

## The Territorial Scope of New Zealand Employment Law: Quarter-Acre or Global Village?

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### 1 Introduction

Employees in New Zealand are protected by a "minimum code" of rights. For example, employees are entitled to receive at least the minimum wage, statutory and annual holidays, and to have access to personal grievance procedures under the Employment Relations Act 2000. The Wages Protection Act 1983 (the WPA) is part of this minimum code of rights. The WPA sets out some simple rules:

- An employer may not make unauthorised deductions from an employee's wages;
- An employer may not stipulate how or where wages are spent; and
- An employer may not demand a premium from a prospective employee (or any other person) in return for an offer of employment.

The last rule, which is set out in s 12A of the WPA, was the subject of a recent important decision by the Employment Court in *Mehta v Elliot (Labour Inspector)*.<sup>1</sup> In *Mehta*, the Employment Court had to decide whether premiums that were paid in India by an employee to a prospective employer for employment in New Zealand were caught by s 12A of the WPA. This, in turn, depended upon whether the WPA had extra-territorial reach.

The decision in *Mehta* is of particular interest because of the ever-increasing impact of information technology and globalization on the recruitment and employment industry. As Judge Colgan pointed out,<sup>2</sup> the protection given by a "minimum code" of employment rights is severely restricted nowadays if the legislation from which these rights are derived does not have extra-territorial reach:

"Negotiations and other arrangements preceding individual employment agreements do not always take place solely within this country. Many people are now engaged overseas to work in New

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<sup>1</sup> AEC 34/02, AC 2A/03, 9 July 2003 (Judge Colgan).

<sup>2</sup> *Ibid* para 40.

Zealand. Offers of employment are conveyed not only orally and/or by written forms of agreement being proffered (as in this case) but are now frequently the subject of electronic communications that can be as easily sent, received and modified in almost any country on earth as they can within the same locality in New Zealand. Similarly, the means by which payments (including payments of premiums for employment) can be made, now take little account of international borders."

## 2 Facts

Mehta was an Indian national living and carrying on business in New Zealand. The Court proceeded on the assumption that Mehta had permanent residence in New Zealand. Mehta ran an immigration consultancy business that was associated with a consultancy in India run by his father. Duhanja saw a newspaper advertisement in India for a sweet-maker. The advertisement had been placed by Mehta's New Zealand consultancy. Because Duhanja wished to move his family to New Zealand he inquired about the position. After discussions about the best way to get residence in New Zealand, Duhanja decided to accept Mehta's offer of employment in a restaurant in New Zealand owned by Mehta. By doing this he hoped eventually to get permanent residence. He paid Mehta, in India, the equivalent of NZ\$15,000 in rupees. Mehta provided a receipt for the money describing the money as an "advance payment for an offer of employment in New Zealand". Duhanja came to New Zealand and worked in the restaurant but the employment relationship broke down.

A Labour Inspector brought proceedings on Duhanja's behalf to enforce the provisions of the Holidays Act 1981, the Minimum Wage Act 1983, the Employment Relations Act 2000 and the Wages Protection Act 1983. Mehta denied that the payment was a premium and said that it comprised fees and commission for immigration arrangements.

## 3 Employment Tribunal

The Employment Tribunal found that Mehta had offered Duhanja work in New Zealand and permanent residence in return for the money.<sup>3</sup> The Tribunal held that it had jurisdiction to hear the matter despite the fact that the relevant actions had taken place in India, because Mehta had submitted to the New Zealand jurisdiction. He had been properly served with the proceedings in India, had instructed New Zealand counsel, had

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<sup>3</sup> *Elliot (Labour Inspector) v Exotiq Ltd* (2002) 6 NZELC (digest) 98,686. As the case involved claims under both the (now-repealed) Employment Contracts Act 1991 and the Employment Relations Act 2000, the Employment Relations Authority exercised the jurisdiction of the former Employment Tribunal and Authority in a single hearing, pursuant to the transitional provisions of s 252 of the Employment Relations Act 2000: *ibid* para 3.

not entered a protest against the jurisdiction of the Tribunal, and had entered into the merits of the case by offering defences to the substantive allegations against him.<sup>4</sup>

The Tribunal did not directly address the issue of the extra-territorial reach of the WPA. Instead, it noted that the charging and payment of the premium in India were "not ... unconnected with New Zealand". They were "acts carried out preparatory to the formation of an employment relationship in this country."<sup>5</sup> This factual link, and the Tribunal's view that the "Wages Protection Act 1983 clearly intends to cast a wide net to catch those seeking to take improper financial advantage of people who for socio-economic reasons may desperately seek work in a particular place", were sufficient to convince the Tribunal that Mehta's actions were caught by s 12A of the WPA.<sup>6</sup> The Tribunal therefore ordered Mehta to repay Duhanja's premium under s 12A(2) of the WPA. It also ordered Mehta to reimburse Duhanja for money owed under the Holidays Act and the Minimum Wage Act and imposed penalties for breaches of those Acts.

#### 4 Employment Court

Mehta appealed against the Tribunal's decision that the premium paid by Duhanja was subject to s 12A of the WPA. He argued that the WPA had no application to the relevant dealings between him and Duhanja, because they had all taken place in India "between two Indian entities".

As against these extra-territorial elements, Judge Colgan listed several factors connecting the case to New Zealand: Mehta was a permanent resident; two New Zealand companies were involved; the premium was charged for work that was to be, and was actually performed in New Zealand; and the premium was connected with Duhanja's New Zealand immigration status. Furthermore, although the relevant employment agreement was entered into in India, it was in a form that complied or purported to comply with the relevant New Zealand legislation.<sup>7</sup> Perhaps surprisingly, Judge Colgan did not comment on which law governed the employment agreement. From the information given in the judgment, there seems not to have been an express choice of law clause. Given the facts of the case, it is likely that New Zealand law was the objective proper law of the employment contract.<sup>8</sup>

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<sup>4</sup> Ibid para 24.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid para 25.

<sup>7</sup> *Mehta*, above n 1, para 35.

<sup>8</sup> See *Mount Albert BC v Australasian Temperance & General Mutual Life Assurance Soc Ltd* [1938] AC 224 (PC); *McConnell Dowell Constructors Ltd v Lloyd's Syndicate* 396 [1988] 2 NZLR 257 (CA); Laurette Barnard, "Choice of Law in International Contracts — The Objective Proper Law Reconsidered" (1996) 2 NZBLQ 27, 29–30.

Judge Colgan was of the view that the Tribunal's approach to the case "confused questions of choice of law with jurisdiction".<sup>9</sup> The real issue was not whether the New Zealand courts had jurisdiction, but whether New Zealand law in the form of the WPA was applicable to the premium negotiated and paid outside New Zealand.

The Judge therefore embarked on an exhaustive analysis of the issue of whether the WPA had extra-territorial reach. He referred to the general presumption against extra-territoriality: unless the contrary intention is clear, statutes passed by the Parliament of New Zealand are presumed to be limited to, and to have effect within New Zealand's territorial jurisdiction only, and are not to be construed as imposing liabilities on, or reducing the rights of foreigners in respect of matters arising outside New Zealand.<sup>10</sup> Although s 12A(1) of the WPA is expressed in very broad and unrestricted terms,<sup>11</sup> Judge Colgan found nothing in the WPA that expressly demonstrated that it was intended to apply to acts taking place outside New Zealand.<sup>12</sup> He noted that, by contrast, other New Zealand statutes such as the Fair Trading Act 1986 and the Commerce Act 1986 contain clear express references to their intended extra-territorial ambit.<sup>13</sup>

Commentators have articulated two approaches to resolving the question of extra-territoriality where statutes are silent as to their territorial scope. The first, favoured by Dicey and Morris, involves the application of "general principles derived from the conflict of laws", which would result in statutes applying only when the issue in question, properly characterized, is governed by New Zealand law.<sup>14</sup> The second approach,

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<sup>9</sup> *Mehta*, above n 1, para 36. In the context of this paragraph, the Judge's remark that the case "turns on the latter, not the former" is obviously an inadvertent transposition.

<sup>10</sup> See eg *Harrison v McGrath* (1903) 22 NZLR 676 (CA); *Philipson-Stow v Inland Revenue Commissioners* [1961] AC 727 (HL), 745; *Public Trustee v Lyon* [1936] NZLR 180; [1936] AC 166 (PC); *Controller & Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278 (CA), 326 per Richardson J.

<sup>11</sup> "No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person."

<sup>12</sup> Compare *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA), 434 per Richardson J in respect of the Employment Contracts Act 1991: "On its face it is unrestricted in its reach. ... It is not qualified so as to limit its application territorially or to any category of employment contract or in any other way." His Honour nonetheless held (p 438) that, whilst the Act "is broadly phrased, it is not expressed to apply extra-territorially ... ." As Barnard points out (above n 8, p 50), however, it is not entirely clear whether Richardson J is here referring to the territoriality doctrine in its private international law or public international law sense.

<sup>13</sup> *Mehta*, above n 1, para 43.

<sup>14</sup> L Collins (ed), *Dicey and Morris on the Conflict of Laws*, 13th ed, London, Sweet & Maxwell, 2000, p 17. For a critique of this approach, see David Goddard and Helen

which is favoured by New Zealand and Australian commentators, attempts to deduce the legislature's unexpressed intention by reference to ordinary principles of statutory interpretation, the legislative history and context, and the legal, social and economic policy considerations underpinning the statute, against the backdrop of the general presumption against extra-territoriality.<sup>15</sup>

The Judge did not engage directly with this theoretical debate, but appears instead to have interpreted the English, New Zealand and Australian case law as following the second approach based on a search for unexpressed legislative intent. The Judge accordingly first outlined the legislative history of the prohibition on the payment of premiums in New Zealand law and of s 12A of the WPA. He found that the prohibition was historically intended to prevent employers from circumventing minimum wage legislation by requiring their trainees and apprentices to pay large premiums back to employers. He concluded that the historical context of s 12A of the WPA either did not particularly assist, or did not support, a conclusion of implied extra-territorial application.<sup>16</sup> Secondly, Judge Colgan investigated whether the prohibition on premiums for employment was underpinned by relevant international Conventions<sup>17</sup> that might indicate an intention of extra-territorial application. He concluded that s 12A and its predecessors were not enacted to conform to international labour obligations, but were rather intended to address a particular domestic situation. The Judge thought that this factor, too, tended to militate against extra-territorial application.

Judge Colgan felt that a comparative analysis of the case law on extra-territoriality showed that English law has watered down the general presumption against extra-territoriality of statutes and has moved towards a more individualised construction of particular statutes.<sup>18</sup> This approach "requires an inquiry to be made as to the person 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

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McQueen, *Private International Law in New Zealand*, Wellington, New Zealand Law Society, 2001, pp 128–129.

<sup>15</sup> Ibid pp 128–129, 151; Barnard, above n 8, p 49.

<sup>16</sup> *Mehta*, above n 1, para 50.

<sup>17</sup> See ILO Conventions 97 (Migration for Employment Convention (Revised), 1949) ratified by New Zealand on 10 November 1950 (except as to Annex 1) and 181 (Private Employment Agencies Convention, 1997) which, Judge Colgan noted (ibid para 53), has not been ratified by New Zealand, even though New Zealand's membership of the ILO requires its recognition.

<sup>18</sup> See, eg *Dicey and Morris*, above n 14, p 16: "It has often been said that there is a presumption that Parliament does not design its statutes to operate beyond territorial limits of the United Kingdom. But if this presumption still exists, it is one which is easily rebutted."

under consideration?"<sup>19</sup> The policy of the legislature in enacting the section in question is crucial. Where a finding against extra-territoriality would frustrate or facilitate evasion of the policy underpinning the statute, Parliament will not be taken to have intended that the statute would have intra-territorial effect only.<sup>20</sup>

Judge Colgan thought that, by comparison, the New Zealand and Australian<sup>21</sup> courts adopted a more conservative approach, adhering to the traditional reluctance to imply extra-territorial application in situations where Parliament could have expressly provided for extra-territorial application but did not do so. Accordingly he held, "with considerable hesitation and reflection" that the demand for, and receipt of a premium for employment in India was beyond the reach of s 12A of the WPA. Mehta could, therefore, not be required to repay the premium.

## 5 Comment

The outcome in *Mehta* was obviously unpalatable to Judge Colgan, and will probably be equally so for most readers. The Judge acknowledged that, in 1992, when s 12A of the WPA was inserted into the Act, the activities of immigration consultants, trends in international employment recruitment, and fundamental immigration policies both contemplated and allowed what had happened in *Mehta*. He also acknowledged the twenty-first century reality of a globalized employment market, which meant that there were good reasons for s 12A of the WPA to have an international reach.<sup>22</sup> Ultimately, however, he felt constrained by the fact that Parliament "did not so express its intention in the way in which it was then doing in other enactments to protect persons from unscrupulous practices connected with New Zealand but carried out overseas".<sup>23</sup>

It is not clear that the Judge should have felt thus constrained. His reasoning arguably overemphasizes the general presumption against extra-territoriality, and moreover suggests a uniformity of Parliamentary intent and a standard of statutory drafting that simply do not reflect New Zealand reality. The issue of extra-territoriality is typically only ever addressed in New Zealand statutes if individual officials or parties making Select Committee submissions underline the issue, overseas legislation with relevant conflict of laws provisions is being copied, or the subject-

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<sup>19</sup> *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130 (HL), 152 per Lord Wilberforce.

<sup>20</sup> *Re Seagull Manufacturing Co Ltd (in liq)* [1994] Ch 345 (CA), 354-355, 360; see also *Re Paramount Airways Ltd (in admin)* [1993] Ch 223 (CA), 235-239.

<sup>21</sup> See eg *Brannigan v Commonwealth of Australia* (2000) 110 FCR 566 (FC).

<sup>22</sup> Compare *Re Seagull Manufacturing Co Ltd*, above n 20, pp 354-355: "By use of the telephone, telex and fax machines English companies can be managed perfectly well by persons who need not set foot within the jurisdiction."

<sup>23</sup> *Mehta*, above n 1, para 71.

matter makes the issue of extra-territoriality blindingly obvious. In most other instances, courts searching for Parliamentary intention by drawing inferences from silences and gaps that may have been deliberate or that are far more likely to be mere oversights, are chasing a mere will-o'-the-wisp.<sup>24</sup>

In such cases, rather than falling back on a blunt and increasingly artificial presumption against extra-territoriality, courts should focus on the specific legal, economic and social policies and aims behind individual statutory provisions. If these policies and aims would be thwarted by denying the statute extra-territorial reach, the inference arguably ought to be that Parliament *did* intend the relevant statutory provision to apply extra-territorially.<sup>25</sup> In adopting such an approach, however, judicial caution is necessary to avoid asserting an exorbitant and stifling extra-territorial reach for local legislation.

In this regard, Judge Colgan's survey of the legislative history of s 12A of the WPA, and the prohibition of premiums generally, demonstrates that the legislation was strongly linked to concerns about, and was enacted to combat, exploitative practices in respect of lower-paid employees, apprentices and trainees employed in New Zealand. As discussed above, s 12A was enacted as part of a package of minimum rights and protections for *New Zealand employees*. If s 12A is construed as having no extra-territorial reach, the social policy underpinning the provision is wholly undermined in respect of vulnerable migrant workers coming to work as employees in New Zealand. It would, therefore, not seem to be drawing too long a bow to argue that, in order to give effect to this social policy, s 12A of the WPA must have been intended to apply to any premiums, wherever negotiated and/or paid, in respect of *actual or prospective employment in New Zealand*.

Judge Colgan's conclusion may have been influenced by the fact that he felt obliged, when construing s 12A of the WPA, to focus on the act of demanding or paying the premium in isolation, perhaps because the statutory provision is triggered regardless of whether the premium actually eventuates in the conclusion or performance of an employment contract.<sup>26</sup> However, the section in its terms does seem to govern the acts of demanding or paying the premium *in the context of actual or prospective*

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<sup>24</sup> So too Goddard and McQueen, above n 14, p 129: "Legislation may be silent on choice of law rules not because the legislature wished the normal rules to apply, but because neither the legislature nor the drafters of the statute adverted to the relevant private international law principles."

<sup>25</sup> *Re Seagull Manufacturing Co Ltd*, above n 20.

<sup>26</sup> See Judge Colgan's analysis of the provision in *Mehta*, above n 1, para 51.

employment in New Zealand.<sup>27</sup> If this interpretation is correct, Judge Colgan's construction of s 12A of the WPA may be regarded as too restrictive.<sup>28</sup>

It is easy, however, to be an arm-chair critic in respect of such difficult, border-line judgment calls. The simple fact is that courts should not be called upon to make them, and citizens should not have to put up with the attendant uncertainty. In the twenty-first century, the territorial scope of all statutes should be addressed by Parliament as a matter of course. As Judge Colgan pointed out, this issue does not just affect s 12A of the WPA. Parliament should also review "other fundamental elements of employment law [that] may be likewise restricted in their applications within the boundaries of the New Zealand quarter-acre in today's global village".<sup>29</sup> Indeed, this issue is by no means confined to employment legislation alone.<sup>30</sup> The decision in *Mehta* signals the need for the legislature to undertake a comprehensive review of the territorial scope of

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<sup>27</sup> "No employer shall seek or receive any premium *in respect of the employment of any person*, whether the premium is sought or received from the person *employed or proposed to be employed* or from any other person." (Emphasis added.)

<sup>28</sup> Another interesting question is whether s 12A of the WPA should apply to situations involving premiums sought or received *in New Zealand* in respect of actual or prospective employment *outside New Zealand*, particularly where the relevant employment contract is governed by foreign law: for such a scenario, see *Nolan v Yokusoka* (1994) EOC 92-571, discussed in *Mehta*, above n 1, para 63. Judge Colgan's exclusive focus on the act of procuring the premiums meant that he did not see *Nolan* as "a case of extraterritoriality" (and, by implication, would presumably apply s 12A of the WPA to a *Nolan*-type scenario). If s 12A is construed in the round, however, both fact situations raise issues of extra-territoriality. In fact, if the legal and social policy behind the provision is seen as the enforcement of minimum standards of conduct in respect of *New Zealand* employment relationships, there is perhaps greater justification for applying s 12A of the WPA to the fact situation in *Mehta* than to the fact situation in a *Nolan*-type case.

<sup>29</sup> *Mehta*, above n 1, para 73. See eg *Governor of Pitcairn and Associated Islands v Sutton*, above n 12, on the Employment Contracts Act 1991; and *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA) where the Court of Appeal, without discussion of the issue, applied the Minimum Wage Act 1983 and the WPA to foreign seafarers' wages claims in the context of the Fisheries Act 1983, even though their employment contracts were governed by Russian law. For commentary on *Udovenko*, see Paul Myburgh, "Shipping Law" [2001] NZ L Rev 105, 119; Bernard Robertson, "*Karelrybflot v Udovenko*" [2000] Employment Law Bulletin 33. The issue is now expressly addressed in s 103(5) of the Fisheries Act 1996, which provides that the Minimum Wage Act and the WPA apply to any employment situation in respect of foreign fishing crews working in New Zealand fisheries waters "as if it were a lawful employment relationship subject to New Zealand law".

<sup>30</sup> See, eg Barnard, above n 8, p 50; DJ Goddard, "New Zealand's Contract Statutes: International Transactions" in New Zealand Law Commission, *Contract Statutes Review*, NZLC R 25, Wellington, 1993, pp 239-267. Goddard's eminently sensible recommendations have finally been implemented after nearly a decade: see the Contracts (Privity) Amendment Act 2002; the Contractual Mistakes Amendment Act 2002; the Contractual Remedies Amendment Act 2002; the Frustrated Contracts Amendment Act 2002; and the Illegal Contracts Amendment Act 2002.

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the entire New Zealand statute book, and to seek out better advice and adopt more exacting drafting standards in future in respect of the private international law dimensions of all proposed statutory provisions.

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