IN THE SUPREME COURT OF FIJI
Civil Jurisdiction

CONSOLIDATED ACTIONS
No. 376 of 1981
No. 377 of 1981
No. 378 of 1981
No. 379 of 1981 and;
No. 380 of 1981.

BETWEEN:

1. BERNARD JOHN FORREST
2. IVAN OWEN STADE
3. DAVID MORTON BROWN
4. PAUL ANTHONY GEORGE HARRIS
5. LESLIE RICHARD HAYNES

PLAINTIFFS

- and -

AIR PACIFIC LIMITED

DEFENDANT

Sir John Falvey Q.C. with Messrs. K.C. Ramrakha and Noor Dean for the plaintiffs.

Mr. Miles Johnson for the defendant.

J U D G M E N T

Writs in these five consolidated actions were filed on the 1st June, 1981.

On the 4th June, 1981 Mr. B.J. Forrest, the plaintiff in action No. 376 of 1981, applied (inter alia) for an injunction restraining the defendant company from terminating his employment. He also sought an order for an early trial.

Mr. Forrest's application was dismissed, but

with the consent of counsel the five actions were consolidated and set down for hearing on the 16th June, 1981.

To facilitate and expedite the hearing, it was agreed that a number of documents be admitted as exhibits subject to the right of Counsel to later argue that certain documents were not admissible as evidence. This resulted in a considerable saving of time and obviated having to prove and tender each document separately.

Counsel also agreed that the affidavits filed in Mr. Forrest's interlocutory proceedings form part of the pleadings.

Before considering the question of admissibility of the documents which have been tendered, I will set out those facts which are not in dispute.

All five plaintiffs were at all relevant times senior captains employed by the defendant. They were amongst the 8 most senior pilots in the company. They are all expatriates.

On the 1st May, 1981, the company issued letters of termination of employment to each of the 5 plaintiffs and 3 other senior pilots. The notices took effect from the 12th June, 1981.

I have only the letter addressed to Captain Forrest before me, which is annexed to his affidavit (Exhibit B), and is in the following terms :

"Capt. B.J. Forrest,
Air Pacific Limited,
S U V A.

Dear Capt. Forrest,

TERMINATION

As required by your contract of service, I hereby give six weeks notice of termination of your employment with the Company. The termination will be effective from June 12, 1981.

Such economy measures are warranted in the interest of the airline. The Senior Personnal Relations Officer will assist you in finalising your arrangements.

Yours sincerely,

(sgd) R. Narayan

Manager Employee Relations"

The letters to the other four plaintiffs I understand were similar letters.

I do not find it necessary to relate the history of events subsequent to the letters dismissing the plaintiffs which Captain Forrest sets out in Exhibit D annexed to his affidavit. Mr. Ramendra Narayan, the Company's Manager employee Relations, has in his affidavit sworn the 3rd day of June, 1981, made it abundantly clear that the Company's decision to terminate the five plaintiffs' contracts is "an irreversible commercial decision taken after a careful and extensive examination of Air Pacific's present and future financial position and after careful consideration of what the management considers to be in the best interests of the company in its broadest sense".

The five plaintiffs have now bowed to the inevitable and seek certain declarations and damages. It was also agreed by Counsel that the issue of damages would be tried separately, if and when the plaintiffs established that the defendant was held to be in breach of contract in dismissing them in the manner it did.

The two main issues in these consolidated actions are the nature and content of each of the plaintiff's contracts of employment with the company and whether the company in terminating the contracts were in breach of those contracts.

The defendant company concedes that each of the plaintiffs was employed under a contract of employment and that the terms and conditions of the contract are contained in :

"(a) A written agreement between the Defendant and the Fiji Airline Pilots Association dated 1 April 1980; and -

(b) To certain manuals referred to therein; and

(c) Certain other conditions implied by statute, in particular by the Employment Ordinance and the Trade Disputes Act (all of which are collectively referred to as "The 1980 Agreement").

The plaintiffs in their Statement of Claim contend that at all material times they were employed on terms and conditions partly contained in a written agreement dated the 1st day of April, 1980, and were otherwise contained in policy decisions and other terms and conditions reached from time to time between the Fiji Airline Pilots Association and the Company.

It will be noted that the parties consider that the agreement between the Fiji Airline Pilots Association and the Company, which I shall hereinafter refer to as the "master agreement", is dated the 1st April, 1980. Two copies of that agreement which appear to be photo copies have been produced to the Court and both are undated. Counsel agreed however that it was executed on the 7th August, 1980.

It appears to me that what the plaintiffs refer to as policy decisions and other terms and conditions reached from time to time may be a reference to the "certain manuals" which the defendant admits form part of the contract of employment.

Clause 6.2 of the master agreement provides :

"A Pilot shall be bound to observe the Company's Operations Manual which incorporates both the Flight Administration Manual and the Personnel Administration Manual."

Although Counsel did not refer to section 6.3 it appears to me that this section is also relevant since it refers to section 6.2.

> "A Pilot shall also be bound by any notices pertaining to the above Manuals provided that such notices are notified by the Company as being current and relevant by the issue of an annual amendment checklist and provided that the subject matter contained within these Manuals is not in any way covered in this Agreement".

Captain Forrest referred in his evidence to an agreement reached with the company to take out of the master agreement certain provisions which had been agreed by the parties during negotiations and to incorporate them in a manual. This is another contentious issue I will deal with later.

I consider that both parties have overlooked what actually forms the core or basis of the contracts. It is the written offer and acceptance of employment in each case. In Captain Forrest's case it incorporated by reference the provisions of the master agreement then current. He did not put in his letter of appointment and I do not know about the appointments of the other 4 plaintiffs. Nothing turns on this as it is not contended by any of the parties that that part of the contracts of employment which consist of the offer and acceptance of employment, contain any express terms which I have to consider in this action additional to or limiting or qualifying the provisions of the current master agreement.

Under the Trade Disputes Act the provisions contained in the master agreement, or "collective agreement" as it is called under the Act, are made implied conditions of contract between every employee of the defendant company and the company. So far as the manuals are concerned, which are referred to in the master agreement, I have before me only one extract from one of the manuals. The extract was put in by Mr. Johnson, (Exhibit 20) and was excluded from his objections as to admissibility of documents. It refers to Employee Terminations. I am assured by Mr. Johnson that this extract is the only relevant portion of the manuals which are bulky documents.

I accept that the contracts between the parties include the master agreement and certain manuals referred to therein and is governed by the legislation referred to in the Defence.

Before I proceed to consider the contentious issues I have to consider what documents are admissible. Mr. Johnson on the issue of admissibility of the documents argues that the master agreement Exhibit 14 and the operation manuals referred to in clause 6.2 thereof are the only documents that contain the terms and conditions of the contract and any other documentary evidence purporting to evidence other terms agreed by the parties are inadmissible. He referred to Life Assurance of Australia Ltd. v. Phillip (1925) 36 C.L.R. 60 one authority referred to by the learned author of Cross on Evidence (Australian Edition) where the author at p.653 states :

> "If the Court is satisfied that they effectively agreed to be bound by a written instrument; they are bound by its terms though unacquainted with them, and though one of the parties believes that something said in the course of the negotiations is still binding. In such circumstances it would be pointless to admit extrinsic evidence with regard to those negotiations because it is irrelevant".

Mr. Johnson relies on that extract.

During the negotiation for the current master agreement, which took from November 1979 to the end of February 1980 to complete, a section which was originally numbered 7.7.0.0, appeared in a draft agreement which the evidence indicates was prepared by the company. Since a great deal of argument centres around this section which is headed LOCALISATION POLICY I repeat it hereunder :

"7.6.0.0 LOCALISATION POLICY

7.6.1.0 Local pilots, when qualified, will replace short-term Contract Pilots at the expiry of their contracts.

7.6.2.0 Local pilots, when qualified, will replace expatriate pilots continuously employed prior to 01 April 1975 subject to the following conditions :

7.6.2.1. The expatriate pilot concerned will be given notice of his localisation date (in conformity with the localisation plan) at least 24 months in advance and this date will not be varied.

7.6.2.2. An expatriate pilot who takes out Fiji citizenship prior to his termination date will retain his seniority and remain on the emolument current to him at the time of his acquiring Fiji citizenship, until such time as parity of local pilot salaries is achieved.

7.6.2.3 Expatriate pilots who do not acquire Fiji citizenship will qualify for severance payment equivalent to one year's salary on termination on the advised date.

7.6.2.4. An expatriate pilot who does not acquire Fiji citizenship and whose employment is to be terminated on the advised date will be given first refusal to any short-term contract position available at that time or caused by the localisation of his position. If accepted he will not qualify for any severance payment should he accept a short-term contract.

Note: 7.6.2.1 to 7.6.2.4 refer to expatriate pilots continuously employed from before 01 April 1975."

The section quoted above is a copy of the original draft clause after a number of amendments had, according to Mr. Forrest; been agreed to by the parties thereto during re-negotiations in July 1980. The plaintiffs contend that the company specifically asked the Association to agree that this clause not appear in the body of the master agreement but in a manual. The plaintiffs say they agreed to that request and it was accordingly left out of Exhibit A14 which the Association later signed.

It is not in dispute that the clause does not appear in the master agreement nor in any manual.

Mr. Johnson accordingly objects to the admission of any document which would establish that the parties did agree on clause 7.7.0.0 (later renumbered 7.6.0.0) of the draft agreement during negotiations and did further agree that the clause after it had been agreed to should not appear

in the body of the master agreement but in a manual.

In addition to denying any such agreement was entered into, the defendant contends that such agreement fails to meet the requirements of section 59(e) of the Indemnity Guarantee and Bailment Ordinance and also fails for uncertainty.

Mr. Johnson did not address me on the question of uncertainty. There is not in my view anything uncertain about the clause. Also I do not consider section 59(e) has any application. There is in existence a written record of the agreement reached after negotiations between the Association and the defendant which contains clause 7.7.0.0 and that is the draft agreement Exhibit A3. Exhibit A3 contains the name of the defendant company. The draft was prepared by the company and on pages 11 and 12 appears the initials of Mr. G.B. Singh one of the company's negotiating team. He has placed his initials at the bottom of page 11 and also page 12. Mr. Singh was the company's acting Manager Personnel at the time and I am satisfied from both Mr. Forrest's evidence and that of Mr. Narayan that Mr. Singh was authorised to agree to clause 7.7.0.0 and to sign on behalf of the company. A 'signature' by means of initials is sufficient (Hill v. Hill 1947 Ch.231, 240).

I consider that all documents are admissible which tend to prove or disprove that the parties agreed on clause 7.7.0.0 of the draft master agreement during negotiations and re-negotiations and to prove the alleged collateral agreement that such clause be included in the master agreement by extracting it from the approved draft and including it in a manual.

The admission of such documents in my view does not violate the rules of evidence. All the terms of the contract are not contained in the body of the master agreement. By virtue of clause 6.2 thereof certain terms and conditions of employment are contained in manuals. The documents I propose to admit do not have the effect of adding to or

varying or contradicting the terms of the master agreement but of establishing what the Association and the company did agree to at negotiations and which form part of the plaintiffs' contract of employment.

Of the 20 documents sought to be admitted into evidence 8, all objected to by Mr. Johnson, are not in my view admissible either on the grounds that they are not relevant or are self serving. The documents are exhibits 4,5,6,8,12,15,16 and 19.

Mr. Johnson introduced some documents himself and also conceded some of those introduced by the plaintiffs are admissible.

There are only two documents, Exhibits 2 and 3, which Mr. Johnson either had doubts about (Exhibit 2) or contended was inadmissible (Exhibit 3) which I consider are admissible. Both these documents are relevant to establish the agreement on clause 7.7.0.0. They are furthermore evidence of the antecedent negotiations which culminated in an agreement partly expressly included in the master agreement and partly to be incorporated by reference in the master agreement to certain manuals.

Apart from the 8 documents listed above, all other documents tendered are in my view relevant and admissible.

I turn now to consider whether clause 7.7.0.0 (or 7.6.0.0 as later amended) was agreed by the parties.

It is essential that I first decide whether this clause 7.7.0.0. is part of the contract as, until the nature of the contracts of employment are determined, it is not possible to finally decide whether the company is in breach of contract in terminating the plaintiffs' employment in the manner they did. Further, it may have some bearing on the issue of damages if the company is held to be liable.

One of the problems I have experienced in considering the documentary evidence is the absence of dates from some of the documents. The first such document is Exhibit A1 headed "An Understanding between the Company and FALPA on Pay Parity and Localisation Procedure for Discussion by the Board of Directors of Air Pacific Limited."

I consider A1 must have been prepared prior to Exhibit A2 which is dated 15.4.80, and which refers to the Company's Board having ratified all the agreements reached during negotiations except for the "PAY PARITY FOR LOCALS idea" which had been rejected.

Exhibit A2 refers also to a draft agreement being available for perusal by the end of April (1980).

Exhibit A3 is a draft agreement between the Association and the defendant which is also undated, and it would appear that it was prepared by the Company after A1 and A2. Page 11 of A3 contains a clause 7.7.0.0 headed LOCALISATION POLICY which is item 2 in Exhibit A1. Item 1 in Exhibit A2 which refers to pay parity for locals does not appear in A3 and this confirms the statement in A2 that the Board did not agree to "PAY PARITY FOR LOCALS idea".

There may have been an earlier draft of the master agreement than Exhihit A3 because the first page thereof refers to sections which do not correspond with the sections in A3. To give one relevant example, ignoring the alterations to page 1, reference 7.4.0.0. REDUNDANCIES should have appeared on page 12. It is however on page 11 of Exhibit A3 which indicates A3 may be a retype of an earlier draft.

With negotiations extending over a period of close on 4 months there may well have been several such drafts. A3 on the evidence before me appears to be the draft prepared after the parties had completed negotiations at the end of February 1980 and the defendant's Board had ratified all agreements reached at negotiations except for pay parity for locals.

It would also appear that the Company's Board must have met between the end of February 1980 and the 15th April 1980 to "ratify all agreements". The minutes of such meetings were not produced by the Company.

The haste with which these actions were brought on for hearing left the parties no time to seek discovery. The Company did, however, produce a photocopy of the minutes of a meeting of its Board held on the 26th June, 1980 (Exhibit 18). Minute 124 of the minutes is relevant and is as follows :

> "PILOTS AGREEMENT: (Previous Minute CLD 118). The draft Pilots Agreement contained in Appendix E was considered and it was agreed -
>
> (1) Long Service Leave - The claim for long service leave be rejected.
>
> (2) Excess Flying Pay - The claim for Excess Flying Pay be rejected.
>
> (3) Localisation Policy - Para. 7.7.2.1 - The claim contained in this para was not acceptable.
>
> Para 7.7.2.3. and para 7.7.2.4. the words 'for any reason' not acceptable.
>
> (4) Loss of Licence Insurance - The capital sum involved to be stated.
>
> (5) Duty Time - To be referred to Chief Executive Civil Aviation Authority of Fiji for comment.
>
> (6) Inducement Allowance - To be split between Inducement Allowance and Rent Allowance.
>
> No increase in allowance to be given to Contract Pilots.
>
> Management was instructed to discuss with the 'Career' Pilots, the possibility of their accepting Contracts and thus achieve 2 category of Pilots - Expatriate and Local."

It has not been explained why the 6 items in what was still being referred to as "the draft Pilots Agreement in minute 124 had to be reconsidered if the company had ratified agreements

reached some time before the 15th April, 1980.

The Company rely on those minutes in support of their argument that clause 7.7.2.1 in the draft agreement was not acceptable to the Board. I accept the minutes as recording the views of the Board on the 26th June, 1980.

In items 1 and 2 of minute 124 the Board also rejected the claims for long service leave and excess flying pay. In the master agreement, however, long service leave provisions appear in Annexure C. What is even more significant is that the clause in the draft master agreement 15.1.0.0. Long Service Leave appears in amended form in Annexure C and excess flying pay provision appears in the master agreement in clause 13.3. Both those provisions which the Board minutes disclose were rejected by the Board now appear in the master agreement and have been altered from the corresponding clauses in the draft agreement fully supporting Captain Forrest's testimony that the clauses were re-negotiated and agreement finally reached on them at a meeting on the 10th July, 1980.

In paragraph 3 of minute 124 of Exhibit 18 it is recorded that "para 7.7.2.3 and para. 7.7.2.4 the words "for any reason not acceptable". This clearly records that the Board accepted those paragraphs with modifications. Those modifications appear in the draft Ex.A3 where those words are deleted.

The minutes indicate that the Board on 26th June, 1980, either accepted or did not object to clauses or paragraphs 7.7.2.2, 7.7.2.3 (as amended) and 7.7.2.4 (as amended) of the draft master agreement. None of these three paragraphs appear in the master agreement which lends support to Captain Forrest's testimony that the Company later requested that clause 7.7.0.0 LOCALISATION POLICY be removed from the body of the master agreement and for that clause to appear in a manual. Even without this supporting documentary evidence I would have accepted Captain Forrest's evidence. He was a good witness and no

effort was made to challenge him on this issue in cross-examination.

The Company called only one witness Mr. Ramendra Narayan, its present Manager Employee Relations. As he had only been with the Company for three months he was of very little assistance either to the Company or the Court. Mr. Aquila Savu the Company's General Manager was one of those persons who took part in the re-negotiations. He was not called.

The Company chose to adopt the strictly legalistic stand that the Localisation Policy provisions, which I am statisfied were agreed to by the negotiating parties, do not appear in the master agreement and evidence to establish any agreement on those provisions should be excluded.

I accept Captain Forrest's testimony that clause 7.7.0.0 (later amended to 7.6.0.0.) appearing in the draft master agreement was re-negotiated by the parties at a meeting held on the 10th July, 1980. The clause in Exhibit A3 indicates that there were more amendments to the clause than are mentioned in the Company's minutes but none of them are substantial amendments which alter the intention of the original clause in the draft.

Both pages 11 and 12 of the draft master agreement have Mr. G.B. Singh's initials on them and also alterations which it has been established are in his handwriting. Mr. Forrest also made alterations during the negotiations. I am satisfied that the parties to the agreement did agree on clause 7.7.0.0 as amended. Furthermore I am satisfied from Captain Forrest's evidence that Mr. G.B. Singh was acting for the Company and that later at or about the time of the re-negotiations the Company specifically requested that that item appear not in the main body of the master agreement but in a manual and that the Association agreed to this. The fact that that clause now apparently exists in writing only in Exhibit A3 (and presumably the Company's copy of the draft agreement) because of the Company's failure to include it in a manual is in my view immaterial. It is part of the agreement negotiated by the Association and the

Company which by agreement between them, is not in the body of the master agreement, and until put in a manual by the Company remains in the written form in Exhibit A3 initialled by Mr. G.B. Singh whom I am satisfied was one of those authorised by the Company to negotiate the agreement on behalf of the Company.

I am satisfied there was a collateral agreement to have clause 7.7.0.0 included in a manual. The only portion of any manual produced is one page, Exhibit A20, bearing no signatures. There is no evidence to indicate that anything included in a manual requires to be signed or dated. Copying clause 7.7.0.0 in the form agreed by the parties to include it in a manual neither adds to nor detracts from the clause or is necessary in my view for its validity or evidential value. I hold in the circumstances that clause 7.7.0.0 as amended in its written form in Exhibit A3 must be deemed to be part of the master agreement.

The plaintiffs have asked that the master agreement be rectified by adding clauses 7.6.1 and 7.6.2 (formerly 7.7.1.0 and 7.6.2.0). This is not a case for rectification. Those clauses were omitted from the body of the agreement by agreement between the negotiating parties. The clauses are, in any event in my view, already part of that agreement.

Before leaving this issue I would point out that there is already a provision in the master agreement relating to localisation which the parties have not mentioned. That is section 5 of Annexure D headed Severance. That covers a situation where a pilot is required to leave Fiji because of Government policy relating to localisation. Clause 7.6.0.0 is intended to cover the situation where the company decides to localise.

This Annexure D is a reprint of the third schedule headed "Additional benefits and allowances applicable only to Expatriate Pilots who joined prior to 01 April, 1975. There is an amendment in the third schedule initialled by Mr. G.B. Singh about expatriate allowance consisting of a

combination of housing and inducement allowance which is item 6 in minute No. 124 of the Company's minutes. The schedule to A3 would appear not to be complete. There is no reference to paragraphs 5 and 6 of schedule 3 of the master agreement dealing with Severance and Transportation from Fiji on Termination.

The fourth schedule mentioned in the index is also not attached to Exhibit A3.

Clearly there must have been other meetings about the agreement and re-arrangement of sections, additions, and omissions which I have not heard about.

Having now determined what are the contracts of employment between the parties I have now to consider whether there was any breach by the Company of those contracts when they terminated the plaintiffs contracts of employment.

The Company contends the plaintiffs' contracts were lawfully terminated by notice given each of them under paragraph 6.6.2(1) of the master agreement by six weeks notice in writing. Under this provision either the Company or a Pilot can give six weeks notice terminating the contract of employment and it is not in dispute that pilots in the past have resigned after giving six weeks notice in writing.

The plaintiffs, however, contend that they were made redundant and that the Company is in breach of section 7 of the Master Agreement which is as follows :

"7. REDUNDANCIES

7.1 Prior to any redundancies, discussions will take place between the Company and the Association. In the event of redundancies occurring, retrenchments shall be in the reverse order of hiring i.e. on a "last on, first off" basis except that all "Contract Pilots" will be retrenched first.

7.2 Retrenched pilots shall have the first rights to re-employment with the Company if vacancies occur at any time up to three (3) years from the date of retrenchment subject to the pilot being licensed and capable of re-employment."

Mr. Forrest in evidence stated that no prior discussions took place between the Company and the Association before the Company purported to terminate their contracts and that the Company in terminating the employment of 5 of the most senior pilots were in breach of the agreement which provides for retrenchment on a "last on, first off" basis. The Company argues that the termination of the five plaintiffs' contracts was not on the grounds of redundancy but to achieve more efficiency. Their positions have been filled by other pilots already employed by the Company.

The word "redundant" does not appear to have been judicially defined. The Shorter Oxford English Dictionary defines it (inter alia) as "super abundance, superfluous, excessive".

"Redundancy" is the state or quality of being redundant.

The meaning most appropriate in its context in clause 7 of the agreement in my view is"superfluous", or exceeding what is sufficient or of which there is more than enough, to take two meanings of "superfluous".

Mr. Johnson referred to the Employment Protection (Consolidation) Act 1978 (Imp.) Part VI of that Act deals with redundancy payments. Section 81(2) of that Act defines dismissal for redundancy. It provides:

81(2) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to -

(a) the fact that this employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease,to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish."

While that subsection provides a definition for the purpose of the Act section 2(b) would appear to cover the situation in the instant case had the Act been a Fiji Act.

Grunfeld in his The Law of Redundancy 1971 edition considered the Redundancy Payments Act 1965 (Imp.) which was repealed by the 1978 Consolidated Act.

Mr. Johnson while acknowledging that the United Kingdom Act had no parallel in Fiji argued that the Act did assist and he referred to pages 85, 91, 95 and 96 of Grunfeld.

At page 85 the learned author states :

"as a general rule, when an employee is dismissed and replaced, this is a good prima facie indication he was not dismissed for redundancy for legal purposes."

There is a similar comment at p. 91 :

"As a general rule of thumb an employee is not dismissed for redundancy when, in a re-organisation, someone else is appointed to do his job or jobs."

Pages 95 and 96 deal with evidentiary weight of simple replacement and calls for no comment.

Mr. Johnson also referred to Chapman & Ors. v. Goonvean and Rostowrack China Clay Co. Ltd. (1973) 2 All E.R. 1063 where it was held (inter alia) that on the evidence the respondent's requirement for employees to carry out that kind of work had neither ceased or diminished for they had employed other men to do the work.

The quotations from Grunfeld v. Chapman's case do not help the defendant and would not help it had the Act been in force in Fiji. Mr. Johnson has overlooked the fact highlighted in Chapman's case that the plaintiffs in Chapman's case were replaced by hiring seven more men.

In the instant case the plaintiffs have been replaced by pilots already employed by the Company. Mr. Johnson argues that the cause of their dismissal is the adoption of more efficient use of pilots without diminution of work.

Grunfeld at p.82, after commenting on the fact that "redundancy" in the new redundancy law was highly technical, stated that an employee will be redundant within the meaning of the Act in two main situational categories only the first of which would apply in a case like the instant case.

It is: "where the number of employees required to carry out work of a particular kind become smaller, or is expected to be smaller and the employee in question is consequently dismissed".

The author has a note to the foregoing :

> "One might argue that if the requirements of a business for the execution of work of a particular kind remain constant, the requirements of the business for "employees" to carry out that work must be unaffected. But it is clear that the 1965 Act is aimed not only at the disappearance of jobs due, e.g. to new systems, technology, or processes, but also at the shake-out of superfluous labour by the more efficient use of labour....."(underlining is mine)

The English legislation and Grunfeld's treatise of the Law of Redundancy do not help much. "Redundancy" in section 7 of the master agreement has no highly technical meaning and must be given the meaning which the parties to it must have given to it and that is that pilots considered surplus or superfluous to requirements must be considered redundant.

On the facts before me it is clear that the Company considered the plaintiffs were surplus to requirements. Their work is now being done by other pilots without the need to employ any more pilots. I hold as a fact that they were dismissed because they were redundant.

Clause 7 of the master agreement provides that where there are any redundancies there must be prior discussions between the Company and the Association. There were no such discussions but of more importance to the plaintiffs personally, retrenchments must be on a "last on first off" basis. As they are 5 of the most senior pilots the termination of their contracts of employment is a breach of their contracts. The Company terminated the plaintiffs employment on a "first on first off basis".

The plaintiffs also pleaded that, as provided in section 7.6.1.0 and 7.6.2.0 Localisation Policy which I have held to be part of the master agreement they were entitled to receive two years notice.

While there was considerable argument as to whether that section or clause was part of the agreement and whether the dismissals were for redundancy, neither counsel addressed me on the issue as to whether the plaintiffs were also dismissed because the Company had introduced a localisation policy.

It may be that counsel considered this was an issue which was concerned only with damages. However, the position may well be that the Company is also or alternatively in breach of that section as pleaded by the plaintiffs.

I accordingly reserve consideration of that issue until counsel have had an opportunity of addressing the Court.

I hold that the defendant in terminating the five plaintiffs' contracts of employment are in breach in each case of such contracts.

An early date will be fixed for the trial on the issue of damages. The parties could however facilitate the hearing if facts and figures not in dispute are first agreed. The plaintiffs are, as stated, expatriates and it is in everybody's interest that these actions be finalised as soon as possible.

The question of costs is reserved until the trial on the issue of damages.

The plaintiffs should apply to the Registrar for an early date for trial on the issue of damages.

(R.G. KERMODE)
J U D G E

SUVA,

14th July, 1981.