

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 14 OF 1999

BETWEEN:

SYDNEY CAMACHO

Employee

and

LIAT (1974) LIMITED

Employers

Before:

The Honourable Cyril L. Maundy
The Honourable Hubert Hood

President
Member

Appearances:

Gerald Watt, Q.C., for the Employee
Charlesworth Browne, Attorney-at-law, for the Employee

2001: April 25, 26, 28

July 9, 11

2004: April 13, 14, 15

JUDGMENT

Unfair Dismissal – Aircraft leaving hangar after repair – Employee and another engineer taking aircraft out of hangar – Employee in the cockpit (pilot's seat) and told by the hangar supervisor on two occasions to release brakes – Employee mistook gust lock (which was off) for brakes lever and said "brakes off on both occasions – aircraft made a nose dive and was badly damaged – aircraft had to undergo extensive repairs and was out of service for about four weeks – Employee admits that

he made a mistake with the levers – Employee dismissed for gross negligence – previous punishment for breach of duties was Suspension.

- [1] **Maundy, P.:** By Reference dated June 10, 1999, Mr Gerald Watt, Q.C., on behalf of the Employee, notified the Court of a Trade Dispute between the Employee, Sydney Camacho, and the Employers, LIAT (1974) Limited.
- [2] In his Memorandum dated July 23, 1999, the Employee asserts that his dismissal was unfair, contrary to the provisions of the Antigua and Barbuda Labour Code, harsh, oppressive and contrary to good Industrial Relations and the rules of Natural Justice.
- [3] In their Memorandum dated and filed on September 2, 1999, the Employers contended that the Employee was grossly negligent in the performance of his duties which resulted in the aircraft being out of service for a period of 4 weeks, significant repair costs, loss of revenue and flight schedule disruption.

Historical Background

- [4] The Employee, a "Grade B" aircraft engineer, was employed by LIAT (1974) Limited for approximately 15 ½ years from December 1, 1982, to March 21, 1998. On March 21, 1998, he was dismissed for gross negligence.
- [5] The Employers, an airline company, operated a fleet of Dash 8 300 and Twin Otto aircrafts between Antigua and several Caribbean destinations including St Martin, the Dominican Republic, Puerto Rico, the US Virgin Islands and the British Virgin Islands. On or about March 14th, 1998, one of the Dash 8 Series 300 aircrafts broke down in St Thomas, U.S.V.I., and was held up there for 2 days. A new engine was

taken to St Thomas and installed but the engineers failed to take down and install an oil cooler that was left in Antigua. The fuel cooler of the aircraft failed on the flight to Antigua.

- [6] On March 17, 1998, the Employee was engineer in charge of the aircraft (a Dash 8 Series 300, Registered No. V2-LET) that was left in the hangar without a fuel heater and he was to supervise the installation of a fuel heater and a fuel pump on it. Assisting the Employee were two mechanics who were to do the installations and his duties were, after completion of the installations, to take the aircraft out to the ramp, perform the runs on it and, if all was well, position it on the ramp for service.
- [7] Further to its arrival in Antigua, engineers tried desperately to complete the repairs overnight as it was a very busy period for LIAT – a test match was being played in Antigua and the aircraft was in urgent demand – it was also wanted for a charter the following morning. The Employee was asked to come in to work at 6:00am but was not able to do so and commenced at 10:00am, his normal time.
- [8] To carry out the runs the aircraft had to be towed from the hangar to the ramp. The Employee and one Alton Thomas went inside the aircraft to carry out certain operations and Michael Salmon was the tug driver – the operations were being co-ordinated by Errol Hodge, the Hangar Supervisor.
- After having hooked up to the tow tug bar, Mr Hodge shouted to Mr Camacho who was in the cockpit to take off the brakes. Mr Camacho replied, "Brakes off," and, at this, Mr Salmon started accelerating and immediately as he did so he felt some resistance and stopped as it appeared to him that the brakes had not been released. Mr Salmon again shouted to Mr Camacho, "Brakes off," and Mr Camacho replied, "Brakes off" and gave him a signal through the cockpit hatch, to say that the brakes were off and had been released. Mr Hodge then told Mr Salmon that all was okay and he should proceed. Mr Salmon again started to accelerate and, as he did

so, in a flash, the nosegear of the aircraft snapped backwards and collapsed.

- [9] At the time he acted, the Employee was under a lot of pressure to get the aircraft back in service, was rushing to and fro and trying to please everyone; it appears he became confused between the gust lock which was in the off position and which was only to be taken off by the pilot and the park brake and believed it was the lever for the park brakes. The aircraft was severely damaged and the manufacturers had to be called in to effect the repairs as the magnitude was too much for the company – the costs of the repairs were approximately US\$ 250,000.00 and the aircraft was out of service for four weeks.
- [10] The aircraft was a fifty-seater and was insured – it was insured against damage and loss of revenue and the insurance paid most of the costs.
- [11] Following the damage to the aircraft the company held an inquiry and the panel found that the Employee was guilty of gross negligence and recommended that he be suspended for three weeks. The findings of the committee were reported to the Chief Executive Officer at a meeting of himself, the company's legal counsel and the chairman of the investigating committee and a decision was taken to dismiss the Employee – he was dismissed on March 21, 1998 by letter of that date – See Exhibit SC5. At the enquiry Mr Hodge sat on the panel and put questions about the accident to the Employee in order to give information re the accident but was not part of the committee of inquiry
- [12] The gust lock was on the off position. It is not supposed to be taken off and it is generally for the pilot to take it off.
- [13] The light in the cockpit was somewhat dark but sufficiently bright to carry out the procedure.

- [14] At the time of the accident the main door of the aircraft was not evenly closed – Mr Hodge should have known that an aircraft should not be moved when the door is open.
- [15] The list of matters for which there could be instant dismissal are set out in Exhibit SC 6/B, but Negligence/Gross Negligence is not expressly mentioned.
- [16] The ground for the instant dismissal appears to have been in accordance with the matters in SC5 and SC4 i.e. that the Employee had jeopardised the safety of the aircraft or participated in the destruction of company property.
- [17] At the time of dismissal the Employee's salary together with his overtime pay was approximately \$ 7,400.00 per month – his basic rate was \$ 7,000.00 per month.
- [18] The only other incident sufficiently serious to merit as much as a written warning by LIAT occurred in 1995 – the Employee was the supervisor supervising the mechanics on a shift.
- [19] The Employee was a British Licensed aircraft engineer and after his termination he did not seek employment in Antigua, as this did not qualify him to work on other aircrafts.
- [20] During the day there are no lights in the hangar – they are not normally turned on during the day. The rising sun comes up at the back of the aircraft. If work had to be done on the tail during the day the workers had to have a tail dock with lights.
- [21] Coming from outside and in the sun the Employee was not sure where he was at the time. He had slipped into the aircraft with the windscreen facing the wall, away

from the sun and then switched off the lights and closed out some more lights within the hatch which affected his sight.

- [22] The Employee did not do a double check after he was told to take the brakes off the second time as he had already checked but simply said that the brakes were off.
- [23] The tug driver did not hesitate to accelerate, on the second occasion, as he felt assured that the brakes were off.
- [24] On the day in question one of the first things the Employee did on entering the aircraft was to check the control levers, the fuel levers and the parking brakes lever which appeared to be in the off position (he did not touch it). The brakes should be normally 'on' when the aircraft is in the hangar but 'off' when it is being towed out of the hangar.
- [25] The Employee did not physically check or put off the brakes.
- [26] The Employee had carried out this procedure before.
- [27] At the time of the dismissal there was no other airline operating in Antigua and Barbuda where the Employee could find similar employment; he did not apply to BWIA as he held a British License and BWIA only employed aircraft engineers licensed to work on the Lockheed Tri Star.
- [28] Believing there were no prospects of employment in Antigua the Employee emigrated to the United States but because of his British License he was unable to find similar or substantially similar employment there and had to find employment outside of this field and went into computers (copiers) – he was told that his British

License was not adequate and that he would have to go back to school and obtain an American License.

- [29] Over the years and from time to time the Employers suffered damage to various aircrafts but the present damage was the most severe for the previous ten years – they had to bring in a jig to ensure that when the aircraft went back into service it was properly aligned.

Triable Issues

- [30] The matters for determination appear to be whether:
- (a) The Employee was guilty of Negligence/Gross Negligence?
 - (b) There were any mitigating circumstances?
 - (c) The dismissal was unfair, harsh, oppressive, contrary to the provisions of the Antigua & Barbuda Labour Code, the rules of natural justice and not in the best interests of good industrial relations and the community as a whole.

The Arguments

- [31] In his submission Mr Watt said the dismissal was not justified under Section C.58(1)(a), (b), (c), (d) or Section C.59 of the Labour Code and that the only reason which the Employers can rely on is Section C.58(e), viz, “prolonged illness or any other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held.” In support of this contention, counsel submitted that, inter alia:
- (1) “The error in identifying the brake lever as being off or mistaking the gust lock for the brake cannot be, in itself described as ‘gross negligence’.”
 - (2) There existed, on that day, a number of existing factors which contributed to the Employee’s error:

- (a) The Employee and the other members of the shift were under pressure to get the aircraft into service.
 - (b) The Employee had to rush into the cockpit to "ride the brakes" at the same time he put off the lights thereby reducing the vision in the cockpit.
 - (c) The gust lock was in the off position (it should have been in the on position) and further contributed to the error.
 - (d) At the time he was being asked "brakes off" the Employee was distracted by the hatch cover which was, in fact, in the driver's seat and which he sought to fix in place at the time he was getting into place.
 - (e) The atmosphere was charged and stressed.
- (3) There were other mitigating factors:
- (a) The Employee's length of service (15 years).
 - (b) The Employee's previously good record.
 - (c) The different punishments meted out to other employees in very similar circumstances e.g. in the case of Mr Adams whose punishment of 7 days suspension was reduced to 7 days deducted from his holidays.

[32] Finally, said counsel, the real two reasons for the dismissal were not the human error involved but the substantial damage to the aircraft, the loss of revenue, both of which were covered by insurance, and the interference with the disciplinary proceedings by the C.E.O., Dr Vincent Richards, to dismiss the Employee even though he was not and never intended to be party to the disciplinary proceedings. In support of his submissions counsel cited Sections C.56 to C.64 of the Labour Code, Page 152 to 155 and 180 to 181 of Modern Employment Law by Michael Whincup, Fifth Edition and Industrial Law by Smith and John C. Wood, Fourth Edition, published by Butterworths, pages 290 to 297.

[33] Mr Brown did not share the above views of Mr Watt and submitted that, inter alia, the dismissal was not unfair, the Employee was grossly negligent and as an experienced engineer performing the duties for about 15 ½ years was fully familiar with the aircraft, was aware of the implications of having the “brakes on” when it was being towed, the likely consequences if he failed to comply with or was reckless or otherwise acted negligently in response to the lawful instructions of Mr Hodge to take the “brakes off”. Counsel contended that:

- (a) The damage was a direct and foreseeable result of the Employee’s gross negligence in the performance of his duties by failing to release the brakes as he was repeatedly instructed to do.
- (b) There was a just cause and factual basis for the dismissal.
- (c) There was no breach of the rules of Natural Justice as the Employee was given his right to be heard through the Committee of Inquiry.
- (d) The punishment was not too harsh in the circumstances.
- (e) The Employers did not act unreasonably in dismissing the Employee.
- (f) The recognised categories of gross misconduct include negligence.
- (g) It was no defence for the Employee to say he was doing several things at the time as if this was so it was his duty, having full knowledge of the likely result if an attempt was made to tow away the aircraft with the brakes still in the “on” position and it was his duty to do all the necessary checks to ensure that all was well and there were no casualties.

[34] In support of his submissions, Mr Brown cited:

- (a) Sections C.56, C.58 & C.59 of the Labour Code.
- (b) Halsbury’s Laws of England, Forth Edition, Vol. 16, paras 545 & 547.
- (c) Rico Limited V Jones (1996) 52WIR59 where the Court of Appeal of Barbados said that the test in these cases is whether the alleged misconduct of the employee prejudices the safe and proper conducting of

the business of the company and therefore justifies the immediate dismissal. The Court held that a dismissal for a single act of misconduct is justifiable where the act interfered with the employer's business.

- (d) *Montserrat Electricity Services Limited V Latour* (1984)33WIR108 where the Eastern Caribbean Court of Appeal held that the Employee's failure to adhere strictly to the safety regulations of the employer coupled with the attendant consequences amounted to gross negligence and justified the dismissal of the employee (pp 110 & 111).
- (e) *Gulstone V Anchor Life Insurance Company Limited* (1976) 27WIR69 where the High Court of Barbados held that the immediate dismissal of an employee for committing a single act of negligence was justified.

The Law

[35] The Law relating to Unfair Dismissal is set out in the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, and Section C.56 grants an employee the right not to be unfairly dismissed; the Section also prohibits an employer from dismissing an employee without just cause.

[36] Section C.58(1) sets out the instances when a dismissal will not be unfair, viz:

- (a) relates to misconduct of the employee on the job, within the limitations of Section C.59 (1) and (2);
- (b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of Section C.59 (5);
- (c) is that the employee was made redundant;
- (d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or

- (e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held;

Provided, however, that there is a factual basis for the assigned reason.

- [37] Section C.58(2) of the Act lays down the test to be applied in deciding whether or not a dismissal was unfair and provides that it is whether or not, under the circumstances, the employer acted unreasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal.
- [38] Section C.59 (1) deals with the issue of misconduct and provides that: "An Employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes but is not limited to situations in which the employee has:
 - (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue.
 - (b) committed a criminal offence in the course of employment without the consent, express or implied, of the employer, or
 - (c) behaved immorally in the course of his duties."
- [39] Section C.59(2) deals with written warnings in lieu of dismissal and provides thus: "Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall

describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of:

- (a) a repetition of the misconduct, or
 - (b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.
- (3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning.
- (4) Where within six (6) months of the receipt of the written warning under subsection (2) the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning.
- (5) Where an employee is no longer performing his duties in a satisfactory manner, the employer may give the employee a written warning which shall describe the unsatisfactory employment in respect of which the written warning is given and state the action the employer intends to take in the event of repetition; and, thereafter, if the employee does not, during the period of three months following the receipt of the written warning, demonstrate that he is able to perform and has performed his duties in a satisfactory manner, the employer may terminate the employment of the said employee."

The Decision

- [40] This case is most unfortunate and results from his failure to do a simple act by the Employee. The Employee admitted he made a mistake when, in reply to the instructions from Mr Hodge to release the brakes of the aircraft he mistakenly said they were off without doing any physical check or double (triple check) – he mistook the gust lock (which was in the "off" position when it should have been on the "on"

position) for the brake lever which was on. As an experienced and Licensed Dash 8 300 aircraft engineer who had been in the company's employment for more than fifteen years and had done the exercise on many previous occasions it is difficult to see why the Employee was so negligent since he should have been aware of the grave consequences that were likely to follow if, as happened, Mr Salmon started to tow the aircraft while the brakes were still in the "on" position.

- [41] Since the Employee acknowledged he was at fault and the accident resulted from his misconduct (negligence) one is obliged to conclude that the investigating committee did not err when they found that he was liable for the accident and damage to the aircraft.
- [42] The Court is aware of the Rule of Natural Justice that a party to a dispute should be given an opportunity to be heard and present his defence and this was done by the investigating committee – the Employee appeared before the Committee, gave his account of what happened and answered questions put to him by the panel and it was but only after this was a finding made on the allegations. It is to be noted that even though he sat with the Committee, Mr Hodge was not a part thereof or a party to the decision but was there to provide information to the members.
- [43] At this juncture I would take a little "time out" to comment on the submission of counsel that there was an irregularity in that the Committee, having arrived at a decision to suspend the Employee for three months was persuaded by Dr Vincent Richards to impose a more severe punishment, dismissal, which it did. In my view the final decision was taken by the Committee and not by Dr Richards and the Committee, despite the intervention of Dr Richards, still had the right to suspend if they so wished and were not bound or irrevocably bound to accept his recommendation or conclusion.

- [44] In my view the act or failure to act, by the Employee, was more than Negligence but was, in fact, Negligence of a gross or inflated nature and falls within the ambit of Section C.58(1)(e) of the Labour Code, being "a substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held." It is to be observed that defines "gross negligence".
- [45] An employer has his business to protect and damage to his business by acts of negligence, failure to follow procedure and do that which an employee is expected to do, or the doing of it negligently, or without due care and attention or the care and attention expected from him or someone holding the expertise which he possesses is not acceptable.
- [46] 15 ½ years of service is indeed a long period and to summarily dismiss someone after being in his employ for such a long period and who, for all practical purposes, must have been a good and faithful employee in view of the fact that throughout this period he was but once ever found to have transgressed so far as to be given a written warning, is indeed complimentary. And surely to cause the Employer of such a person to Summarily dismiss in itself shows the hurt and disruption of his business that must have resulted therefrom. We are told that the cost of repairs was within the region of US\$ 250,000.00 but although the aircraft was insured against loss of revenue and damage we are not told whether the insurance company paid the total amount of the loss which is most unlikely and would be most unusual. But what of the fall in value of the aircraft (depreciation) resultant from the accident? Also, the loss of reputation suffered by the Employers as a result of the accident and the cost of the disruption of the company's business consequent upon the damage to the aircraft and its non-availability for service for 4 weeks; these too have a price.

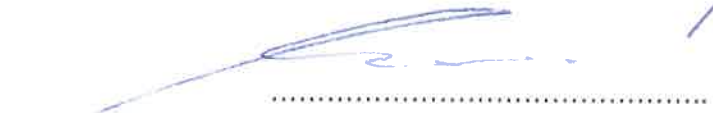
- [47] Counsel submitted that there were several mitigating factors available to the Employee and that dismissal was harsh, oppressive, severe and beyond that handed down to previous offenders in similar situations. I have already addressed the conditions under which the Employee had been working and the pressure which he was under to have the aircraft returned to service. But an engineer of his long standing and experience, and there was no evidence that he was not in good health or suffering from any illness that would have affected his mental state, I am forced to conclude that he was expected to control these issues and not allow them to affect his performance. And it must be remembered that the Employee had done this exercise on many previous occasions with no mishap. Further, as before mentioned, the light in the cockpit was not such as to render him unable to identify the brake lever or to distinguish it from the gust lock.
- [48] The Court will intervene if and whenever and wherever the punishment meted out to an employee at fault is too severe or unconscionable and in keeping with Section 10(3)(b) of the Industrial Court Act by which it is mandated that in arriving at a decision, it must consider what is fair, just and in the best interests of good industrial relations and the interests of the community as a whole.
- [49] In his final submission Mr Watt did not dwell on the Brush case where, the pilot of another aircraft of the Employers acted negligently when attempting to land at an airport in Dominica with results similar to those in the present case and was only suspended for three weeks which were taken from his holidays. But it must be emphasized that this is a far more serious issue and was a much higher degree of Negligence and the accident could have been avoided by simply locating the brake lever and ensuring that it was in the off position before giving the okay to proceed to tow away the aircraft.

[50] As stated at the outset this was a very unfortunate matter and resulted in "injury" to both the Employee and Employers and although the cost of his mistake caused the Employee his job, his career and much disruption in his life and lifestyle I have not seen where it could be said or I could find that the Dismissal was unfair and, in the circumstances, the Reference cannot succeed and is dismissed.

DATED the 9th day of July, 2004


Cyril L. Maundy
President

I concur


Hubert Hood
Member