IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2020] NZEmpC 35
EMPC 396/2018

IN THE MATTER OF	a referral of a question of law from the Employment Relations Authority
BETWEEN	MISHELE RADFORD Plaintiff
AND	CHIEF OF NEW ZEALAND DEFENCE FORCE Defendant
AND	MINISTRY OF FOREIGN AFFAIRS AND TRADE Intervener

Hearing:	19 and 20 May, 12 August 2020 (Heard at Wellington)
Court:	Judge Corkill Judge Smith Judge Holden
Appearances:	G Lloyd, counsel for plaintiff J Catran and T Witten-Sage, counsel for defendant R Warren and M Andrews, counsel for intervener
Judgment:	24 March 2021

JUDGMENT OF THE FULL COURT

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[1] Mishele Radford was employed by the Chief of Defence Force (CDF) to work for the New Zealand Defence Force in Washington DC. She worked in the United States of America for eight years before her employment was abruptly ended in 2018. In terminating Ms Radford's employment, the CDF relied on the law in Washington

DC, which he understood allowed him to dismiss her immediately, without reasons or an investigation, because he regarded her as an "at will" employee as that expression is understood in the USA. Ms Radford is dissatisfied with the way her employment ended.

[2] Ms Radford has issued proceedings in New Zealand, where she now lives, claiming to have been unjustifiably dismissed, and to have been disadvantaged by the CDF's decision. The litigation gives rise to two main issues; does USA or New Zealand law apply to the employment agreement and subsequent dispute and can Ms Radford's case be heard in New Zealand?

[3] The CDF considered that the agreement is governed by USA law and the proper place for the litigation is in Washington DC. Ms Radford disagreed and considered that New Zealand law applies and that she should be entitled to take action in New Zealand.

[4] In response to Ms Radford's proceedings the CDF has filed a protest to the jurisdiction of the Employment Relations Authority and subsequently the Court.

The determination

[5] Arising from the CDF's protest an application was made for a question of law to be removed to the Court without the matter first being investigated. The Authority agreed and the following preliminary issue was removed to the Court:[1]

> The question is whether the New Zealand employment institutions and the provisions of the Employment Relations Act 2000 apply to an employment agreement between the Chief of Defence Force and a person in Ms Radford's situation.

[6] In evaluating whether the matter should be removed to the Court, the Authority received evidence from the Divisional Manager for Human Resources for the Ministry of Foreign Affairs and Trade (MFAT), as well as from the parties.

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1 *Chief of New Zealand Defence Force v Radford* [2018] NZERA Wellington 106 (Member Campbell) at [20].

[7] Subsequently, MFAT applied for and was granted intervener status in this proceeding.[2] It sought leave to appear at the hearing, to make submissions, and to file affidavit evidence regarding the nature of employment of staff by that department overseas. The basis of the application was the similarity between s 10 of the Foreign Affairs Act 1988 under which MFAT employs some staff overseas and s 90A of the Defence Act 1990. The outcome of this proceeding was considered to potentially have an effect on those employment relationships.[3]

[8] MFAT participated by making submissions and relying on an affidavit by its Principal Advisor, Organisational Capability Team.

Agreed Statement of Facts

[9] The parties prepared an agreed statement of facts supplemented by affidavits from Ms Radford and Nigel Lucie-Smith, who is a legal advisor employed by the CDF. The following description of events is taken from those sources.

[10] On 4 October 2010, Ms Radford started working for the New Zealand Defence Force (NZDF) in Washington DC as a Finance/Administration Assistant. Ms Radford is a New Zealander who was recruited while living and working in Australia.

[11] To be able to work lawfully in the USA, Ms Radford had to secure a visa. Being employed to work for the NZDF made her eligible for an A-2 visa, authorising her to be in the USA indefinitely so long as she worked for the NZDF. The visa, however, did not attract diplomatic status.

[12] What took Ms Radford to the USA was her successful response to an advertisement for a vacancy the NZDF advertised on its intranet and the New Zealand Embassy website in early August 2010. Her attention was drawn to the vacancy by an email sent to her by the Business Manager in the New Zealand Defence Staff in Washington DC, Ms Talei Ruby. Ms Ruby would eventually become Ms Radford's line manager.

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2 *Radford v Chief of New Zealand Defence Force* [2019] NZEmpC 156.
3 At [7].

[13] Ms Radford was offered the job on 23 August 2010. The job offer, a draft individual employment agreement and a job description were sent to her by Ms Ruby. She eventually received a copy of New Zealand Defence Staff Washington's Standing Orders and the Civilian Employment Manual 2009.

[14] Ms Radford signed the individual employment agreement in August 2010 and her job was to begin on 4 October 2010. Steps were taken by the New Zealand Defence Staff to obtain a visa and Ms Radford started work as anticipated. The NZDF operates from part of the New Zealand Embassy in Washington DC and that is where Ms Radford worked.

[15] In 2011, Ms Radford transferred from her administrative position to become Personal Assistant to the Head of the New Zealand Defence Staff (Washington). The move was an internal one and the position was not advertised, but a new employment agreement was signed.

[16] Ms Radford worked as a Personal Assistant until she successfully requested a return to her former position. Her return was effective from 20 August 2012. Another employment agreement was signed to record the move back to working in the Finance/Administration role.

[17] In what would begin the final stage of Ms Radford's employment, in November 2014, she signed a new employment agreement as a Business Support Officer and three other documents:

(a) new terms of employment;

(b) an acknowledgment of receipt of the NZDF Civil Staff Code of Conduct 2006; and

(c) a position description for Business Support Officer at the New Zealand Defence Staff, Washington.

[18] Just short of two years later, in July 2016, Ms Radford signed a position description for Business Support Officer (Finance).

[19] Ms Radford was dismissed on 7 June 2018, by Commodore David Gibbs who was by then the Defence Attaché and Head of New Zealand Defence Staff in Washington DC. Her employment was ended by a letter prepared in advance and handed to her at a meeting that day. Her employment ended immediately, but she was paid out the 30 days' notice required by the employment agreement. Certain contractual benefits, such as medical insurance, were extended to coincide with the 30 days' notice that could otherwise have been given.

[20] Commodore Gibb's letter advised Ms Radford that her right to be in the USA was adversely affected by the dismissal, but her visa would not be cancelled until the end of the 30-day notice period. The dismissal meant Ms Radford needed to promptly leave the country.

[21] Throughout the time Ms Radford was in Washington DC, she was regarded by the NZDF as a locally employed civilian having been employed under s 90A of the Defence Act. Having been employed on that basis she paid her own way to Washington DC and met many of her expenses personally.

The employment agreements in more detail

[22] The first employment agreement Ms Radford signed purported to be between her and the head of the New Zealand Defence Staff. While not material, at all times her employer was the CDF, whose position is created by the Defence Act.[4] This employment agreement was subject to a three-month trial followed by a two-year appointment ending on 4 January 2013 unless it was otherwise terminated.

[23] Six weeks' notice was required to terminate this agreement. Medical and dental insurance was paid for by the NZDF. A gross salary was paid and Ms Radford was expected to ascertain her own liability for and pay taxes in New Zealand or the USA.

[24] The employment agreement provided that it could be terminated for unsatisfactory work or conduct and that "serious on the job infractions" could lead to

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4 Section 71(a).

instant dismissal. The examples of these infractions included theft, fraud, unacceptable public behaviour or being convicted of a criminal offence. As to poor performance, the agreement provided for an oral warning, counselling followed by a formal warning, and further counselling before the employee was exposed to the risk of dismissal.

[25] An acknowledgment at the end of this agreement stipulated that any unresolved dispute would be "settled in accordance with the US employment law in a US court of law".

[26] A replacement employment agreement was concluded in January 2011, again for two years. This agreement was for the position of Personal Assistant to the Head of Defence Staff in Washington. Despite the change in job and job description, the core elements in the agreement remained the same as the previous agreement. Six weeks' notice of termination was required. Unsatisfactory work could lead to warnings and counselling before dismissal. Again, this agreement recorded that any dispute was to be settled in accordance with "US employment law in a US court of law."

[27] When Ms Radford returned to the Finance/Administration role another employment agreement was concluded. As with the previous agreements, this one also provided for disputes to be settled in accordance with US employment law and in a US court.

[28] Before the final employment agreement was signed, the NZDF implemented changes for employees it considered to be locally employed civilians. In about July 2014, a new human resources framework was approved that was intended to apply to all locally employed civilians. Initial approval of this framework was limited to employees in smaller overseas postings, not including Washington DC. Ultimately it was extended to include staff located in Washington and Canberra.

[29] The stated purpose of this framework was to ensure consistency and "equity" between locally employed civilians and to apply where possible the "principles of

employment for the NZDF Civil Staff to the employment of LECs".[5] Before the framework was reviewed, guidance on the employment of local civilians was provided by Defence Order 47(2), although that had come to be seen as inadequate.

[30] From March 2014, Washington-based NZDF employees regarded as locally employed civilians, including Ms Radford, were informed of the proposed changes. Meetings were held to consult those employees about them.

[31] Commodore Keating, who at the time was the Defence Attaché in Washington DC, advised Ms Radford by letter dated 16 October 2014 about the review of this framework and that it was intended to apply to all locally employed civilians. She was informed that the new framework was to be effective immediately, but was offered a choice between remaining on her then current terms and conditions of employment or accepting new ones.

[32] Commodore Keating's letter explained what would happen if the new terms and conditions were accepted. A salary increase was only available if the new terms and conditions of employment were accepted. If they were accepted he explained that documents comprising the employment agreement would be:

(a) The letter of offer (that is, the letter of 16 October 2014).

(b) A position description, which was attached to the letter.

(c) The 2014 individual employment agreement, a draft of which was also attached to the letter.

(d) The NZDF Locally Employed Civilian's Code of Conduct, which was not attached to the letter.

[33] Commodore Keating's letter informed Ms Radford that if the letter was accepted, collectively the letter and the individual employment agreement would be referred to as the Employment Documentation. He also informed her that the letter of

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5 LEC is a common abbreviation for Locally Employed Civilians.

offer was to prevail over any inconsistency between anything offered previously and the new terms and conditions of employment.

[34] The differences between Ms Radford's then current terms and conditions of employment and the new offer were explained so she could make a comparison. The letter of offer contained an acknowledgment that, in accepting the new terms and conditions of employment, Ms Radford:

(a) agreed to the new terms and conditions of her employment as enclosed with the letter;

(b) had read and understood the terms and conditions of the Employment Documentation;

(c) had read and signed the "NZDF LEC Civilian Staff Code of Conduct";

(d) could seek independent advice about the offer and Employment Documentation and that she had a reasonable opportunity to seek advice; and

(e) accepted the new Employment Documentation as applying to her employment with the NZDF.

[35] Commodore Keating's letter provided for an election to be made to accept the offer by completing an attached form. Ms Radford signed the form.

[36] Previously, in emails to Ms Radford and to other staff, Commodore Keating had answered several questions about what was affected by the changes. In one of those emails he referred to the CDF being the employer of locally employed civilians, going on to advise them that "they are not deemed to be NZDF civilians" before carrying on to say "as such, LEC's are distinctively different from NZDF Civil Staff members based in NZ and employed under NZ employment legislation. The fundamental difference is they are primarily governed by local legislation".

[37] What then did Ms Radford's new employment agreement provide? The introduction to this agreement described her as having been employed as a "locally engaged civilian staff member" as defined in s 90A of the Defence Act. The agreement stated that New Zealand legislation did not apply and instead that it would be subject to "United States of America Labor Laws and legislation". Unlike the previous agreements, this one did not provide that any unresolved dispute was to be litigated in a court in the USA.

[38] This employment agreement, together with the letter of offer, was stated to be a full record of the terms and conditions of employment. To that end, it provided that previous written or oral agreements, understandings or undertakings, or past custom or practice were superseded.

[39] Despite the beginning of the agreement referring to USA law applying to it, at the end of it, immediately above each party's signature, there was a section dealing with concepts from New Zealand employment law, referring to employment relationship problems. Under that heading provision was made for personal grievances and disputes and for an informal problem resolution procedure. Although the expression "personal grievances" was used in this section of the agreement the term was not defined in it. The expression was, however, used in the code Ms Radford acknowledged receiving in the materials supplied to her, discussed shortly.

[40] In a different section of the agreement labelled "Problem resolution definition" what was described as an employment relationship problem included any dispute about the interpretation, application or operation of the agreement. The problems included any situation where Ms Radford believed she had been unfairly treated, unjustifiably dismissed, or had suffered from some other form of personal grievance extending to issues relating to or arising out of the employment relationship.

[41] The agreement included a commitment by the parties that they would try to resolve any employment relationship problem expeditiously and, if a matter remained unresolved, to start the problem resolution procedure. That procedure was not stated in the agreement.

[42] While the letter of offer stated that the code of conduct for locally employed civilians was to be signed, Ms Radford signed something different. She was provided with, and signed a receipt for, the "NZDF Civil Staff Code of Conduct 2006" (the Code).

[43] The decision to have Ms Radford sign the Code was deliberate; neither the protest to the Court's jurisdiction, or the agreed statement of facts, called into question what happened. There is no evidence that there was a separate code of conduct for locally employed civilians.

[44] The act of signing the Code was designed to incorporate it into the documents comprising the employment agreement and is significant. The Code refers to and applies the Employment Relations Act 2000, to all persons appointed as members of the NZDF Civil Staff regardless of their location in the world.[6]

[45] The Code was issued by the CDF under s 60 of the Defence Act. It is comprehensive, describing the minimum standards of integrity and conduct applying to members of the Civil Staff and guidelines about standards of behaviour and performance. Relevantly, it contains detailed provisions for dealing with poor performance, misconduct and serious misconduct. Where poor performance is in issue, there is a process for giving warnings before a dismissal is contemplated.

[46] Material to Ms Radford's proceedings, however, is that the Code refers to personal grievances and, in that way, is linked to the employment agreement. Under the Code, every NZDF civilian employee has the right to submit a personal grievance "in terms of the Employment Relations Act 2000" because of a claim of:

(a) unjustified dismissal;

(b) an unjustified disadvantage;

(c) discrimination in employment;

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6 Under pt 5 of the Defence Act.

(d) sexual harassment; or

(e) being subject to duress in relation to membership or non-membership of an employee's organisation.

[47] Consistent with the Employment Relations Act, the Code states that a personal grievance must be submitted within 90 days. A copy of the personal grievance procedure was annexed to the Code. A procedure was provided for the settlement of personal grievances, culminating in the ability to refer a personal grievance to the Employment Relations Authority. Demonstrating the comprehensive nature of the Code, it also contained provisions dealing with settling general disputes about the interpretation, application or operation of employment agreements.

[48] As will be apparent from this overview, there is a tension in the documents presented to Ms Radford, between providing for USA law to apply but in the same agreement using concepts from New Zealand employment law and using a Code designed to apply New Zealand employment law.

Personal grievances and response

[49] Immediately after being dismissed Ms Radford wrote to the then CDF, Lieutenant-General Tim Keating, raising concerns about the termination of her employment. Her email of 12 June 2018 acknowledged being a locally engaged civilian and that her termination was in accordance with her employment agreement but contended that it was unfair and not within the ethos of a good employer.

[50] On 2 July 2018 Ms Radford's lawyer, Mr Lloyd, raised a personal grievance on her behalf which was responded to by Mr Lucie-Smith. Mr Lucie-Smith described Ms Radford as being employed under s 90A of the Defence Act and his reply ended with:

> It is NZDF's position that it is United States labour laws which must apply to this matter and the United States is the appropriate jurisdiction to deal with this matter.

[51] Details for the NZDF's United States-based lawyer were provided by Mr Lucie-Smith and an address for service was nominated as the New Zealand Defence Attaché, in the New Zealand Embassy in Washington DC.

[52] Ms Radford's invitation to attend mediation was declined, although the NZDF was prepared to meet her and Mr Lloyd to consider what remedies may be available in the USA. Mr Lucie-Smith's letter advised her that the NZDF's American lawyer had been instructed to meet with her, at her convenience, at the New Zealand Embassy in Washington DC.

[53] There was no meeting. At the end of August 2018, a statement of problem was lodged in the Authority.

The pleadings

[54] Ms Radford filed a statement of claim pleading that she had a personal grievance against the CDF, for unjustified dismissal, for a breach of the employment agreement between them and for a breach of the Defence Act. There were ancillary allegations of a breach of the duty of good faith by misleading or deceiving her by maintaining that she must be employed as a locally employed civilian under s 90A of the Defence Act.

[55] Two reasons were pleaded to support the claim of unjustified dismissal, namely that she was dismissed without cause and without any process being undertaken beforehand.

[56] The alleged breach of the employment agreement turns on the dismissal not following the procedural steps in the Code. The alleged breach of the Defence Act was that ss 61A and 90A had been misunderstood and misapplied by the CDF. Specifically, that Ms Radford ought not to have been employed as a locally employed civilian when she was, in fact, a member of the Civil Staff and was subject to New Zealand law.

[57] As he had done in the Authority, the CDF appeared under protest to the Court's jurisdiction to hear and determine the proceedings. The grounds relied on in his protest were:

(a) The Employment Relations Act does not apply to locally employed civilians appointed under s 90A of the Defence Act, and the Authority (and the Court) has no jurisdiction to inquire into matters involving locally employed civilians under that section.

(b) The terms and conditions of locally employed civilians under s 90A are specified or prescribed by the CDF. Ms Radford's terms and conditions were in employment agreements entered into in the USA and her duties were performed there.

(c) At the relevant time, her terms and conditions of employment were in an agreement of 18 November 2014, which provided that it was subject to USA "Labor Laws and legislation".

[58] The CDF maintained that the appropriate forum for determining Ms Radford's claims was a court in the USA, rather than in the Authority and/or Employment Court.

[59] Although the CDF appeared under protest there were no applications to set aside, to strike out or stay the statement of claim. However, in the circumstances, that is not material to this decision.

The issues before the Court

[60] While the case was initially prepared, and presented, on the basis of the preliminary issue described by the Authority, it became apparent during submissions that a more nuanced approach was required. After receiving submissions from counsel, the preliminary questions submitted to the Court became:

> … whether the Authority and/or the Court have jurisdiction to consider the claims brought by Ms Radford against the Chief of the New Zealand Defence Force:

a) Because pt 5 of the Defence Act 1990 applies to her circumstances so that New Zealand law is the applicable law;

b) Alternatively, because the application of conflict of laws principles confirms that New Zealand law is the applicable law;

c) Alternatively:

(i) Because the Authority/Court may consider an application to apply the law of Washington DC on forum conveniens principles; and

(ii) Because New Zealand is the appropriate forum.

[61] The following discussion addresses the issues in each of the questions submitted to the Court.

The provisions of the Defence Act

[62] Both parties rely on the Defence Act but in diametrically opposed ways. Ms Radford's case was that under the Defence Act the provisions of the Employment Relations Act apply to all civilian staff, including her, so that there is no justiciable issue about the parties having made a choice of law in their employment agreement. If that is correct, it follows that Ms Radford could not have been employed and dismissed as an "at will" employee.

[63] For the CDF, the argument was that s 90A of the Defence Act allowed him to employ Ms Radford overseas, as a locally employed civilian, and the parties were free to agree to have their agreement governed by local law. If that is correct, it follows he could employ and dismiss her as an "at will" employee in the USA.

[64] We begin by summarising the provisions of the Defence Act, which came into force on 1 April 1990.

[65] The Defence Act applies in New Zealand and to all naval ships and defence areas outside New Zealand.[7] It is divided into eight parts. Part 1 deals with the Armed Forces and their constitutional position, including the Governor General's powers to raise and maintain them.[8] This part creates the position of the CDF.[9]

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7 Section 4(1).
8 Section 5.
9 Section 8.

[66] Part 2 constitutes the Defence Force which comprises the Armed Forces of New Zealand and the Civil Staff appointed under s 61A. Part 3 contains the requirements necessary to discharge the functions of the CDF who is responsible for the general conduct of the NZDF and its management.[10] One of those functions is issuing Defence Force Orders.[11] The balance of pt 3 deals with the administrative structure and operation of the NZDF.

[67] The terms and conditions of service for personnel in the Armed Forces is in pt 4. Under s 45(5), nothing in the Employment Relations Act applies to members of the Armed Forces.

[68] Part 5 is dedicated to the terms and conditions of employment of the members of the Civil Staff. This part of the Defence Act is comprehensive and begins at s 59 with a statement of general principles which the CDF is required to adopt. For example, the CDF is to operate a personnel policy complying with the principles of being a good employer, including providing good and safe working conditions and an equal employment opportunities programme.[12] The CDF is empowered to issue a code of conduct covering the minimum standards of integrity and conduct to apply to the Civil Staff.[13]

[69] Appointment to the Civil Staff is provided for in s 61A. Under this section, suitable persons who are not members of the military are to be appointed for the efficient conduct of Defence Force business.[14] Vacancies must be notified and there is a process to review appointments in response to a complaint from a member of the Civil Staff.[15] Appointments are to be made on merit.[16]

[70] Finally, in this discussion of pt 5, s 69 provides that the Employment Relations Act applies to the Civil Staff.[17] Consistent with applying the Employment Relations

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10 Section 25(1)(b)(ii)–(iii).
11 Section 27(1); such orders are not to be inconsistent with the Armed Forces Discipline Act 1971 or any other enactment.
12 Section 59(1)–(2); see also the recognition of the aims and aspirations, employment requirements, and need for the greater involvement of, the Māori people.
13 Section 60.
14 Section 61A(1).
15 Sections 63 and 67(1).
16 Section 62.
17 Substituted on 2 October 2000 by s 240 of the Employment Relations Act 2000.

Act, s 71 recognises the ability for a member of the Civil Staff to pursue a personal grievance. Where that happens, under s 71(a), the CDF is the employer.

[71] Parts 5A, 6 and 7 cover superannuation, cadet forces and offences punishable by courts respectively.

[72] The remaining part of the Defence Act is pt 8 which includes s 90A. This part deals with miscellaneous matters, providing for diverse subjects such as producing an annual report, that arms issued to members of the Defence Force remain the property of the Crown, and for abolishing the Nelson Rifle Prize Fund.[18]

[73] Importantly, pt 8 begins with s 90A and the ability to employ local civilians. It reads:

> **90A Locally employed civilians**
>
> The Chief of Defence Force may employ persons who are outside New Zealand to undertake work for the Defence Force outside New Zealand on terms and conditions specified or prescribed by the Chief of Defence Force.

[74] There are no other sections in pt 8 supplementing s 90A. Locally employed civilians are not mentioned anywhere else. While "Civil Staff" is a term defined in s 2, "locally employed civilian" is not defined. The phrase "locally employed civilian" only appears in the heading of the section.

[75] Finally, before turning to a discussion of the submissions for the parties, s 90A was added to the Defence Act in 2001.[19] Before that amendment there was no separate statutory provision enabling staff to be employed by the NZDF for work not intended to be performed by members of the Civil Staff. While staff were employed other than as members of the Civil Staff, effectively, they were employed under s 10 of the Foreign Affairs Act 1988.

[76] Ms Radford's primary argument is that, properly construed, the Defence Act means she was, and always had to be, a member of the Civil Staff. If that claim is

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18 Sections 91, 92 and 96A.

19 By s 6 of the Defence Amendment Act 2001.

correct the extraterritorial reach of the Defence Act, and its preservation of the application of the Employment Relations Act regardless of where a Civil Staff member worked, would be a complete answer to the CDF's protest to the jurisdiction of the Court.

[77] While Ms Radford's case underwent changes during its presentation, her dominant theme was that the circumstances in which she was employed precluded the CDF from employing her other than as a member of the Civil Staff. As a member of the Civil Staff Ms Radford would enjoy the right to pursue personal grievances under the Employment Relations Act regardless of the 2014 employment agreement. Such a conclusion would render the purported choice of law clause in the employment agreement otiose.

[78] Mr Lloyd accepted that s 90A has to be given meaning but favoured a narrow interpretation. To that end he said the section empowered the CDF to employ civilians, and to have the employment agreement governed by laws of a foreign country, but applied only in limited circumstances. They were where the employee is a citizen of the host country, the work is non-governmental in character, and not conducted in a defence area. It was common ground that Ms Radford worked in a defence area of the Embassy.

[79] Mr Lloyd sought to characterise the Defence Act as creating only two categories of personnel, not three, divided between the Armed Forces and the Civil Staff. He summed up the position by saying while Ms Radford worked in the USA that must be viewed against the fact that, before the Defence Act was enacted, the (former) Ministry of Defence employed staff under the State Sector Act 1988.

[80] Mr Lloyd relied on the Defence White Paper 2016 which set out the Government's defence policy objectives and strategy as illustrating that, as well as providing for defence and security, one facet of the NZDF was to advance economic interests as part of New Zealand's international relationships.[20] Applied to Ms Radford's circumstances, he argued that her job was an integral part of the NZDF's work in the USA. It was part and parcel of maintaining those international

[20] Ministry of Defence *The Defence White Paper 2016* (June 2016) at 2.18.

relationships. He argued that the Bill proposing to amend the Defence Act shone no light on the meaning of s 90A and that it did not expressly say that the purpose was to create a new class of employees who, while employed by the CDF, were not members of the NZDF.

[81] Section 90A was introduced into the Defence Act by the Statutes Amendment Bill 2000, with only a brief explanatory note of what was intended. That explanation was to the effect that it allowed the CDF to employ persons outside New Zealand to undertake work for the NZDF outside New Zealand, and that locally employed civilians would not form part of the NZDF.[21] Mr Lloyd's point was that the explanatory note to the Bill must be wrong because any employee, by reason of being employed, becomes part of his or her employer's organisation.[22]

[82] The purpose behind these submissions, it seemed, was to seek a construction of s 11 of the Defence Act (dealing with the constitution of the NZDF) so that s 90A could be read to say that all civilian employees are necessarily members of the Civil Staff. On this analysis the distinction to be drawn between locally employed civilians and Civil Staff was that for the former, the CDF may determine their terms and conditions so long as they are not inconsistent with the purposes of the Defence Act.

[83] Mr Lloyd also argued that the employment agreement between Ms Radford and the CDF must be governed by New Zealand law, and any disputes dealt with in the Authority and/or Court, because:

(a) the CDF, as the employer, is the Crown;

(b) the employer is based in New Zealand;

(c) the employer's constitutional role includes providing for the defence and security of New Zealand;

(d) Ms Radford is a New Zealand citizen;

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21 Statutes Amendment Bill 2000 (97-1) (explanatory note) at 7.

22 This submission relied on the Employment Relations Act s 6(1)(a).

(e) the work was exclusively governmental;

(f) the work required a security clearance;

(g) Ms Radford's job is part of the NZDF's mission in the USA;

(h) the only connection to the USA was the location of the work; and

(i) the employer, as the Crown, is entitled to rely on sovereign immunity to resist any civil claim in the USA.

[84] Mr Lloyd's submissions had a further limb, that focused on Ms Radford no longer being eligible for a visa, making it difficult to bring her case in the USA. He argued that this further difficulty could lead to an absurd situation where a New Zealand citizen, living in New Zealand, was required to sue the Crown in a foreign court. In essence, this was an argument that the barriers caused by the distance between New Zealand and the USA, as well as any complexities that might emerge over her entitlement to be in that country, limited Ms Radford's rights under s 27 of the New Zealand Bill of Rights Act 1990.[23] This is a submission which is better considered later, when we deal with forum conveniens arguments.

[85] Ms Catran, counsel for the CDF, did not accept attempts to construe the Defence Act so that employees employed under s 90A are members of the Civil Staff. She submitted that the Defence Act imports some, but not all, of the provisions of the Employment Relations Act for some, but not all, of the CDF's employees. She submitted that the definition of Civil Staff in s 2, should not be expanded to those staff members employed under s 90A. In other words, the attempt to stretch the provisions of the Defence Act, so that Ms Radford would be treated as a member of the Civil Staff, required unnecessarily adding to the statutory definition in a way that could not be justified. She went further and argued that just stretching the language would not

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[23] Section 27 is about the right to justice; every person has the right to the observance of the principles of natural justice by any tribunal or public authority that has the power to make a determination about that person's rights, obligations, or interests protected or recognised by law. Section 27(3) provides that every person has the right to bring civil proceedings against, and to defend civil proceedings brought by the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

be enough, s 90A would have to be read in a correspondingly narrow way to achieve the outcome desired by Ms Radford.

[86] We agree with Ms Catran. Mr Lloyd's argument strains the language of the Defence Act beyond its capacity and we do not accept his analysis of s 90A.

[87] The meaning of an enactment must be ascertained from its text and in light of its purpose.[24] Ascertaining the meaning of an enactment can include indications in headings to Parts and sections, its organisation and format.[25] Even if the meaning of the text is plain, isolated from its purpose, there should be a cross-check against that purpose.

[88] We consider the text of s 90A is clear; the CDF is able to employ persons to work outside New Zealand for the NZDF on terms and conditions he specifies or prescribes without that person being a member of the Civil Staff. The text of the section does not contain any reference to Civil Staff or to pt 5.

[89] Likewise, there is nothing in the definition of Civil Staff in s 2 to suggest that it must be read in a way capturing persons employed under s 90A. The words simply do not say so. Stretching them to suggest they should overlooks the fact that the Defence Act is divided into distinct parts, each with a specific function, with the possible exception of pt 8 dealing with miscellany. Part 5 deals exclusively and comprehensively with Civil Staff. There is nothing in that part to indicate an intention to incorporate someone employed under s 90A into the Civil Staff.

[90] A deliberate decision was made by Parliament to place s 90A among the miscellaneous provisions and, in so doing, to distinguish between employees employed in reliance on it and those employed under s 61A as members of the Civil Staff. It is immaterial that there are no limits on what the CDF may require of a person employed under s 90A, so that the employee may perform the same tasks as a member of the Civil Staff. Had the intention been, as Mr Lloyd argued, to provide that all non-

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[24] Interpretation Act 1999, s 5(1); and see *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] 3 NZLR 767.

[25] Interpretation Act 1999, s 5(2).

military personnel must be members of the Civil Staff, it would be reasonable to expect the Defence Act to say that and for s 90A to be within pt 5. Neither happened.

[91] The text of s 90A, and the way the Defence Act is organised, supports the conclusion that a distinction was intended between locally employed civilians and members of the Civil Staff. That would also be consistent with the purpose of s 90A, to enable employment of persons separate from the Civil Staff and in a similar manner to local MFAT employees. We consider that s 90A was added to the Defence Act for clarity, to enable the CDF to be able to employ personnel in overseas post as required and, in doing so, to elect not to make an appointment to the Civil Staff.

[92] Mr Lloyd's final point, that Ms Radford is a New Zealand citizen and, therefore, should only be able to be appointed under the provisions of pt 5, is unpersuasive. Section 90A does not contemplate a citizenship test, despite the heading referring to "locally employed civilians", and it is immaterial that she was not local in any sense when first employed, having been recruited from Australia.

[93] We have not lost sight of the net result of this analysis: when employing a person overseas the CDF can choose to do so under either s 61A or s 90A as he pleases. Whether that was intended when s 90A was introduced is unclear, but there is nothing in the text or purpose of the Defence Act to preclude this outcome.

[94] Our conclusion is that Ms Radford was, at all times, a locally employed civilian pursuant to s 90A of the Defence Act. She was not, at any time, a member of the Civil Staff. She could not, therefore, rely on the Defence Act preserving the application of the Employment Relations Act to her circumstances.

Application of conflicts of law principles

[95] The second issue asks if the Authority and/or the Court have jurisdiction to consider Ms Radford's claims because of the application of conflict of laws principles.

[96] A significant amount of hearing time was dedicated to arguing about conflicts of law principles but, initially, not in the way expressed in the statement of issues. An explanation is required.

[97] From the beginning of this dispute the CDF treated the employment agreement as containing a choice of USA law as the proper law of the contract and requiring any litigation to take place in that jurisdiction. That position raises two subsidiary issues. First, what is the proper law to be applied; and second, where should the case be heard.

Which law applies to the employment agreement?

[98] Mr Lloyd submitted that the choice of law clause in the 2014 agreement was not bona fide, was contrary to public policy and that the proper method to consider is either to:

(a) apply the Defence Act as a statute with a particular choice of law clause (a reference to the extraterritorial reach in s 4 of the Defence Act); or

(b) apply the Employment Relations Act as an overriding statute, following the approach in *Brown v NZ Basing*;[26] or

(c) in fact the parties chose New Zealand law.

[99] Mr Lloyd's submission about the Defence Act was, essentially, that because it applies to all defence areas outside of New Zealand its ambit encompassed Ms Radford's circumstances. This argument was linked to the claim that she was a member of the Civil Staff at all relevant times. His argument that the Employment Relations Act is an overriding statute is linked to both the extraterritorial reach of the Defence Act and his concerns about matters of public policy emphasising Ms Radford's employment by the Crown. He argued the Crown has good faith and good employer obligations towards employees. As a matter of public policy, it follows that these obligations should not be able to be resiled from by the Crown when employing a New Zealand citizen by applying to that person the law of a foreign country.

[100] Ms Catran argued that the key issue was one of statutory interpretation regarding how the Defence Act and the Employment Relations Act fitted together. The CDF's case was that Ms Radford's employment was governed by s 90A, Defence

[26] *Brown v NZ Basing Ltd* [2017] NZSC 139.

Standing Orders and the 2014 agreement signed in the USA. An attempt was made to distinguish *Brown v NZ Basing*, by arguing that it had altered the approach to the choice of law in employment cases in New Zealand. The Supreme Court in that case found that, applying the choice of law approach to employment agreements, the Employment Relations Act could be applied on a case by case basis.

[101] Ms Catran argued that the Employment Relations Act is imported into the Defence Act only for Civil Staff not for locally employed civilians. Instead, s 90A was said to empower the CDF to prescribe terms and conditions of employment for locally employed civilians. In that way the two statutes were said to fit together or, as she described it, the Defence Act "mediated" when the Employment Relations Act does and does not apply. These arguments were said to illustrate that the Defence Act gives weight to the choice of law clause.[27]

[102] As to *Brown v NZ Basing*, Ms Catran said it should not support the Employment Relations Act being treated as an over-riding statute because of differences between the circumstances in that case and Ms Radford's situation. She was not a peripatetic employee as the pilots in *Brown v NZ Basing* were; her home during her employment was Washington DC, not New Zealand, and the employment relationship was formed and performed in the USA.

[103] We do not accept Ms Catran's analysis. It would not be safe to conclude that, because pt 5 of the Defence Act applies the Employment Relations Act to the members of the Civil Staff, that it automatically follows that the rights and benefits conferred by the statute are not to apply to staff employed under s 90A. Had that outcome been intended, Parliament could have been expected to expressly exempt locally employed civilians from the ambit of the Employment Relations Act as, for example, was done in s 45(5) relating to conditions of service of members of the Armed Forces.[28]

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[27] Exception was also taken to the attempt to characterise the New Zealand Embassy in Washington DC as a New Zealand enclave to fit within the third category of employee described by Lord Hoffman in *Lawson v Serco Ltd*, *Botham v Ministry of Justice*, *Crofts v Veta Ltd [2006] UKHL 3* (this case is typically referred to as *Crofts*). The reason for this point was that the New Zealand Embassy is not an extraterritorial New Zealand enclave in the USA because of the Vienna Convention on Diplomatic Relations 1961.

[28] Defence Act 1990, s 45(5).

[104] That leaves for consideration whether the parties choose New Zealand law. In turn that requires consideration of the terms and conditions of the employment agreement itself.

[105] Ms Catran argued that the starting point was the intention of the parties objectively ascertained by reference to the words used.[29] Her submission was that if the words are clear that, generally, was determinative. She accepted that the surrounding circumstances may be relevant and that the interpretation should accord with "business common sense".

[106] The CDF argued that the parties intended USA law to apply, because that was what the agreement provided for. That choice was supported, in this argument, by contemporaneous documents; the 2014 review of locally employed civilians worldwide by the NZDF, emails explaining what was intended, and the conduct of the parties.

[107] Ms Catran said that USA law was clearly chosen and there was a stronger connection with the USA, rather than New Zealand, arising from a combination of circumstances. The choice of law clause in the agreement has already been mentioned, but she emphasised other factors such as Ms Radford's responsibility for paying her own taxes, which were to be paid in the USA, that there were no ACC levies paid on her behalf, and remuneration was in US dollars in the USA. Attention was also drawn to dealings Ms Radford had with human resources representatives in Washington DC and the fact she did not have a home in New Zealand before and immediately after working in Washington because she lived and worked in Brisbane.

[108] These arguments placed significant weight on one part of the employment agreement to the exclusion of other parts of it and other documents that together comprised the whole agreement. In the introduction to the employment agreement, under the heading "Employment status", it read:

> You are a Locally Engaged Civilian staff member as defined under Section 90A of the Defence Act 1990. Accordingly, New Zealand legislation does not

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[29] By relying on *Dwyer v Air New Zealand Ltd* [1996] 2 ERNZ 146 at 151; see also *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

> apply, rather you are subject to United States of America Labor Laws and legislation.

[109] That clause, however, may not be determinative. There are some circumstances in which a bona fide choice of law may be made in other ways besides an express statement in an agreement. Where the parties to an agreement have not made an express choice of law, or there is ambiguity as to the choice made, the Court may infer an intention about the governing law from the terms and nature of the contract and the general circumstances. If it cannot be inferred in this way, the contract will then be governed by the system of law with which it had its closest and most real connection.[30]

[110] There are clauses in the agreement that may suggest what seems to be an unequivocal choice of USA law was not made. They deal with concepts derived from New Zealand law, for dispute resolution and personal grievances, which are inconsistent with employment "at will" favoured by the CDF.

[111] There are also inconsistencies in the agreement between USA law and New Zealand law. An example is where it mentions the Family and Medical Leave Act (a USA statute) dealing with the sick leave and parental leave. That can be compared to Ms Radford being entitled to celebrate 11 public holidays each year corresponding to the Holidays Act 2003. Further, the Code refers to the Employment Relations Act 2000, and other New Zealand statutes including the Official Information Act 1982, the Privacy Act 1993 and the Smokefree Environments and Regulated Products Act 1990.

[112] Adding to this situation is that the CDF's protest to the jurisdiction of the Court did not state an intention to argue (in either the USA or New Zealand) that the Code was signed in error. The only available conclusion is that the parties accept the Code was intentionally signed and applies to the employment relationship. That conclusion is reinforced by the agreed statement of facts, which listed the documents signed on 18 November 2014 and included the Code without further comment.

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[30] *Brown v NZ Basing,* above n 26, at [63]; citing with approval Lord Collins of Mapesbury (ed) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [32-006] (footnotes omitted).

[113] Mr Lloyd made the point that, when the documents are read together, it could not be said that there was an unambiguous choice of USA law. His solution to resolve any ambiguity between the agreement and the Code fell into alternative parts. His first proposition was that it would be possible to apply USA law "to the extent necessary". His contention was that there is nothing preventing different laws from applying to different aspects of the relationship depending on the circumstances.

[114] We understand this argument to result in an approach where USA law would apply to some aspects of the agreement and New Zealand law would apply to others. Mr Lloyd's example of this approach was that USA law might apply to matters such as providing medical insurance, but New Zealand law would apply to the personal grievance claims.

[115] His alternative argument was that the employment agreement could be read as providing Ms Radford with a choice of pursing a claim under the Employment Relations Act, or USA law, depending on which was more appropriate. Given Ms Radford's circumstances, she had elected to pursue a claim under the Employment Relations Act because it was the most convenient to her.

[116] If all of that failed Mr Lloyd argued that, since the CDF was responsible for drafting the documents, any uncertainty or ambiguity should be resolved against his interests.

[117] Ms Catran argued that Ms Radford's interpretation of the Code was weak if it was intended to lead to a conclusion that the parties chose New Zealand law and New Zealand employment institutions to resolve disputes. Such a conclusion was said to:

(a) be inconsistent with an express term in the agreement;

(b) be inconsistent with the context of a worldwide review of locally employed civilians' arrangements by the NZDF in 2014 and the contemporaneous correspondence from the head of the New Zealand Defence staff in Washington DC to employees employed on that basis;

(c) be inconsistent with correspondence from the New Zealand Defence staff in Washington addressing the question of the applicable law during discussions leading up to the 2014 agreement being signed and referring to USA law;

(d) overlook that the Code expressly applies to Civil Staff. In its first paragraph it refers to s 60 and pt 5 of the Defence Act and it is designed to outline the minimum standards of integrity and conduct that are to apply to them; and

(e) references in the Code to the Employment Relations Act are logical and sensible, given that it applies to civilian staff deployed or posted overseas from New Zealand.

[118] What does this mean for a decision about the choice of law? There appear to be four options:

(a) Option 1: Mr Lloyd's "mixed model" where a choice is available to Ms Radford depending on the circumstances.

(b) Option 2: Ms Catran's view that USA law exclusively applies because that was stipulated in the agreement.

(c) Option 3: USA law applies but that does not preclude considering (and potentially applying) the Employment Relations Act because that is provided for in the Code incorporated into the employment relationship by agreement.

(d) Option 4: something has gone wrong with the drafting of the agreement, and any ambiguity should be held against the CDF.

[119] Options 1 and 2 are problematic and unhelpful. There can be circumstances where the laws of different states may apply to different issues within the same

dispute.[31] We are not, however, attracted to the cherry-picking approach suggested by Mr Lloyd. Allowing such an approach would be an invitation to Ms Radford to select New Zealand law for the substantive dispute for no other reason that she perceives a more rewarding outcome is possible by doing so compared to what she may anticipate will be the case if USA law applies. Before we could accept Mr Lloyd's submission there would need to be clear delineation in the agreement as to what areas of it would be subject to an alternate law and that is not the situation here.

[120] We do not accept that the position is as clear cut as Ms Catran's submissions suggest it might be. The net result of these submissions was cherry-picking of its own, accepting at face value the first part of the employment agreement ostensibly nominating USA law, but rejecting consideration of anything that might be inconsistent with that outcome.

[121] Option 4 contains a shortcoming which is self-evident; the parties have not raised any issue about the agreement such as a claim that a mistake was made requiring rectification.

[122] We consider that, on an objective basis, a reasonably informed bystander would conclude that option 3 applies and the parties intended to apply US law to their agreement because:

(a) Ms Radford was employed expressly under s 90A of the Defence Act contemplating engagement as a locally employed civilian in Washington DC.

(b) The agreement refers to applying USA law (although we acknowledge our previous comments that this nomination has problems).

(c) She was not recruited from New Zealand or posted to Washington in the same manner as would apply to a member of the Civil Staff.

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[31] *Club Mediterranee NZ v Wendel* (1987) 1 PRNZ 292 at 294.

(d) Negotiations leading up to the 2014 agreement took place in Washington against a background of Ms Radford being already employed there under employment agreements that nominated the law of the USA.

(e) Correspondence from the Defence Attaché answering questions about the proposed new employment agreements, before they were signed, referred to USA law applying.

(f) There was an element of continuity in the 2014 agreements, providing for revised terms but with the agreement still to be performed in the USA.

[123] Those factors, we consider, tend to show that the parties made a choice that USA law is to apply to their agreement. That conclusion is not, however, the end of this assessment.

[124] When the CDF was required to present submissions about the choice of law he provided an opinion from an expert in employment law from Washington DC, Ms Sargeant. That evidence was given by affidavit and took the form of answers to questions posed by counsel for the CDF, to assist in identifying the applicable law and to give an overview of the nature of the litigation that could occur in a court in Washington DC if Ms Radford was to issue proceedings there.

[125] Ms Sargeant's opinion was reasonably comprehensive and helpful. In her opinion she concentrated on what a USA court would make of the employment agreement. She explained what is meant by "at will" employment in Washington DC. In giving her opinion, particular attention was paid to the clause at the beginning of the agreement nominating USA law.

[126] Ms Sargeant's opinion was that Ms Radford would be regarded in the USA as an "at will" employee and enjoyed only what might loosely be called limited litigation rights. That meant proceedings could be pursued successfully only if the reason for the dismissal was a prohibited ground of discrimination or, in some circumstances,

where it could be argued there was a breach of contract. She did not give an opinion as to how a court in Washington DC would treat an agreement that incorporated New Zealand law. That is a topic on which evidence would be required at the hearing of Ms Radford's claim if it is pursued in New Zealand.

[127] That discussion brings us to the next issue, whether Ms Radford's claim can and should be heard in New Zealand.

Where should the case should be heard?

[128] It seems to us there are two parts to this issue; whether the Authority and/or the Court have jurisdiction to consider the claims brought by Ms Radford against the CDF, and whether, on forum conveniens principles, New Zealand is the appropriate forum.

Jurisdiction of the Authority

[129] The CDF accepted the Employment Court has jurisdiction to apply foreign law in cases involving breach of contract.[32] That said, the argument was that it is not clear the Authority also has that jurisdiction.

[130] In *Brown v NZ Basing* the Supreme Court confirmed the Employment Court has jurisdiction to apply foreign law but left undecided whether the Authority might have a corresponding jurisdiction. The Supreme Court preferred to leave that decision for a case where the subject was raised directly.

[131] There have been no other cases where the Authority's jurisdiction to consider and apply foreign law has been comprehensively discussed, although it was touched on more or less in passing in *Musashi v Moore*.[33] In that case jurisdiction was an issue but was essentially assumed without detailed analysis. As to the Authority itself, determinations are said to point in each direction without a consensus being reached.[34]

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32 Relying on *Brown v NZ Basing,* above n 26; *Royds v FAI (NZ) General Insurance Company Ltd* [1999] 1 ERNZ 820; and *Iverson v Directus International Ltd* EmpC Auckland AC9/00, 1 March 2000.

33 *Musashi Pty Ltd v Moore* [2002] 1 ERNZ 203.

34 The cases referred to were *Kramer v DML Resources Ltd* ET Christchurch CT140/98, 28 September 1998; and *Utai v Chief Executive of the Department of Labour* ERA Auckland AA328/10, 21 July 2010.

[132] Ms Catran submitted that the statutory framework of the Employment Relations Act casts doubt on the Authority's jurisdiction. Exclusive jurisdiction is conferred, by s 161, to make determinations about employment relationship problems generally, including disputes about the interpretation, application or operation of an employment agreement and matters relating to a breach of an agreement.[35]

[133] Despite the broad language in the introduction to s 161(1), Ms Catran submitted that it was linked to, and limited by, breaches of the Employment Relations Act and employment relationship problems governed by New Zealand law, so that the Authority would not be able to consider and apply USA law. Support for this restrictive reading was gleaned from s 161 itself, for example by reference to ss 161(1)(f), (r) and (s).

[134] The Authority's jurisdiction was confined, it was said, by ss 161–164 inclusive and in particular s 162. Under s 162 the Authority may make any order that the High Court or District Court may make under any enactment or rule of law relating to contracts, specifically pt 2 of the Contract and Commercial Law Act 2017 and the Fair Trading Act 1986.

[135] The threads of these arguments were drawn together in a single proposition: if USA law applies, the statutes listed in s 162 would be displaced by the substantive US law but the Authority, as a creature of statute, has no power to implement that law.

[136] This argument was said to be supported by an old case, *White v Fellow Travel Inc*.[36] In that case, Chief Judge Goddard rejected an argument that the Authority possessed jurisdiction to authorise service on a party overseas.

[137] We do not agree with Ms Catran's submissions. We do not accept that the language in s 161(1) should be read down merely because some of its subsections refer to duties or obligations imposed by the Employment Relations Act or matters of interpretation arising from it.

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35 Section 161(1)(a)—(b).
36 *White v Fellow Travel Inc* [2004] 2 ERNZ 32 at [6]–[7].

[138] We are also confident that an analogy can be drawn between the Authority's jurisdiction and the Court's jurisdiction. Our view is that Parliament intended the Court and the Authority to be able to entertain cases which involve the application of foreign law.

[139] In *Brown v NZ Basing*, the Supreme Court analysed the circumstances in which the Employment Court could hear cases having an extraterritorial element. The Supreme Court noted that when the Employment Contracts Act 1991 was passed it provided for rights to seek personal grievance remedies not confined to industrial awards or collective instruments.[37] These changes were part of a broader restructuring of the jurisdiction of the Employment Court. The effect was to create the potential for the Court to hear cross-border employment disputes. The Supreme Court went on to hold that this aspect of the Employment Court's jurisdiction was not recognised at the time and the Employment Contracts Act gave no indication about how such disputes should be resolved.[38] For that matter the Employment Court Regulations did not contain provisions tailored for such disputes beyond making general provisions for "matters not provided for".[39]

[140] Continuing with that analysis, the Supreme Court noted that when the Employment Relations Act 2000 was enacted, with its associated regulations, there were no specific provisions for cross-border disputes. That changed in 2004 when sch 3 was amended to insert cl 5A providing for service out of New Zealand of any document relating to a matter before the Court. At the same time the regulations were amended by adding regs 31A and 31G, to facilitate addressing cross-border disputes.[40] Under reg 31A leave may be given to serve a statement of claim on an overseas party. The regulation specifies what must be satisfied before the Court grants leave.[41]

[141] Under Employment Court Regulations 2000, reg 31G, the Court may decline jurisdiction even though leave to serve overseas was granted. That can happen if the

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37 *Brown v NZ Basing*, above n 26, at [35].
38 At [35].
39 At [35].
40 Clause 5A was inserted by s 71 of the Employment Relations Amendment Act No 2 2004; see also regulations 31A–31G of the Employment Court Regulations 2000 inserted by regulation 9 of the Employment Court Amendment Regulations 2004.
41 Under cl 5A(a) of sch 3.

overseas party successfully challenges the Court's assumption of jurisdiction on a forum non conveniens basis.[42] The Supreme Court noted similar provisions were introduced in relation to the Authority.[43]

[142] Those observations in *Brown v NZ Basing* formed part of an analysis as to whether the Employment Court had personal jurisdiction over the respondent in that proceeding. As to subject matter jurisdiction, the Supreme Court's preferred approach to territoriality was to treat the definitions of "employer" and "employee" as unlimited and to determine, on a case by case basis, whether the Employment Relations Act applied to the particular claim.[44]

[143] The Supreme Court bore in mind that the Employment Court has jurisdiction in respect of statutory personal grievance causes of action and other claims, including those for breach of contract. It held that there was no reason why such claims should not be determined by reference to foreign law, if that law was the proper law of the contract.[45] In so doing the Supreme Court approved of the view taken previously by this Court in *Royds v FAI (NZ) General Insurance Ltd*.[46]

[144] The decision in *Brown v NZ Basing* touched on the position of the Authority. While noting that the Court in *Musashi* had assumed the Authority would be able to determine a dispute in accordance with the law of the State of Victoria, the Supreme Court noted:[47]

> This may be so given the generality of the statutory language associated with the jurisdiction of the Employment Relations Authority 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.

[145] That observation was a reference to s 161(1) and the Authority's jurisdiction to make determinations about employment relationships generally, as well as the

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42 The case of an Australian defendant is different and does not need to be assessed in this analysis.
43 *Brown v NZ Basing*, above n 26, at [36]; and see sch 2 cl 4A of the Employment Relations Act 2000 inserted by s 70 of the Employment Relations Amendment Act No 2 2004.
44 At [41].
45 At [47].
46 *Royds*, above n 32.
47 *Brown v NZ Basing*, above n 26, at [49] (footnote omitted).

jurisdiction under s 161(1)(r) to deal with any other action relating to a breach of an employment agreement.

[146] We consider that the Authority does have jurisdiction to apply foreign law in the same way the Court does and for much the same reasons. This analysis is bolstered by considering the changes made to sch 2 and to the Employment Relations Authority Regulations from December 2004. The change was to introduce cl 4A into sch 2 permitting the service out of New Zealand of any document relating to a matter before the Authority. At about the same time regs 19A and 19B were introduced. Under reg 19A the Authority was empowered to grant leave to serve a party overseas.[48] Under reg 19A(2) that overseas party has a right to object to the Authority's jurisdiction or to file a statement in reply.

[147] While the regulations applying to the Court and the Authority each deal with leave to serve overseas there is a difference between reg 19A (for the Authority) and 31A (for the Court). That is in the way each regulation deals with how the decision granting leave to serve overseas is to be dealt with.

[148] In reg 31A(5)(b) of the Employment Court Regulations there are five matters to consider each one of which involves an assessment about the appropriate connection to New Zealand. For example, the Court must consider if the employment agreement which is the subject of the proceeding was made in New Zealand, or if the agreement was to be wholly or partly performed in New Zealand.[49] Under the Authority's regulations there is no repetition of the criteria in reg 31A(5).

[149] Despite the difference in language between the Employment Court Regulations and Authority Regulations we consider that they are directed to the same broad purpose. The absence of specific criteria applying to the Authority's decision-making does not alter, or diminish, the breadth of the jurisdiction it possesses. It is difficult to conceive of a situation where, for example, the Authority would not work through an exercise similar to the one the Court is required to undertake to assess whether leave

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[48] Regulation 19A(1); under cl 4A(a) of sch 2. The schedule was altered from 1 December 2004 and the regulations from 10 December 2004.

[49] Regulation 31A(5)(b)(i) and (iii).

should be granted. We also note that there is no repetition of those linguistic differences when it comes to the ability of the Authority or Court to decline jurisdiction under regs 19B and 31G respectively.

[150] Given that the intention of both the Court's and Authority's regulations was to confer jurisdiction to authorise service overseas, we are satisfied that they are intended to produce the same overall result.

[151] The breadth of the Court's jurisdiction to resolve employment matters, and the extent of the regulations, were critical to the Supreme Court's decision in *Brown v NZ Basing* confirming the Court's ability to apply foreign law if required. We consider that there is no reason in principle why the same conclusions should not be reached so far as the Authority's jurisdiction is concerned. There is no principled reason to differentiate between the reach of the jurisdiction of the Authority and that of the Court in those circumstances.

[152] Even if our assessment is wrong, and the Authority has no jurisdiction to apply foreign law to resolve an employment relationship problem, there is no reason in principle preventing it from removing such a case to the Court to be heard.

[153] Finally, although not raised in submissions, we have not put aside an assessment of s 113 of the Employment Relations Act. That section operates to preclude common law claims for damages for breach of an employment agreement. Instead, all claims are now pursued as personal grievances although the exact parameters of s 113 have not been exhaustively analysed. We do not see that provision as an impediment to the Authority considering and, if necessary, applying foreign law to an employment relationship problem.

Forum conveniens issues

[154] That discussion means it is necessary to consider if New Zealand is the appropriate forum for this dispute.

[155] Not surprisingly, the CDF argues Washington DC is the appropriate forum, drawing on the fact that the employment agreement was created and performed in the

USA. Two potential witnesses, the Defence Attaché who signed the dismissal letter and Ms Radford's former manager, are still posted to Washington DC. If their evidence is required arrangements would need to be made for them to return to New Zealand with attendant difficulties given present quarantine-related issues, or to give evidence remotely. The CDF also argued that comity and public international law considerations require New Zealand to behave as "a good international citizen" and allow the proceedings to be decided in the USA.

[156] Ms Radford wants to litigate in New Zealand because she and her employer live here and, we assume, the cost of litigating in the USA and the obstacles to success there are both substantial. She intends to give evidence and, at this stage, may not call other witnesses. In support, she points to the employment agreement co-opting concepts from New Zealand law that are well-known and understood by the Authority. That was said to be significant and is a counterfoil to the expert evidence called by the CDF.

[157] Mr Lloyd argued that there was no overwhelming connection with the USA, or for that matter little in the way of practical impediments to the CDF conducting a case here. That is because there is no dispute about how Ms Radford was dismissed. His argument was that whichever law is applied will probably be determinative. Under USA law the dismissal would probably be lawful and Ms Radford would have no remedies. Conversely, if New Zealand law is applied, the dismissal had none of the usual features which would be considered to comply with s 103A of the Employment Relations Act. On that basis, Mr Lloyd considered that the balance of the evidence would be about claims for remedies. That evidence will come from Ms Radford and will not involve evidence from the USA.

[158] The CDF's approach to the forum issue is a troubling one for two reasons. First, the parties are both domiciled in New Zealand. A consequence of accepting the approach argued for on his behalf would be to compel the parties to litigate in the USA even though they are both here.

[159] Second, the parties accepted that the CDF is the Crown.[50] If the CDF's approach is accepted Ms Radford, as a New Zealand citizen, would be compelled to sue the Crown in a foreign jurisdiction, while resident in New Zealand. The difficulties that would present are illustrated in a significant amount of hearing time being taken up with arguments about sovereign immunity and whether it could be used as a defence by the CDF in any action by Ms Radford in the USA.[51] Almost all of the CDF's argument was designed to demonstrate that he would not be able to rely on that defence because the dispute would be characterised by a court in the USA as commercial as it did not involve the governmental or diplomatic functions required to qualify for immunity.[52] At a reasonably advanced stage, and in response to questions from the Court, the CDF accepted that he would not raise a sovereign immunity-related defence to any claim by Ms Radford in the USA.

[160] We are satisfied that New Zealand is the appropriate forum for this proceeding. Not only do the parties live here but we do not accept that the potential for two witnesses living in the USA to give evidence should be given much weight. We accept Mr Lloyd's submission that evidence about Ms Radford's dismissal is likely to be reasonably straightforward and not disputed. While the evidence we received and the agreed statement of facts were not exhaustive and, for example, did not discuss the circumstances that led up to Ms Radford being handed the dismissal letter, it was common ground that the decision to terminate her employment was not preceded by any of the procedural steps required by the Code.

[161] Viewed in that light, we prefer to see issues about forum conveniens (or perhaps more correctly forum non conveniens) as more nuanced than merely asking where the preponderance of the witnesses are likely to come from. We also bear in mind that a degree of cooperation to make witnesses available, if they are required from the USA, would be reasonable. One way that might be achieved, if there are

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50 Section 71(a) of the Defence Act deems the Chief of Defence Force to be the employer for personal grievance matters under that Act.

51 By reference to the Foreign Sovereign Immunities Act of 1976 (USA).

52 Cases referred to as examples included *Republic of Argentina v Weltover Inc* 504 US 607 (1992); *Saudi Arabia v Nelson* 507 US 349 (1993); *El-Hadad v United Arab Emirates* 496 F3d 658 (DC Cir 2007); *Hijazi v Permanent Mission of Saudi Arabia to United Nations* 403 Fed Appx 631 (2nd Cir 2010); and *Sanchez-Ramirez v Consulate General of Mexico in San Francisco* 603 Fed Appx 631 (9th Cir 2015).

travel restrictions or other issues about their availability, is for evidence to be taken remotely.

[162] There are other considerations in Ms Radford's favour. Amongst them are the costs and impediment of attempting litigation in the USA while resident in New Zealand. Ms Sargeant estimated that the costs likely to be incurred in litigating in Washington would be in the region of US$100,000 and the case might take three to four years. We assume no allowance was made for possible additional costs caused by attempting to handle such litigation remotely. That cost and timing can be contrasted with the Authority's emphasis on speedy and low-key litigation at comparably modest cost.

[163] Finally, a compelling factor in this assessment is that the CDF is the Crown. We consider, as a matter of public policy, the Crown should be able to be sued in New Zealand by a New Zealand citizen living here.

[164] We are satisfied that there is a sufficient connection to New Zealand for this jurisdiction to be the appropriate forum.

[165] Before concluding this decision, a brief comment is necessary about the very comprehensive and thoughtful submissions provided by Ms Warren and Mr Andrews for the Ministry of Foreign Affairs and Trade as intervener. They carefully outlined the statutory provisions which apply to MFAT when employing civilians in a country where New Zealand has an embassy or other diplomatic presence. While MFAT clearly has an interest in being able to compare and contrast its circumstances with those of the CDF it has not been necessary for us to refer to those submissions in this decision. The circumstances Ms Radford and the CDF faced were different from those more general issues which MFAT may well be concerned about.

Outcome

[166] The issues as put to the Court result in the following outcomes:

(a) The Authority has jurisdiction to determine Ms Radford's claims against the CDF.

(b) The choice of law was the law of the USA.

(c) In applying USA law, however, the Authority will need to be satisfied, as a fact, of what a court in that jurisdiction would do in applying all of the documents comprising the agreement, including the Code with its references to the Employment Relations Act.

[167] It follows that the protest to jurisdiction is unsuccessful and it is set aside.

[168] Costs are reserved. If they are pursued memoranda may be filed seeking directions.

K G Smith
Judge
for the full Court

Judgment signed at 9.55 am on 24 March 2021