed fully in the Court of Appeal decision: *Crofts v Cathay Pacific Airways Ltd* [2005] EWCA Civ 599, [2005] ICR 1436 [*Crofts* (CA)] at [3]–[12] per Lord Phillips MR.

12 *Lawson v Serco Ltd* [2006] UKHL 3, [2006] 1 All ER 823 [*Crofts*].

[14] Against this background, Cathay Pacific came up with Conditions of Service 2008 (CoS08) which: (a) provided for retirement at 65; but (b) provided for reduced remuneration for pilots. CoS08 applied to the employment of all pilots engaged after 1 January 2008. In 2009 Cathay Pacific (and NZBL) offered all other pilots (that is, those who had been employed prior to 1 January 2008) an election to enter into agreements incorporating CoS08. Messrs Brown and Sycamore declined this offer.

[15] In due course, restructuring of the employment agreements for Cathay Pacific pilots based in the United Kingdom, Canada and Australia was completed. The restructured arrangements provide that the local law (that is, the law of the jurisdiction in which the pilots are based) is the law of the employment agreements. They also provide for retirement at 65. No such restructuring has taken place in respect of the 33 or so pilots based in New Zealand. It is not entirely clear why this is, although it was suggested in argument that it is probably associated with the particular age profile of the New Zealand-based pilots.

[16] In 2013 Mr Sycamore requested NZBL to change his conditions of service from CoS02 to CoS08. Mr Brown made a similar request in early 2014. Both were declined. Messrs Brown and Sycamore reached the age of 55 years on 4 March 2015 and 24 September 2015 respectively. Both face dismissal from NZBL, albeit that this has been deferred pending the result of this appeal. As a result, they remain employed as senior captains flying A330 and A340 aircraft, and are generally rostered for flights between Auckland International Airport and Cathay Pacific's hub at Hong Kong International Airport.

An overview of the legislative scheme

[17] New Zealand was comparatively slow to create statutory rights and remedies associated with security of employment. A personal grievance procedure was first provided for by s 4 of the Industrial Conciliation and Arbitration Amendment Act 1970. More elaborate procedures were laid down in the Industrial Relations

Act 1973. Those provided in the latter Act were tied to awards, collective agreements and union membership.[13] Employees whose work was not covered by an award or collective agreement were left to their common law remedies, if any.[14] This continued to be the position – at least broadly – under the Labour Relations Act 1987.

[18] This changed in 1991 with the Employment Contracts Act 1991 (the 1991 Act). Under this statute, the personal grievance procedure was available to all employees, albeit this was achieved rather awkwardly by requiring "an effective procedure" to be made available in every employment contract and providing a statutory procedure as a default where appropriate contractual provision had not been made.[15]

[19] Under the 2000 Act, the personal grievance procedure is grounded only in the statute and the right to pursue personal grievances is no longer treated as part of the contractual arrangements between employers and employees.[16] Section 123 provides a "broad mix" of remedies.[17] There is, however, no express statement of corresponding rights. There is thus a right to pursue a claim for unjustifiable dismissal, but no express right not to be unjustifiably dismissed. We see this, however, as simply an artefact of the legislative, and thus drafting, history. In particular, we are satisfied that the remedies provided by way of personal grievance imply the existence of rights not to be treated in a way which gives rise to such remedies. We will refer to these implied rights as "personal grievance rights".

[20] Most relevantly for present purposes, personal grievance rights include a right not to be subject to age discrimination, which in context encompasses a right

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13 There may be scope for argument whether this was also so of the personal grievance procedure established in 1970.

14 See the useful overview given by Gordon Anderson "The Origins and Development of the Personal Grievance Jurisdiction in New Zealand" (1988) 13 New Zealand Journal of Industrial Relations 257.

15 See ss 26–27, 32–33 and sch 1 of the Employment Contracts Act 1991.

16 Section 65(2)(a)(vi) of the 2000 Act merely provides that an individual employment agreement must provide "a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised". See also s 54(3)(a)(iii) as to collective agreements.

17 See Peter Churchman and Mary Foley *Personal Grievances* (online looseleaf ed, Brookers) at [11.1.01].

not to be required to retire on grounds of age. This right is provided for in part directly by provisions located in pt 9 and in part by the incorporation of certain provisions of the HRA.[18] The HRA operates in parallel with the 2000 Act although a claimant may seek relief under only one Act.[19]

[21] In the case of the HRA the prohibition on age discrimination is provided for by ss 21 and 22 but this prohibition is subject to exclusions which apply also to age discrimination claims under pt 9 of the 2000 Act.[20] Relevant exclusions are provided by ss 24 and 26 of the HRA:

> **24 Exception in relation to crews of ships and aircraft**
>
> Nothing in section 22 shall apply to the employment or an application for employment of a person on a ship or aircraft, not being a New Zealand ship or aircraft, if the person employed or seeking employment was engaged or applied for it outside New Zealand.
>
> …
>
> **26 Exception in relation to work performed outside New Zealand**
>
> Nothing in section 22 shall prevent different treatment based on sex, religious or ethical belief, or age if the duties of the position in respect of which that treatment is accorded—
>
> (a) are to be performed wholly or mainly outside New Zealand; and
>
> (b) are such that, because of the laws, customs, or practices of the country in which those duties are to be performed, they are ordinarily carried out only by a person who is of a particular sex or religious or ethical belief, or who is in a particular age group.

[22] We should also set out s 238 of the 2000 Act. It provides:

> **238 No contracting out**
>
> The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.

As will become apparent, this provision received considerable attention in the judgments of the Employment Court and Court of Appeal.

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18 See ss 104–106 of the 2000 Act.
19 Section 112 of the 2000 Act.
20 By dint of s 106 of the 2000 Act.

The litigation in the courts below

[23] The case commenced in the Employment Relations Authority and was transferred by consent to the Employment Court.[21] Before the Court was the statement of claim by Messrs Brown and Sycamore together with a statement of defence and a protest to jurisdiction by NZBL. The protest to jurisdiction appears to have been advanced on the basis that, in light of the choice of Hong Kong law, the Employment Court lacked jurisdiction to make the orders sought. *Forum non conveniens* arguments were not relied on.

[24] In his judgment, Judge Corkill saw the law of Hong Kong as the proper law of the employment agreements, a conclusion which reflected the express choices of law made by the parties.[22] He reviewed the relevant New Zealand legislation (and in particular the 2000 Act and the HRA) before turning to *Crofts*.[23] He then went on:

> [82] I conclude that Parliament has left it to the Authority/Court to determine the issue of the application of the [2000 Act], as is appropriate to the substantive right which is in issue. In the case of discrimination, that issue is to be determined in light of the significant protections which are provided by those statutes, subject to any particular exemptions which Parliament has seen fit to impose. Given the broad language used when referring to employment, the [*Crofts*] "base test" provides appropriate guidance in respect of peripatetic employees when discrimination is asserted.

And, having referred in a little more detail to the employment arrangements:

> [84] … I conclude that Mr Brown and Mr Sycamore are based, for the purposes of their employment, in Auckland. The laws of New Zealand under the [2000 Act] and the HRA – subject to any particular exemptions – apply to their employment agreements.

[25] Judge Corkill then held the exceptions to the prohibition on age discrimination were not engaged.[24] In so concluding in relation to s 24, he focussed primarily on how the employment agreements between Messrs Brown and Sycamore came to be entered into and, on the basis of this analysis, found that they had not been engaged "outside New Zealand".[25] The terms on which leave to appeal to the

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21 *Brown v New Zealand Basing Ltd* [2014] NZERA Auckland 386 (Member Fitzgibbon) at [3] and [25].
22 *Brown* (EC), above n 5, at [65].
23 At [67]–[74]; the discussion of *Crofts* is at [75]–[81].
24 At [86]–[87].
25 At [86](a).

Court of Appeal was granted did not encompass this issue,[26] and we understand that it was not argued in the Court of Appeal.[27] There was certainly no challenge before us to this aspect of Judge Corkill's decision.

[26] We have some reservations whether, in this context, "engaged" in s 24 should be read as referring just to the circumstances (and in particular the location) in which an employee was hired. We are inclined to see it as also, and perhaps primarily, requiring consideration of the location of the employee when "engaged" in the fulfilment of employment obligations. This qualification to the approach adopted by Judge Corkill, however, would be of no assistance to NZBL given that the duties of Messrs Brown and Sycamore within New Zealand mean that it could not sensibly be said that their engagement is relevantly outside New Zealand.

[27] NZBL also attempted to rely on s 26 in the Employment Court but Judge Corkill concluded that the second part of the section was not satisfied.[28] Again there is no challenge to the result he arrived at.

[28] The two conclusions just discussed – that the 2000 Act (meaning the incorporated prohibition against age discrimination) applied and the exceptions to the prohibition on age discrimination did not apply – were sufficient to warrant a finding in favour Messrs Brown and Sycamore. Unnecessarily to our way of thinking, the Judge went on to consider whether: (a) s 238 of the 2000 Act (which prohibits contracting out) applied so as to in effect overrule the Hong Kong choice of law made by the parties;[29] or (b) the application of Hong Kong law was contrary to public policy.[30] He answered both questions in favour of Messrs Brown and Sycamore.[31]

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[26] See *New Zealand Basing Ltd v Brown* [2015] NZCA 168 (Ellen France P, Harrison and Stevens JJ).

[27] The Court did, however, allude to it when it commented: "In view of our conclusion that New Zealand law does not apply, it is unnecessary for us to consider whether the exceptions to its application listed in s 24 of the Human Rights Act 1993 apply." See *Brown* (CA), above n 6, at n 10.

[28] *Brown* (EC), above n 5, at [86](b).

[29] At [88]–[101].

[30] At [102]–[127].

[31] At [101] and [127] respectively.

[29] The protest to jurisdiction was dismissed on the basis of his conclusion as to the overriding effect of s 238.[32]

[30] NZBL's appeal to the Court of Appeal was successful. The Court analysed the legal framework in which it was required to decide the case in the following way:[33]

> (a) When a court confronts a private problem with a foreign element, it must look for what has been called the "seat" of the legal relationship — that is, the legal system to which in its proper nature the relationship belongs or is subject. Following the old English common law, which has diverged since accession to the European Union, the courts of New Zealand apply a well-settled choice of law process to identify the system that will resolve the issue on its merits. This determination of what law should apply is distinct from the related question of whether a court has jurisdiction to hear and decide the case.
>
> (b) The issue must first be characterised. If an issue is characterised as contractual in nature, the relevant connecting factor is the proper law of the contract. This is presumptively the parties' bona fide and legal choice of law or, if the written agreement is silent on this point, the system with the "closest and most real connection" to the contractual relationship.
>
> (c) If this process leads to a foreign system governing the contract, a court may then consider the law of the forum to decide whether there is a mandatory rule or public policy ground for overriding the proper law. The domicile of a party in the forum, like the pilots in the present case, does not generate a presumption that statutory instruments of the forum will govern the private relationship. However, the domicile of both parties in the forum may well mean a foreign election is not bona fide.
>
> (d) So, in the context of an employment agreement with a foreign element, a New Zealand court need not consider the domestic regime unless and until (i) the choice of law process reveals the law governing the matter is in fact the law of the forum, in which case a New Zealand court would deal with the case as an ordinary dispute under the [2000 Act]; or (ii) a party seeks to override the foreign proper law by reference to extraordinary concerns such as public policy or a mandatory rule.

[31] In essence the Court approached the case on the basis that if the proper law of the contract was the law of Hong Kong, the provisions of the 2000 Act had no

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32 At [130].

33 *Brown* (CA), above n 6, at [30] (footnotes omitted).

application unless they could be said to be of a mandatory and overriding nature or such application was required by public policy.

[32] The Court characterised the claim by Messrs Brown and Sycamore as being for "alleged breach of contract for unlawful dismissal"[34] and proceeded generally on the basis that the underlying rights were contractual. It did not, however, explain why it was of this view. The Court also concluded that: (a) the proper law of the contract was that of Hong Kong;[35] (b) the provisions of the 2000 Act invoked by Messrs Sycamore and Brown were not of an "overriding" nature (and in particular that such effect was not achieved by s 238); and (c) their application was not required by public policy.[36] In deciding whether the provisions of the 2000 Act relied on were "overriding", the Court confined itself to a consideration of the effect of s 238. There was no analysis of the scheme of the 2000 Act and HRA with a view to determining whether the provisions creating the right not to be discriminated against envisaged application in the context of employment agreements not governed by New Zealand law.

[33] The Court concluded that Judge Corkill had been:[37]

> … diverted by *Crofts* to a finding that because the pilots are based in Auckland the laws of New Zealand would apply "subject to any particular exemptions which Parliament has seen fit to impose". In this way he inverted the settled approach to contracts in conflicts jurisprudence: the courts must proceed from an assumption that the choice of the parties will govern their rights and obligations.

It saw *Crofts* as distinguishable by reason of a number of factors. In particular:

(a) The context provided by the Rome Convention[38] governing choice of law in the European Union was material to the outcome.[39]

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34 At [34].
35 At [34]–[35].
36 At [40]–[83].
37 At [41] (footnotes omitted).
38 Convention on the law applicable to contractual obligations 1605 UNTS 59 (opened for signature 19 June 1980, entered into force 1 April 1991) [Rome Convention], as incorporated in sch 1 to the Contracts (Applicable Law) Act 1990 (UK).
39 *Brown* (CA), above n 6, at [46].

(b) Section 204 of the UK Act was important. This provides that it is immaterial for the purposes of the Act whether the law governing a person's employment "is the law of the United Kingdom, or part of the United Kingdom, or not". Although there was no reference to s 204 in *Crofts*, the Court of Appeal assumed that the parties and the court had proceeded on the basis that s 204 had an overriding effect.[40]

(c) The particular legislative history in respect of the UK Act was also of moment.[41] We will refer to this shortly.

The Court also noted that in later decisions, the United Kingdom Supreme Court has treated a choice of law clause as material to the question whether the UK Act applied.[42]

[34] Neither the Employment Court nor the Court of Appeal referred to the limited extent to which the 2000 Act and the somewhat greater extent to which the Employment Court Regulations 2000 deal with cross-border employment disputes.

Did the Employment Court have personal jurisdiction over NZBL?

[35] As we have noted, the 1991 Act provided for rights to seek personal grievance remedies which were no longer embedded in awards or collective agreements.[43] This was part of a broader restructuring of the jurisdiction of the Employment Court which was extended to all employment contracts (as opposed to the enforcement of awards and collective agreements). The combined effect of this was to create a potential for the Employment Court to hear cross-border employment disputes. This, however, was not recognised at the time as the 1991 Act gave no indication of how such disputes should be resolved.[44] Nor did the regulations made

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40 At [46] and [54].

41 At [47].

42 At [53], citing *Duncombe v Secretary of State for Children, Schools and Families (No 2)* [2011] UKSC 36, [2011] 4 All ER 1020; and *Ravat v Halliburton Manufacturing & Services Ltd* [2012] UKSC 1, [2012] 2 All ER 905.

43 Above at [18].

44 Chief Judge Goddard of the Employment Court in *Ching v P T Duffill Watts Indonesia* [2000] 1 ERNZ 633 held that the Employment Tribunal had no jurisdiction to authorise service of proceedings overseas, although the Employment Court would have authority in proceedings before it.

under it contain provisions tailored to such disputes beyond making general provision for "[m]atters not provided for".[45]

[36] Under the 2000 Act as first enacted and the associated regulations, there were likewise no specific provisions addressed to cross-border disputes. In 2004, however, sch 3 of the 2000 Act (dealing with the procedures of the Employment Court) was amended to insert cl 5A and regulations under the 2000 Act were amended to address such disputes.[46] For simplicity, we will confine our discussion of these changes to those affecting the Employment Court. Similar provisions, however, were also introduced in relation to the Employment Relations Authority.[47]

[37] Section 389 of the Companies Act 1993 provides:

> **389 Service of documents on overseas companies in legal proceedings**
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> (1) A document, including a writ, summons, notice, or order, in any legal proceedings may be served on an overseas company in New Zealand as follows:
>
> (a) by delivery to a person named in the overseas register as a director of the overseas company and who is resident in New Zealand; or
>
> (b) by delivery to a person named in the overseas register as being authorised to accept service in New Zealand of documents on behalf of the overseas company; or
>
> (c) by delivery to an employee of the overseas company at the overseas company's place of business in New Zealand or, if the overseas company has more than 1 place of business in New Zealand, at the overseas company's principal place of business in New Zealand; or
>
> (d) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; …
>
> …

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45 See the Employment Tribunal Regulations 1991, r 25 (as enacted); and the Employment Court Regulations 1991, r 23 (as enacted).

46 Clause 5A was inserted by s 71 of the Employment Relations Amendment Act (No 2) 2004; see also regs 31A–31G of the Employment Court Regulations 2000, inserted by reg 9 of the Employment Court Amendment Regulations 2004.

47 See cl 4A, sch 2 of the 2000 Act, inserted by s 70 of the Employment Relations Amendment Act (No 2) 2004.

NZBL is an overseas company for the purposes of s 389. Because it carries on business in New Zealand, it should have (although it has not) registered as such under pt 18 of the Companies Act. Had it done so, service could have been effected under s 389(1)(a) or (b). As it was, NZBL was amenable to service under s 389(c) or (d).

[38] There can be no doubt that s 389 applies to service of proceedings in the Employment Court. This is because reg 29A of the Employment Court Regulations 2000 (introduced in 2004[48]) provides:

> **29A Service in New Zealand on overseas companies**
>
> A document that must be served in legal proceedings under the Act on an overseas company may be served in New Zealand only under section 389 of the Companies Act 1993.

Did the Employment Court have subject matter jurisdiction over the employment agreements between NZBL and Messrs Brown and Sycamore?

[39] Both the Employment Court and Court of Appeal noted the absence of express territoriality limitations to the definitions of "employer" and "employee" provisions in the 2000 Act or generally as to the application of the 2000 Act to cross-border employment agreements.[49] Neither Court, however, discussed subject matter jurisdiction as a discrete issue.

[40] A territoriality restriction on the application of the 2000 Act could be achieved by reading down the definitions of "employer" and "employee" (and related expressions) so that they apply only to employment relationships which have an appropriate level (whatever that might be) of connection with New Zealand. New Zealand law being the proper law of the agreement might be sufficient, or perhaps even necessary, to create such a connection. On this approach, employment relationships which did not have the required connection would lie outside the jurisdiction of the Employment Court.

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48 By reg 8 of the Employment Court Amendment Regulations 2004.

49 *Brown* (EC), above n 5, at [77]; and *Brown* (CA), above n 6, at [33](a).

[41] An alternative approach to territoriality is to treat the definitions of "employer" and "employee" as unlimited but rather to determine, on a case by case basis, whether the provisions of the 2000 Act relied on apply to the particular claim. This alternative approach accords with our preference, for reasons which we will now explain.

[42] Clause 5A of sch 3 of the 2000 Act provides:[50]

> **5A Service outside New Zealand**
>
> Any document relating to a matter before the court may be served out of New Zealand—
>
> (a) by leave of the court; and
>
> (b) in accordance with regulations made under this Act.

[43] Rule 31A of the Employment Court Regulations 2000 provides:

> **31A Leave to serve statement of claim on overseas party**
>
> (1) This regulation applies when a plaintiff seeks the leave of the court under clause 5A(a) of Schedule 3 of the Act to serve a statement of claim on an overseas party (because that party is not a defendant in Australia on whom, or on which, the statement of claim may under section 13 of the Trans-Tasman Proceedings Act 2010 be served without the court's leave).
>
> (2) An application for leave must be made on notice to every party to the proceedings other than the overseas party.
>
> (3) An application for leave must be supported by an affidavit providing the court with information for the purposes of subclause (5) or subclause (6).
>
> (4) The court may give leave—
>
> (a) in the cases described in subclause (5); or
>
> (b) in any case in which the court considers that it should give leave, having regard to the factors in subclause (6).
>
> (5) For the purposes of subclause (4)(a), the cases are as follows:
>
> (a) the overseas party has submitted to the jurisdiction of the court; or

[50] See also cl 4A of sch 2.

(b) the employment agreement that is the subject of the proceedings—

(i) was made in New Zealand; or

(ii) was made by or through an agent trading or residing in New Zealand; or

(iii) was to be wholly or partly performed in New Zealand; or

(iv) was expressly or impliedly to be governed by New Zealand law; or

(v) is said in the statement of claim to have been breached in New Zealand, wherever it was made; or

(c) the overseas party is a necessary and proper party to the proceedings brought by the plaintiff against a person who is to be, or has been, served in New Zealand.

(6) For the purposes of subclause (4)(b), the factors are as follows:

(a) where the overseas party is or may be found; and

(b) whether the overseas party is a New Zealand citizen; and

(c) the amount or value of the matter in dispute; and

(d) the importance of the matter; and

(e) the existence of a court with jurisdiction in the matter in the place where the overseas party is; and

(f) the comparative cost and convenience of having the matter dealt with in New Zealand or in the place where the overseas party is.

The Regulations also address service in Australia and in jurisdictions which are parties to conventions with New Zealand as to the service of documents.[51]

[44] An overseas party may challenge the assumption by the Employment Court of jurisdiction and, in cases not involving an Australian defendant, the Court may decline jurisdiction on *forum non conveniens* grounds as provided for by reg 31G:

31G Court may decline jurisdiction

(1) The court may decline to hear and determine proceedings in which there is an overseas party if it is satisfied that—

[51] See regs 29B, 31AA and 31B.

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

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

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

(d) the defendant will suffer unfair disadvantage if the proceedings are heard in New Zealand.

…

[45] We see the 2004 amendments as giving reasonable pointers as to the features of an employment relationship in which it was assumed that the Employment Court would have jurisdiction in respect of an employment dispute. Also material in this context, although even more material in respect of the next question we address, are ss 22, 24 and 26 of the HRA. These sections pre-suppose that the prohibition on age discrimination will or may apply despite the employee working wholly or predominantly outside of New Zealand and, in particular, in respect of air-crew and mariners.

[46] Read together, ss 22, 24 and 26 of the HRA, cl 5A of sch 3 of the 2000 Act and regs 29B and 31AA–31G of the Employment Court Regulations contemplate the exercise of jurisdiction by the Employment Court in cases with a diverse range of cross-border features. We see this diversity of features as inconsistent with the definitions of "employer" and "employees" being subject to a territorial limitation requiring some particular and definable connection with New Zealand. Thus, the approach postulated above at [40] would be inconsistent with the overall legislative and regulatory scheme.

[47] It should be borne in mind that the Employment Court has jurisdiction in respect of not only the statutory personal grievance causes of action but also other claims, including claims for breach of contract, and there is no reason why such claims should not be determined by reference to foreign law if such law is the proper law of the contract. This was the view taken, in respect of the 1991 Act, by Judge Travis in *Royds v FAI (NZ) General Insurance Co Ltd*[52] and we think it clear that the same position obtains under the 2000 Act, particularly in light of the

[52] *Royds v FAI (NZ) General Insurance Co Ltd* [1999] 1 ERNZ 820 (EmpC).

Employment Court Regulations. On this point, the judgment of the Court of Appeal in *Crofts* is of some interest as it addresses the distinction between the statutory and contractual claims which were advanced and application of *forum non conveniens* principles in that context.[53]

[48] We are accordingly satisfied that the Employment Court had subject matter jurisdiction in respect of the employment agreements between Messrs Brown and Sycamore and NZBL.

[49] There is one additional point we should make. This relates to whether, in a cross-border employment dispute, the Employment Court would have jurisdiction to give effect to statutory rights arising under a foreign statute which correspond generally to our personal grievance rights. In *Musashi Pty Ltd v Moore*,[54] where the claims were for unjustifiable disadvantage and unjustifiable dismissal, Chief Judge Colgan concluded that the employment agreement was governed by law of the State of Victoria and, in dismissing a *forum non conveniens* argument, assumed that the Employment Relations Authority would be able to determine the dispute in accordance with the relevant Australian statutory provisions. This may be so given the generality of the statutory language associated with the jurisdiction of the Employment Relations Authority[55] but we think it best to leave this aspect of the approach of the Chief Judge for a case in which the issue arises directly.

Do the provisions of pt 9 of the 2000 Act relating to discrimination apply to the conduct of NZBL towards Messrs Brown and Sycamore?

Overview

[50] As noted, the approach of the Court of Appeal was that the right invoked by Messrs Brown and Sycamore was contractual in nature and that, accordingly, in accordance with conflict of laws principles, was applicable only: (a) where New Zealand law was the proper law of the employment contract; or (b) if the legislative provisions which created the right were mandatory overriding rules. As

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53 See *Crofts* (CA), above n 11.

54 *Musashi Pty Ltd v Moore* [2002] 1 ERNZ 203 (EC).

55 See for instance s 161(1) (of the 2000 Act) "jurisdiction to make determinations about employment relations problems generally" including over "any other action … arising from or related to the employment relationship" (s 161(1)(r)).

we have explained, the Court's conclusion that the rights were contractual was not articulated and, as we will now explain, we do not see this conclusion as being self-evidently correct.

[51] The rights and obligations of employers and employees are dependent upon the existence of an employment agreement. Some of those rights and obligations are directly provided for in the agreement and are thus obviously contractual in nature. Also obviously contractual in nature are rights and remedies arising under certain statutes, by way of examples, the Contractual Remedies Act 1979, the Contractual Mistakes Act 1977, the Illegal Contracts Act 1970 and the Frustrated Contracts Act 1944. These statutes all formed part of the New Zealand law of contract.[56] On the other hand, there are some statutory rights and obligations which arise in the context of employment agreements which are plainly non-contractual. Tax obligations and health and safety rules exemplify this.

[52] The present case concerns personal grievance rights (and the correlative obligations). These rights can resemble contractual rights. Thus the right not to be unjustifiably disadvantaged applies alongside the contractual rights of employees. More significantly, a claim in respect of dismissal can only be brought by way of personal grievance.[57] Accordingly the right not to be unjustifiably dismissed replaces the right not to be dismissed in breach of contract.

[53] The right not to be discriminated against is, as we will explain, not as contractual in flavour as the right not to be unjustifiably dismissed. But it nonetheless has some contractual characteristics. Thus:

(a) If Messrs Brown and Sycamore are entitled to rely on the right not to be discriminated against by reason of age, the practical effect is that they are entitled to work until they are 65. Such an entitlement could be created by contract.

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[56] With the coming into force of the Contract and Commercial Law Act 2017 on 1 September 2017 these Acts are now repealed and their substance re-enacted.

[57] See s 113 of the 2000 Act.

(b) Where anti-discrimination provisions relied on apply, a contractual provision permitting an employer to require an employee to retire on grounds of age is ineffective.

[54] Further, as we have explained there is a real sense in which the personal grievance procedures provided for in the 1991 Act were treated as contractual in character (albeit that they could not be contractually excluded). If this case had fallen to be determined under that Act, the logic of the Court of Appeal's conclusion that the rights were contractual would have been enhanced.[58] Indeed, in a number of cases decided under the 1991 Act it was treated as axiomatic that the personal grievance procedure was available only in respect of employment contracts governed by the law of New Zealand. The view was that personal grievance rights were: (a) contractual in nature; and (b) not in the nature of mandatory overriding rules. These cases thus followed the approach proposed in *Dicey, Morris and Collins* and adopted by the Court of Appeal. There are, however two points which are worth noting: first that all cases involved claims for unjustifiable dismissal and secondly that the mandatory overriding analysis was confined to the effect of s 147 of the 1991 Act (which was the precursor to s 238 of the 2000 Act).[59]

[55] On the other hand, as we will see, some personal grievance rights do not correspond closely to contractual rights. By way of example, in the case of rights to be free from sexual and racial harassment, the only significance of the employment relationship is that it provides the context in which the rights exist and might be infringed. In such circumstances, the terms of the underlying employment agreement are of no moment. And, as we will see, similar considerations apply to

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58 As to this see Jacquelin Mackinnon "Dismissal protections in a global market: Lessons to be learned from *Serco Ltd v Lawson*" (2009) 38 ILJ 101 at 107.

59 See for instance *Clifford v Rentokil Ltd* [1995] 1 ERNZ 407 (EmpC) (a claim for unjustifiable dismissal, where Judge Palmer held that unless the proper law of the contract was the law of New Zealand, the personal grievance procedure could not be invoked and, in particular that the 1991 Act was not an "overriding statute": see at 431); *Redmond v DML Resources Ltd* [1996] 1 ERNZ 448 (EmpC); and *Royds*, above n 52. In the *Redmond*, it was common ground personal grievance procedures were available only in the case of contracts governed by New Zealand law: at 463. The Court of Appeal judgments in *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 and *Jardine Risk Consultants Ltd v Beal* [2000] 1 ERNZ 405 dealt with different issues (sovereign immunity in the former case and a claim in tort in the latter). In the *Pitcairn* case, Richardson J stated that the 1991 Act was "not expressed to apply extra-territorially" but he did not explain what he meant by "extra-territorially": at 438. In the only case decided by reference to the 2000 Act, the same general approach was taken. This was the judgment of Chief Judge Colgan in *Musashi*, above n 54, to which we have already referred.

the right to be free from discrimination, and this is particularly so in respects other than on grounds of age. Furthermore, as will become apparent when we discuss *Crofts* and subsequent decisions from the United Kingdom, a contractual or otherwise characterisation of the right not to be unfairly dismissed did not feature in the reasoning of the judges in those cases.

[56] More generally, the 2000 Act is premised on the view that employment involves a relationship (and thus status) and not just contract. This is explicit in the title of the statute and is implicit in s 3(a)(i) and (ii) which provides:

> **3 Object of this Act**
>
> The object of this Act is—
>
> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
>
> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
>
> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships … .

[57] Given that the characterisation of a personal grievance right arising out of a "legislative requirement" addressed to "good faith behaviour' as contractual would be, at worst, contrary to the premise of the 2000 Act and at best a matter of impression, there seems to us to be little point in engaging in a two-step interpretative exercise and in particular no point in seeking to determine, from the scheme of the legislation, whether personal grievance rights invoked are contractual or non-contractual. In saying that, we accept that the more contractual a particular right may appear to be, the easier it may be to construe the right as applying only where the proper law of the employment agreement is that of New Zealand. This is a consideration which may be of some moment where the personal grievance right invoked is the right not to be unjustifiably dismissed.

[58] The approach we favour might be thought to involve an interpretative exercise very similar to what would be necessary to determine whether the relevant

provisions are mandatory overriding rules in accordance with the approach proposed in *Dicey, Morris and Collins* and applied by the Court of Appeal. The main difference in theory is that the exercise we propose to undertake is not premised on a starting point assumption that the provisions do not apply.[60] There is also a significant practical difference between the exercise as carried out by the Court of Appeal and the one we are about to embark on. This is because the Court of Appeal confined its inquiry into the effect of s 238, a provision which we see as being of no more than contextual significance.

The New Zealand legislation

[59] Section 103 of the 2000 Act provides:

> **103 Personal grievance**
>
> (1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—
>
> (a) that the employee has been unjustifiably dismissed; or
>
> (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or
>
> *(c) that the employee has been discriminated against in the employee's employment; or*
>
> (d) that the employee has been sexually harassed in the employee's employment; or
>
> (e) that the employee has been racially harassed in the employee's employment; or
>
> (f) that the employee has been subject to duress in the employee's employment in relation to membership or non-membership of a union or employees organisation; or
>
> (g) that the employee's employer has failed to comply with a requirement of Part 6A; or
>
> (h) that the employee has been disadvantaged by the employee's employment agreement not being in accordance with section 67C, 67D, 67G, or 67H; or

[60] Compare the remarks of the Court of Appeal quoted above at [33].

(i) that the employee's employer has contravened section 67F or 67G(3).

(j) that the employee's employer has, in relation to the employee,—

(i) engaged in adverse conduct for a prohibited health and safety reason; or

(ii) contravened section 92 of the Health and Safety at Work Act 2015 (which prohibits coercion or inducement).

…

(emphasis added)

Primarily relevant for present purposes is 103(1)(c).

[60] We note that some personal grievance rights are premised on the application of other sections of the 2000 Act; in particular those recognised by s 103(1)(g), (h), and (i). The territorial scope of those rights is necessarily limited by the territorial reach of the other sections. In contradistinction, there is no indication, either way, of the territorial scope of the other personal grievance rights.

[61] Sections 104 and 105 expand on what is meant by "discriminated against in that employee's employment". Prohibited grounds of discrimination (including age) are stipulated in s 105 which incorporates the definitions provided in the HRA:

105 Prohibited grounds of discrimination for purposes of section 104

(1) The prohibited grounds of discrimination referred to in section 104 are the prohibited grounds of discrimination set out in section 21(1) of the Human Rights Act 1993, namely—

(a) sex:

(b) marital status:

(c) religious belief:

(d) ethical belief:

(e) colour:

(f) race:

(g) ethnic or national origins:

(h) disability:

(i) *age:*

(j) political opinion:

(k) employment status:

(l) family status:

(m) sexual orientation.

…

(emphasis added)

Crofts

[62] Lord Hoffmann's speech in *Crofts* is succinct, to say the least.[61] He did not address the case in terms of the framework which the Court of Appeal adopted in the present case. There is thus no indication of a characterisation of the right as contractual and a conclusion that the provision which created it operates as a mandatory overriding rule. The short point of *Crofts* is that the territorial application of the right not to be unfairly dismissed turns primarily on whether the UK Act applied to the employee's place of work.

[63] Lord Hoffmann discussed in some detail the legislative history of the right not to be unfairly dismissed.[62] This right was originally confined to those who worked in Great Britain, a limitation which suggested a territoriality approach based on whether the work of the employee occurred within Great Britain. Given this history and also s 204 of the UK Act (which provides that the Act applies irrespective of the proper law of the worker's employment), it was obvious that the right not to be unfairly dismissed was not excluded by the Hong Kong choice of law. Indeed, Lord Hoffmann seems to have seen it as so obvious as not to warrant explanation. All that was really in issue in the case of Mr Crofts was whether his employment was sufficiently connected with Great Britain to warrant application of the UK Act.

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61 As noted above at n 11, a more elaborate discussion of the case is to be found in the Court of Appeal judgment.

62 *Crofts*, above n 12, at [7]–[14].

Subsequent cases concerning expatriate employees

[64] There have been two subsequent cases in the United Kingdom Supreme Court dealing with expatriate employees.[63] In both cases, it was held that the right not to be unfairly dismissed was applicable. In one of the cases, the proper law of the contract was material, but not determinative, to whether the connection between the employment relationship and United Kingdom justified the conclusion that the right not to be unfairly dismissed was engaged.[64] Both cases involve what in a sense were extensions of the approach favoured by Lord Hoffmann in *Crofts* but importantly there was no challenge to his conclusions in respect of peripatetic employees.[65]

[65] A perhaps subtle point arises out of these cases. On the Court of Appeal's analysis of *Crofts*, the right not to be unfairly dismissed is contractual in nature but, by reason of s 204 is not excluded by a choice of foreign law as the law of the employment agreement. On this approach, s 204 has an extending effect but the right, being contractual in nature, should apply in the case of any employment agreement governed by the laws of England and Wales or Scotland. This, however, was not the approach proposed by Lord Hoffmann in *Crofts* and likewise was not the approach favoured by the United Kingdom Supreme Court in the two cases we have just mentioned. This suggests that the right not to be unfairly dismissed was not seen as contractual in nature for the purposes of the approach favoured by *Dicey, Morris and Collins* and adopted by the Court of Appeal in this case.

Our conclusions

[66] The 2000 Act does not contain a provision akin to s 204 of the UK Act and likewise there is nothing in its legislative history which gives a clear pointer to the territorial scope of its provisions. For these reasons, which correspond to some of the grounds relied on by the Court of Appeal, we agree that *Crofts* is not directly on point.[66] We nonetheless see *Crofts* as relevant. In part this is because *Crofts* is at

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63 *Duncombe* and *Ravat*, both above n 42.

64 *Ravat*, above n 42.

65 See Louise Merrett "New Approaches to Territoriality in Employment Law" (2015) 44 ILJ 53.

66 Contrary to the view of the Court of Appeal we do not see the Rome Convention as being of moment; this given that it was not engaged by the facts of *Crofts*.

least consistent with the view that statutory employment rights have a sui generis character, the application of which is not necessarily dependent on the proper law of the employment agreement. As well, the subsequent conduct of Cathay Pacific in relation to pilots based outside of Hong Kong, along with the absence of any obvious difficulties with the practical application of *Crofts* to peripatetic employees, suggest that the approach adopted in *Crofts* is not impracticable to apply.

[67] That the Employment Court has jurisdiction in respect of employment agreements governed by foreign law is assumed by reg 31A of the Employment Court Regulations. So in this respect, the position in relation to the 2000 Act is at least partly comparable to that created by s 204 of the UK Act. And although there is no clear statement in the 2000 Act that the right not to be discriminated against can apply to employment agreements governed by foreign law, we are satisfied that the legislative scheme as a whole can only sensibly be interpreted on the basis that it does so apply.

[68] The general right not to be discriminated against provided by s 103(1)(c) sits alongside the rights not to be sexually or racially harassed (s 103(1)(d) and (e)). Sexual or racial harassment is wrong irrespective of what an employment agreement may say (or not say). The prohibition of such conduct is in the nature of a "legislative requirement" addressed to conduct and the only significance of the employment relationship is that it provides the context in which the conduct is legislatively addressed. The rights not to be sexually and racially harassed are not, in any sense, contractual and there is therefore no sensible reason for confining them to employment relationships governed by the law of New Zealand. Accordingly, they are not excluded by even a bona fide choice of another system of law as the proper law of the employment agreement. Instead, they are breached by any conduct which occurs within New Zealand. This being so in relation to sexual and racial harassment, it would be difficult, on ordinary principles of statutory construction, to reach a different conclusion in respect of the right not to be discriminated against.

[69] The right not to be discriminated against by reason of age is one of a number of non-discrimination rights recognised in s 105 of the 2000 Act and borrowed from the HRA, including the rights not to be discriminated on grounds of sex, race, colour

and sexual orientation. These are free-standing rights, that is, rights not dependent on, or closely related to, the terms of the employment agreement between the parties. Once again, the only relevance of such agreement is that it, and the associated employment relationship, provide the context in which the rights exist. The rights apply to conduct which occurs in New Zealand. It follows that a Hong Kong choice of law would not immunise NZBL from liability in respect of such breaches as occurred in New Zealand. And if it is the case – and Mr Waalkens was not inclined to argue to the contrary – that NZBL would not be so immunised from liability in respect of discrimination of those other kinds, it is difficult to see why such immunity should exist in relation to discrimination on grounds of age. Indeed, we cannot see a credible statutory interpretation route by which such a result could be arrived at.

[70] Looking more broadly at the HRA, a "proper law of the contract" limitation of the kind contended for is not consistent with the scheme of the statute. Sections 24 and 26 of the HRA envisage the application of the HRA in circumstances of the kind involved in this case. In such circumstances – with aircraft crew, mariners and those who work wholly or predominantly outside of New Zealand – it is inherently likely that the proper law of the employment agreements will not be that of New Zealand. But this is not identified as providing an exclusion. And more generally, it might be thought to be contrary to the policy of the HRA to exclude its operation in relation to acts of discrimination which occur in New Zealand merely because the proper law of the employment agreement is not that of New Zealand. We thus agree with the view expressed by Ellen France J at [88] of her reasons.

[71] For the reasons we have outlined we are satisfied that the right not to be discriminated against on grounds of age is not limited to employment relationships where the employment is governed by New Zealand law. Given this, its territorial application must be determined by reference to other criteria. In recent cases from the United Kingdom, the issue has been put in indeterminate terms: that is whether the employment relationship is so connected with Great Britain as to justify the application of the right. And the UK Act has been held to apply to employees whose work is conducted wholly outside of the United Kingdom. The issue in the present

appeals is rather more straight-forward, given that Messrs Brown and Sycamore are based in New Zealand.

[72] To adapt the language of Lord Hoffmann in *Crofts*, there can be no doubt that the paradigm case for the application of pt 9 remedies is that of an employee working in New Zealand at the time it is alleged that the personal grievance right was infringed. This necessarily means that there is a decision to be made in the case of someone who works both in and outside New Zealand. As we have already explained, the statutory context (including the HRA and Employment Court Regulations) shows that, at least in respect the right not to be discriminated against on grounds of age, the right does apply to such a person.

[73] As will be apparent, our focus in this case is the right not to be discriminated against on grounds of age. We leave undetermined the territorial scope of the other personal grievance rights, and in particular, the right not to be unjustifiably dismissed (in cases not involving unlawful discrimination).

Disposition

[74] The appeal is allowed and the judgment of the Employment Court is restored. The order for costs made in the Court of Appeal is set aside. NZBL is to pay Messrs Brown and Sycamore costs in respect of the Court of Appeal hearing to be fixed by that Court and in respect of this appeal of $25,000 and reasonable disbursements. We certify for two counsel.

ELIAS CJ, O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

[75] We agree that the appeal should be allowed and the judgment of the Employment Court be restored. We also agree that costs should be dealt with as set out in the judgment of William Young J.[67] In reaching these conclusions, we broadly agree with the approach adopted by William Young J. In particular, we agree that the effect of the legislative scheme is that the appellants are protected by the age

[67] Above at [74].

discrimination provisions in the Employment Relations Act 2000 (the 2000 Act).[68] We would, however, express our reasons a little differently, as we now explain.

A question of statutory interpretation

[76] The starting point is a question of interpretation of the 2000 Act. In that fundamental respect we, like William Young J, differ from the approach taken in the Court of Appeal.[69]

[77] We see the matter as one of statutory interpretation because of the sui generis nature of employment law.[70] As the written submissions for the Human Rights Commission record, the employment relationship "is not an ordinary contractual relationship involving the attendant levels of party autonomy".[71] The object of the 2000 Act makes that plain.[72] That is apparent, in particular, from the reference in s 3(a) to building "productive employment relationships through the promotion of good faith" in the employment relationship "(i) by recognising … also … a legislative requirement for good faith behaviour; and (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; …".

[78] The principal relevance of *Lawson v Serco Ltd* (*Crofts*) to this case in our view is the recognition by Lord Hoffmann of the nature of employment law and how that affects the approach to the consideration of territorial application.[73] The other aspect of *Crofts* of relevance is the conclusion that the home base of a peripatetic employee was the determinant that the law of the base applied.[74]

[79] Lord Hoffmann noted first the general principle that, prima facie, legislation is territorial in application.[75] It followed from that principle that all parties agreed

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68 Above at [8] and [71]–[72].

69 *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 (Harrison, Miller and Winkelmann JJ) [*Brown* (CA)].

70 *Lawson v Serco Ltd* [2006] UKHL 3, [2006] 1 All ER 823 [*Crofts*] at [6]; and see Employment Relations Act 2000, s 3(a)(i) and (ii).

71 The approach we adopt is that advanced by the Human Rights Commission in its submissions.

72 Employment Relations Act, s 3(a).

73 *Crofts*, above n 70, at [6].

74 At [28]–[30].

75 At [6]. See also *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [15] per Elias CJ and at [30]–[31] per Tipping J delivering the judgment of Blanchard, Tipping, McGrath and Wilson JJ.

that the scope of s 94(1) of the Employment Rights Act 1996 (UK) (the UK Act), which was in issue in that case and dealt with unfair dismissal, had some "implied territorial limits".[76] The difficulty was in identifying those limits. Lord Hoffmann continued:[77]

> Where legislation regulates the conduct of an individual, it may be easy to construe it as limited to conduct within the area of applicability of the law, or sometimes by United Kingdom citizens anywhere (see *Re Sawers, ex p Blain* (1879) 12 Ch D 522, [1874–80] All ER Rep 708). But s 94(1) provides an employee with a special statutory remedy. *Employment is a complex and sui generis relationship, contractual in origin but, once created, having elements of status and capable of having consecutive or simultaneous points of contact with different jurisdictions.* So the question of territorial scope is not straightforward. In principle, however, the question is always one of the construction of s 94(1). As Lord Wilberforce said in *Clark v Oceanic Contractors Inc* [1983] 1 All ER 133 at 144, [1983] 2 AC 130 at 152 it requires–
>
> > 'an inquiry to be made as to the persons with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?'

[80] The question was also treated as one of statutory construction by the High Court of Australia in *Old UGC Inc v Industrial Relations Commission of New South Wales*.[78]

[81] The Court of Appeal distinguished *Crofts* on the basis there was no New Zealand equivalent to s 204(1) of the UK Act, the Rome Convention[79] governed choice of law in the United Kingdom,[80] and s 94(1) fell to be construed against its particular legislative history.[81]

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76 At [6].

77 At [6] and see also at [23] (emphasis added).

78 *Old UGC Inc v Industrial Relations Commission of New South Wales* [2006] HCA 24, (2006) 225 CLR 274 at [23] per Gummow, Hayne, Callinan and Crennan JJ.

79 Convention on the law applicable to contractual obligations 1605 UNTS 59 (opened for signature 19 June 1980, entered into force 1 April 1991) [Rome Convention], as incorporated in sch 1 to the Contracts (Applicable Law) Act 1990 (UK).

80 *Brown* (CA), above n 69, at [46], and see also at [54]. The Court also noted that the base test in *Crofts* was seen as necessary to ensure redress: at [55].

81 At [47].

[82] Section 204(1) states that:

> **204 Law governing employment**
>
> (1) For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom, or not.

[83] The relevance of the Rome Convention, the Court of Appeal said, was the recognition that overriding provisions of English law can apply "irrespective of the law otherwise applicable to the contract".[82]

[84] As the Court of Appeal noted, Lord Hoffmann made no reference to either s 204(1) or to the Rome Convention.[83] Nor did Lord Hoffmann refer to the choice of law provision applicable to Mr Crofts' contract which, as a Cathay Pacific pilot, was presumably to the same effect as that applying to the appellants' contracts in this case. We consider the absence of any reference to these matters is likely to be explicable by the Court's view of the nature of the employment relationship in law.[84]

[85] This aspect of *Crofts* is not undermined by the two subsequent cases in the Supreme Court of the United Kingdom dealing with expatriate employees.[85]

[86] It is not necessary to decide whether the 2000 Act as a whole applies but there is nothing in the 2000 Act or the Human Rights Act 1993 that would suggest that the approach taken in *Crofts* is excluded by clear statutory language to the contrary. It follows also that we, too, leave open the possibility a different approach may apply to the right not to be unjustifiably dismissed.[86] But where the issue

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82 At [46], citing the Rome Convention, above n 79, art 7.2.

83 At [46].

84 In an article critical of the approach in *Crofts*, Uglješa Grušić described the "common law of conflict of laws of employment" approach as treating "statutory claims" as in a different class from "contractual and tortious claims": Uglješa Grušić "The Territorial Scope of Employment Legislation and Choice of Law" (2012) 75 MLR 722 at 751 and see also at 722. The author said that decisions about "the territorial scope of the statutory rights conferred by employment legislation forming part of English law was regarded as an issue entirely disconnected from the choice-of-law process": at 751. This was described as the "conventional view": at 751. Compare Louise Merrett "New Approaches to Territoriality in Employment Law" (2015) 44 ILJ 53 at 65 and 74.

85 *Duncombe v Secretary of State for Children, Schools and Families (No 2)* [2011] UKSC 36, [2011] 4 All ER 1020; and *Ravat v Halliburton Manufacturing & Services Ltd* [2012] UKSC 1, [2012] 2 All ER 905. We agree with the discussion of these two cases in the judgment of William Young J above at [64]–[65].

86 See above at [57].

relates to the application of the anti-discrimination provisions, as we now discuss, the position is clear cut.

Application to the present case

[87] Turning then to the purpose and scheme of the 2000 Act as it affects the appellants' case, we have referred to the object of the 2000 Act in s 3(a)(i) and (ii).[87] The relevant personal grievance provision is s 103(1)(c) which deals with the situation where the employee has been discriminated against in his or her employment. Sections 104 and 105 of the 2000 Act link unlawful discrimination to discrimination on the prohibited grounds in s 21(1) of the Human Rights Act. Those grounds include age.[88] The value attached to these matters is reflected also in the protection against unlawful discrimination in s 19 of the New Zealand Bill of Rights Act 1990.

[88] It is relevant that the exceptions in relation to discrimination in s 106 of the 2000 Act incorporate the exceptions in the Human Rights Act, in particular, those in s 24 relating to the crews of ships and aircraft and in s 26 dealing with work performed outside of New Zealand.[89] The indication from these exceptions is that consideration has been given to the extent of the territorial application of the 2000 Act.[90]

[89] On the factual findings made by the Employment Court Judge, the appellants would come within the scope of the 2000 Act and not within any of the exceptions. Judge Corkill reached his finding that the appellants were based in New Zealand[91] on the following factors:[92]

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87 See above at [77].

88 Employment Relations Act, s 105(1)(i).

89 As an alternative to a personal grievance, employees claiming discrimination on a prohibited ground may, instead of pursuing a personal grievance, make a complaint under the Human Rights Act 1993: Employment Relations Act, s 112(1)(b). A personal grievance is, however, the only option if the employee wishes to challenge dismissal: s 113.

90 The amendments made by the Employment Relations Amendment Act (No 2) 2004, discussed by William Young J above at [36]–[38] and [42]–[44], are further indicators that consideration has been given to the extent of the territorial application of the 2000 Act.

91 *Brown v New Zealand Basing Ltd* [2014] NZEmpC 229, [2014] ERNZ 770 at [84].

92 At [83].

a) …, pilots who wished to be employed … by [New Zealand Basing Ltd (NZBL)], were required to resign their employment with Cathay Pacific, and to do so irrevocably.

b) Thereafter, their base – described as their "Home Base" – was Auckland.

c) … . It was a specific requirement that they reside and continue to reside in New Zealand. If they wished to take up a Home Base in another country, their employment with NZBL would terminate.

d) Their tours of duty began and ended in Auckland. Even if the flying circle began elsewhere, they would be positioned from Auckland.

e) They were paid a salary designed to reflect a lower cost of living than that experienced in Hong Kong.

f) They were paid in New Zealand dollars, albeit to an account held in Hong Kong as a matter of administrative convenience.

g) As an overseas company, NZBL should have been registered under Pt 18 of the Companies Act 1993 as a company carrying out business in New Zealand.

h) Various New Zealand statutes apply to the [appellants'] circumstances as a result of their employment, … (when they are working in New Zealand).

i) The [appellants] and their dependants are paid New Zealand medical insurance.

j) Tax is now deducted according to a Double Tax Agreement entered into between the Hong Kong Government and the New Zealand Government. This is due to a range of factors taken into account by those Governments, and not because of any negotiation between the parties to this proceeding.

[90] Against this legislative and factual background s 238 of the 2000 Act reinforces the position we have taken. Section 238 says "[t]he provisions of [the 2000 Act] have effect despite any provision to the contrary in any contract or agreement". That makes explicit the proposition, which we accept, that the parties' choice of law provision is irrelevant in this case.

Conclusion

[91] 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 very odd to construe the 2000 Act to allow discrimination in the employment context in relation to persons in the appellants'

position, solely on the basis of the parties' choice of law. For these reasons, we conclude that the intention was for the anti-discrimination provisions to apply to employment relationships such as those between the appellants and New Zealand Basing Ltd.

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