IN THE SUPREME COURT OF NAURU

CIVIL ACTION NO. 9/2000

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| BETWEEN | : | **CLAY SOLOMON** | PLAINTIFF |
| AND | : | **NAURU AIR CORPORATION** | DEFENDANT |

Dates of Hearing: 27, 28 November 2001
Date of Decision : 30 November 2001

Paul Aingimea, Pleader for the Plaintiff
Leo Keke of Counsel, for the Defendant

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## DECISION OF CONNELL, C.J.

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The Plaintiff, a flight attendant employed by the Defendant Nauru Air Corporation (hereinafter referred to as 'the Corporation'), was dismissed on 1 April 1998 by letter from the Personnel and Administration Manager of Nauru Air Corporation, Presley Debao.

The Plaintiff has sued the Defendant Corporation for breach of contract in that he was wrongfully dismissed in terms of his contractual

conditions. Irrespective of the contention in the Statement of Claim paragraph 16, it appears that the Plaintiff did not sign a written contract for a duration of two years but was employed under, unrevealed in evidence, oral terms and conditions by the Corporation. Paragraph 6 of the Defence mention General Terms and Conditions of Employment but these were never before the Court nor sought specifically by the Plaintiff.

The Plaintiff never produced the contract or even asserted what it was. So far as could be gleaned from the evidence, a document, the employee history of Clay Solomon, Exhibit"K", would indicate that he had a commencing date of 3 January 1996 and a current salary in, presumably, 1998, of $408 per fortnight.

In matters of this nature, care should be taken by the Plaintiff to plead the contract. Details relating both to the incident itself generating the dismissal and the surrounding administrative developments of the suspension and final dismissal could have been sought and obtained through Discovery and a set of Interrogatories. Any necessary changes then to the Statement of Claim could have been achieved by amendment. It is too late in the day to try and piece this together on the day of hearing.

Careful pleading backed by sure knowledge of the facts will bring out the main issues to which the trial proceeding is really set up to hear. Furthermore, it gives both sides a better idea of where the matter is heading and obviously assists settlement. These few homilies are made because as the first day wore on it was clear that most of the documentation had never been sighted by the Plaintiff and it should have saved a great deal of time and made for a much clearer picture if it had been ferreted out before trial.

The actions of the Plaintiff which generated his eventual dismissal surrounded his behaviour amounting to insubordination on the aircraft when he was a member of the cabin crew on flights ON361 AND ON372 on the days of Saturday 17 January and Sunday 18 January 1998. However, when the investigation was made by the Corporation it was apparent certain other behavioural faults of the Plaintiff were considered when coming to the final decision. The history appears to be the following: -

1. Report of Second Senior Glenda Hicks to Flight Attendant Manager, Mr. Peter Nolan dated 19 January 1998

2. An inter-office Memorandum suspending the Plaintiff on 20 January 1998 recorded by the Plaintiff in Exhibit "D"

3. A memorandum of suspension from duty without pay from the Personnel Manager to the Plaintiff dated 4 February 1998 which had effect from Wednesday 21 January 1998

4. A faxed letter from the Flight Attendant Manager dated February 13, 1998 to the CEO, Mr. Banks, recording that the Flight Attendants Department had suspended the Plaintiff for disciplinary reasons.

5. The same faxed letter from the Flight Attendant Manager carried a recommendation "based on extensive investigation that Mr. Solomon should be dismissed as he no longer provides the standards required as a flight attendant with Air Nauru".

6. At the bottom of the same faxed letter, there is written "Approved" with some scribble below which is unintelligible and signed 'Rex Banks' and dated 13 February 1998.

7. There then follows a further note at the bottom of the same faxed letter – "Presley, Just received today from memory fax 444-3282. Will you please advise your recommendation". The signature was apparently that of Michael Aroi and dated 26 February 1998.

8. Meantime, the Chairman of NAC had been sent a letter by the Plaintiff dated 26 January 1998 giving his explanation along with some extra gratuitous remarks. He was seeking some consideration of the position by the Chairman. The Chairman on 7 March 1998 in a note at the top of the Plaintiff's letter asked Presley Debao – "what is the real story".

9. Presley Debao answered the Chairman by letter dated 10 March 1998. What is clear from that letter is that the final decision of management to dismiss was apparently based on a number of incidents which are summarized in Exhibit "K" along with that associated with Glenda Hicks. He stated that in reply to the Acting Chief Executive Officer, Mr. Aroi, Presley Debao recommended the Plaintiff's termination with immediate effect as from 27 February

1998. But he added that by 10 March 1998, a termination letter had not been sent to the Plaintiff.

10. On 27 March, the Acting Chief Executive Officer, Michael Aroi, put up a submission to the Chairman recommending that the Plaintiff's services be immediately terminated based on the incident with Purser Eleanor Detsiogo, the approval of the dismissal by Rex Banks of 13 February 1998, the view of Captain Stanton that the incident involving Glenda Hicks was a serious threat to flight safety and that the flight attendant supervisor, Bernadette Star, recommended that the Plaintiff's behaviour be not tolerated.

11. In answer, the Chairman noted to the Acting Chief Executive Officer dated 30 March 1998, "I would like to talk to Clay before considering the recommendation. Can you come with Presley on the appointed date. Bring his file".

12. A meeting was almost immediately held at the office of the Defendant Corporation. Present were the Chairman, Presley Debao and Michael Aroi along with the Plaintiff. The Chairman stated in

evidence that the Plaintiff was asked several questions about the report. He then asked two questions. The first concerned his behaviour on the plane, and the second concerned whether the Plaintiff had called Eleanor Detsiogo, "a stupid bitch", to which he answered "No, I called her a bitch". At which point, the Chairman stopped the interview.

13. The Chairman stated that the meeting was held to explain the Plaintiff's side of the story. "I heard it and decided not to in any way involve the Board. Management had already taken a decision, and I signified agreement to the decision."

14. On 1 April 1998, a letter was sent to the Plaintiff from Presley Debao terminating the services of the Plaintiff with the Corporation. The letter read as follows: -

"Mr. Clay Solomon
Nibok District
Nauru

Dear Sir,

This is to advise that investigation into allegations of misconduct on your part on Flight ON 361/372 on 19 January and 18/19 January 1998, respectively has been completed.

You were given an opportunity to explain your side with respect to these allegations and you took that opportunity.

Management has now considered the results of the investigation and has decided to terminate your services with the Corporation as a Flight Attendant.

Your conduct is considered serious and detrimental for the safe operations of the Corporation's airline services.

Please see the undersign(ed) in respect to any outstanding entitlement and other related matters.

I wish to thank you for your services during your period of employment with the Corporation.

Yours faithfully,
Presley A. Debao
Personnel & Administration Manager
Nauru Air Corporation"

And so ended a most convoluted and drawn out administrative saga. Who suspended the Plaintiff? Initially it appears to have been the Flight Attendant Manager and then by Presley Debao through written communication to the Plaintiff on 4 February 1998.

Who dismissed the Plaintiff? Probably the catalyst is the approval of the Chief Executive Officer on 13 February 1998, but never revealed officially to the Plaintiff until the letter written by Presley Debao on 1 April 1998. If nothing else, the administrative merry-go-round revealed displayed a marked lack of administrative cohesion. The question, however, naturally arises who has the power to suspend and dismiss?

Nauru Air Corporation is a statutory corporation. Its powers and operations are derived from its statute, the Nauru Air Corporation Act 1995 ('the Act'). The Act makes provision for a Board of Directors that is to control the business of the Corporation (S.7). There is to be a Chairman and Vice-Chairman appointed by Cabinet from the members of the Board. There are certain objects of the Corporation as stated and powers are provided for the Corporation to achieve these objects. The Board must regularly meet (S.14) to conduct the business of the Corporation at least once in every two months but more frequently when required. The Secretary of the Corporation is responsible for the preparation of meetings, agenda, Board Minutes and records and official papers of the Board. The Chief Executive Officer, who is head of the management structure, is appointed by the Board and is required to attend meetings of the Board

but is not a director.

The Corporation is enjoined by Section 26 of the Act to establish and maintain an appropriate management structure. For that purpose, the Act states in sub-section 2 of Section 26 the following: -

"(2). The Corporation may,

(a) appoint, engage or employ;
(b) apply such terms and conditions in respect of; and
(c) dismiss or suspend such officers, staff or labour

as the Board considers necessary or appropriate."

Such a provision clearly gives power to the Board of the Corporation to appoint, dismiss or suspend staff. Is that power exclusive to the Board, or is it also available to management and, more particularly, the Chief Executive Officer? The former Chairman of the Board, Mr. Felix Kun, gave evidence that the role of the Board was to formulate policies and generally to represent the interests of the owners. It was his belief that employment being a management matter was best left to management. At the same time, he asserted that employment and dismissal of pilots remained with the Board and almost as an afterthought the hiring and firing of senior

management and local Nauruans. An earlier predecessor in the office of Chairman, Paul Ribauw was perhaps more forthright in a somewhat curiously written memorandum addressed to the Chief Executive Officer dated 20 March 1996. It reads –

> "Effective 15th March 1996, all matters relating to the employment and dismissal of any Corporation employees must be approved by the Board of Directors.
>
> All department heads must comply with this strict regulation. For your information, Section 26(2)(c) of the Nauru Air Corporation Act 1995 enforces this decision.
>
> Department heads should where and when necessary, make recommendations for the Board who will immediately give due consideration."

Of course, the above memorandum was not a regulation nor was it strictly S.26(2)((c) only, but really the whole of S.26(2) which gave the power to the Board. The first paragraph is odd. Why should it be effective 15 March 1996? The Act came into force much earlier and unless there had been an earlier delegation, which he does not mention, then the full powers of the Corporation to appoint, suspend, and dismiss was already there and not just from 15 March 1996. Further it was not a question of approval that was at stake, it was the actual making of an appointment and decision to

suspend or dismiss.

Whilst one has some sympathy for the position taken by Mr. Kun as to the role of management in regard to employment, and even he expressed some limitation, the Act makes it very clear where responsibility lies for these decisions. Control will always be exercised by the Board, but for day to day decisions, for example, on employment, the Act, with the wisdom of Parliament, makes provision for delegation of powers in section 22. It is important that it be stated –

> "22. (1) By an instrument of delegation the Board may delegate to a member of its staff any power, duty or function of the Board under this Act other than –
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> (a) this power of delegation; and
> (b) the power to approve any expenditure not contained in a budget approved by the Board.
>
> (2) By an instrument of delegation the Chief Executive Officer may delegate to a member of the Corporation staff any power, duty or function of his or her office other than this power of delegation.
>
> (3) A delegation under this section is revocable and does not prevent the exercise of a power, duty or function by the Board or the Chief Executive Officer.
>
> (4) The Secretary shall keep a register of delegations to members of Corporation staff."

Under this section, Board powers may be delegated to a member of its staff other than the power of delegation. At the same time, powers, duty or function of the Chief Executive Officer may be delegated to a member of staff but not, of course, any power, duty or function which has been delegated to him by the Board. The fact of delegation does not of itself prevent the exercise of the power of that person, Board or Chief Executive Officer holding the original power. Finally, for the obvious purposes of administrative cohesion and information of the Corporation, the person responsible for the administration of the Board, the Secretary, must keep a register of delegations to members of Corporation staff. In other words, all instruments of delegation are kept and registered by the Secretary.

The fact of the matter is that there was no evidence of any delegation by the Board to a member of staff relating to any aspect of section 26. The question may well be asked was the appointment of the Plaintiff a wrongful exercise of power in 1996, before the Ribauw memorandum, quite apart from the suspension or dismissal. The operation of proper administrative procedures has the virtue not only of clearly delineating tasks and responsibilities but also affords some protection for personnel in

employment situations.

I find that in suspending and dismissing the Plaintiff, the management acted outside its scope of power and, therefore, the Plaintiff was both wrongly suspended and dismissed.

What was the nature of the contract that the Plaintiff had with the Corporation? So far as the evidence in this case revealed, and no interrogatories were delivered by the Plaintiff on this matter, he was recruited in the Federated States of Micronesia, with the Plaintiff's understanding, and there appeared to be some intention, that he was to be given a two-year contract. However, as earlier stated, there was no written contract and none of any terms or conditions were revealed to the Court. It was even difficult to determine his start date, though it seems clear that, after training, this was either 1 January 1996 or 3 January 1996. On that basis, given the best will in the world, the two years terminated on either 31 December 1997 or 2 January 1998. Certainly any initial period, if there was one, was completed prior to the occurrence of the flight incidents of 17/18 January 1998.

Without any evidence to the contrary, it would appear that the Plaintiff was employed on a simple master and servant contract. Whatever might be said for the period up to 2 January 1998, it is clear thereafter that the contract of the Plaintiff was one at common law of master and servant. In ***Malloch v Aberdeen Corporation***, [1971] 2 All ER 1278, Lord Reid said at 1282, "The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract".

I have already found that there has been a breach of contract in that he was a de facto, but ultra vires, dismissal by the management of the Corporation. What remedies are available? As Lord Reid has said only in damages. See also ***Francis v Kuala Lumpur Councillors*** [1962] 1 WLR 1411 (P.C.) There is no right of reinstatement. What then is the measure of damages?

The Plaintiff was suspended without pay by Presley Debao, Personnel Manager, with effect from Wednesday 21 January 1998 to his letter of dismissal on 1 April 1998. Identically with dismissal, there was no power to suspend granted to the Personnel Officer. His purported exercise

of such a power was therefore ultra vires. The Plaintiff, therefore, is entitled to receive his pay at the rate applicable at the time between Wednesday 21 January 1998 and 1 April 1998. So far as his dismissal is concerned, Buckley L.J. in ***Guston v Richmond-upon-Thames L.B.C.*** [1981] 1 Ch 448 at 469 puts it in this way –

> "Where a servant is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wage he would have earned under the contract from the date of dismissal to the end of the contract. The date when the contract would have come to an end, however, must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself; that is to say, that he would have determined the contract at the earliest date at which he could properly do so."

As I have indicated the Plaintiff was employed on a Master and Servant contract both at the time of his suspension and dismissal. Whilst strictly there is not a requirement of notice, normal business practice would, where dismissal is not at stake, allow to the immediate following pay-day following April 1, 1998.

I would, therefore, ask the representatives of the parties to agree on the amount in damages payable to the Plaintiff for (a) the period of

suspension as stated and (b) in relation to dismissal to the first pay-day following 1 April 1998. I am assuming, as there is no evidence to the contrary, that the Plaintiff was otherwise paid his entitlements in accord with the letter of Presley Debao dated 1 April 1998.

A considerable time in the hearing was devoted to the evidence surrounding the incident of January 17 and 18 flights of Air Nauru. Owing to my decision that the process of suspension and dismissal was flawed as an ultra vires act, I restrict myself to some comment. First, on balance I accepted the evidence of Glenda Hicks and Elani Scriven as to what took place in preference to that of the Plaintiff. The question whether it was sufficient to dismiss the Plaintiff was open to argument. Great emphasis was placed by Mr. Aingimea for the Plaintiff on the seemingly trivial nature of the various incidents but there was, in my view, insubordination. It is important for an airline carrying international passengers that its passengers have complete confidence in their cabin and flight crews. Dissension in the cabin is clearly not in the interests of the airline. It is clear from the evidence led by the Defendant Corporation that it was disturbed by the incident allied to past behaviour of the Plaintiff. This was made clear by Mr. Nolan's remarks to the Chief Executive Officer where he

stated that the Plaintiff should be dismissed "as he longer provides the standards required as a flight attendant with Air Nauru". Those standards are, of course, paramount. The Court would not want to second guess a decision to dismiss without a good deal more evidence from both parties on required standards of behaviour. I am, therefore, content to accept the assessment of the airline. Such assessment, however, is unimportant in the context of this case as the matter is being decided for other reasons.

In his final written submissions, which I acknowledge as being particularly helpful to the Court, Counsel for the Defendant Corporation drew attention to the fact that this case has had a second start. The original Writ of Summons was drawn by a different Counsel to the Plaintiff. It immediately attracted the attention of the Defendant Corporation who filed an interlocutory summons on various grounds. Apart from the wrongful naming of defendants, it attracted the problems associated with the Republic Proceedings Act 1972 due to its tortious claims. Eventually the matter came before me in Chambers on 10 September 2001, where two defendants were struck out and leave was granted to the Plaintiff to replead the Writ of Summons in contract. Costs of the Chamber Summons were in the Cause.

Upon hearing the representatives of the parties on the question of costs, I have decided to grant to the Plaintiff his costs to the extent of three quarters of party and party costs from the date of, but not including, the Chamber Summons, 10 September 2001. If the final sum of costs is not agreed between the parties, then it can be taxed by the Registrar.

**BARRY CONNELL**
**CHIEF JUSTICE**

A Certified True Copy of the Original:

SAMPATH B. ABAYAKOON
REGISTRAR, SUPREME COURT