

IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Civil Action No. 19 of 1982

Between:

KENNETH JOHN HART

Plaintiff

and

AIR PACIFIC LIMITED

Defendant

Sir John Falvey with Mr. Noor Dean for the Plaintiff
Mr. B. Sweetman for the Defendant

J U D G M E N T

The plaintiff is an aeronautical aircraft engineer. By a written contract of employment dated the 9th January, 1978 he was employed by the defendant company, Air Pacific Limited as a Repair and Overhaul Superintendent.

In August 1977 the defendant company, through its Engineering Manager, Mr. Christoffersen, informed the plaintiff that Air Pacific had a vacancy for a repair and overhaul superintendent (Ex.A1) and asked plaintiff to advise it if he was interested. After this there was an exchange of telexes as a result of which plaintiff came to Fiji in October, 1977 for an interview with Mr. Christoffersen who found his technical qualifications suitable and who recommended him to the Personnel Department of Air Pacific where the terms and conditions of his employment were discussed and it was decided to employ him as a repair and overhaul superintendent. The plaintiff then returned to Australia and returned again towards the end of 1977 when the contract of employment (Ex.B) was signed between the plaintiff and Air Pacific. This was Air Pacific's

standard form of contract used by Air Pacific for its expatriate engineers. This contract was signed in the Personnel Department of Air Pacific and an Air Pacific's officer in the Personnel Department signed on behalf of Air Pacific. Mr. Christoffersen was present when term and conditions of the plaintiff's employment were discussed with Air Pacific's Personnel Officer but he was not present during the signing of the contract in the Personnel Department of Air Pacific.

On 30th November, 1977 prior to plaintiff coming to Fiji to take up employment, Air Pacific applied for and obtained from the Fiji Immigration Department a work permit for the plaintiff valid to 28th November, 1980 (Ex.F3).

The provisions of the contract of employment regarding its term is as follows :

"The Company offers and the Employee accepts an offer of employment as Repair and Overhaul Superintendent for a minimum period of 3 years from the 31st December 1977 subject to earlier termination as hereafter provided and on the following terms and conditions: "

The provision regarding earlier termination referred to above contained in Clause 2(a) of the contract is as follows :

"2. Contract Validity:

(a) It is mutually agreed by the Company and the Employee that this contract may be terminated by either party :-

(i) By three calendar months' notice in writing

or

(ii) By the payment or forfeiture of three months' salary in lieu of notice, as applicable in (i) above.

(b) Nothing herein shall be construed to prejudice the Company's right at common law to dismiss or suspend the Employee for misconduct or other sufficient cause. In the event of dismissal the Employee and his dependents will be provided with return

economy class air passages only to his country of origin and shall be paid up to the time of dismissal only. "

The plaintiff commenced his duties under the contract on 1st January, 1980. The "minimum period of 3 years" provided for in the contract was due to expire on 31st December, 1980. The plaintiff, however, continued to be employed by Air Pacific after 31st December, 1980, that is, beyond the "minimum period of 3 years". On the 19th October, 1981 he was given a 3 months' written notice (Ex.H) by Air Pacific terminating his employment on 18th January, 1982. This notice from Air Pacific advised the plaintiff as follows :

" I wish to advise you that in accordance with Clause 2(a)(i) of your contract of employment you are hereby given three calendar months notice that your contract of employment will be terminated on 18th January, 1982.

Please liaise with the undersigned to finalise details of your final pay and repatriation.

Satish Maharaj
Personnel Relations Officer "

There is conflict of evidence relating to the circumstances in which the plaintiff continued his employment with Air Pacific after the expiry of the "minimum period of 3 years" on 31st December, 1980.

The plaintiff's evidence regarding what took place is as follows :

In the early part of 1980 the plaintiff says he found that a house of another Air Pacific employee was going to become vacant in the middle of 1980 and he was interested in moving into it. So he approached Mr. Christoffersen, the Engineering Manager, regarding the Company's intentions regarding his future employment after the 3 year minimum period expired at the end of 1980. Mr. Christoffersen assured him that his services would be required for at least another 2 years. On the basis of this assurance he moved into the house in June 1980.

Prior to that he had applied for other jobs and as a result he was informed of a job being available as engincer in charge of workshop with Royal Brunei Airlines. He says he informed Mr. Christoffersen of what he calls the offer from this Airline in March or April 1980. He says Mr. Christoffersen told him he did not want him to leave Air Pacific which required his services for at least another 2 years. Plaintiff says he then told Mr. Christoffersen that he had received a very good offer of employment from Royal Brunei Airlines and he wanted Air Pacific to guarantee him 2 years employment failing which he would take up Royal Brunei Airlines' offer. He says he told him he wanted guaranteed employment with Air Pacific until 31st January, 1983 - that is a further 2 years and one month from the expiry of the minimum time of 3 years under his contract. He says he told Mr. Christoffersen that his employment for 2 years one month should be guaranteed for this period and that he did not want Clause 2(a) and (b) regarding the right to terminate on 3 months' notice to apply to this 2 year and one month guaranteed employment. He says Mr. Christoffersen accepted his proposals on behalf of Air Pacific. It was on this basis he says that he continued to work for Air Pacific after 1st January, 1981. He says because of this agreement with Mr. Christoffersen he wrote to Royal Brunei Airlines rejecting their offer.

He then produced copies of two letters from Royal Brunei Airlines dated 29th July, 1980 and 26th November, 1980 (Ex.C and D) which he says he treated as offers of employment. He did not produce a copy of his letter rejecting these so called offers.

He says that as he had this guaranteed contract of employment with Mr. Christoffersen before the expiry of the 3 year minimum period under the previous written contract, he arranged with Mr. Manueli of Air Pacific for certain of his personal effects which he had left behind in Australia to be brought to Fiji and as a result Mr. Manueli wrote letter Ex.E.

Plaintiff continued working until he received Air Pacific's notice of 19th October, 1981 terminating his employment on 18th January, 1982, that is long before the expiry of the 2 years one month period which he says

Mr. Christoffersen guaranteed him. He says after receiving this notice terminating his employment he spoke to Mr. Christoffersen who told him he was surprised that he had been given this notice and that it was in breach of the verbal agreement they had entered into and that he would be looking into the matter. Plaintiff thereafter saw Mr. Savu, the Chief Executive of Air Pacific, and mentioned the agreement he had with Mr. Christoffersen. He says Mr. Savu told him that Mr. Christoffersen neither had the right nor power to enter into such an agreement.

In cross examination plaintiff agreed that his first contract (Ex.B) was signed by him at Air Pacific House and that Mr. Mohandas signed on behalf of Air Pacific and not Mr. Christoffersen. He agreed that the contract was for a minimum period of 3 years but he knew he could carry on under it for a further period. He also admitted that although he had made the agreement with Mr. Christoffersen for further employment for a fixed period in about June 1980 yet in October 1980 (according to letter Ex.D) he cabled Royal Brunei Airlines saying that he was interested in their vacancy for a foreman. He explains this by saying that he sent his cable because there were delays in getting his work permit and he did not want to be left without a job. He also agreed that Royal Brunei Airlines' letters offered him an interview only and it was not a firm offer of employment.

He agreed also that Mr. Christoffersen's letter of 17th June, 1980 to the Chief Personnel Officer of Air Pacific suggesting that a 12 months' extension of plaintiff's work permit be applied for did appear strange in view of his guarantee to him of 2 years' employment. He agreed that his discussion with him took place in the middle of 1980. He also agreed that his alleged agreement for a guaranteed 2 year one month employment was oral and was never reduced to writing and that he never asked that it be reduced to writing. He says that according to his agreement with Mr. Christoffersen his employment was to be for a fixed period of 2 years one month on the same terms as the old

contract minus the part giving either party the right to terminate one 3 months notice. In all other respects it was the same as the old contract. He says he did not discuss this new agreement with the Personnel Department of Air Pacific and never sought any reassurance about his employment in writing, relying entirely on his verbal agreement with Mr. Christoffersen.

Mr. Christoffersen, at present the Manager, Technical Services for Air Pacific but formerly its Engineering Manager, with whom the plaintiff alleges he reached agreement for a fixed term contract for 2 years one month with ut ei her side having the right to terminate the employment by 3 months' notice, was called by the defendant Company, Air Pacific, to give evidence and his evidence conflicts with that of the plaintiff. Mr. Christoffersen's evidence is as follows.

Air Pacific had a vacancy in its Engine Overhaul and Repair Division. The plaintiff applied for the job and telexes were exchanged with him in August 1977. As a result arrangement was made for plaintiff to fly over from Australia for an interview. Mr. Christoffersen interviewed him on a purely technical basis and found him suitable so he recommended him to the Personnel Department of Air Pacific. The terms and conditions of plaintiff's employment were then discussed between the Personnel Department and the plaintiff at which Mr. Christoffersen was present.

Later the plaintiff signed a contract of employment with Air Pacific but Mr. Christoffersen was not present when it was signed but he was aware of it. It was in the Company's standard form used for all expatriate engineers. A work permit to 30th November, 1980 was issued to the plaintiff and he commenced working for Air Pacific on 1st January, 1978.

During 1980 Mr. Jorgensen, an engineer with Air Pacific, was interested in applying for Fiji citizenship and Mr. Christoffersen's intention was to appoint him as Repair and Overhaul Superintendent in place of the plaintiff upon the expiration of plaintiff's 3 year period. He wrote the

following letter to the Chief Personnel Officer of Air Pacific on 17th June, 1980:

" Please find attached letter from Mr. K.J. Hart re his work permit. I would suggest we apply for a 12 months extension.

Mr. Jorgensen has been nominated to take over the position currently held by Mr. Hart but the C.A.A. Surveyor is stipulating a 12 month understudy period. However there is a possibility that Mr. Jorgensen may decide to terminate his employment with Air Pacific which would necessitate the need for continuing Mr. Hart's employment. "

The letter from Mr. Hart attached to Mr. Christoffersen's letter (Ex.F9) was dated 20th May, 1980 and was as follows :

"Chief Immigration Officer,
Development Bank Building,
Suva.

Dear Sir,

My present work permit expires late November 1980. Air Pacific have approached me in regard to continuing employment with them, and this letter is to certify my willingness to do so.

Yours sincerely,
Kenneth J. Hart
Overhaul Superintendent "

In September Mr. Jorgensen resigned and Mr. Christoffersen wrote another letter (Ex.F7) dated 22nd September, 1980 to the Personnel Officer as follows :

" Ref. attached. Would you please apply for a 2 year extension to Mr. Hart's work permit.

Mr. Jorgensen who was to take over from Mr. Hart has resigned and is due to leave in mid-October. We shall have to appoint an understudy to Mr. Hart but at this time we have not as yet made a selection. We intend to call for applications in the near future. "

A local citizen, Mr. Abdul Aziz, was thereafter appointed to understudy Mr. Hart. Mr. Christoffersen says the period of understudy would be based on how well Mr. Aziz

progressed and functioned in this position. This he says was the reason for applying for a two year extension to plaintiff's work permit. Mr. Aziz did this understudy until plaintiff left and is still performing satisfactorily the work plaintiff was doing.

At about the time he wrote the letters dated 17th June, 1980 and 22nd September, 1980 Mr. Christoffersen had several discussions with the plaintiff about the extension of his work permit. He says :

" As to the 1980 situation and discussions with plaintiff. I did not make any agreement with him. I did not at any stage guarantee him employment till the end of 1982. I did not have authority to do that. I believed I would require his services for approximately 2 years hence my reason for recommending 2 year work permit extension I did not ever tell plaintiff that this 3 months' notice provision in his contract would no longer apply. "

Mr. Christoffersen says Air Pacific's policy in mid 1981 was to localize as quickly as possible and a major re-organization of the engineering section was going on. Bearing this in mind in the latter part of 1981 he recommended to the Personnel Department the termination of appointment of three expatriate contract engineers one of whom was to be the plaintiff. He says he recommended two engineers' employment be terminated in January 1982 and that of the plaintiff in April 1982. These posts were to be localized in accordance with the Company's policy of localization.

Thereafter on 19th October, 1981 the Personnel Department gave the plaintiff 3 months notice of termination of his employment (Ex.H). Personnel Officer, Mr. Satish Maharaj, brought the notice to Mr. Christoffersen's office where Mr. Christoffersen handed it over to the plaintiff.

Later that afternoon Mr. Christoffersen says he drove plaintiff in his car. He saw that the plaintiff was genuinely upset. Mr. Christoffersen says: "I don't believe

he stated at the time that it was a breach of his contract. He was complaining that the period of his work permit had not been worked out. He felt he should have served for the period of his work permit. He was not critical of me during the discussion. He did not say I had made contract with him for 2 years. He kept talking about the period of work permit which was 2 years. I was a little disappointed that my recommendation had not been accepted by the Personnel Department. At this time I felt I really needed his services till end of April."

Plaintiff asked him if he could intervene on his behalf. Mr. Christoffersen had a meeting with the Engineering Co-ordination Committee. But the Committee felt that the Personnel Department had been informed that Mr. Aziz had been approved and there was no point in Mr. Christoffersen making any further recommendations.

Mr. Christoffersen says that to waive the 3 months notice provision "there would be agreement on both sides and at no time did plaintiff ask me to recommend a change in his contract".

Explaining why the period was extended for 2 years and 2 months to 31st January, 1983 Mr. Christoffersen says his original recommendation was 2 years but the plaintiff wanted the period to go to January 1983 for personal reasons and that the plaintiff had discussions with the Personnel Department about it.

On the question of the extension of plaintiff's work permit for a further two years he says "I have dealt with a lot of engineers. If you apply for 2 or 3 years' permit it is generally assumed that he would work for that time. If for some reason operation of the Airline changes and they do not need him for 2 or 3 years then it is terminated on 3 months notice". Later he says "I know of many expatriate engineers whose contracts were terminated on 3 months notice before the expiry of their contracts".

Exhibit F12 shows that initially the plaintiff's work permit was renewed for 1 year on 20th November, 1980. Thereafter Exs. F3, F13 and F14 show that on 26th November, 1980 it was further extended to 31st January, 1983.

Plaintiff in his letter (Ex. F9) sent to the Immigration Department on 20th October, 1980 wrote: "I have been asked by my employer Air Pacific Limited and agree to renew my contract of employment for a further period of two (2) years. It would be appreciated if you could kindly renew my current work permit accordingly." Mr. Ganley who was called by the plaintiff says he knew in general terms that the plaintiff's contract had been extended for 2 years but he was not aware that it was for a fixed period. He admits he was not present during the discussions between the plaintiff and Mr. Christoffersen but as General Manager he was told of the discussions. He knew that application had been made to renew plaintiff's work permit for 2 years. He says he understood from his conversations with Mr. Christoffersen that plaintiff's services would be needed for a further 2 years as a local was not then available to take over the plaintiff's work.

In cross examination this witness said "I see Ex.B. This is standard form of contract. I see Clause 2(a) either party terminate on 3 months notice. To my knowledge the Company has never employed an expatriate without right to terminate on 3 months notice..... For Air Pacific a contract without such termination rights would be most extraordinary. As General Manager I have never come across such a contract. Plaintiff never suggested that the Company did not have right to terminate his employment on 3 months notice. If he had made this suggestion I would not have agreed with it. That is part of contract. Whether plaintiff had one contract which was extended or a new one would not alter that fact. The information I had been given was Mr. Hart was expected to be with the Company for 2 years. They always look at locals to do work and if opportunity arose his employment would be terminated..... We are always on lookout for localizing expatriate engineers' jobs. If local was available to do expatriate engineer's job it would

be Company policy to terminate expatriate's employment. Engineering Manager decided Mr. Hart's place could be localized and that is why it was localized." Later he says "I don't know if he was assured his contract would not be terminated before January 1983". Mr. Satish Maharaj, a Personnel Officer in Air Pacific, said in his evidence that the plaintiff's contract with Air Pacific (Ex.B) was the only contract with him. He says that the plaintiff never approached him for any renewal of this contract "though contract does not need renewal". He says there was no variation of contract (Ex.B) at any time and says "I do not know of any contract which would disentitle Company to give 3 months notice. All contracts so far made by Company with contract engineers provide for termination on 3 months notice".

As we have seen the contract between the parties is "for a minimum period of 3 years" with Clause 2(a) giving either party the right to terminate the employment by 3 months notice at any time. It could, for example, be terminated by either side by 3 months notice during the minimum period of 3 years. The contract uses the word "minimum period". In my opinion the intention to be gathered from the use of these words is that its operation would not be restricted to the minimum period if the parties mutually agreed to continue the employment beyond the minimum period without making a new contract. They could, of course, if they mutually agreed, make a completely new contract after the minimum period and mutually agree to any variation in the old contract. I have to decide what actually happened in this case.

I have carefully considered all the evidence before me and have seen and heard the witnesses for both sides and also considered all the documents put in evidence. I did not find the plaintiff to be a reliable and truthful witness and I do not accept his version of his discussions with Mr. Christoffersen. On the other hand, I found Mr. Christoffersen to be a reliable and truthful witness and I accept his version of the discussions he had with the plaintiff. There is no other witness to the discussions

that took place between them.

The plaintiff relies entirely on his allegation that Mr. Christoffersen verbally agreed to guarantee that his employment would be for a further period of 2 years one month with neither party having the right to terminate the employment during this period as is provided in Clause 2(a) of contract Ex.B. He says he did not ask for this agreement to be confirmed in writing by Mr. Christoffersen or Air Pacific. He knew perfectly well that although Mr. Christoffersen interviewed him in 1977 before he first commenced working for Air Pacific his contract of employment was made with the Personnel Department of Air Pacific and not with Mr. Christoffersen. He must have known that contracts of employment for expatriate engineers were made by the Personnel Department. Yet after his discussions with Mr. Christoffersen he did not ask for his alleged new contract or, if he alleges only a variation of the first contract, any variation thereof, to be confirmed by the Personnel Department. He did not even ask Mr. Christoffersen to confirm his alleged agreement with him in writing. This alleged agreement introduced a very important change in the standard form of contracts used by Air Pacific for expatriate engineers in that it took away its right to terminate the contract on 3 months notice. The plaintiff made no effort at all to have the new agreement confirmed in writing but continued to work from the expiration of his minimum term of 3 years on 31st December, 1980 to 19th October, 1981 when he received notice of termination of his employment. In his two letters addressed to the Immigration Office he does not refer to any new agreement or variation of the first agreement but states in his letter of 20th May, 1980 that as "Air Pacific have approached me in regard to continuing my employment, and this letter is to certify my willingness to do so" and in his letter of 20th October, 1980 he says: "I have been asked by my employer Air Pacific Limited and agree to renew my contract for a further period of 2 years....." He speaks here in October 1980 of "renewing" his contract and not of a new contract or any important change in the terms of his contract.

I have considered all the evidence on the question of the signing by the plaintiff of an approval for Mr. Fremlin. I do not believe him when he says he signed this paper blindly without knowing what he was signing.

Even Mr. Ganley, who was called as plaintiff's witness and who was General Manager of Air Pacific, and who says he was kept informed of developments, says that the plaintiff never suggested to him that the Company did not have the right to terminate his contract of employment on 3 months' notice and that if he had made such a suggestion he would never have agreed with it. He said that the plaintiff was expected to be with the Company for a further period of 2 years but he goes on to say that if a local was available to do the expatriate engineer's job it would be the Company's policy to terminate the expatriate's employment. He further says that for Air Pacific any contract without such termination rights would be most extraordinary and as General Manager he had never come across such a contract.

The plaintiff says Mr. Christoffersen agreed to the fixed period of further employment without right of termination in the middle of 1980. Even the plaintiff agreed in cross-examination that if he had so agreed it was strange that Mr. Christoffersen initially recommended a 12 months' extension of plaintiff's work permit in his letter to the Personnel Department on 17th June, 1980. It was not until Mr. Jorgensen resigned that Mr. Christoffersen recommended a two year extension of the work permit on 22nd September, 1980.

I accept as true Mr. Christoffersen's evidence that he did not at any stage guarantee or have the authority to guarantee the plaintiff employment for 2 years or 2 years and one month. I accept his evidence that he believed he would require plaintiff's services for approximately 2 years after Mr. Jorgensen's resignation and that is why he recommended a 2 year extension to the work permit. I believe his evidence that he did not ever tell the plaintiff that

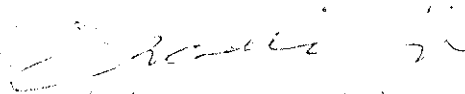
the 3 months notice provision in his contract would no longer apply to this extended period of employment. In 1981 due to the re-organization in the Company and its localization policy and the availability of Mr. Aziz he recommended that the plaintiff's employment be terminated in April 1982 and that of two other expatriate engineers in January 1982. Air Pacific while accepting his recommendation that the plaintiff's employment be terminated, decided to terminate it earlier than he recommended.

I have no doubt on all the evidence before me that the plaintiff's employment with Air Pacific continued under the provisions of contract (Ex.B) after the expiration of the minimum period of 3 years mentioned therein.

I therefore find that the termination of the plaintiff's employment by 3 months notice as aforesaid was lawful and as provided for in the contract (Ex.B) which applied at the date of such termination.

The plaintiff's claim for damages for breach of contract therefore fails. I am satisfied from the evidence of Mr. Satish Maharaj, Personnel Officer for Air Pacific, that all amounts due to the plaintiff were paid to the plaintiff. As to the alleged telephone account of \$20 the defendant Company is willing to pay it if the plaintiff submits details. As regards 3 days' hotel accommodation entitlement the plaintiff was requested to pick up the voucher but failed to do so. This voucher is still awaiting collection by the plaintiff.

The plaintiff's claim is, therefore, dismissed with costs to the defendant Company.



(T. Madhoji)
JUDGE

21st December, 1982

Suva,