

IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Civil Action No. 987 of 1984

000468

000467

Between:

KALLOOKKULATHIL THOMAS SEBASTIAN Plaintiff

and

AIR PACIFIC LIMITED Defendant

Mr. Sohan Singh for the Plaintiff  
Mr. B. Sweetman for the Defendant

REASONS FOR JUDGMENT

On the 21st March, I dismissed this action with costs to the defendant. These are my reasons for that order.

The proceedings began by way of Originating Summons dated the 5th of October, 1984. The plaintiff claimed the following relief :

- " (a) For a declaration that my contract of employment with the Defendant dated 11th February, 1984 is valid and binding upon the Defendant.
- (b) In the alternative damages for unlawful dismissal.
- (c) Costs of this action.
- (d) Such further and other relief. "

With regard to (a) above, as no question arises that the contract referred to is valid and binding upon the defendant, it is not apparent what value the declaration sought would be to the plaintiff. What is in issue is whether there was a breach of the contract by the defendant entitling the plaintiff to damages for unlawful dismissal.

At the end of 1983 the defendant who is the National Airline was operating a fleet consisting of 7 aircraft. It was anxious to recruit a maintenance engineer with radio workshop qualifications. The defendant advertised the vacancy.

The plaintiff was one of about three dozen applicants who responded to the advertisement. He was at that time working at Bahrain as a radio technician with Gulf Air. He made contact by telephone with Mr. Bal Krishna (D.W.1), who at the end of 1983 worked for the defendant as Manpower Development Manager. According to the plaintiff he discussed with Mr. Krishna the salary offered and the duration of the contract. Mr. Krishna offered a minimum period of 3 years, but, the plaintiff held out for an extension beyond that period making a total of 6 years. Mr. Krishna told the plaintiff that he could not do this as the normal contract offered by the airline was not more than 3 years' duration, but, according to the plaintiff Mr. Krishna said he would guarantee that the plaintiff would get a further 3 year contract. Mr. Krishna outlined the existing staff position to support his argument that the plaintiff would definitely have a minimum of 6 years' service in Fiji.

However, the plaintiff was advised by the defendant in a letter that the contract, if offered, was subject to 3 months' notice on either side. The

plaintiff said that he told Mr. Krishna that he could not agree and that any such clause in the contract should be taken out. Mr. Krishna demurred and said that a contract could not function without such a clause because of labour regulations. He said that the provision existed for the protection of the employee and he said that if the plaintiff did not find things satisfactory in Fiji he could leave by giving 3 months' notice.

Negotiations on the telephone between Mr. Krishna and the plaintiff are not, on general principles, relevant. They cannot be used as an aid to the interpretation of the contract entered into by the parties.

In February 1984, the defendant sent two men to Bahrain to interview the plaintiff and another applicant. The two officials were Satish Maharaj (D.W.2), the defendant's Personnel Administration Manager, and Mr. Muni Deo who was not a witness. Mr. Deo was present because he was familiar with the technical aspects of the work which the plaintiff would be required to do, if appointed.

At the interview various matters were discussed, including the size of the defendant's fleet, and the terms of the contract. The contract was on a printed form to which was added certain details such as the date, the plaintiff's name, his position etc. At the end of the contract and below the place reserved for the signatures of the parties the following clause was added :

"It is further agreed by Air Pacific Limited that should Sabestian's net earnings in any 12 months' period is less than \$20,400.00, excluding housing and fifty per cent of company's F.N.P.F. contributions, the

company will pay him the difference between the net salary and the above amount. "

The contract itself is expressed to be :

"for a minimum period of three years subject to the following :

- (i) Fiji Immigration Authorities approving relevant permits in respect of this employment;
- (ii) Earlier termination as hereafter provided;
- (iii) Satisfactory medical condition during the employment period. "

The relevant portion of clause 2 reads 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.

The period of notice may be waived by mutual agreement. "

After signing his contract the plaintiff terminated his existing employment with Gulf Air, spent a short time in India with his family and arrived in Fiji to take up his new appointment on the 13th May, 1984.

Between the signing of the contract and the arrival of the plaintiff there had been a change of policy in the defendant company with regard to the number of aircraft that it proposed to maintain. The fleet had been greatly reduced.

According to the plaintiff he first met Mr. Peter Hughes, the head of the Engineering Department, on the 15th May. It was not a very satisfactory meeting. Mr. Hughes appeared to be unaware that the plaintiff had been recruited and he immediately asked him "What is the period of your termination notice?" The plaintiff was, quite understandably, resentful about the attitude of Mr. Hughes, but, he nonetheless started to work on the remaining aircraft. On the 2nd August the plaintiff was given 3 months' notice under the terms of his contract. At that time Mr. Hughes explained to him that the workload had been reduced because the airline had sold four of its aircraft. The plaintiff asked Mr. Hughes, "Did you not know this before I was recruited?" Mr. Hughes said he did not.

The plaintiff took the view that he should not be listed among the people to be laid off as he had come to Fiji two and a half months earlier after resigning from a stable job in the Middle East. He complained about his being one of the first to be declared redundant. Eventually the plaintiff received in writing on the 3rd August, 1984, a letter from the Director of Engineering explaining the new circumstances which had arisen and which required the defendant company to reduce its engineering staff.

The plaintiff complained to Mr. Krishna about his treatment. Later he tried to see the then Acting Chief Executive, Captain Ganley, but, all was to no avail. The plaintiff left the defendant's employment on the 31st October, shortly before he commenced this action.

Both Mr. Krishna and Mr. Maharaj denied in their evidence that they had given the plaintiff reason to believe that he could expect 6 years of steady employment with the defendant company.

The plaintiff based his claim against the defendant company on the existence :

- (a) of a collateral contract; and
- (b) on the doctrine of estoppel.

In view of the express nature of the wording in clause 2 of the contract, I do not see how the plaintiff can maintain that there came into existence simultaneously a collateral contract which provided that the agreement he had signed could not be terminated by the defendant on 3 months' notice. In regard to estoppel, for the plaintiff to succeed, he would be required to establish that the agents of the defendant made a representation in words or by acts or conduct by silence or in action, with the intention and with the result of inducing the plaintiff on the faith of such representation to alter his position to his detriment.

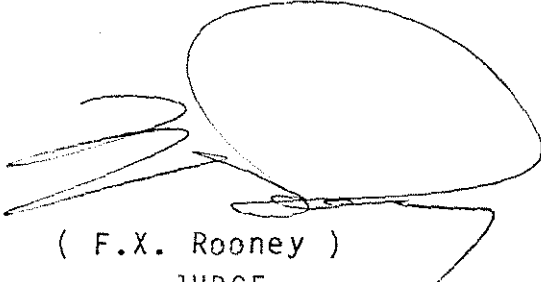
There can be no doubt that at the time the plaintiff was recruited, the defendant was anxious to obtain his services. It was offering a 3 year contract. I have no doubt that the possibility was canvassed that the plaintiff might, in ordinary circumstances, expect a further contract of 3 years' duration on completion of his initial contract. However, the contract cannot be considered in isolation. The plaintiff was an expatriate coming to Fiji for the first time. The contract makes mention that it is subject to :

- (1) Fiji Immigration Authority's approving relevant permits in respect of this employment;

(2) Earlier termination as hereinafter provided.

No representations made by the defendant's agents (and I do not find they were made in the terms alleged by the plaintiff) could blind the plaintiff to the meaning and purport of the contract which he had signed. That the printed form of contract could be varied to some extent to meet the plaintiff's requirements was proved by the additional clause inserted at the end of the printed document to which I have referred. The plaintiff agreed that Mr. Krishna refused to remove the notice clause. He did not allege in his evidence that Mr. Maharaj made any representations to him other than that "the other clauses in the contract were just a formality".

While one can only have sympathy for the plaintiff, who was the victim of what can be described as gross incompetence by the staff of the defendant, the position remains that he has no redress in law against his employers.



( F.X. Rooney )  
JUDGE

Suva,

3rd April, 1985