

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Alexandra Samau-Fa'alogo (Applicant)

AND Polynesian Limited t/a Polynesian Airline of Samoa (Respondent)

REPRESENTATIVES Simativa Perese, Counsel for Applicant
Penny Swarbrick, Counsel for Respondent

MEMBER OF AUTHORITY Marija Urlich

INVESTIGATION MEETING 15 September 2005
16 September 2005

SUBMISSIONS RECEIVED 19 and 20 October 2005

DATE OF DETERMINATION 1 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Polynesian Limited ("Polynesian") operates an airline. Its head office is in Apia, Samoa and it has offices in Auckland, located in Karagahape Road and Mangere, and Wellington. The applicant, Alexandra Samau-Fa'alogo, had a long employment history with Polynesian. She was first employed by the Company in Samoa and on moving to New Zealand in 1993 was re-employed as a ticketing officer until 2000 when she took up a position with Qantas. In 2001 Mrs Samau-Fa'alogo returned to Polynesian to take up the position of supervisor of the Manukau travel centre where she remained until her dismissal on 8 December 2004. Mrs Samau-Fa'alogo's employment was subject to a written employment agreement.

[2] On 23 October 2004 Mrs Samau-Fa'alogo attended a meeting with representatives of Polynesian where she was advised an investigation into fraudulent activities at the Wellington office had commenced, that it appeared the Manukau office was involved and it was put to Mrs Samau-Fa'alogo that she should go on leave with pay until the investigation into those unspecified activities was concluded. Subsequently, specific allegations were put to Mrs Samau-Fa'alogo to which she was invited to respond. Following an investigation into the allegations on 8 December 2004 Polynesian advised Mrs Samau-Fa'alogo her actions amounted to serious misconduct warranting dismissal.

[3] Mrs Samau-Fa'alogo says her dismissal was unjustified. She says Polynesian's investigation into the allegations against her was flawed and the outcome was predetermined. She says given her lack of training, the failure of the auditing system to pick up shortfalls and the historical nature of most of the allegations it was unreasonable to conclude her conduct amounted to serious misconduct. She seeks reimbursement of wages lost as a consequence of her dismissal and compensation to the sum of \$50,000 for hurt and humiliation caused as a consequence of her

dismissal.

[4] Polynesian says Mrs Samau-Fa'alogo's dismissal was justified in all the circumstances; that Mrs Samau-Fa'alogo was well aware of the serious allegations she faced and the basis of those allegations, that Mrs Samau-Fa'alogo was given a fair opportunity to respond to those allegations and that it took reasonable steps to address Mrs Samau-Fa'alogo's concerns that the outcome had been predetermined.

[5] I record that the parties have attended mediation in an attempt to resolve this employment relationship problem.

[6] This dismissal must be considered under section 103A of the Employment Relations Act 2000. The Authority must consider whether it was fair and reasonable in the all the circumstances for Polynesian to conclude that:

- (i) Mrs Samau-Fa'alogo's conduct amounted to serious misconduct; and
- (ii) the whether the misconduct was so grave as to warrant dismissal.

Issues

Predetermination

[7] Two aspects of this fact situation have given rise to allegations of predetermination:

- (i) the first concerns the manner in which Mrs Samau-Fa'alogo was stood down from her position on 23 October 2004;
- (ii) the second concerns the statement made by Fatu Tielu, Polynesian's Chief Financial Officer, to Amasi Fili, another employee of Polynesian regarding Mrs Samau-Fa'alogo's alleged involvement in the fraudulent activity uncovered in the Wellington travel centre and to what extent, if any, this tainted Polynesian's decision making.

(i) Stand down – 23 October 2004

[8] Polynesian says the meeting on 23 October 2004 was conducted in a fair and reasonable manner and that Mrs Samau-Fa'alogo agreed to go on leave with pay while an investigation was undertaken. Mrs Samau-Fa'alogo says her request for legal representation, made during the meeting, was dismissed and that she felt she had been accused of stealing money.

[9] A typed record of the 23 October meeting has been provided to me. At the investigation meeting the parties accepted these notes were generally accurate which is supported by their contemporaneous signatures on the typed document.

[10] At the 23 October meeting Mrs Samau-Fa'alogo was advised that:

- (i) an investigation into fraudulent activities in the Wellington travel centre had implicated the Manukau travel centre;
- (ii) this investigation was to continue;
- (iii) it was Polynesian's view that Mrs Samau-Fa'alogo should stand down on pay while this investigation continued; and
- (iv) Mrs Samau-Fa'alogo would be advised of the outcome of the investigation hopefully within a week.

[11] At the outset of the meeting Mrs Samau-Fa'alogo was offered an opportunity to have a witness present. She declined this offer. Later in the meeting Mrs Samau-Fa'alogo requested legal representation and said she wanted to talk about work pressures, staff shortages and lack of lunch breaks. The notes record that Mr Tielu told Mrs Samau-Fa'alogo she would have an opportunity to respond to any allegations put to her and she could have legal representation present. Mr Tielu said the purpose of the current meeting was to raise Mrs Samau-Fa'alogo standing down from her duties while the investigation was undertaken. The notes record that Mrs Samau-Fa'alogo agreed to go on leave with pay and at Mr Tielu's request agreed to return any company property in her possession.

[12] Mrs Samau-Fa'alogo did not receive notice of the meeting. Given the purpose of the meeting was to advise Mrs Samau-Fa'alogo of the tentative investigation to date and how that may affect her as the travel centre supervisor it was not unreasonable to raise these preliminary issues with her face to face. The notes record that Mrs Samau-Fa'alogo was advised of the broad nature of the investigation at the outset ie, that there appeared to be a link between the fraudulent activities in Wellington and the Manukau travel centre, and then invited to have a witness present. I am satisfied Mrs Samau-Fa'alogo declined the offer of a witness once she was generally aware of the nature of the meeting.

[13] Was Mrs Samau-Fa'alogo's request for legal representation fairly dealt with? Mr Tielu responded to this request with an explanation as to the purpose of the meeting and to put to Mrs Samau-Fa'alogo that she stand-down during the investigation. I am satisfied that this explanation was reasonable in the circumstances and that the stand down proposal was fairly put to Mrs Samau-Fa'alogo. The notes do not record that Mr Tielu dismissed Mrs Samau-Fa'alogo's request for legal representation. What the notes record is that Mr Tielu responded to the request with an explanation as to why it was unnecessary then, that a further opportunity would be provided to Mrs Samau-Fa'alogo to be legally represented at any future meetings and Mrs Samau-Fa'alogo accepted the proposal that she go on leave with pay. At the investigation meeting Mrs Samau-Fa'alogo confirmed that she accepted the stand down on 23 October 2004. I find on balance that Mrs Samau-Fa'alogo was not treated unfairly during the meeting on 23 October 2004.

(ii) investigation into allegations of serious misconduct

[14] On 4 November 2004 a letter under the name of Toalepai Tautolo, Polynesian's New Zealand regional manager, was couriered to Mrs Samau-Fa'alogo home. The letter advised that following the meeting of 23 October the preliminary investigation was complete and:

“The report summarises the results of the research and indicates the more significant evidence that could result in conclusions of misappropriation of company monies and/or falsification of documents by yourself”

[15] The letter then set out specific allegations concerning eight sets of ticket transactions issued by Mrs Samau-Fa'alogo to passengers of Polynesian, the transaction trail for each ticket and the sums of money unaccounted for at the end of those transaction trails. The tickets in question were issued between March 2002 and June 2004. The letter provided Mrs Samau-Fa'alogo with the specific details of the allegations; the MCO (Miscellaneous Charge Order ie, a record that money has been paid for tickets for a particular passenger or passengers) number, the passenger name the ticket was issued under, the date of issue, the price of the ticket, the method of payment, the amount received as recorded on the Sales Office Return, the sums banked and any shortfall between the sums banked and the sum recorded on the Sales Office Return. Copies of supporting documents were also provided to Mrs Samau-Fa'alogo.

[16] The letter stated that Polynesian was extremely concerned about the listed incidents and if substantiated they would amount to serious misconduct under the terms of the employment agreement.

[17] The letter then invited Mrs Samau-Fa'alogo to attend a meeting on 11 November 2004 to provide a response to the allegations, advised who would represent Polynesian, explained the process to be used, put Mrs Samau-Fa'alogo on notice that Polynesian could take steps to recover the outstanding sums from her in the event the allegations were upheld, encouraged Mrs Samau-Fa'alogo to bring a representative with her to the meeting and asked her to advise of any Polynesian employee who could be called to provide evidence.

[18] On 8 November Mrs Samau-Fa'alogo's barrister, Mr Perese, wrote to the CEO of Polynesian, John Fitzgerald:

- (i) noting the indication in the 4 November letter that the investigation was not yet complete, and asking why a disciplinary meeting was being convened in such circumstances;
- (ii) requesting a full copy of Mrs Samau-Fa'alogo's personal file;
- (iii) seeking the details of the alleged link between the Manukau office and the alleged fraudulent activities in the Wellington office as advised at the 23 October meeting;
- (iv) requesting advice of the experience of the company representatives in assessing the allegations faced by Mrs Samau-Fa'alogo and the standard of proof to be applied;
- (v) that a strong inference of predetermination could be drawn from the unreasonable timeframes set by Polynesian, that a disciplinary meeting was convened before any discussion about the allegations was held with Mrs Samau-Fa'alogo and the 4 November letter states if substantiated the allegations would amount to misappropriation of company funds; and
- (vi) raising a personal grievance on Mrs Samau-Fa'alogo's behalf and putting Polynesian on notice that an injunction may be sought to ensure a fair process.

[19] On 8 November Mr Tielu replied to Mr Perese:

- (i) that the proposed meeting would only deal with those allegations set out in the 4 November letter;
- (ii) with a request for specific items from Mrs Samau-Fa'alogo's personal file;
- (iii) that Mrs Samau-Fa'alogo had issued ticket stock to the Wellington office, without the knowledge of head-office Apia. This was uncovered during the investigation of the alleged fraudulent activities in the Wellington office;
- (iv) with details of the Polynesian representatives to attend the proposed meeting;
- (v) refuting that the timeframe was too short given the detail of the allegations provided to Mrs Samau-Fa'alogo; and
- (vi) advising no decision had yet been made.

[20] An email exchange followed between Mr Perese and Mr Tielu and Mr Perese and Mr Barlow, Polynesian's solicitor in Apia, the outcome of which was Polynesian provided Mr Perese with a copy of Mrs Samau-Fa'alogo's personal file and the meeting was rescheduled to 18 November. While I acknowledge this argy-bargy over time frames and the provision of the personal file would have caused Mrs Samau-Fa'alogo stress additional to that inherent in facing disciplinary proceedings, both issues were resolved in her favour and there was no evidence they caused any ongoing disadvantage to Mrs Samau-Fa'alogo's employment.

[21] Mrs Samau-Fa'alogo attended the 18 November meeting accompanied by Mr Perese, her husband, her brother, her sister and her brother-in-law. The Company was represented by Mr Tielu, Daisy Roebeck, an accountant employed by Polynesian, Sulami Asi, General Manager People and Facilities, Agnes Pouafe, Mrs Swarbrick and Mr Barlow. A recording of that meeting has been made available to me.

[22] Polynesian's representatives advised Mrs Samau-Fa'alogo at the outset of the meeting that the allegations were that Mrs Samau-Fa'alogo had failed to account for Company monies and/or had failed to follow the company's cash handling procedures. Mrs Samau-Fa'alogo was further advised that if the allegations were substantiated they could amount to serious misconduct. While pared back from the allegations set out in the 4 November letter it is clear the basis of the allegations remained the same.

[23] The allegations were reviewed and Mrs Samau-Fa'alogo presented a written response which the company representatives adjourned to read through and then returned to discuss with Mrs Samau-Fa'alogo. The allegations and Mrs Samau-Fa'alogo's responses to them are summarised as follows:

A. Talagi Transaction - 7 April 2003

Allegation 1 – cash shortfall \$629

Response - Mrs Samau-Fa'alogo may have overlooked taking the cash from the customer. No ADM (Agents Debit Memorandum) was issued, which is the system to pick up discrepancies. Mrs Samau-Fa'alogo denied stealing any money and noted there were only two staff on duty and they were very busy. Mrs Samau-Fa'alogo said she was unable to recall the exact transaction because it happened some time ago and the ADM system should have picked up any discrepancies.

Allegation 2 – endorsement (ie, transfer to another passenger) was not shown on audit copy of ticket.

Response - it was not an unusual practise to note an endorsement only on the office copy. Passenger Talagi may have paid a deposit with the intention to later advise who would use the money.

B Ticketing for passengers Mani and Patea - 10 June 2004

Allegation 1 – \$263 unaccounted for and incorrect information entered into the Sales Report.

Response - Mrs Samau-Fa'alogo could not recall transaction specifically. Mani and Patea same family, endorsement may have been because infant was unable to travel and ticket was endorsed to an adult hence, the MCO showed greater value than the ticket.

Allegation 2 – cash received not receipted in the required timely manner.

Response - The cash was received and receipted. Date stamp may have shown wrong day - the receipts are dated within two days of the cash being received.

C Passenger Sovala – 28 April 2003

Allegation – \$852 ticket upgrade unaccounted for; false or incomplete information reported.

Response - There must be an MCO attached to the tickets to show the upgrade amount. Usual practise in Manukau office to show zero money value received for payment for a manual document. No ADM issued. Busy day; over \$29,000 taken that day and two agents working.

D. Passengers Maulolo and Hunt – 16 April 2003

Allegation - \$3418.40, the full amount for the tickets, is unaccounted. The MCO was not attached to the Sales Return and has been found in the desk drawer of Amasi Fili, an employee at head-office, Apia.

Response - Cannot recall the transaction occurred over a year ago. No ADM was raised. There is no evidence Mrs Samau-Fa'alogo forwarded the MCO to Apia to fix

the system so it would not show up on the missing document report. Busy day with takings over \$25,000.

E. Vaitoe family – 21 March 2003

Allegation 1 – expired tickets falsely reissued resulting in shortfall of \$1044.22

Response – Mrs Samau-Fa’alogo could not recall this transaction. Had discretion to give a discount and factoring this in no shortfall arises.

Allegation 2 – MCO used twice.

Response - Recall querying the Accounts Department and told that MCO had not been used.

F. Toilolo Family – 7 November 2003

Allegation 1 – Deliberate falsification to hide unaccounted funds on the MCO for payment of the Toilolo family tickets

Response – Toilolo and Puni family are the same party, no shortfall.

Allegation 2 – Value of Laban tickets transferred to Brown, difference of \$1300 unaccounted for.

Response – Unable to recall detail of Laban/Brown transaction but may have forgotten to enter the MCO in the sales report as no cash to account for because paid by MCO.

G.

Allegation – failure to account for cash paid by passengers for tickets, no receipt issued for cash, cash not reported in the Sales Report for the relevant day. \$1800 unaccounted for.

Response - Mrs Samau-Fa’alogo could not recall this transaction which occurred 19 months ago and suggests the supporting documentation must be attached to the audit copies of the transactions.

H. Assembly of God group

Allegation - \$4000 MCO issued in February 2002 was used a year later in part payment for an Assembly of God group in July 2003. None of the passengers in the AOG group had the surname Matau. Procedure requires MCO to have been checked with K Rd office or Head Office. \$4000 unaccounted.

Response – Mrs Samau-Fa’alogo said she would have queried the use of the MCO with Head Office because over a year old. An ADM should have been issued.

[24] During the course of the meeting notes of a meeting held a month earlier with Ms Fili were provided to Mrs Samau-Fa’alogo by the company. This hand over occurred following some discussion. The notes contain the following exchange:

“Meeting on 19/10/04 at Polynesian’s Board Room at 9.50am

Present: Fatu Tielu, Daisy Roebeck, Aimasi Fili, Agnes Pouafe and Sulami Asi

...

7. Benefits received.

Fatu – Aimasi, you admitted to me when I interviewed you before that the only benefit you received from Alex [Mrs Samau-Fa’alogo] for fixing up these documents in the system to hide her fraud were allowance for excess baggages (sic) when you or your family travel from new Zealand. Are you really certain that you never received any monetary benefit?

Aimasi – That’s correct, no monetary benefits but only excess baggage allowances.

8. Equally Quilty (sic)

Fatu – Even though you believe you did not receive any monetary benefits except excess baggage allowances, you are equally quilty (sic) as Alex for the amount of money the company has lost through these fraudulent activities and you can justifiably be dismissed for what you have done.
 ...”

[25] On the basis of this exchange Mr Perese argued Mr Tielu could not remain the decision-maker because he had already determined that Mrs Samau-Fa’alogo was guilty of the allegations. After some discussion between the parties Mr Tielu stood down from the decision-making role in the disciplinary process and Mrs Asi assumed that role. Mrs Samau-Fa’alogo and Ms Perese continued to assert the process was fundamentally unfair. The meeting concluded shortly thereafter.

(iii) Mrs Asi’s consideration of Mrs Samau-Fa’alogo’s response

[26] Following Mr Tielu stepping down from the decision-making role it fell to Mrs Asi to consider Mrs Samau-Fa’alogo’s responses. Mrs Asi does not have a ticketing background and she first had to get her head around the complexities of ticketing. She told me she familiarised herself with the technical issues by consulting with Ms Roebeck and Mr Tielu and that they attended follow up investigation meetings with Manukau office staff.

[27] In a letter dated 23 November Mrs Swarbrick wrote to Mr Perese setting out Polynesian’s preliminary views having had an opportunity to consider Mrs Samau-Fa’alogo’s response. Mrs Samau-Fa’alogo was invited to comment on the contents of the letter or provide further explanations by 4pm 25 November.

[28] In summary Mrs Swarbrick’s letter:

- (i) traverses each allegation individually, Mrs Samau-Fa’alogo’s response to each allegation and what issues remain outstanding for the company having considered those responses;
- (ii) broadly restates Mrs Samau-Fa’alogo’s responses as either; she could not recall the detail of transactions which occurred months or years ago, the office was very busy and this may have contributed to mistakes being made, no ADM’s were issued to allow discrepancies to be dealt with as they arose and she had received no or insufficient ticketing training;
- (iii) the company’s response to these broad issues was;
 - it accepted the transactions at question were old and difficult to recall but if the proper procedures had been used the transactions in questions would have been transparent and the funds in question would be able to be accounted for;
 - busyness was not an excuse for failing to follow proper cash handling procedures and the company did not accept Mrs Samau-Fa’alogo could not perform her job without making errors;
 - the company accepted no ADMs had been raised but responded that failure to issue ADMs did not excuse Mrs Samau-Fa’alogo from performing her duties properly; and
 - Mrs Samau-Fa’alogo had adequate experience and training to undertake her role.
- (iv) the company accepted Mrs Samau-Fa’alogo explanation in relation to the Toilolo allegation that manual transactions were sometimes zero rated;

[29] Mrs Samau-Fa’alogo did not provide any further information or response to these preliminary findings.

[30] On 8 December 2004 Mrs Swarbrick wrote to Mr Perese confirming the company's decision that the investigation upheld the allegations of serious misconduct and that dismissal was warranted.

Determination

[31] The letter of 8 December states that the serious misconduct upheld by the investigation was:

“her [Mrs Samau-Fa'alogo's] failure to account for the company's funds, and her failure to follow procedures, as set out in the letter of 4 November and my letter of 22 November.”

[32] The letter of 8 December also states why Polynesian decided dismissal was warranted:

“In the circumstances, the necessary trust and confidence in the employment relationship cannot exist, and the company has decided to terminate Mrs Faalogo's employment forthwith.”

[33] Mr Perese submits that Mrs Samau-Fa'alogo's conduct falls into the category of poor performance and therefore could not reasonably be treated as serious misconduct warranting dismissal.

[34] There is no dispute that Mrs Samau-Fa'alogo as the travel centre supervisor, was responsible for receiving and handling company funds. In her evidence Mrs Samau-Fa'alogo confirmed that she was responsible for:

- (i) preparing the daily sales office return;
- (ii) reconciling revenue receipts;
- (iii) banking; and
- (iv) ticket stock reconciliation.

[35] I am satisfied that Polynesian had cash handling processes which Mrs Samau-Fa'alogo was aware of and which Mrs Samau-Fa'alogo understood she was required to use. I accept Mrs Samau-Fa'alogo's evidence that there was no copy of the finance manual kept in the Manukau office. I also accept her evidence that she was familiar with all the cash handling processes which were required to trace Company funds she received and handled during the course of her duties.

[36] In *Click Clack International Ltd v James* [1994] 1 ERNZ 15 the Employment Court overturned a decision of the Employment Tribunal which had found Mr James' conduct in significantly damaging a die during the course of his work did not amount to serious misconduct because the conduct was neither wilfully negligent nor reckless. The Court held that, in considering the justifiability of the dismissal, the issue was not Mr James' intention at the time the damage was caused but whether, in all the circumstances, the employer was justified in concluding that the serious damage to the die was conduct which:

“destructively impaired the basic/necessary level of confidence and trust which underpinned the respondent's [Mr James] employment with the company as a die setter.”

[37] In the circumstances of this matter could Polynesian reasonably say Mrs Samau-Fa'alogo's conduct had so seriously damaged its confidence that she could discharge her duties faithfully?

[38] I have carefully considered the investigation conducted by Polynesian which resulted in Mrs Samau-Fa'alogo's dismissal. I am satisfied that the allegations and basis of those allegations were fairly put to Mrs Samau-Fa'alogo, that she was given a fair opportunity to provide a response and that response was fairly considered. If there was any uncertainty as to the category of allegation faced, which I am not satisfied there was, it was certainly clarified by 23 November 2004 when

Polynesian's preliminary view was put to Mrs Samau-Fa'alogo to comment on or provide any further information. In the absence of further comment or information from Mrs Samau-Fa'alogo Polynesian was entitled to believe Mrs Samau-Fa'alogo had provided her response to the allegations and that it was fair to move to next stage of the investigation and form a firm view. Mr Tielu's recorded comment to Ms Fili gave rise to a proper challenge to his role as impartial decision-maker. I am satisfied that the issue of predetermination was dealt with openly by Polynesian and any flaw was remedied when Mrs Asi was appointed to the decision-making role. I am satisfied that the issues around Ms Fili did not form any part of the allegations faced by Mrs Samau-Fa'alogo and were not part of the information considered by the decision-maker Mrs Asi. On the evidence received I am satisfied that Mrs Asi was the decision-maker and that Mr Tielu did not participate or influence that process.

[39] Given the seriousness of the issues, the circumstances of Mrs Samau-Fa'alogo's employment ie, that she was the supervisor in a small office receiving and handling large amounts of cash, the level of trust inherent in an employee holding such a role and the clear evidence that she had failed to follow the accepted cash handling procedures which resulted in significant funds remaining unaccounted for, the decision to dismiss was one open to Polynesian in all the circumstances. For these reasons Mrs Samau-Fa'alogo does not have a personal grievance.

Costs

[40] The issue of costs is reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to do so they may apply to the Authority to determine costs.

Marija Urlich
Member of Employment Relations Authority