

IN THE EMPLOYMENT RELATIONS COURT  
AT LAUTOKA

ERCA No. 09 of 2021

BETWEEN : FIJI AIRLINES LIMITED

INTENDED APPELLANT

[EMPLOYER]

AND : ALBERT GARY JONES

INTENDED RESPONDENT

[GRIEVOR]

**COUNSEL** : Mr. N. Prasad for the intended appellant

: Mr. R. Singh for the intended respondent

**Date of Hearing** : 26 August 2022

**Date of Decision** : 20 October 2023

# DECISION

*EMPLOYMENT LAW                      Dismissal – Preliminary objection on disclosure of flight records  
– Disclosure requiring Attorney General’s approval – Leave to appeal – Regulations 11 & 32,  
Civil Aviation (Occurrence Reporting and Investigation) Regulations 2009 – Section 4, Civil  
Aviation Act 1996*

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1. The intended respondent’s (respondent) employment was terminated for not having reported a hard landing of an aircraft that resulted in a portion of its tail striking the runway (tail strike). The respondent was the pilot of flight FJ 34 when the alleged incident took place at the Labasa Airport on 25 August 2017. Upon dismissal, he raised an employment grievance, which was referred to the Employment Relations Tribunal.
2. When the tribunal took the matter up for hearing, an objection was raised on behalf of the respondent to the disclosure of certain documents by the intended appellant (applicant). The respondent’s objection was under regulations 11 and 32 of the Civil Aviation (Occurrence Reporting and Investigation) Regulations 2009 (CAORIR).
3. The documents sought to be produced as evidence before the tribunal are:
  - i.* copy of safety investigation for suspected tail strike event on FJZ flight FJ34 SUV-LBS
  - ii.* copy of extract from text message from passenger on board the aircraft at the time of the incident
  - iii.* copy of hand written notes from Albert Gary Jones
  - iv.* copies of various flight records/ technical log and trend monitoring reports of the Fiji Link airline.
4. The respondent took the position that those documents contain data and information relating to the landing of the aircraft, information regarding the alleged incident and other safety investigation information, and that regulation 32 of the CAORIR and section 4 (a) of the Civil Aviation Act 1996 (CAA) require the attorney general’s sanction for their disclosure.

5. The resident magistrate held that it was necessary to obtain approval in terms of regulation 32 of the CAORIR and section 4(a) of the CAA to tender the documents to the tribunal as evidence. By determination dated 15 April 2021, the tribunal granted the applicant 30 days to take steps and comply with the provisions.
6. In his determination, the resident magistrate noted that regulation 32 authorises the attorney general to determine that the disclosure outweighs adverse domestic and international impact such action may have on any future investigation, and that section 4 (a) of CAA requires the attorney general's approval to disclose safety information to the public.
7. The applicant filed a notice of motion on 19 August 2021, and asked for leave to appeal the tribunal's determination of the preliminary issues on 15 April 2021, or alternatively, leave to file an appeal out of time, and for a stay of the tribunal's proceedings.
8. The respondent filed an affidavit in opposition. There was no opposition to filing the leave application out of time. Therefore, court heard the parties only on the question of leave to appeal the determination of the preliminary issues.
9. The respondent's proposed grounds of appeal are stated below:
  1. "The learned Resident Magistrate having found in paragraph 14 of the ruling that the Report
    - (a) Was not an occurrence investigation under section 11 of the Regulations and
    - (b) Was an internal investigation under section 18 of the Regulations, erred in law and in fact in finding that:
      - (i) Section 32(1) of the Regulations applied to the Report or documents that form part of the Report, and/or
      - (ii) The Appellant is required to obtain the approval of the Attorney General in order to rely on the Resort, by operation of section 32(1) of the regulations and section 4A of the Act.

2. The learned Resident Magistrate erred in law and in fact in finding that the internal investigation, document and record, which culminated into the Report are governed by the Act and the Regulations when the Act and Regulations only apply to investigations carried out pursuant to the Act and the Regulations (not internal company investigation) and therefore have no application to the investigation, documents and records which culminated into the Report.
  3. The Learned Resident Magistrate erred in law in misconstruing the Regulations vis-a-vis an internal investigation of a company premised on its own internal policies and manuals, versus an investigation carried out by an investigation-in-charge appointed pursuant to Part 3 of the Regulations.
  4. The Appellant upon preparing the Record seeks to make such further or other grounds of appeal as may be apparent to it upon provision of the Record and reserves the right to argue based on such amended grounds”.
10. The applicant submitted that the Civil Aviation Act and the CAORIR do not apply to the facts of the case. The applicant contends that the resident magistrate erred by stating that the internal investigation, documents and records which culminated in the report are governed by the Act and regulations. The applicant says that the tribunal failed to address whether the regulations apply to the present case, and that it also did not discuss the facts leading to the report or provide reasons for not considering those facts.
11. The applicant submitted that it became aware of the occurrence four flights later when the crew on that flight saw scratch marks on the tail of the aircraft and identified this in their flight log. Thereafter, the employer conducted an internal investigation and identified the respondent as the pilot for the sector in question. The applicant said it was the respondent’s failure to report the matter that triggered an internal safety investigation, which was carried out by an ATR flight safety officer in terms of the Safety Management System Manual.
12. The respondent relied on the decision of *Sun Flower Aviation Ltd v Civil Aviation Authority of Fiji Islands*.<sup>1</sup> This was a case in which an application was made to the High Court for the specific discovery of some documents. Having considered the

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<sup>1</sup> [2015] FJHC 260; HBC 250.2008 (20 April 2015)

relevant provisions of the Civil Aviation Authority Act, the CAORIR, the Convention on International Civil Aviation (Chicago Convention 1944) and the approaches taken in several jurisdictions, Tuilevuka J stated:

“Fiji became a fully-fledged member of the International Civil Aviation Organisation (“ICAO”) in 1973. The ICAO was formed by the Convention in Chicago in 1944. Article 44 of the Chicago Convention stipulates that the overall objective of ICAO is to:

.....ensure the safe and orderly growth of international civil aviation throughout the world.

Over the years, the ICAO has produced successive policies and practices in aviation safety, with periodical updates, to guide member nations. A key area of concern to the ICAO is the investigation of aviation accidents and incidents. In this regard, ICAO encourages member nations to enact laws premised on a policy of non-disclosure of aviation-accident reports. Member nations have responded accordingly by enacting laws to that effect. Fiji’s response is embodied in regulation 32”.

13. Section 3 of the Civil Aviation Act empowers the minister to make regulations for carrying out the Convention on International Civil Aviation 1944 (Chicago Convention). Section 4 of the Act concerns the investigation of accidents or incidents. Section 4 (2) (e) states regulations may contain provisions protecting accident or incident investigation reports, records or information in accordance with the requirements of Annex 13 to the convention on International Civil Aviation.
14. Section 4A is under the heading “Protection of Information”. The enactment states:
  - (1) “Any safety investigation or any safety information is protected from inappropriate use to ensure its continued availability so that proper and timely preventive actions can be taken and aviation safety improved.
  - (2) Any safety investigation information or any safety information shall not be used in disciplinary, civil, administrative or criminal proceedings against operational personnel.

- (3) Any safety investigation information shall not be disclosed to the public unless –
- (a) “The Attorney General considers that circumstances reasonably indicate or there is evidence that the occurrence was caused by an act considered, in accordance with the law, to be conducted with intent to cause damage, or conduct with knowledge that damage would probably result, or is equivalent to reckless conduct, gross negligence or wilful misconduct; or
  - (b) A review by the Attorney General determines that the release of the safety information or safety investigation information is necessary for the proper administration of justice, and that its release outweighs the adverse domestic and international impact such release may have on the future availability of such information”.

15. Section 4A (4) sets out the criteria to be considered by the attorney general for the disclosure of any safety information or safety investigation. The statute defines the terms safety information and safety investigation information.

16. The respondent submitted that the safety investigation report sought to be relied upon by the applicant comes under regulation 32 (1) (e) of the CAORIR.

17. Regulation 32 (1) states:

“The following records shall not be made available for purposes other than accident or incident investigation, unless the Attorney General determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any further investigation –

- (a) all statements taken from persons by the investigation authorities in the course of their investigation;
- (b) all communications between person having been involved in the operation of the aircraft ;
- (c) medical or private information regarding persons involved in the accident or incident;
- (d) cockpit voice, flight data and relevant air traffic service recordings and transcripts from such recordings; and

(e) opinions expressed in the analysis of information, including any relevant recorder information”.

18. An occurrence is defined to mean an accident or incident under regulation 3 of the CAORIR. The term incident means an occurrence other than an accident, associated with the operation of an aircraft that affects or could affect the safety of operation. The investigation was in relation to the hard landing.
19. Regulation 11 of the CAORIR provides that the sole objective of an occurrence investigation is the prevention of accidents and incidents, and not to apportion blame or liability.
20. The applicant’s position is understandable. The documents it has asked are perhaps relevant to justifying its decision to terminate the respondent’s employment. The applicant’s interest must, however, be considered in light of the statutory requirement reflecting the country’s civil aviation policy and international obligations.
21. In his determination, the resident magistrate has examined the purport of the relevant regulations and the legislative provision. He also makes reference to Fiji’s civil aviation policy and to the Chicago Convention of 1944.
22. The resident magistrate gave time to the applicant to obtain the necessary approvals from the designated authority. By doing so, the tribunal did not leave the applicant without a remedy. The applicant could have applied for approval to make the disclosure within the time given by the tribunal. The applicant did not do so.
23. Nearly four months later, the applicant filed an application seeking leave. As the respondent did not object, the delay was not an impediment to the application.
24. The Act and the regulations have vested the attorney general with authority to decide whether disclosure of safety information or safety investigation should be disclosed. The applicant has not made an application to the attorney general

seeking permission for the disclosure notwithstanding that time was granted to do so. No reasons have been cited for not seeking disclosure approval. The applicant may yet be able to apply for disclosure provided the tribunal in its discretion grants further time to comply with the provisions.

25. There is no reason, however, to disturb the resident magistrate's conclusion. Leave to appeal the determination is declined.

**ORDER**

- A. The application for leave to appeal is dismissed.
- B. The applicant is to pay the respondent costs summarily assessed in a sum of \$1,500.00 within 21 days of this decision.

Delivered at **Suva** on this **20<sup>th</sup>** day of **October, 2023**.



M. Javed Mansoor  
Judge