IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 267/92

BETWEEN: PATI EVES of Vailima, Flight Attendant:

FIRST PLAINTIFF

A N D: THE WESTERN SAMOA FLIGHT ATTENDANTS ASSOCIATION a duly registered Association of Flight Attendants:

SECOND PLAINTIFF

A N D: MARK BERKING of Vaoala near Apia, Captain:

FIRST RESPONDENT

A N D: POLYNESIAN AIRLINES (HOLDINGS) LIMITED a duly incorporated company having its registered office at Apia and carrying on business as Airline Carrier:

SECOND RESPONDENT

COUNSELS: T. Malifa for Plaintiff
R. Drake for Defendant

HEARING: 28th to 30th July 1993

DECISION: 9th August 1993

DECISION OF DILLON, J

The Plaintiff was employed as a Flight Attendant/Purser by the Respondent airline operator up until 19th August 1992 when he was summarily dismissed in writing by the First Respondent for the Second Respondent, for failing to attend a dangerous goods awareness course on the evening of 10th August 1992.

The Plaintiff seeks a declaration that the dismissal was invalid/void and of no effect, full status and seniority on reinstatement, damages including exemplary damages, for wrongful dismissal, loss of earnings, mental anxiety and distress, and compensation for violation of his rights under the Constitution.

The Western Samoa Flight Attendants' Association Working Agreement (Ex.A) forms the basis of the master/servant relationship between the parties. This is comparable to the Pilots Agreement referred to in Keil v Polynesian Airlines Limited, 28.5.87, Bathgate J and 8.1.91 on Appeal. Whereas that claim was for simple termination of services, however, this action involves termination for cause and different provisions of the award apply. Consequently, this cannot be regarded as a simple re-run of the Keil decision.

Termination of services by the Company as in the Keil case would be effected pursuant to Clause 4(d)(ii) of the award providing for not less than one month's notice in writing....Clause 4(d)(iii) provides: "Where a cabin crew is discharged without notice or reasonable cause, he/she shall be paid one(1) month's pay in lieu of notice....Reference should also be made to Clause 4(e): "Nothing in this Agreement shall detract from the Company's right at common law to dismiss or downgrade an employee for misconduct, provided that in such a case the employee shall have a right of appeal against such action by the Company under the Grievance Procedures in paragraph 22".

The notice to the Plaintiff dated the 19th August (hereafter called the notice) was exhibited to the Statement of Claim and sets out the complaint by the Respondents against the Plaintiff in the first five paragraphs. It then concludes in two paragraphs as follows:

"As a result of the above I regret to advise you that your service with the company has been terminated effective on this day the 19th of August 1992.

You are asked to report to our Accounts Section for your final pay after you have returned all Company property that you possess".

The notice cannot be categorised as termination of services with notice under Clause 4(d)(ii) of the award, as in the Keil decision, since there is not one month's minimum notice. Nor can it be classified as termination of services without notice under Clause 4(d)(iii) since the notice is written and instantaneous. It cannot be classified as termination of services without reasonable cause, under Clause 4(d)(iii), because the notice sets out in five paragraphs the Respondents complaints against the Plaintiff. The Respondents then fall back on Clause 4(e) to claim a common law right to dismiss for misconduct, leaving the Plaintiff with a right of appeal against the action of the Company under the Grievance Procedures in paragraph 22 (Clause 22).

Throughout the case, counsel for the Respondents confirmed the entitlement of the Plaintiff to such a right of appeal under Clause 4(e), to counter the allegations by the Plaintiff that he had been treated unfairly, without a right to be heard and in breach of the fair and equal treatment the Plaintiff claims is guaranteed to him by the Constitution. This is in marked contrast to the Keil decision where the Supreme Court held that (a) once the termination of the contract was effected then the grievance procedures were no longer available to the Plaintiff and (b) the grievance procedures need to be put in train prior to the effective termination of the contract. With respect, this case highlights the alternative point of view, that the grievance procedures are still available to the Plaintiff after the effective termination of the contract.

Because this decision may not end the dispute between the parties I record the facts as I have found them to be established to my satisfaction on the balance of probabilities.

1. The Plaintiff was employed by the Second Respondent as a Flight Attendant as from July 1984.

2. The Plaintiff was promoted to purser as and from 16.1.1991.

3. The Plaintiff's personal file (Ex.1) records a number of occasions the Plaintiff has been called upon to account for incidents in and about his employment with the Respondents.

4. The Plaintiff applied for leave as and from 10th August 1992, on 20th July 1992. This was logged as a normal leave application. It could have been applied for as Sports leave under Clause 13(g) of the award but did not fall clearly and exactly within the definition in the award. In any event the Plaintiff did not seek sports leave. It was considered that he had a good chance of getting the leave, he being third in line for that day, but there was no guarantee of it being granted to him.

5. The Plaintiff was one of the national junior tennis coaches in the International Tennis Federation Tournament with competitors arriving by plane in Western Samoa on Monday, 10th August 1992.

6. The Plaintiff was not granted leave for 10th August 1992 but was required to attend a dangerous goods awareness course commencing at 6.00pm that Monday and expected to last two(2) hours. The Plaintiff was notified of the time, date and place of that course on Saturday, 8th August 1992 at 1451 hours or 9 minutes to 3.00pm.

7. The Plaintiff made enquiries of the Acting Manager for Flight Operations, Pania Schwenke, on the afternoon of Monday, 10th August 1992 about his having time to meet the incoming flight with the tennis competitors on board at 4.45pm and still make the dangerous goods awareness course at 6.00pm that day. She checked with the Duty Travel Office and confirmed that the flight was running on time and suggested to the Plaintiff that he would be able to meet the plane and still make the course. She felt some responsibility for the resulting problems. The plane was late, the Plaintiff did not

make it back from the airport to the course until 6.55pm at which time the course, expected to be for two(2) hours, but taking less than one(1) hour, had concluded.

8. If the Plaintiff had been 3 - 4 minutes late then it is doubtful if any disciplinary action would have been taken. But to be one hour late for a two hours lecture is not acceptable. It cannot be regarded as attendance at the lecture. The matter becomes even more unacceptable when the two hour lecture is condensed down to one hour and the one hour is missed completely.

9. The Plaintiff failed to notify that he had missed the course to the Acting Manager for Flight Operations, Pania Schwenke. She was notified by the Personnel Section on the 11th August 1992 that the Plaintiff had missed the lecture and she called upon the Plaintiff that same day for an explanation. It seems that she considered the failure of the Plaintiff to advise her of his missing the course as the "misconduct" that required to be reported to the First Respondent, Captain Mark Berking.

10. The Plaintiff apologised to Pania Schwenke for what had happened and was able to arrange to attend the same dangerous goods awareness course on Wednesday, 12th August 1992.

11. The matter was reported to Captain Mark Berking on his return to Western Samoa on or about 17th August 1992 and after discussions with the General Manager and Deputy General Manager of the Second Respondent on the 17th and 18th August 1992, the notice of termination was delivered to the Plaintiff on the 19th August 1992.

12. At no stage from 12th August 1992 on, was the Plaintiff aware that his continued employment was at risk. No opportunity was given to him

to put his side of the story and it is a matter of conjecture as to what sort of "spin" may have been given to the reports on the incident, received by Captain Mark Berking, the First Respondent.

13. Captain Mark Berking, the First Respondent is the Manager of Flight Operations and is the duly authorised agent of the Second Respondent to hire and fire flight personnel subject to discussions with the General Manager and the Deputy General Manager.

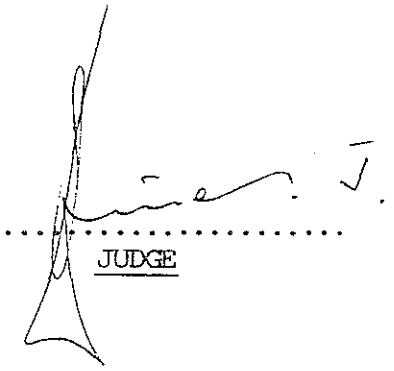
14. The Plaintiff has not accepted his final pay nor has he returned Company property as called for in the notice to him of 19th August 1992.

15. The Plaintiff through his counsel, wrote seeking disputes resolution, grievance procedure and reserving the right to appeal under Clause 22(d) of the award in a two(2) page letter dated 21.8.92 (Ex.B). This was followed by a six(6) page letter of 31.8.92 (Ex.C) neither of which were replied to prior to the issue of these proceedings on 23.9.92. Thereafter it was not considered necessary or appropriate to reply to the correspondence from the Plaintiff's counsel.

16. There is clearly a reluctance on the part of the Respondents to continue the award procedures once lawyers are involved. This is unfortunate since the Court now faces the situation where the Plaintiff has an unexercised right of appeal to the General Manager and thereafter any subsequent appeals to the Commissioner of Labour under Clause 22(d) of the Award, almost one year after the notice of termination of 19.8.92.

It is for that reason that I have set out the findings of fact that I have made, to assist the parties in resolving this matter or at least to exercise the appeal rights pursuant to Clause 22(d) of the Award.

In the circumstances this matter will be adjourned sine die (7 days notice) to enable the appeal rights of the Plaintiff to be exercised pursuant to Clause 22(d). Costs are reserved.



JUDGE