IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 55 of 1981

Between:

AIR PACIFIC LIMITED — Appellant

and

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

E. Lloyd Q.C. & G.M.G. Johnson
for the Appellant.
P. Liddell Q.C. & Nur Dean for
the Respondents.

Date of Hearing: 15th July, 1982.
Delivery of Judgement: 30th July 1982.

JUDGMENT OF THE COURT

Speight J.A.

This appeal is against two decisions given by the Hon. Mr. Justice Kermode in the Supreme Court at Suva on the 14th July, 1981 and the 9th September 1981 respectively. In that action the present respondents had been the plaintiffs and the present appellant had been the original defendant. The respondents had for many years been air line pilots employed by the appellant and on the 1st May 1981 Mr. Narayan, the Manager Employee Relations of the appellant company gave each of the respondents and three other senior pilots six weeks' notice of termination of employment. The respondents and one at least of the other pilots allege that this was in breach of their contract of employment and brought

96

proceedings in the Supreme Court claiming damages. In the first of the judgments mentioned above delivered on 14th July 1981, the learned trial Judge found in favour of the respondents and held that Air Pacific had broken its contract. The Judge then adjourned the matter for the Hearing of further evidence on the question of damages. Evidence was taken and submissions were made, and a final judgment was given on the 9th September, 1981 whereby the respondents were each awarded damages in sums of the order of $70,000 - varying a little according to their individual circumstances.

All the pilots with whom we are concerned are expatriates, that is to say, they are not Fiji citizens. They are, one understands, either Australians or New Zealanders. They had been in the employ of the Airline since prior to 1975 and they together with the other three to whom notice was given, were eight of the nine most senior pilots in the company. Their contracts of employment in earlier times are not relevant to the present matter for their conditions of service had been re-negotiated between their Association, the Fiji Airline Pilots Association and their employer. These negotiations in which they had been represented by the first named respondent, Capt. Forrest as president of the Pilots Association had taken place late in 1979 and early in 1980. There were produced in evidence at the trial draft documents showing the type of clauses which had been under negotiations. These were, of course not admitted for the purpose of defining the contract because they were superceded by a formal contract document, but there was at least one other clause which appeared in the draft which did not later become part of the formal agreement but which the learned trial Judge held was agreed to and was collateral to the main agreement. In certain circumstances that clause could have governed the entitlement of the pilots to compensation upon termination of services. This can be referred to as "The Company Localisation Clause" and it will be discussed in greater

detail later.

From the evidence concerning contemporary employment circumstances in Fiji and from the knowledge which all parties had on such matters, it is apparent that of considerable importance to an understanding of the case was the matter of "localisation". It is the policy of the Government of Fiji to replace expatriates in its own service by local citizens as and when qualified persons become available for such duties. The procedure whereby this is brought about in respect of members of the Public Service is to be found in Clause 14 of the Fiji Independence Order 1970. Procedures are there set out whereby the Public Service Commission or other authorities which control appointments within the Public Service are required from time to time to compulsorily retire non-Fijians from its employ and replace them with local candidates as and when suitably qualified persons of appropriate ability become available. As far as we are aware there is no statutory equivalent relating to the termination of employment of expatriates and their replacement by locals in industry and commerce, but the same result is achieved in practice through the operation of the Immigration Act (Cap.88). Without reciting the specific provision in the Immigration Act it is sufficient to say that the right of persons who are not citizens of Fiji to enter the country to reside here and/or to work here is governed by the requirement that a permit shall be held either for working and/or for residence, permanent or temporary, or as a visitor. A work permit normally is issued for three years but it may be for any length of time either longer or shorter and after its expiration or cancellation it is unlawful to work here and after expiry of a residential or visitors permit, it is unlawful for any person to remain in Fiji and he or she will then be liable to deportation.

In practice persons may, and frequently do, apply for renewal of a work or other permit prior to the date of expiry and the appropriate authority, viz the

Permanent Secretary of the Ministry of Immigration, may or may not grant an extension. In the case of work permits inquiry is made of the employer concerning the need for an expatriate to remain as an employee and of paramount relevance is the inquiry whether or not there is a local person suitably qualified to perform the work. From evidence given at the hearing before the learned trial Judge it was apparent that in the cases of qualified persons such as the present respondents and probably in respect of all classes of employees, a work permit is never renewed if there is a suitable local replacement available. Apart from the evidence given in this matter this is common knowledge to all persons whether local or expatriate interested in employment within Fiji. The motive behind the policy both in the Public Service by virtue of the Fiji Independence Order, and in the private sector by the operation of the work permit system, is undoubtedly to promote legitimate national aspirations and to sustain the economy. The process is universally known as "localisation" which ever way it is achieved. There is no definition of that word which we can ascertain but its meaning is well understood whatever may have been the motive in replacing the employee in this fashion whether by Government or otherwise. The expatriate whose services have been terminated in these circumstances is said to have been "localised". That word was used by several of the appellants in the course of their evidence to express the circumstances which had arisen, namely that their dismissal had been followed by their replacement as jet pilots by Fijian nationals.

However this is merely colloquial adoption of a word which has no statutory definition - and government policy may change from time to time.

The respondents were not in government employ so the provisions of the Fiji Independence Order did not apply to them, and there was nothing to show that any government pressure had been brought to bear on the

99

appellant - indeed to the contrary for the dismissals were for another reason. The word "localised" has been used by the respondents because of their knowledge of what has happened since 1st May 1981, but legally speaking their dismissal has in our view been for redundancy, as we shall endeavour to show. Terms of employment of the pilots by the Company are contained in several written documents.

It was said in evidence that the main agreement had been concluded by the 1st April 1980 but it seems that it was not signed by the parties until 7th August. As printed the main agreement of employment for pilots contains 22 clauses over 24 pages of the document. The clauses are of universal application to all pilots in the company's employ and relate to such matters as engagement, seniority, training, salary, retirement, dismissal and other matters. Then there are four annexes 'A' to 'D' which are of more limited application. 'A' is a sub-clause for pilots who agree to undertake a course of training on jet air craft. Annex 'B' deals with salaries, 'C' to leave entitlement and then of considerable importance to this case is Annex 'D' which is headed "Additional benefits and allowances applicable only to expatriate pilots who joined prior to 1st April 1975". These additional benefits include substantial additional pay allowances, very generous allowances to enable children of expatriate pilots to be educated in Australia or New Zealand, largely at the company's expense, and generous travelling allowances for them, and liberal leave travel with free air tickets for expatriate pilots, their wives and children to travel backwards and forwards to Australia or New Zealand.

Before continuing further it is convenient to cite the clauses concerning dismissal and other methods of ceasing to be employed and the consequences thereof.

Ordinary termination is in the main agreement:-

162

"6.6. The services of a Pilot shall be terminable by either the Company or the Pilot:

6.6.1 During the Period of probation

(i) by seven (7) days notice in writing, or

(ii) the payment to the Pilot of seven (7) days salary in lieu of the notice in writing, or

(iii) the forfeiture by the Pilot of seven (7) days' salary or part thereof in lieu of the notice in writing.

6.6.2 Thereafter

(i) by six (6) weeks notice in writing; or

(ii) by the payment to the Pilot of six (6) weeks' salary in lieu of notice; or

(iii) by the forfeiture by the Pilot of six (6) weeks' salary or part thereof in lieu of notice in writing.

6.7. Nothwithstanding the provisions of 6.6.1(i) and 6.6.2 (i) above, the period of notice may be reduced or waived by mutual agreement between the Pilot and the Company. "

Immediately thereafter is Redundancy:-

"7. <u>REDUNDANCIES</u>

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 anytime up to three (3) years from the date of retrenchment subject to the pilot being licensed and capable of re-employment."

Followed by Retirement:-

101

"8. RETIREMENT

8.1. The retirement age of all pilots shall be 55 years. The Company and the employee are both free at any time to give notice of not less than three months in order to implement retirement.

8.2. By mutual agreement, service may be continued up to 60 years of age, subject to continued medical fitness and general ability in the performance of normal flying duties, on a "year-to-year" or any other mutually acceptable basis. The Company and the employee are both free at any time to give notice of not less than three (3) months in order to implement termination. "

Then, in Annex D5 we find one of the "Special Benefits":-

"D5. SEVERANCE

(a) Should any pilot covered by this Annex D be required to leave Fiji because of Government policy relating to localisation and not as a result of any action on the part of the pilot, the Company shall, if obliged to terminate his services give him six months notice in writing or pay him salary and allowances in lieu thereof. In addition, the Company shall pay a severance pay equivalent to one year's current salary of the pilot concerned.

(b) The Company undertakes to use its good offices and request the Immigration Authorities of Fiji to permit the Pilot to remain in Fiji to enable him to wind up his affairs. "

And of some significance for future consideration:-

"D6. TRANSPORTATION FROM FIJI ON TERMINATION

(a) The Pilot shall be provided by the Company with Economy Class airline tickets for himself, his wife and dependent children 18 years of age and under, and any other children receiving full time education, from Fiji to the relevant port of entry of the country from where he was originally recruited with the understanding that Sydney and Auckland constitute ports of entry for Australia and New Zealand

respectively. He shall be entitled to financial assistance with the transportation and packing of his personal effects in accordance with the provisions of sub-clause (b) herein. "

Despite conflicting submissions the learned Judge also held the following material contained in a draft discussed between the parties to be a collateral agreement:-

"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 emoluments 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.

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

The evidence was that this had been discussed in preliminary negotiations and accepted by all parties. Although it was only to be found in written form in the draft referred to and was not reproduced in the main agreement no challenge is now made to this as part of the pilots' contract.

As is well known, the beginning of this decade saw a dramatic down turn in the fortunes of most major airlines. Fiji was not exempt. On 1st May 1981 the following notice was sent to all respondents:-

"Dear Captain,

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 Personnel Relations Officer will assist you in finalising your arrangements.

Yours sincerely,

Sgd. R. Narayan
Manager Employee Relations "

In their statements of claim (the actions were consolidated) the respondents alleged:-

"9. EACH of the plaintiff claims that he has been dismissed on the grounds of redundancy and/or localisation, as the dismissal of the plaintiffs was designed to make way for pilots who were not Senior to the Plaintiffs, and any dismissal as an "economy measure" is tantamount

> to redundancy. The plaintiffs were among the eight seniormost pilots employed by the defendant company. "

In the pleadings and at the hearing the dismissal of the pilots was argued as being for redundancy (Clause 7) or alternatively company localisation policy (Clause 7.6.2.). In the course of the hearing counsel for the respondents advised the Court that the latter argument was abandoned but the contents of this clause may still be relevant as the evidence of the measure of damages which on cross appeal the respondents claimed they were entitled to. Before discussing these arguments however, some reference to the evidence is necessary. The letter of termination has already been recited. In an affidavit prior to the hearing Mr. Narayan - a senior executive of the appellant company said:-

> " In order to assist the Court by enlightening it on the surrounding circumstances I can assure the Court that the decision to terminate the plaintiff's contract (and the contracts of 4 other senior pilots) is regarded by the Company as 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."

There was also produced as supporting evidence a transcript of an interview between Mr. Apted (a senior Air Pacific administrator) and Mr. Savu (Deputy General Manager) and this was put forward without objection as proof of the company's motives. The interview was recorded on 1st May 1981 and it obviously related to the dismissal notices. There are other documents on the file which show that Air Pacific was greatly concerned about very substantial losses that it was sustaining in its operation - something of the order of $6,000,000 in the current year and there was discussion of the measures which would need to be taken including a hoped for reduction of 5 percent in staff. Without reciting that

interview in detail it is apparent from the remarks of Mr. Savu, who obviously was responsible for implementing the economy programme, that the company's motive in selecting the eight senior pilots for dismissal rather than others more junior was that they were on expatriate conditions and therefore much more highly paid than any others (expatriate allowances were about $13,000 a year each). As Mr. Savu very frankly said he was not so much concerned with what sort of passports they carried but their costs to the company. Had there been for any reason a Fiji citizen also in receipt of the inflated pay rate not received by more junior men then it seems not unlikely that he too would have been dismissed. There was in fact no such person so the question did not arise. In answer to questions from his superior Mr. Savu is noted as saying that it would save the company $300,000 per annum, there would be no reduction in the number of services provided by the company, that the existing man power could cope and that they would be moving local pilots up to fill the vacancies. He added that if possible they would be recruiting additional pilots but the main reason was purely a cost measure. We take this to mean that he was endeavouring to staff the Airline with eight less pilots because in his view the company was overstaffed, but that if need be he could recruit additional pilots. It would be obvious however that as economy was the motive he would prefer not to do so. Evidence to the same effect was given before the learned trial Judge. Cap. Forrest said at page 79 -

> "Defendant dispensed with 8 senior pilots for economic reasons as worded in their letter. Our particular jobs done by locals. 8 others not employed to take our places. Pilot strength reduced by 8 - senior pilots. One pilot has been rehired by the company - not one of the plaintiffs. 8 persons considered surplus to requirements and therefore redundant. "

Mr. Narayan said at page 86:

> "We have..... 1 chief pilot Capt.Seymour otherwise the 8 are senior pilots..... All plaintiffs were BAC111 captains. For economic reasons terminated their employment and proposed to move Banderante captains up in their places. "
>
> (- Banderante is a model of smaller aircraft operated by the company)

During the course of submissions Mr. Lloyd on behalf of the appellant acknowledged that after the dismissal of the five pilots (and probably the others) the duty of flying the company's jet planes was taken over by other pilots already in the company's employ and that as far as was known no other junior pilots or any other additional flying personnel were taken on at that time. The situation may have changed since with more recent and unrelated alterations of air craft types. While reference is being made to the evidence given it is convenient to note one or two other passages which are of importance particularly in relation to the work permit situation. Capt. Forrest at page 117 said -

> "If national could do job no permits issued to expatriate. My position has been localised. I agree a national is doing my job. My permit was due for renewal in October. If I did not get a permit that would be the end of me as a pilot in Air Pacific. Threat to future could be overcome if I had become Fiji citizen. "

On the same topic Mr. Narayan said at page 125:

> " Without permits (expatriates) cannot work in Fiji. Where a national can do a job an expatriate doing the job will not have permits renewed.
>
> Procedure is for company to make application. Jobs of plaintiffs were done by pilots remaining in the company. In those circumstances I was not prepared to apply for renewal of permits for any of the plaintiffs. Application would have been a waste of time in any event. "

As Mr. Lloyd observed on behalf of the appellants this evidence given by a Fiji citizen was not cross-examined

upon in a court where counsel representing both parties were, with the exception of Mr. Lloyd, Fijian citizens. We also noted that the judgment was given by a Fijian Judge who said:-

> "The stage had quite obviously been reached when government in furtherance of its localisation policy would have refused to renew expatriate pilots' work and residential permits when they expired where there were other pilots already employed by the company who could do their work. "

This last passage has not been challenged by any party as an accurate summation of government policy although, with respect, the words "and residential" were not the subject of any evidence and do not accord with policy always followed. For completion it should be mentioned that the learned Judge in the same passage had said that it was apparent that the expatriate pilots in negotiating conditions of employment envisaged that they could have their employment lawfully terminated before the retirement age of 55 either by government refusal of permit or in a "situation under the control of the company, namely, a decision by it to localise its pilots".

We now refer briefly to the basis upon which the learned Judge reached his conclusions in favour of the respondents. He discussed the written contract with particular emphasis upon the passages we have quoted. He also considered the company localisation clause and said that it was appropriate to accept extrinsic evidence concerning the negotiations, leading him to the conclusion that the company localisation clause was collateral to the main contract. He then considered arguments addressed to him, which have been repeated in this Court. These led him to the conclusion that the appellants had been dismissed because they were redundant. That is to say by better organisation of the company's pilot strength, management was able to conduct its operations at the same level but with fewer pilots than before. He placed emphasis on a factor which influences this Court, namely

that the evidence showed that this was not a case of an individual employee or several employees being dismissed and replaced by others recruited in their place. It was instead a re-organisation of the type sometimes brought about in industry by modernisation of processes, but in this case apparently by streamlining staff utilisation, as a result of which existing services could be performed with reduced staff numbers. This allowed the company to do without 8 of its most expensive pilots, who in the phraseology of the text books and the few cases that have been drawn to our attention are thereby described as redundant, that is to say surplus to establishment. In agreeing with the learned trial Judge's interpretation of the matter we have paid regard to dictionary and case references which were discussed by counsel.

Mr. Lloyd relied on a passage in a text book Law of Employment by Prof. A. Szakats (2nd Edit.) (Butterworths NZ) as follows (page 424):-

> "The following is a definition of redundancy:
>
> ' An excess of manpower resulting from mechanisation, rationalisation, or from decrease of business activity, including the closing down of an enterprise or changes in plant, methods, materials or products, or re-organisation or other like course requiring a permanent reduction in the number of workers employed on other than a casual, temporary or seasonal basis.'
>
> The central issue is the concept of job as distinct from the holder of the job. This is the crucial distinction between termination for other reasons, where the job remains, and redundancy, where the job itself disappears. "

The definition cited by the author is extracted from an industrial award in New Zealand and with respect supports the concept which we adopt that redundancy relates to reduction of personnel numbers. Such reduction may or may not also coincide with a fewer number of jobs being performed. There are two possibilities -

(a) the same functions as before may be performed by fewer personnel, due either to mechanisation or re-organisation, or

(b) some functions no longer need to be performed.

In either case this would be redundancy. In our view the additional comment (supra) by the author over emphasises the concept of "job". If the number of jobs, in the meaning of functions performed, decrease but staff numbers remain the same there has not been redundancy - conversely if the number of functions performed remain the same, but can be carried out by fewer people with the balance of employees dismissed, that is redundancy.

Mr. Liddell quoted Macquarrie's Australian Dictionary (1981) definition:-

> "Denoting or pertaining to an employee who is or becomes superfluous to the needs of the employer".

In the United Kingdom there is statutory provision in the Redundancy Payments Act 1965 and in Section 1(2) redundancy is defined as including an employee whose dismissal is attributable to:-

> " .....
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind.....have ceased or diminished or are expected to cease or diminish. "

This definition accords with our understanding of the ordinary meaning of the word and indicates that the decision of the appellant to carry on the same level of air service with fewer pilots amounts to redundancy - i.e. a surplus of employees, who were discarded.

In discussing this definition the author of The Law of Redundancy Grunfeld (Sweet & Maxwell) says at

p. 82:

> "Redundancy within the above meaning may arise by reason of simpler or more sophisticated forms of re-organisation of a business impelled by a wide variety of industrial or commercial reasons. "

The passage quoted is followed by a number of reported cases, supporting this view, but in the absence of statutory provision in this jurisdiction no further quotation is really helpful, for they are but illustrations of the proposition.

Mr. Lloyd also referred the Court to an unreported decision of the Full Court of South Australia.

> Reg. v. Industrial Commissioner of South Australia exparte Adelaide Milk Supply Cooperative (20th April 1977)

That case dealt with reduction of staff numbers due to automation where some functions previously performed were eliminated, and expresses a proposition with which we do not quarrel that "the concept of redundancy in the context we are discussing /automation/ seems to be simply this, that a job becomes redundant when the employer no longer desires to have it performed by anyone". But that is not a comprehensive definition of redundancy, which for reasons we have endeavoured to express also includes reduction of staff numbers due to re-organising by streamlining.

Mr. Lloyd's submission was that this was not a case of redundancy because other pilots were and are still flying the BAC111 so that there has merely been replacement. We suggest that this is too narrow a view and is based on the examination of jobs rather than of employees. We accept that if one is discussing a job becoming redundant the fact that it is still being performed is against redundancy. However, despite the paucity of modern

authority we accept that the popular understanding of redundancy relates to loss of his job by the employee and it is the man not the job who is made redundant. In the context of employment contracts where compensation for displaced persons is under consideration in our view that is the appropriate meaning to be assigned, namely, that the man has become superfluous to the employer's requirements whether it be that there is no need for his particular function to be fulfilled or that the function is still being fulfilled but with reduced manpower. It is too narrow a view we suggest to consider the individual situation without looking at the overall position of the employee viz-a-viz the work force before and after the termination of the services. It is for that reason that we regard as crucial the evidence quoted that by streamlining the company was able to provide the same air services with 8 fewer pilots, and we agree with the learned trial Judge's conclusion.

Having held the respondents had their employment terminated for redundancy it was, of course, immediately apparent that this had been done in direct breach of the method of coping with the redundancy situation provided in Clause 7.2 of the agreement. No discussion had taken place prior to the termination and retrenchment had not been in the reverse order of hiring, indeed the very opposite. The men dismissed were to all intents and purposes the longest serving pilots. So that the dismissals constituted breaches of contract. No argument was advanced that this was not the case if the court did hold for redundancy.

As earlier mentioned the learned trial Judge did not in his first decision then deal with quantum of damages for it had been arranged that this would be the subject of further evidence and submissions. Although he based his decision on a redundancy finding it might in the alternative have been dismissal in pursuance of Company localisation policy. The Judge left the matter open with

an indication that that might be relevant in any event to damages. He said that consideration of what damages respondents were entitled to for breach might involve a consideration of the company localisation clause. This seems a relevant comment for if one adopts the view we have described that localisation is the situation which arises when an expatriate's employment is terminated and his place is taken by a local, and if such a situation is brought about by the company it would, we think be arguable that that is "company localisation" although the motive was economic from the employer's point of view.

When the hearing resumed, however, Mr. Ramrakha, senior counsel at that time for the respondents advised the learned Judge that the respondents abandoned any claim "on the issue of localisation". We are not quite sure what Mr. Ramrakha meant by this expression, but the Judge appears to have treated it as meaning that dismissal was not due to localisation and therefore Clause 7.6.2 was not the automatic measure of damages. However, Mr. Liddell for the respondents in this Court returned to it as being not irrelevant on the cross appeal. This will be referred to later. Although the learned Judge had held that dismissal had been in breach of the provisions as to redundancy, there was, of course nothing in the contract as to any method of assessing damages in such case, so that the court had to turn to a consideration of what the individual employee's prospect of future earnings would have been if the employment had continued according to contract. It is true that provision is made for a retiring age of 55 but that is only a maximum age for service. If the respondents had not been expatriates and if they had continued to serve in a satisfactory way, they could no doubt have expected many years of further employment although an evaluation of this would be subject to an assessment of contingencies. The crucial factor however was that they were on permits to allow them to work in Fiji and the evidence showed that the permits for four out of the five respondents expired in September or October of 1981 with the fifth named respondent,

Capt. Haynes, having a longer period viz until 18.6.83.

The learned Judge turned his attention to the severance clause in the annex, Clause No. D5. It should be clear that in discussing it he was not, as Mr. Liddell suggested at one stage of his submissions, treating the appellants as having been dealt with in accordance with Government localisation policy. He was paying regard to the existence of that policy as a factor in assessing how long these pilots would be likely to continue in employment but for their redundancy dismissal. As has already been quoted he accepted that the government if approached for an extension of permits would have ascertained the availability of local pilots to perform the work and without doubt would have refused to renew. So that there was certainty that it would be impossible on the facts for anybody to contemplate that these men could work for the company beyond their expiry date. He quoted a passage from the judgment of Megaw L.J. in The Michalis Angelos (1971) 1 Q.B. 164 at 210:-

> "If the contractual rights which he has lost were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if it can be shown that those events were, at the date of the acceptance of the repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost having regard to those predestined events. "

It must be emphasised however that despite the use by the respondents of the word "localised" that is only their description arising from the subsequent employment of Fiji pilots - albeit from the company's existing staff.

The dismissals were dismissals for redundancy, and were contrary to the obligation on the company under Clause 7 which called for "prior discussion".

Had that taken place doubtless there would have been negotiation as to compensation for loss of employment.

114

Professor Szakats in the book already referred to at paragraph 249 discusses the nature of compensation. The principal material available comes from the provisions to be found in certain awards applicable to industrial unions and is of little relevance. However the following more general observation on the policy behind redundancy payments under the United Kingdom Redundancy Payments Act is of interest:-

> "A redundancy payment is compensation for loss of a right which a long term employee has in his job. Just as a property owner has a right in his property and when he is deprived of it he is entitled to compensation, so a long term employee is considered to have a right analogous to a right of property in his job, he has a right to security and his right gains in value with the years. "
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> Wynes v. Southrepps Hall Broiler Farm Ltd. (1968) 1 T.R. 407.

In Lloyd v. Brassey (1969) 2 Q.B. 98 Lord Denning M.R. said:-

> "A worker of long standing is now recognised as having an accrued right in his job, and his right gains with the years. So much so that if the job is shut down he is entitled to compensation for loss of the job - just as a director gets compensation for loss of office. The director gets a golden handshake. The worker gets a redundancy payment. "

The comparison with the United Kingdom situation however is of limited relevance, for under that Act redundancy is paid even if the worker gets another job straight away - a situation somewhat different from the present which is a damages claim, involving an estimate of future loss including the possibility of unemployment. But although overshadowed by the peril of "localisation" the present respondents can legitimately claim that the company's obligations in redundancy situations should have been that the first on should be last off. So length of service if of some relevance.

The learned trial Judge thought that in assessing the loss, a long term of employment could legitimately have been expected but for localisation possibilities, and he thought that the expectation could be measured by analogy with payment which would be made in such circumstances.

Mr. Lloyd has based his submission firmly on the proposition that the severance clause would not apply because of its wording - more of this in a moment but we defer this to deal with Mr. Liddell's submissions on the cross appeal which sought to increase the award. He submitted on a factual basis that localisation would not have taken place for some years pending retraining of junior pilots on to more sophisticated airplanes. It was in support of this argument that he referred to the company localisation clause not as conferring any specific entitlement but as evidentiary recognition by the parties that a period of two years or more would be necessary to bring about such replacement and accordingly he submitted that damages should be of the order of three or four years salary. Before we revert to the appellant's submissions we say that in our view the respondents' argument on this ground cannot succeed in the face of the evidence given. The hearing had commenced in June 1981 at a time when the six weeks' notice had not yet expired and it was continued in September. As has already been mentioned the displaced pilots mostly said that they had been superceded, and that the planes they had formerly flown were now being flown by locals and indeed the very last line of evidence from Nr. Narayan given on the 20th August was "Air Pacific is still flying today and local pilots are managing". Finally on this point we note from the exhibits that pilots lists, even excluding the 8 persons mentioned, showed a number of BAC111 pilots in employ at that time. One cannot imagine the company giving only six weeks notice if it did not have other qualified people available to fly its international service.

We return to Mr. Lloyd's submissions. As we shall mention shortly we do not accept that the Severance clause is the sole guide to assessment. But if it were we are of the opinion that it could not be given the literal meaning Mr. Lloyd contends for.

He stresses that the wording starts "Should any pilot covered by this Annex D be required to leave Fiji because of government policy relating to localisation..... the company shall.....". His point turns on the use of the words "required to leave Fiji". He says, and quite correctly that the effect of ceasing to hold a work permit is that the pilot can no longer be employed by the company, but whether thereafter he leaves Fiji or not may be determined by such possibilities as whether he obtains another work permit for different employment, whether he has an ongoing residential permit, whether he obtains a residential permit for a longer period without working, whether he applies for and obtains Fiji citizenship, perhaps even whether he gets a visitors permit. So it is submitted that loss of a work permit does not of itself require departure from Fiji which the clause makes a condition of severance payment. It was the same strict interpretation of the word "require" which was adopted by Mr. Liddell though in pursuit of his different submissions. At first glance this appears to be a formidable argument. If accepted it leads to some odd consequences. As has been pointed out under the Immigration Act, once a residential permit expires the man is an illegal immigrant. If applied strictly this interpretation of the severance clause would mean that it is a prerequisite to the entitlement to 18 months salary that the pilot shall have placed himself into a category where he is liable for deportation. If he chooses by some means to stay within the country even for a short period, perhaps on a visitors or temporary residence permit and then departs, he has not been "required to leave" because of localisation policy and would not be entitled to this large sum of money. Similarly if he obtained permanent residence, he would also be disentitled.

To produce such a result appears to be irrational and of course has nothing to do with the purpose for which this and similar clauses were negotiated between the Pilots Association and the Company as expressed in the Annex. It is a fundamental principle in the law of contract that if words are clear and unambiguous they must be so construed but an agreement ought if possible to receive such construction which its language will permit as will best give effect to what the whole of the document would indicate to have been the intention of the parties and the power of an individual word to dominate must be viewed with some care if it appears in its ordinary meaning to do violence to manifest intention. Considerable debate could arise as to whether "required" means compelled by authority, or obliged by circumstances.

Examination of Annex D5 as expounded by Mr. Lloyd brings to light two inconsistencies -

(a) A strict construction of the phrase "required to leave Fiji because of Government policy relating to localisation" produces a contradiction within itself when viewed against Government powers and practice in such matters; Localisation involves termination of the work permit - nothing more - and to say that a person is thereby "required" to leave Fiji is an inaccurate use of words and contrary to the operation of clauses 3, 8 & 11 of the Immigration Act.

(b) Such construction also produces inconsistency with other parts of the contract - namely the company localisation policy, whereunder the employee may elect to apply for and obtain Fiji citizenship or accept notice and compensation, with no requirement as to his future residence, which obviously was of no concern to the negotiating parties. (Clause 7.6.2.).

It is clear that the severance payments are part of the contract designed to compensate a pilot in the event of him losing his employment by "localisation" - but if a strict construction is applied to Annex D5 results are produced which are absurd in themselves and also inconsistent with another part of the contract, and synonymous phrases have produced different results.

If this was a case where expatriate employees had been severed within the meaning of Annex D5 and the company declined to pay in accordance with subclause (a) on the grounds of non-entitlement along the lines of Mr. Lloyd's argument an action could and doubtless would be commenced and we have no doubt that one of the remedies claimed would have been for rectification of the words "required to leave Fiji" to make the instrument accord with the obvious intention of the parties. Authority for interpretation in this way can be found in the many cases recited in the 24th Edition of Chitty on Contracts at para.310 & para. 699 et seq. A modern and authoritative view on the topic can be found in Penn v. Simmonds (1971) 1 WLR, 1381 particularly in the observations of Lord Wilberforce at pp. 1383-4. It is no answer therefore to say that an award could not be made as on a severance basis, for this was not an action for severance pay. It is a claim for damages for breach of contract, and in assessing the various rights which serving expatriates had, the probability that they could if the circumstances arose achieve the benefits under Annex D5 in a properly constituted action is relevant to their legitimate financial expectations. Indeed the availability of the rectification remedy was discussed by the learned trial Judge - albeit in relation to Clause 7.6.2 - but it is of importance to realise that he, like us, did not regard the verba ipsissima of the document as sacrosant.

We return to our earlier observation that the respondents were not in a "localisation" situation. They have proved that the company was in breach of its

redundancy procedure and the measure of damages is to be gauged by assessing what would have been the probable compensation negotiated in "prior discussion".

Faced with the company's intimation of forthcoming redundancy, matters discussed would include length of service and seniority; Prospects of continuation; Options open to the pilots, including the possibility of obtaining Fiji citizenship; perhaps being given work permits provided they accepted local pay rates; re-engagement as contract pilots; and of course the overriding threat of lapse of work permits with the compensation entitlements which could be claimed in the manner referred to in the previous paragraphs.

Assessment of what result might have been achieved had the company complied with its contractual obligations must be a matter of opinion, or of uniformed assessment but is not capable of precise quantification.

The upper limit might have been the 24 months notice plus 1 year's salary provided in Clause 7.6.2. But in view of this being discarded as the basis of assessment it can not now apply, although in litigation conducted differently it might have been achieved. Mr. Lloyd contended for much lower figures - 6 weeks pay plus transportation or alternatively salary to the expiry of current work permits. This disregards the company's deliberate breach of undertaking in Clause 7 with its emphasis on security for seniority.

In all the circumstances we feel that no quarrel can be had with the learned trial Judge's approach - namely that the situation was not governed by, but was analogous to the benefits which would be received on severance and we accept that as an appropriate measure of damages. There was an exception in the case of Capt. Haynes for whom there was the additional factor in his favour of an extended work permit date. In respect

of all the respondents we agree with the assessments of loss of earnings and the mode of computation and turn to one or two minor items. The question of whether or not payment should be reduced by an amount equivalent to the tax which salary would attract was raised in this Court, but was not really pressed.

The learned trial Judge accepted that under the Income Tax Act (Cap. 201) the damages awarded being related to loss of income would attract tax and we concur with that view. Some question arose as to the possibility that the Commissioner might exempt a sum not exceeding $5,000 in his absolute discretion. The Judge did not feel he could take account of such a possibility, and in this Court the correctness of that view has been confirmed by subsequent information agreed to by counsel that no such indulgence will in fact be granted.

A claim was renewed on the cross appeal for supplementary payments, the equivalent of the company's contribution to some of the respondents' superannuation contributions to a life assurance company. The evidence concerning this was sparse and counsel before us were unable to enlarge on the true position. The learned Judge had ascertained that the contribution made was voluntary and hence could be terminated at any time - he awarded a sum equivalent to the payments which would be made up to the date of the expiry of work permits and that seems to be as much if not more than the respondents could legitimately claim. The only other matter was a claim for further compensation based on accumulated sick leave entitlement. For reasons expressed in the judgment, with which we concur, no further consideration need be given to this minor claim and indeed little argument was addressed upon it.

Appeals dismissed with costs to be taxed if necessary.

VICE PRESIDENT

JUDGE OF APPEAL

JUDGE OF APPEAL