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IN THE SUPREME COURT OF NAURU

CIVIL ACTION NO. 18/1998

BETWEEN : **MICHAEL AMIES**

PLAINTIFF

AND : **NAURU AIR CORPORATION**

DEFENDANT

Dates of Hearing : 30 and 31 October, 2001
Date of Decision : 2 November, 2001

Mr. O'Gorman with Mr. McGinness for the Plaintiff
Mr. Keke for the Defendant.

JUDGMENT OF THE HONOURABLE JUSTICE ROBIN MILLHOUSE, Q.C., A JUDGE OF THE SUPREME COURT

The plaintiff is an Aircraft Maintenance Engineer. In late 1996 the defendant Corporation employed him temporarily. In January 1997, the Corporation offered him a permanent job and he accepted. The parties signed a contract of employment on the 24 January.

The paragraphs of the contract relevant in this action are 3.1,

4.2.4 and 4.4:-

> "3.1 Throughout the period of employment the Employee shall devote his full time and attention to, and shall use his best efforts in furtherance of the prosperity, development, reputation and business of the Corporation ....."
>
> "4.2 The employment of the Employee may be terminated forthwith by the Corporation, without requirement to give notice or payment in lieu of notice to the Employee in any of the following events:-
>
> .....
>
> 4.2.4 if he is guilty of serious misconduct in carrying out his duties.
>
> 4.4 If the Corporation terminates the employment of the Employee for reasons other than those contained in paragraphs 4.1 or 4.2 of this Agreement, the Employee shall be entitled on such termination to payment equivalent to three (3) months remuneration ....."

On the 10 February 1998 the plaintiff had an acrimonious telephone conversation with the Flight Attendant Manager, Mr. Peter Nolan. The plaintiff was in Nauru, Nolan in Brisbane. Neither was on duty.

According to the plaintiff Nolan had made, at some time in the recent past, unwelcome verbal sexual advances to Hattie Edwin, a flight

attendant and the plaintiff's girlfriend.

There is no dispute that the plaintiff made threats to Nolan because of Nolan's conduct towards Hattie Edwin nor is there any doubt about the language he used. The plaintiff readily admitted them. He confirmed them in Court and they were confirmed by a defence witness, Ms. Velsha Zena Seaborne, another flight attendant.

Velsha Seaborn was with Nolan during the telephone conversation and could hear both sides of it. The plaintiff several times said to Nolan that if Nolan came back to Nauru he was going to "rip-off his head and shit down his throat". The plaintiff made other threats, that he would tell Nolan's wife and that he would report to the taxation people that Nolan was working here in Nauru. Ms. Seaborne said that after the conversation, which he terminated by hanging up, Nolan was upset, scared and worried about coming to Nauru.

Ms. Seaborne reported the matter to Capt. Paul Stanton, the Director of Flight Operations. The report refers to the date of the conversation as"11-02-98" but itself is dated "19-01-98". I am satisfied that this is a

typing error and the date of the report was the 19 February. The report is an exhibit and in it the conversation is set out.

Sometime later the plaintiff saw a letter from Nolan on the notice board at the Nauru Airport to the effect that Nolan had resigned. He thought the matter was finished. It was not. On the 4th of March the plaintiff was called to meet Mr. Felix Kun, the Chairman of the defendant Board. Also present were Mr. Mike Aroi, the A/Chief Executive Officer and Mr. Pressley Debao, Personnel & Administration Manager.

My note of the plaintiff's evidence in chief: -

"Kun said 'Did you threaten Nolan?' 'Yes.'

'Did you use the words 'rip-off' his head and shit down his throat?' 'Yes'.

'In the light of this situation, it has got round the Island and has been blown out of proportion. I have to dismiss you.' 'I accept your decision.'

'I was dismissed but Mr. Kun, asked me to stay on until a replacement which I did".

The plaintiff stayed for another three days.

The next day, the 5th of March, Mr. Kun wrote to the plaintiff:

"Dear Mr. Amies,

Upon the report of the Maintenance Controller and your own failure upon request to provide a written report to the Maintenance Controller surrounding the incident involving the flight attendant manager, Peter Nolan, I have decided, upon full consideration and following an interview with you in which you admitted the facts of the incident, that your services to Nauru Air Corporation should be immediately terminated for serious misconduct.

This decision has full support of the Board of the Corporation.

I have made arrangements for you to be on flight ON361 to Brisbane on Saturday. Your on-carriage to Cairns has been arranged.

I have asked Brandon Itsimaera, the Chief Engineer, to obtain from you all keys, files and any other materials or equipment you may have in your possession or control. You will be paid up to and including Saturday 7 March, and any amount owing will be settled by the Chief Financial Officer in Melbourne."

On the 6th of March Mr. Aroi sent the plaintiff a memorandum: -

"Dear Mick,

As agreed, Air Nauru will assist you with the movement of your personal belongings from Nauru back to your place of residence in Cairns.

> You will be re-imbursed for expenses incurred by yourself when forwarding your personal belongings from Brisbane to Cairns. Re-imbursement will be subject to you making available a valid receipt with the appropriate documentations.
>
> It was a pleasure knowing you and working with you and I look forward to meeting you again the near future.
>
> My very best wishes."

Mr. Aroi also sent to the plaintiff a copy of his memorandum of the same day to the Chief Financial Officer: -

> "Dear Eddie,
>
> This is to advise you that the services of Mike Amies with Air Nauru has been terminated effective 04th March 1998.
>
> Grateful if you would process payment of all entitlements to Mick Amies including payment equivalent to three (3) months remuneration and any other accrued recreational leave."

The defendant had a change of heart. The Board at its meeting on the 20th of March resolved that the plaintiff "was not entitled to 3 months pay" and directed the CEO to send "a letter advising of this resolution". On the 23rd of March, Mr. Aroi wrote a letter less cordial than his earlier letter

telling the plaintiff he would not be paid for the 3 months. The plaintiff now claims payment of $16,250.

During Counsel's final submissions, I suggested that perhaps the defendant was estopped from denying the plaintiff payment. Mr. D.P. O'Gorman with Mr. D.A.McGinness, for the plaintiff, did not take up the point. I later acknowledged to Counsel that it was a red herring: if for no other reason than there is no evidence of the plaintiff ever acting to his detriment in the expectation of receiving the money.

I have mentioned the evidence of the plaintiff and Ms. Seaborne. The other witness was Mr. Aroi, for the defence. He admitted overlooking that the reason for dismissal given by Mr. Kun in his letter of 5th of March was serious misconduct. Under paragraphs 4.2 and 4.4 this disentitled the plaintiff to payment of the 3 months remuneration. A good deal of Mr. Amies's cross-examination was about whether Mr. Kun had taken it upon himself to sack the plaintiff or whether it was the decision of the Board to do so. It does not matter. The only question is whether the plaintiff was properly dismissed for "serious misconduct", whether what he did and said amounted to "serious misconduct". If so, then the defendant is justi-

fied in not paying him for the 3 months; if not, then the plaintiff is entitled to payment. [I should say that no point was taken as to amount; I assume a tacit agreement between Counsel that the correct amount is $16,250.]

It all hinges on that telephone conversation. Certainly the plaintiff's language was coarse and vulgar. Mr. O'Gorman conceded that the plaintiff was guilty of "misconduct" but argued that it was not "serious misconduct".

The cases are to the effect that it is a matter of fact. The burden of proving misconduct is on the party alleging it, (**Blyth Chemicals Limited v Bushwell** (1933 49 CLR 66 @ 83 per Dixon and McTiernan JJ). The defendant has the onus of proving on the balance of probabilities that the plaintiff was guilty of serious misconduct.

Apart from Mr. Kun's letter of 5th of March, the circumstances surrounding the dismissal itself hardly suggest at that time the defendant considered the plaintiff was guilty of serious misconduct. Normally, I suggest, one would expect that serious misconduct once

discovered, would mean instant dismissal ("termination forthwith" to use the words used in paragraph 4.2). "You are dismissed. Go now and don't come back". That did not happen. I assume senior management and Mr. Kun knew of the incident quite soon after Ms. Seaborne's report of 19th of February, if not earlier . No action was taken until 4th of March: then it was dismissal but "stay on until we have a replacement". This was followed by Mr. Aroi's letter on the next day. All this does not end up to "termination forthwith". I do not rely on these inferences (which are my own) in coming to my conclusion, even though they do confirm the conclusion which I have otherwise reached.

Both Mr. O'Gorman and Mr. L. D. Keke, for the defendant, referred me to the decision of the Court of Appeal in **Laws v London Chronicle (Indicator Newspaper) Ltd.** [(1959) 2 All ER 285]. Lord Evershed, M.R. discusses (pp. 287-288) the approach which a Court should take. It is a matter of fact whether dismissal be justified. The Master of Rolls says at page 288: -

> " ..... I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in

> effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that the disobedience must at least have the quality that it is "willful": it does (in other words) connote a deliberate flouting of the essential contractual conditions."

Having heard and seen the witnesses, especially the plaintiff, I do not consider what the plaintiff did and said amounted to "a deliberate flouting of the essential contractual conditions" between the parties.

Certainly the plaintiff's words were, as I have said, coarse and vulgar and he made threats of physical violence towards (as the evidence showed) a smaller and older man. Mr. Nolan did not give evidence and his absence was not explained, except by Mr. Keke remarking that he was not available.

The plaintiff said that he had been provoked by Nolan's approaches to his girlfriend, but the nature of the approaches is not in evidence. I cannot say whether the plaintiff is justified, but I find the plaintiff believed he was justified.

Neither man was on duty. The row between them had nothing to do

with their work (although I do not overlook that Nolan mentioned Hattie's not being rostered for duty on a particular flight). It did not affect the plaintiff's carrying out of his duties. It simply was not "serious misconduct" in the circumstances. Whatever the defendant may have thought, it was not justified in dismissing the plaintiff for serious misconduct.

The plaintiff was not guilty of serious misconduct in carrying out his duties, as contemplated in paragraph 4.2.4: he was not properly dismissed, pursuant to that paragraph: pursuant to paragraph 4.4 he is entitled "to payment equivalent to three (3) months remuneration".

There will be judgment for the plaintiff for $16,250.

Robin Millhouse

ROBIN MILLHOUSE, Q.C.

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