IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0023 OF 1996S
(High Court Civil Action No. HBC0117 of 1995)

BETWEEN:

VANUA AIR CHARTER LIMITED APPELLANT

-and-

VLADIMIR HERMAN RESPONDENT

Mr. R. Singh for the Appellant
Mr. V. Maharaj for the Respondent

Date and Place of Hearing : 18 February 1997, Suva
Date of Delivery of Judgment : 28 February 1997

JUDGMENT OF THE COURT

This appeal by Vanua Air Charter Limited is brought against the Judgment of Scott J. of 12 April 1996 in the High Court at Suva. By agreement of counsel the only evidence was a record of correspondence and the issues were settled in a pre-trial conference. His Lordship found the Company was in breach of a contract made on 12 August 1994 to employ the respondent, Vladimir Herman, as a captain/pilot for a term of 3 years.

His claim was based on a written offer contained in a letter of that date from the Company's Chief Executive Officer offering him the position of aircraft captain in the following terms:-

> *"I have pleasure in offering you a position for a period of three years under the following standard terms and conditions"*

Then followed a job description, a statement of minimum qualifications, and provisions about salary and allowances, transport, housing and other matters, all of a kind which could be regarded as falling within the general description of "standard terms and conditions" referred to in the letter. Included among them, however, under the heading "Contract" was one at the heart the dispute between the parties. It read:-

> *"Contract will be offered for a period of one or three years renewable by mutual consent and subject to the granting of a Permit to Work and Reside in The Republic of Fiji."*

The letter noted that the respondent might be eligible for Fiji citizenship.

It is clear from its earlier letter of 10 August that the Company was anxious to secure the respondent's services as soon as possible: he was asked to take his "Fiji licences etc" to the Immigration Office and told that the Company would reimburse him for any expenses in the acquisition of a temporary work permit. On 22 August he wrote to the Company stating:-

> *"Thank you for the Contract/Employment letter and offer to be Captain of Vanua Air for next 3 years. Please find enclosed the signed Copy of Letter of Employment as my acceptance to this*

offer."

He added that it was his intention to apply for citizenship but as he expected this might take a year, he asked the Company to arrange a work and residency permit until he was eligible. He enclosed a completed form of application for such a permit. It required a certificate by the Company containing undertakings to comply as an employer with the conditions of any permit and to provide a bond for repatriation if necessary. The respondent concluded his letter with the statement that he would like to stay with the Company on a least a one-year permit.

He started work with it on 12th of August 1994 and there were no problems apparent until 1 February 1995 when the Managing Director advised him that as a result of cost-cutting measures, the Company was reducing his housing allowance of $900.00 to $200.00 per month. The respondent replied that this was not acceptable according to the conditions laid down in the letter of Employment "as valid for both sides until 12/8/97".

He had also expressed concerns about his work permit, and the Managing Director wrote on 3 February advising him there was no need to panic as he had assured the Immigration Department that there would be a letter to cover all pilots still without permits in a week's time, and that everything would be formalised then. He added that his intention in

seeking the respondent's "acceptance for a reduced housing allowance" was so that he could apply for a permit not only for a year, but also for 3 years; and that if Mr. Herman could not find cheaper accommodation, the Company would have to obtain only a year's work permit and review his stay on an annual basis. He emphasised that his performance was not questioned, but the review was based purely on economic factors and the need to cut costs. He contended that the Company was entitled to take this course under the Contract.

We are satisfied that it was not; and we observe that in its original letter purporting to reduce the housing allowance, there was no question of the Company seeking the respondent's acceptance; it was put to him as a unilateral decision. We think Scott J. was justified in his view that this letter was nothing less than an attempt to force Mr. Herman to accept the reduced allowance. It also demonstrated that almost 6 months after he started working for it, the Company had not applied for the work permit.

The Managing Director followed this with one of 8 February stating that when they applied "to formalise the work permits", they were advised by Senior Immigration Officials that the Department was not in favour of issuing long-term permits, preferring a term of 3 months at the most. He referred to the clause in the standard conditions cited above to the effect that the contract was subject to the granting of a permit, and concluded that as the Company could not obtain

one for the period Mr. Herman was interested in, he had no choice but to cancel the "offer" of employment and gave notice accordingly. This prompted a response from Mr. Herman's solicitors pointing out that there was a concluded contract and threatening court action.

Mr. Herman then received a letter of 20 February from the Immigration Department advising that the Company had confirmed its intention "to discontinue the processing of the application for a permit to work on your behalf", and telling him to make immediate arrangements to leave the country. We understand he was granted an interim residential permit to enable him to issue these proceedings.

The statement of claim described the employment agreement as one for a period ranging from a minimum of 12 months to a maximum of 3 years from 12 August 1994, and a declaration was sought accordingly. However, respondent's counsel (Mr. Maharaj) pointed out that in the pre-trial conference of June 1995 one of the agreed issues for determination by the Court was the duration of the contract - was it for 12 months or 3 years? The trial proceeded on that basis, rather than on the ambiguous way this point had been pleaded.

Scott J. reviewed the correspondence and concluded that there was a binding contract made when Mr. Herman accepted the terms of the company's offer contained in its letter of 12th of August 1994 and we have no doubt that this must be so. We

also agree with his conclusion that this document was an amalgam of the standard terms and conditions and special terms applicable to the situation of parties, so that the standard terms must be read as subject to the specific offer of a position for 3 years.

In his letter of 22 August confirming acceptance, the respondent described the offer as one for that period. Had there been any misunderstanding by him in this point, we have no doubt that the Company would have corrected the position immediately. Instead, Mr. Herman commenced his employment and continued for some six months without any suggestion its period was less than three years, until the Company decided to reduce his housing allowance in February 1995. Accordingly we are satisfied that His Lordship was correct in holding that the contract was for that period.

He also held that the contract came to an end because the Company withdrew the application for a work permit, for which it was to apply on the respondent's behalf. We agree with him that there was an implied term that the Company would make its best efforts to obtain that permit, especially as its co-operation as employer was necessary for one to be issued. In its letter to Mr. Herman 20 February 1995, the Department merely stated that the Company had confirmed its intention to discontinue the application. There was no mention of its policy of restricting permits to 3 months. In the light of the dispute over the housing allowance and the Company's

stated need to economise, it is not surprising that Scott J. was prepared to infer that the Company withdrew the application because it no longer wished to employ Mr. Herman. In the circumstances the statement in the Company's letter of 8 February about the Department's policy must be regarded as questionable hearsay.

The onus of establishing that policy as the real reason for the failure to obtained a permit rests upon the Company. In the absence of any direct evidence from the Department to that effect, we are satisfied that His Lordship was entitled to conclude that by withdrawing the application, the Company was in breach of its obligation to use its best efforts to obtain the permit. Further evidence of that breach is apparent in the unexplained delay of nearly 6 months in applying.

The respondent had originally suggested that a term of 1 year for the permit would be sufficient to enable him to obtain citizenship, in respect of which the Company also acknowledged he could be eligible; he was married to a Fijian and had lived and worked here previously, so that his application could well have succeeded. As a result of the Company's default, we are satisfied he was deprived of this opportunity and the ability to carry out the contract and earn the salary and allowances it provided.

The final matter is the question of illegality. This was not identified as an issue in the High Court, but must be considered. Section 19(*1*) of the Immigration Act (Cap.88) makes it an offence for a person not the holder of a permit to engage in any business, profession or employment. The respondent entered into a contract under which he was to be employed subject to a work permit being obtained. By merely entering into that contract he did not "engage" in employment; that did not happen until he actually started working for the Company. There is nothing in the Act prohibiting persons entering into such a contract, or declaring it to be illegal or unenforceable. Accordingly we are satisfied that the Act does not operate to deprive the respondent of his remedy for breach.

The result is that the appeal is dismissed, with costs to the respondent. The matter will now go to the High Court for assessment of damages in terms of the judgment.

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Sir Maurice Casey
Judge of Appeal

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Mr. Justice Gordon Ward
Judge of Appeal

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Mr. Justice Peter Hillyer
Judge of Appeal

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