

Supreme Court clarifies scope of age discrimination law

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In recent times the life expectancy of the human population has increased significantly. That trend looks set to continue.

An ageing population brings with it a multiplicity of issues, including the need to work longer, whether or not to extend the retirement age and how to protect against age discrimination.

Last year, I wrote about the Court of Appeal decision *New Zealand Basing Ltd v Brown and Sycamore*. This involved two airline pilots with employment agreements requiring them to retire from service at the age of 55. The court ruled the law chosen by the parties to the agreement was Hong Kong law and therefore New Zealand's prohibition against age discrimination did not apply.



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In a decision delivered last month, the Supreme Court overturned the Court of Appeal. It upheld the right not to be discriminated against on the grounds of age. That right is contained both within the Employment Relations Act and Human Rights Act.

The Supreme Court focused on where the employment relationship was struck. It also found that both the Employment Relations Act and Human Rights Act are clear - the right not to be discriminated against is not limited to employment agreements governed exclusively by New Zealand law.

New Zealand personal grievance rights include a right not to be subject to age discrimination. This includes a right not to be required to retire on the grounds of age. The Human Rights Act presupposes that prohibition against age discrimination may apply despite the employee working wholly or predominantly outside of New Zealand.

The Employment Relations Act 2000 heralded a significant change in New Zealand employment law. Its predecessor was the Employment Contracts Act 1991. The Employment Relations Act 2000 is premised on the view that employment involves a

relationship and not just a contract. 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.

However, the court was satisfied that the only sensible interpretation is that the prohibition against discrimination must have application where the work is in part performed in New Zealand.

The rights not to be discriminated against on the grounds of sex, race, colour, sexual orientation, and age are free standing rights. They are rights not dependent on, or closely related to, the terms of an employment agreement. A Hong Kong choice of law, therefore, did not protect the employer from liability for such breaches occurring in New Zealand.

While the pilots in this case were required in their employment agreement to reside in New Zealand, their tours of duty were largely outside of New Zealand. The court found that the right not to be discriminated against because of age applies to someone who works both in and outside of New Zealand.

The Employment Relations Act specifically acknowledges the inherent inequality of power in employment relationships.

Discrimination is often premised on an inequality of power. It is reassuring to know that the laws of New Zealand are focused on addressing these issues with a view to a fairer society for all.

Disclaimer: The opinions expressed in this article are those of the writer and do not purport to be specific legal or professional advice.

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