



[4] SORAL's business included securing job offers from New Zealand employers for people in Samoa and then lodging visa applications on behalf of those people with the NZIS branch in Apia.

[5] After identifying the potential conflict of interest issue in 2005 Miss Utai's manager, James Dalmer, issued her with a letter of instruction. This letter set out measures to avoid conflict between her role as a visa officer determining applications and her mother's business. Miss Utai signed the instructions which included these directions:

- *Do not discuss any visa applications for any applicants, whether they be temporary entry or residence applications, whether they have been lodged by SORAL or not, with your parents or any person connected with SORAL.*
- *Do not process, receipt, assist any other visa officer or support officer, or have anything to do at all with any application or client of SORAL.*

[6] In the following weeks further information about connections between Miss Utai and SORAL led to an internal audit review. This investigation found Miss Utai was involved in signing SORAL cheques submitted with applications to the NZIS Apia office and had discussed applications with her mother before cheques were signed.

[7] Mr Dalmer began a disciplinary investigation which included meeting with Miss Utai, with Mrs Utai present as a support person. The investigation found Miss Utai had breached the NZIS code of conduct. After considering written submissions from her lawyer in Apia, the Department dismissed Miss Utai for serious misconduct.

[8] Miss Utai says she was dismissed for signing a "blank" or "open" cheque for her family's account which could have been used for household purchases.

[9] Her lawyer's submissions – dated 7 July 2005 – conceded she had "failed to declare the potential conflict of interest in signing cheques for SORAL" but alleged the process followed in deciding on her conduct was inadequate because Mrs Utai was not allowed to speak and Mr Dalmer was said to be intimidating and "not impartial".

[10] In its letter of dismissal – dated 25 July 2005 and signed by Mary Anne

Thompson, a Department deputy secretary at that time – NZIS did not accept the criticism of Mr Dalmer and noted Ms Utai had not raised concerns about him when she had spoken to a departmental investigator.

[11] Through an employment advocate in New Zealand, Ms Utai notified the Department of a personal grievance for unjustified dismissal. The grievance letter, dated 14 October 2005, stated that Ms Utai felt “*merely signing company cheques*” meant “*a conflict of interest situation ... had not arisen*”. It asserted her employment and dismissal was “*governed by New Zealand law*”.

[12] By letter of 31 October 2005 the Department responded that Miss Utai was “*a locally engaged staff member, employed under Samoan law*” so New Zealand employment institutions had no jurisdiction and she should pursue any claim “*in accordance with Samoan law in Samoa*”.

[13] On 29 January 2010 Ms Utai lodged an application in the Employment Relations Authority stating she understood that she was “*out of time*” to pursue her grievance but requesting “*special permission*” to do so now.

[14] The Department did not consent to her grievance being heard by the Authority in New Zealand or being heard out of time.

## **Issues**

[15] The issues for determination are whether:

- the law governing Ms Utai’s employment by NZIS in Apia was Samoan or New Zealand law; and
- New Zealand is the appropriate or natural forum (that is, *forum conveniens*) to hear her claim (under either Samoan or New Zealand law); and
- If the Authority could determine Ms Utai’s claim under New Zealand law, should she be granted an extension to pursue her claim despite taking no action in the Authority for more than three years after raising her grievance?

## **The investigation**

[16] In a case management conference held by telephone on 23 March 2010, the parties were directed to mediation and a timetable was set for the lodging of affidavits, any additional documents and submissions on the identified issues. A date for the investigation meeting was also set and agreed. Mediation did not resolve the matter and the Department lodged affidavits from Mr Dalmer and a human resources advisor, Catherine Pomare, along with submissions on the facts and the relevant law.

[17] Miss Utai did not exercise the opportunity provided in the timetable for her to lodge an affidavit on any additional information or respond to the Department's submissions. Neither did she attend at the notified 10am starting time for the investigation meeting. I was satisfied she had been properly notified of the meeting. I had a support officer ring the mobile and landline telephone numbers Miss Utai had previously provided. The officer was able to leave a message on the mobile telephone.

[18] After 15 minutes I exercised the Authority's power to proceed and heard submissions from Mr Gane.<sup>1</sup> The meeting finished at 10.40 am. Later that morning Miss Utai contacted the Authority support officer to advise that she had not attended due to "*car trouble*". I note Miss Utai had made no earlier attempt to advise the Authority of the delay. I have proceeded to determine this matter as follows.

## **Determination**

- **Was Miss Utai employed under Samoan law or New Zealand law?**

[19] Miss Utai signed an acknowledgement of her terms and conditions of employment on 19 October 2004. The letter setting out those terms refers to her employment being with "*the Department of Labour's New Zealand Immigration Service Branch in Apia*".

[20] There is no reference to a governing law in the agreement. Ms Pomare's evidence was that "*locally employed*" NZIS staff were employed on "*local contracts*

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<sup>1</sup> Clause 12 of Schedule 2 of the Employment Relations Act 2000.

*under relevant Samoan labour laws*". Those staff were paid in Samoan tala. This contrasts with New Zealand managers who were posted to the Apia branch. Those managers had employment agreements based on New Zealand law, diplomatic status during posting, and were paid in New Zealand dollars in New Zealand bank accounts.

[21] On those facts I accept the Department's submission that Samoan law applies to Ms Utai's employment as an inference from the circumstances. However if it were not, I would also determine that Samoan law applied for the following reasons:

- (i) Samoa is a sovereign nation with its own employment law, including its Labour and Employment Act 1972. Section 20 of that Act deems unlawful and of no effect any term of a contract of service contravening that Act; and
- (ii) New Zealand's Employment Relations Act 2000 does not apply extra-territorially; and
- (iii) New Zealand law on jurisdictional questions tends to accept the law of the place of performance as likely to be regarded as the proper law.<sup>2</sup>

- **Is Samoa or New Zealand the natural and appropriate forum?**

[22] Although I have determined Samoan law applied to Miss Utai's employment, her claim could be heard here if New Zealand was the natural or appropriate forum. Such a hearing would have to apply Samoan law.

[23] The natural forum is the country with which the action has the most real and substantial connections both in terms of convenience and expense and also the law governing the relevant transaction. Factors to be weighed may include where the employment agreement was made, where the employment was performed, the places of residence or business of the employer and the employee, and the nature of the agreement. The place of performance is increasingly recognised as the appropriate location to resolve employment disputes.<sup>3</sup>

[24] In the present case Miss Utai was employed in Samoa to work in NZIS's Apia branch. There was, from the terms of the employment agreement, no requirement or

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<sup>2</sup> *Royds v FAI General Insurance Company Limited* [1999] 1 ERNZ 820 (EC) and *Jardine Risk Consultants v Beale* [2000] 1 ERNZ 405 (CA) at [28].

<sup>3</sup> See *Royds* and *Jardine* above.

expectation that she work elsewhere for NZIS, either in New Zealand or another country. She resided in Samoa and NZIS's business in Apia was, as far as I can tell from the evidence, to process Samoan visa applications. While NZIS was based in New Zealand, and managers from and in New Zealand were involved in the decision about Miss Utai's future with NZIS, I do not consider that factor displaces Samoa as the jurisdiction with the most real and substantial connection with her employment.

[25] I take the question of convenience and expense as a neutral factor in the present case, favouring neither jurisdiction. Miss Utai is presently resident in New Zealand and at least one of the managers involved in her case is here and remains employed by the Department. Mr Dalmer, an essential witness, is posted to Hong Kong. While Ms Thompson no longer works for the Department, I assume she would be locatable in New Zealand if necessary. I have also assumed that some witnesses regarding the events said to amount to conflicts of interest, including NZIS staff, will still be resident in Samoa.

[26] Also to be taken into account is the status of Samoa as a sovereign nation governed according to its constitution. I understand Samoa to have independent courts in which Miss Utai would have a fair opportunity to make her case and receive proper justice.

[27] In July 2005 Miss Utai was free to seek remedies for any breach of her contract of service by way of civil proceedings in the Supreme Court of Samoa (which I understand to be the equivalent of the High Court here). The documents she provided the Authority confirm she was legally represented at the time.

[28] Samoan employment law does not presently include the statutory concepts of unjustified dismissal found in New Zealand and Australian law. Workers may pursue an action in wrongful dismissal.<sup>4</sup> Although there appears to be no general duty to act fairly, express terms are enforceable.<sup>5</sup> Miss Utai's employment agreement included a term that NZIS would "*observe the rules of procedural fairness which apply to the termination of employment*". That provision would arguably found an action if NZIS

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<sup>4</sup> *Brighouse v National Bank of Samoa Ltd* [2004] WSSC 1 (Sapolu CJ).

<sup>5</sup> *Keil v Polynesian Airlines* [1980-1983] WSLR 395 (WSCA).

had failed to follow fair procedures in its disciplinary investigation.<sup>6</sup>

[29] Looked at overall, I find Samoa has the most real and substantial connections with Miss Utai's case and is the natural forum for her to pursue any claim, subject to whatever limitation laws may apply in that jurisdiction.

- **Should an extension be granted?**

[30] In case I am wrong in the conclusions reached on either of the first two issues and Miss Utai's claim could be brought under New Zealand law, I have considered whether an extension should be granted for her action to proceed 'out of time'.

[31] There is no doubt Miss Utai raised a personal grievance within 90 days of her dismissal, satisfying the requirement of s114(1) of the Employment Relations Act 2000 (the Act).

[32] An employment advocate, Allan Silberstein, wrote to Ms Thompson on 14 October 2005 – that is 81 days after the dismissal. A letter of reply from the Department noted Mr Silberstein's letter was received on 20 October 2005 so it was clearly within the 90 day period. His letter also set out the grounds on which an unjustified dismissal was alleged which I accept was in sufficient detail to make the Department aware of what Ms Utai wanted addressed in responding to her grievance.

[33] However, having raised a grievance by no later than 20 October 2005, Ms Utai did not lodge an application in the Authority until 29 January 2010 – that is more than four years and three months after the grievance was raised.

[34] No action may be commenced in the Authority in relation to a personal grievance more than three years after the date on which the personal grievance was raised: s114(6) of the Act. However an interested person may ask the Authority to exercise its discretion and order an extension of time where an action has not been commenced within the period allowed: s219(1) of the Act. The established legal principles governing exercise of such a discretion require a range of factors to be

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<sup>6</sup> *Liki v Samoa Breweries Ltd* [2005] WSSC 3 (Sapolu CJ).

considered in each case.<sup>7</sup>

[35] There is no sworn or affirmed evidence from Miss Utai to explain why she did not lodge her claim earlier in the Authority. She has provided a copy of a letter she wrote to the Minister of Labour in which she says “*the lawyer I approached said it is too late to raise my matter and the issue was meant to be raised no more than 3 years (sic).*” She also states she had “*been seeking legal advice from day one*” and “*an agent who was meant to lodge my personal grievance 3 years ago did not end up lodging my application ...*”. This confirms Ms Utai did seek advice from more than one source and suggests she was aware in 2007 that an action had not been properly begun in the Authority. It does not explain why she did nothing more before the three year period expired in October 2008.

[36] There is potential prejudice to the Department’s ability to bring some evidence if it had to now defend its dismissal decision. Mr Dalmer is presently posted to Hong Kong and Ms Thompson is no longer with the Department. There is no firm information on the availability of other potential witnesses who worked at NZIS’s Apia branch in 2005.

[37] I may also make some assessment on the merits of Ms Utai’s case, if she were allowed to proceed, and whether there would be “*some reasonable prospects of success*”.<sup>8</sup> Her chances are slim in light of the clear instructions given to her by letter of 15 April 2005 and a subsequent admission that she had not disclosed some of her dealings with the family business because she knew it would be seen as a conflict. Submissions from her lawyer, Maiava Peteru, in July 2005 put it this way:

*Gloria admits that she failed to declare the potential conflict of interest in signing cheques for SORAL ... In taking instructions from Gloria we have advised her regarding the fact that signing cheques for SORAL Ltd is plainly a conflict of interest situation.*

[38] The evidence from the Department confirms the allegations were subject to an audit by an investigator brought over from New Zealand and Ms Utai was given an opportunity to respond to those findings and the Department’s conclusions before any

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<sup>7</sup> *Roberts v Commissioner of Police* (unreported EC, AC33/06, 27 June 2006, Colgan CJ) at [19] and [20]; *Tu’itupou v Guardian Healthcare Limited* (unreported, EC, AC50/06, 6 September 2006) at [64]; and *Day v Whitcoulls Group Ltd* [1997] ERNZ 541, 547-548.

<sup>8</sup> *Day*, above, at 549.

decision to dismiss her was made. I doubt she would succeed in establishing the Department acted in an unjustified manner in carrying out its inquiry on the allegations or its dismissal decision.

[39] Considering the history of the matter and overall justice of the case, there is no compelling reason to permit an extension of time. Rather the application is declined in order to give effect to the purpose of the statutory limitation period in preventing litigation of stale grievances with little chance of success.<sup>9</sup>

### **Costs**

[40] Costs are reserved. At the investigation meeting Mr Gane advised the Department would seek costs if successful. The parties are encouraged to agree any issue of costs. If they are unable to do so, the Department may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Miss Utai would then have 14 days from the date of service to lodge a reply before the Authority determines costs. No application for costs will be considered outside this timeframe.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>9</sup> *Sandilands v Chief Executive of the Department of Corrections* (unreported, EC, WC 23/09, 14 October 2009, Couch J) at [26] and [28].