Determination Number: AA 179/01
File Number: AEA 497/01

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND OFFICE**

| | |
|---|---|
| **BETWEEN** | Loganathan Appu (Applicant) |
| **AND** | Royal Tongan Airlines Limited (Respondent) |
| **REPRESENTATIVES** | Hugh Fulton, Counsel for Applicant<br>Harry Waalkens, Counsel for Respondent |
| **MEMBER OF AUTHORITY** | Dzintra King |
| **INVESTIGATION MEETING** | 25 September 2001 |
| **DATE OF DETERMINATION** | 16 November 2001 |

DETERMINATION OF THE AUTHORITY

This matter was originally filed as a personal grievance but the respondent, Royal Tongan Airlines Limited, challenged the Authority's jurisdiction, claiming that the matter is properly subject to the law of Tonga, not that of New Zealand. The applicant, Mr Loganathan Appu, says that New Zealand law is the appropriate law.

Royal Tongan Airlines Limited is a private company incorporated under the Companies Act of Tonga 1995 and its registered office is in Nuku'alofa in Tonga. There is also a registered office in New Zealand. Royal Tongan Airlines flies both internationally and domestically.

Mr Appu is a New Zealander who has held a number of positions with airlines and with the NZ Civil Aviation Authority before working for Royal Tongan Airlines as Deputy General Manager (Airline Operations).

At the time of entering into the contract with Royal Tongan Airlines Mr Appu was resident in Wellington. Mr Appu's initial contact was by mail or fax with Mr Va'inga Palu, the Acting General Manager. At a meeting in Auckland with Mr Palu and Mr Lisiate Akolo, a Board member, the final terms of the employment agreement were negotiated. The written agreement required some corrections which were to be carried out on the computer master copy which was held in Tonga. The final form of the agreement was faxed from Tonga to New Zealand on 24 March 2000 and Mr Appu signed and dated it that day.

On 27 March Mr Palu wrote to Mr Appu from the Auckland office confirming the terms and enclosing a signed copy of the contract which required a correction (originally handwritten) amending the starting date to 10 April 2000.

On 28 March 2000 Mr Appu went to Tonga to meet members of the Board and management in accordance with the letter of appointment which states: *" . . .and you will be required to report for duty at the Airlines' Head office located at Royco Building, Fatafehi Road, Nuku'alofa, Tonga."*

Another copy of the agreement was signed in Tonga and dated 29 March. That was the original hard copy of the faxed version which had been completed in New Zealand.

The documents relating to the contract give the address of the company as variously being the Auckland address and the address in Tonga.

An announcement of Mr Appu's appointment was made to divisional managers on 7 April. It stated that Mr Appu would be based in Auckland and would be directly responsible for flight operations, engineering and maintenance, quality assurance and airport operations and standards.

Mr Appu said he needed to be based in Auckland in order to carry out a significant part of his position. His contract stipulated that the airline would be nationalised and moved to Tonga within five to six years. From the evidence during the hearing it became apparent that the term "nationalise" was being used not in the sense of handing a private enterprise over to state control but in the sense of eventually ensuring that all the employees were Tongan.

Mr Appu moved to Auckland and he was paid a relocation allowance and the housing allowance specified in the contract was paid to him while he was in Auckland. A vehicle allowance was also paid.

He was provided with an office at the Royal Tonga Airlines premises at Royal Oak in Auckland. He worked from this office and other employees of Royal Tongan Airlines also worked from there. This address of Royal Tongan Airlines is the one listed on the Air Operating Certificate and Mr Appu was the Senior Nominated Person for the purposes of the Certificate. Mr Semisi Taumoepeau, now the Chief Executive Officer of Royal Tongan Airlines and a member of the Board for the past eight years, said that Mr Appu was responsible for the Senior Nominated Person function which is required under New Zealand Civil Aviation Rule Part 119 and that he was the person responsible for all regulatory and compliance issues.

Royal Tongan Airlines issues a document called a Foreign Air Operator Exposition wherein Mr Appu is described as at 15 May 2000 as domiciled in New Zealand; and from the time of his appointment, with the exception of travel as required to Tonga, Mr Appu was domiciled in Auckland, until his appointment as Acting General Manager in September 2000. He held this position until a General Manager was appointed in November 2000. During this time Mr Appu spent more time in Tonga and he said that while the new Board Chairperson was critical of his absence from Tonga as Acting General Manager he had not been given any instruction to live permanently in Tonga.

Mr Taumoepeau said he believed it had been made clear to Mr Appu that the airline operations covered both domestic and international and that his position was based in Tonga. Mr Taumoepeau did not take part in those negotiations and there was no evidence from any member of the company who had taken part in the negotiations.

Section 2 of the Employment Agreement states at clause 2 that the relocation will be from Wellington to Auckland to Tonga. Clause 6 of Schedule 2 states that the respondent company will be responsible *"for obtaining the necessary work/residence permit for duration of the employment to legally work and stay in Tonga."*

The contract also provides at Schedule 2 that "*The relocation allowance shall cover all carrier and incidental travel expense incurred by the Employee and his family while in transit by the shortest and most direct route to Tonga…"*. It further provides that "*Upon completion of the agreement the Company shall pay all actual and reasonable cost for the repatriation of the Employee and his family to their place of origin as set out in the letter of appointment. Tonga to Auckland*."

Mr Appu set up a bank account at the ANZ Bank in Tonga into which his salary was paid. Mr Appu paid income and other taxes to the Government of Tonga as do other Tongan employees. A housing allowance was also paid into Mr Appu's Tongan bank account in accordance with the employment agreement. Mr Appu said the Tongan bank account was set up at the suggestion of the respondent.

The respondent's position is that Mr Appu was initially to be based in Auckland for a short period during his appointment as Deputy General Manager (Airline Operations) but that within a relatively short period he was to move to Tonga. The relocation provisions in the contract support the contention that a move to Tonga was envisaged.

The agreement provides for a salary stated in NZ dollars and the amount of the weekly housing allowance is also given in NZ dollars.

The contract provided for six weeks' annual leave and one month's sick leave. It is a three year contract with the possibility of extension and may be terminated on 30 days' notice. The company reserved the right to dismiss the employee with or without notice for serious misconduct or gross breach of the contract. The company also undertook to act as a good employer in all aspects of its dealings with the employee.

Choice of Law

In Royds v FAI (NZ) General Insurance Company Ltd [1999] 1 ERNZ 820 the Court accepted as applicable to New Zealand the commentary in 8 Halsbury's Laws of England setting out three ways in which the proper law may be determined: by express selection; by inferred selection from the circumstances; and, in the absence of either of the preceding, by judicial determination of the system of law with which the transaction has the closest and most real connection.

There has been no express selection of law in this case. It is therefore necessary to try to ascertain whether it is possible to determine the proper law by an inferred selection. Dicey and Morris state:

> ***Flexible method of determining the proper law.*** *English Judges have consistently refused to tie themselves down by any rigid or narrow rule for determining the proper law of a contract, and they have always considered a variety of circumstances, such as the nature of the contract, the customs of businesses, the place where the contract is made or is to be performed, and the like. Any one of these may, in a given case, permit an inference as to an implied intention of the parties or suggest a conclusion as to the connection of a contract with a particular legal system.*

At para 861 of Halsbury a number of factors from which the Court can identify the inferred choice of law are listed. These include the legal terminology in which the contract is drafted, the form of the documents involved in the transaction, the currency in which payment is to be made, the use of a particular language, a connection with a preceding transaction, the nature and location of the

subject matter of the contract, the residence of the parties and the fact that one of the parties is a government.

At para 864 Halsbury states:

> *…the law of the place of performance is likely to be regarded as the proper law, that is the system of law with which the contract is most closely connected, if the contract is made in one country but is wholly to be performed by both parties in another. Where performance is to be made in more than one country, the significance of the place of performance will be far less.*

It is apparent from the above that in the instant case the matter is not easily determined by looking at the place of performance for clearly performance was to be both in New Zealand and Tonga.

In Musashi Pty Ltd v Clinton Moore, unrep, Colgan J, AC 43A/01, 9 October 2001 at p. 18 Colgan J stated:

> *Dicey and Morris [The Conflict of Laws, 13th ed, London, 2000, r 182] goes further than highlighting the importance of the jurisdiction in which the work is carried out. At para 33-050 at p.1304 the authors point out that the provisions of Article 6 of the Rome Convention are driven by the need to secure "more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship." It notes that wide freedom of choice of law could have the effect of depriving an employee of the protection of the mandatory rules designed to protect employees which, as a matter of social policy, ought nevertheless to be applied.*

At the same page Colgan J goes on to say that s238 Employment Relations Act 2000 is indicative of the legislature's intention that employment contracts entered into and performed in New Zealand should comply with the minimum legislative standard provided.

As to the form and place of payment and taxation, in Redmond v DML Resources Ltd [1996] 1 ERNZ 448 Travis J stated at p.466 that where tax was paid on the money did not assist in determining the proper law of the contract and in Royds (supra) the remuneration was expressed in PNG kina but indexed to the NZ dollar and that fact did not lead to a determination that the law was that of Papua New Guinea.

The fact that the contract was signed in New Zealand initially and that the negotiations took place in New Zealand cannot be given great weight either. In Royds (supra) Travis J at p.830 accepted the submission that in an age of modern communications the place of contracting was not to be given great weight.

The contract itself does not contain any specific references to either New Zealand or Tongan law, which material provided to me during the Investigation Meeting and subsequent research carried out by the Employment Institutions Information Centre has shown to be essentially English common law. The sole reference which may have a link with New Zealand is the reference to the respondent being a good employer, a concept which has been in New Zealand statutes for some years.

Apart from occasional visits to Tonga while he was Deputy General Manager and a longer period of residence while he was Acting General Manager Mr Appu's place of work was in New Zealand. It was unclear when he was expected to move permanently to Tonga; and when he was resident in

Tonga the respondent continued to pay for his Auckland accommodation. The place of employment and residence therefore points to New Zealand.

The respondent is a company based in Tonga but with a not insignificant New Zealand base. The business of the respondent is carrying passengers by air, both domestically and internationally. This factor points somewhat in the direction of Tonga.

The method of payment, the currency and the place of contracting are not helpful while the reference in the contract to the good employer concept points to New Zealand.

When the above factors are considered together with the comments made by Colgan J in Musashi (supra) regarding the intention of the legislature and the need to provide mandatory protection of employees as a matter of social policy I am of the view that the applicable law is that of New Zealand.

Forum Non Conveniens

The principles are set out in Oilseed Products (NZ) Ltd v H e Burton Ltd (1987) 1 PRNZ 313 at 316. These are that a stay will only be granted if there is another available forum of competent jurisdiction which is the appropriate forum; the burden of proof rests on the defendant; and the "natural forum" is that with which the action has the most real and substantial connection both in terms of convenience and expense and also the law governing the relevant transaction.

In terms of *forum non conveniens* relevant considerations will be the convenience and expense, the places where the parties respectively reside and carry on business, the law governing the transaction, what is the "natural forum" – that with which the action has the most real and established connection – and whether a New Zealand forum offers an applicant a "legitimate personal or juridical advantage." As Lord Goff of Chiveley stated in Spiliada Maritime Corporation v Cansulex Limited [1986] 3 All ER 843 at 858*: 'The Court's task is "to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice." '*

In Jardine Risk Consultants v Beal [2000] 1 ERNZ 405 at 411 Gault J stated that it was increasingly being recognised that employment disputes should be resolved in the jurisdiction in which the work had been carried out unless that location was temporary. While the location of the employment in New Zealand was not to be permanent the work in the position to which the applicant was appointed was nonetheless carried out largely in New Zealand and the time of transfer to Tonga had not been specified.

I accept that there is an inconvenience to the respondent in bringing its witnesses to New Zealand. Against this is the fact that the respondent is an airline which flies to New Zealand and that it maintains an office in New Zealand and that its personnel come to New Zealand from time to time. Mr Appu would be put to financial expense to go to Tonga. On balance, New Zealand is the *forum conveniens*. The respondent's protest to jurisdiction is dismissed.

Costs in this matter are best determined at the conclusion of the personal grievance. If for any reason the personal grievance does not proceed then an appropriate timetable for costs for this challenge to jurisdiction will be made.

Dzintra King
Member of Employment Relations Authority