

IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 20 of 1985

Between:

AIR PACIFIC LIMITED

Appellant

- and -

AIR PACIFIC EMPLOYEES'
ASSOCIATION

Respondent

B. Sweetman for the Appellant
H.M. Patel and J. Singh for the Respondent

Date of Hearing: 2nd July, 1985.

Delivery of Judgment: 20th July, 1985.

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against the judgment of Kearsley J. on an application for judicial review of the award of the Permanent Arbitrator Professor F.J.L. Young on a trade dispute referred to him pursuant to section 6(2)(b) of the Trade Disputes Act (Cap.97).

At all material times one Veer Satish Singh was President of the Respondent Association (APEA), and was employed by Air Pacific as its Fuel Administrator. On the 1st November, 1983, Veer Singh received this letter from Air Pacific:

"CONFIDENTIAL"

TO: Mr. V.S. Singh

FROM: Director Personnel

COPIES TO: Industrial Relations
Manager
Personnel Administration
Manager
Chief Executive

OUR REF. PF/209
YOUR REF.

DATE: 01 November 1983

I refer to our discussions today and remind you of the following matters raised:

- . as a senior staff of the Company you have acted against the best interests of the Company in using APEA to take industrial actions on matters with no substance.
- . these industrial actions have also been imposed without the activation of agreed procedures.
- . your conduct when dealing with senior employees of the Company has been noted and is the subject of recent complaints.

Management is convinced that you are being intentionally disruptive to the Company for reasons best known to you and are taking advantage of your position as President of APEA to do so. I advise that Management is considering the line of action to pursue in these matters.

Moreover, as advised earlier, because of recent complaints on your conduct and an earlier warning in this regard a disciplinary inquiry will be held in accordance with the procedures laid down in the relevant agreement:

- (i) the purpose of the interview is to investigate complaints laid against you
- (ii) the charges are that you have been abusive and disorderly in your conduct
- (iii) you are warned that disciplinary action will result if these allegations are upheld
- (iv) you have the right to be accompanied and represented by an official of the Senior Staff Association, if you so wish.

Because of the circumstances involved you are being stood down with effect from 5.00p.m. Tuesday, 01 November, 1983.

The inquiry is set down to be heard in my office at 3.00p.m. Thursday, 03 November, 1983.

(Sgd) G.P. Singh

"

At the meeting on the 3rd November Air Pacific was represented by Mr. G.P. Singh, Director of In-Flight Services and Mr. D. Sainikinaivalu, Industrial Relations Manager; and APEA by Veer Singh and other members of APEA's executive. It was explained to Veer Singh that at that stage the enquiry was limited to the allegations contained in the 1st November letter that he had been abusive and disorderly in his conduct towards senior employees of the Company. The complaints put to Veer Singh were that he had been abusive and aggressive towards a Mrs. Cornish, a Personal Assistant; had abused the Regional Manager Mr. Solomon Beg in a telephone call in which foul language was used to the distress of Mr. Beg and his family; and had abused a Mr. Kiouzelis, Director Engineering, while the latter was engaged in conversation with another senior employee. None of the complainants appeared at the meeting but when the grounds of complaint had been put to him Veer Singh was asked to tell his side of the story. He denied that his confrontation with Mrs. Cornish was abusive, denied using foul language to Mr. Beg, but admitted calling Mr. Kiouzelis a "fucking liar" which Veer Singh described as "industrial language", by which we assume he meant that no offence was intended nor should have been taken.

The meeting ended with an intimation that Air Pacific's Industrial Relations Manager would make

further enquiries, and speak to witnesses where necessary, and report back when either side could call further witnesses. The meeting reconvened on the 9th November when the Industrial Relations Manager expressed the view that the complaints made by Mrs. Cornish and Mr. Beg had been substantiated. Neither side sought to call witnesses and later in that day Veer Singh was handed this letter:

"09 November 1983

DP:PF/211

Mr Veer Singh,
88 Princes Road,
Tamavua,
SUVA.

Dear Sir,

I refer to my earlier advice to you regarding what action Management would consider on the matters raised with you and as stated in my memo DP:PF/209 of 01 November, in relation to your position as a senior employee of the Company.

The 'explanations' you gave to me were not satisfactory.

We remind you of the following instances in which you as a senior staff of the Company made use of your position within the APEA and improperly ordered overtime bans during the last 10 weeks:

- . Your demand to have an APEA rep in the interview panel for senior staff vacancies whereas no agreement for this exists
- . Your demand that M Wong be paid acting allowance when he had not even begun acting in order to attract such allowance
- . Your disputing our transfer of V King to learn driving which would have qualified him for more pay. You are well aware that transfers are an established right of Management.
- . Your disputing our transfer of A Rahiman to Quality Control, which eventually was accepted

- . Your disputing our appointment of casual staff at Nadi where management averted industrial action by delaying the appointments, although management was not in breach of any agreement.
- . Your own travel advance problem for duty travel which was fixed but industrial action had already been taken by you and maintained for 3 days, although this too had nothing to do with any agreement being breached.

Regrettably these incidents and industrial actions were also taken without any consideration for laid down procedures and your actions have been contrary to the best interests of the Company. You have been advised previously that overtime bans in an essential service constitute a breach of contract of employment. Management must note the adverse effect this has on safety and the commercial interests of the Company.

The above events have been considered by the Company which is of the view that these incidents have been serious enough to warrant your dismissal. I also draw your attention to the Personnel Administration Manual, Clause 20-06 on 'Employee obligations' relevant parts of which are quoted here:

- '2. The public and in particular the airline travellers, are sensitive to careless or irresponsible behaviour on the part of employees of the Company.
- 3. The Company expects all employees irrespective of their work in the Organisation, to adopt a responsible attitude toward their work and to conduct themselves in such a manner so as to maintain and promote the operations and commercial interests of the Company.'

Therefore, the Company has decided to terminate your services with effect from today. You will be paid one month's salary in lieu of notice. Your final pay and all other monies due to you will be paid into your bank account tomorrow.

In passing, I wish to point out that as a result of the disciplinary Inquiry (in which you were present) carried out in respect of allegations contained in my memo dated 01 November, Management has concluded

that the said allegations against you were substantiated. It is also noted that you have once been warned in respect of a similar incident. These would normally warrant your dismissal subject to the requisite procedures being followed. In view, however, of your termination for the reasons outlined above, Management feels that no further action is necessary.

Yours faithfully,

(Sgd) G.P. Singh
DIRECTOR PERSONNEL

"

It is to be noted that the letter of dismissal raised six complaints concerning overtime bans which had not been referred to in the enquiry of the 3rd November, and did not purport to rely on the matters that had been discussed at the meeting as grounds for dismissal.

APEA duly lodged notice of a trade dispute, which was referred to the Permanent Arbitrator who, by his term of reference, was required to resolve "A claim by the Air Pacific Employees Association that the termination of employment of their President Mr. Veer Singh by Air Pacific is unfair and that he should be reinstated."

The hearing before Professor Young occupied three days with the evidence running to 179 pages. Mrs. Cornish and Messrs. Beg and Kiouzelis did not give evidence and the great bulk of the evidence bears on the question of overtime bans and their effect on the Company. We note that in their final addresses before Professor Young, Counsel for Air Pacific did not mention the alleged abusive conduct, and Sir Vijay Singh for APEA referred to it only in the context that as it was not a ground of dismissal he would make no submissions upon it unless the Permanent Arbitrator required them. It is clear from the record that Professor Young was

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was apparently not then interested in the issue for no submissions were made on it.

In his decision Professor Young concluded that the overtime bans and industrial unrest which apparently stemmed from the six incidents referred to in the letter of dismissal of the 9th November were the fault of both parties, and that APEA's allegation of Veer Singh's discriminatory treatment in this regard by Air Pacific had not been proven. In the result he appeared to put both those issues aside and then there appears this passage from his decision which contains his reasons for concluding that the dismissal was not unfair:

"The dispute can be resolved in terms of the conduct expected of employees in modern organisations. Employees should not be subjected to the type of hectoring experienced either by Mrs. Cornish or by those who faced Mr. Veer Singh's wrath over the travel advance (the sixth incident listed in the letter of 9.11.83 signed by the Director of Personnel). It is quite proper for any employer to terminate an offending employee in such circumstances. The Tribunal consequently finds that the termination of Mr. Veer Singh by Air Pacific was neither unfair nor discriminatory."

In the judicial review proceedings APEA sought relief on the grounds that the Permanent Arbitrator had misdirected himself in a number of respects, but it appears from the record of Counsels argument before Kearsley J., who heard the matter, and the Learned Judge's judgment, that the main ground of complaint was that the Permanent Arbitrator had held that dismissal on the grounds of abusive behaviour towards Mrs. Cornish "or those who faced Mr. Veer Singh's wrath over the travel advance" was not unfair, when in fact Veer Singh had not been dismissed for abusive conduct.

Added to that was the plea that in any event the enquiry into the abusive conduct was contrary to the rules of natural justice in that it was conducted by the Industrial Relations Manager in the absence of Veer Singh who was never faced with his accusers.

In his judgment Kearsley J. acknowledged the submission, expressed the view that it was arguable that the dismissal was unfair having regard for the procedure adopted by the Industrial Relations Manager, and then said: "But was he really dismissed for misconduct in pursuance of the disciplinary procedure?" The Learned Judge then proceeded to consider an issue of his own creation for we were assured by Counsel that it was not raised by either party before the Permanent Arbitrator or Kearsley J. It was this: the Memorandum of Agreement between Air Pacific and the Air Pacific Senior Staff Association (of which Veer Singh was a member) concerning terms of employment contains two provisions relating to termination of employment and they read:

"4.5 The employment of senior staff covered by this Agreement may be terminated by either the Company or employee by giving in writing one months notice of termination or the payment or forfeiture of one month's salary. In the event of termination by the Company written reasons shall be given to the employee.

4.6 A senior staff may be disciplined for an offence. When such disciplinary action is contemplated the Company shall take such action in accordance with the procedures laid down in the Disciplinary Procedure of this Agreement."

("Disciplinary action" is defined in the Agreement as including dismissal).

Where the Company takes action under Article 4.6 the disciplinary procedure in Article 27 applies and it was this procedure which was followed after a fashion in relation to the complaints of personal abuse.

Kearsley J's point was that as the letter of dismissal of the 9th November referred to the payment of "one month's salary in lieu of notice" it was arguable that in fact Veer Singh had been dismissed under Article 4.5. He saw the enquiry before the Permanent Arbitrator as having raised these problems:

"If it was a dismissal for misconduct under Articles 4.6 and 27, a number of questions might well have occurred to the Permanent Arbitrator in relation to the principal issue, raised by the terms of reference, of whether or not the termination of Mr. Veer Singh's employment was unfair. Was the net effect of those articles that the company could dismiss for misconduct only in pursuance of the disciplinary procedure fairly conducted? If so, did either the fact that the Industrial Relations Manager interviewed complainants and witnesses in the absence of Mr. Veer Singh or the fact that the dismissal was for misconduct not even considered in the course of the disciplinary procedures mean that they had been unfairly conducted? If the disciplinary proceedings were unfairly conducted, did it follow that the dismissal, when it was effected, on 9th November, 1983, was unfair, however great the misconduct revealed to the course of the arbitration proceedings?

If, on the other hand, it was a termination of employment under Article 4.5, the principal issue of whether or not the employment had been terminated unfairly had to be decided in the light of that article, the meaning of which it was for the Permanent Arbitrator to construe. He would certainly have had to decide whether misconduct was relevant at all. Was misconduct a condition precedent to the operation of the article or did it permit the company to terminate employment regardless of misconduct? Did the company

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observe the letter and spirit of the article?
If it did, could it be said that the termination
of Mr. Veer Singh's employment was unfair?"

In the result Kearsley J. concluded that the Permanent Arbitrator had not applied himself to the real question before him, namely, was the dismissal pursuant to Article 4.5 or 4.6 when different considerations would apply. Kearsley J. saw this failure as going to jurisdiction and quashed the award on that basis with a direction that the Permanent Arbitrator reconsider the matter.

The sole ground of appeal advanced before us was that Kearsley J. erred in making an issue of the Articles and quashing the award on that ground. Mr. Sweetman's submission in short was that the Permanent Arbitrator had conducted the enquiry in accordance with his terms of reference and reached a conclusion which was open to him on the evidence, and nothing more was required.

With respect to Kearsley J. we cannot accept his reasoning but neither can we accept Mr. Sweetman's submission that the award should stand. In our opinion the letter of dismissal makes it clear that Veer Singh was dismissed for disciplinary reasons, namely the improper ordering of overtime bans. After specifying the six occasions on which bans were imposed the letter says "The above events have been considered by the company which is of the view that these incidents have been serious enough to warrant your dismissal". After drawing attention to the obligations of an employee the letter continues "Therefore, the company has decided to terminate your services with effect from today". The final paragraph of the letter seems to put it beyond doubt that it was the "overtime ban" misconduct which was the basis for dismissal. It reads:

"In passing, I wish to point out that as a result of the disciplinary Inquiry (in which you were present) carried out in respect of allegations contained in my memo dated 01 November, Management has concluded that the said allegations against you were substantiated. It is also noted that you have once been warned in respect of a similar incident. These would normally warrant your dismissal subject to the requisite procedures being followed. In view, however, of your termination for the reasons outlined above, Management feels that no further action is necessary."

(Our emphasis).

It is true that the "overtime ban" allegations were never subjected to the disciplinary procedure provided by Article 27 but until Kearsley J. raised the matter the point was never taken. It was certainly never advanced as an element of unfairness. The question before the Permanent Arbitrator was whether Veer Singh's dismissal was unfair and the record shows that virtually the whole enquiry into that issue was limited to Veer Singh's activities as an officer of APEA and the overtime bans, which had been the basis on which he had been dismissed.

The simple issue before the Permanent Arbitrator was whether Veer Singh's conduct had been such that his dismissal was not unfair, and we see no profit in confusing that issue by an enquiry into whether Article 4.5 or 4.6 applied.

Although we disagree with Kearsley J's reasons for quashing the award we are satisfied that justice requires that it be quashed on different grounds which is a course open to us pursuant to Section 12 of the Court of Appeal Act (Cap.12).

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The basic enquiry before the Permanent Arbitrator was whether the dismissal was unfair having regard for the reasons for dismissal. The alleged abuse of Mrs. Cornish was not one of the grounds for dismissal, and although there was some brief evidence bearing on it, but not from Mrs. Cornish, it is clear that by the close of the evidence before the Permanent Arbitrator it was a dead issue. Furthermore, the second incident which the Permanent Arbitrator saw as justifying dismissal, namely the "travel advance" matter was not advanced as a case of hectoring or personal abuse as the Permanent Arbitrator apparently believed but concerned an overtime ban, and earlier in his decision he had virtually abandoned those allegations as a basis for his decision.

This was simply a case of the Permanent Arbitrator asking himself the wrong question, and thereby stepping outside his jurisdiction, and failing to answer the correct one which was - was Veer Singh's dismissal unfair having regard to the nominated grounds of dismissal? The Permanent Arbitrator put that issue to one side.

The effect of this judgment is that the appeal is dismissed but the direction to the Permanent Arbitrator is varied with effect that he is to reconsider the question posed in his terms of reference in the light of this judgment, and such further evidence or argument as he may elect to receive.

No order for costs.



 Vice President



 Judge of Appeal

