

**EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2018/0292

IN THE MATTER of a decision by the Defendant to deem as genuine a failure recorded against the Claimant on March 2nd 2018 during an aircraft proficiency check (APC/IPC check) without allowing the Claimant any or any adequate opportunity to challenge the said failure to be heard

BETWEEN:

JUDE JOLIE

Claimant

And

EASTERN CARIBBEAN CIVIL AVIATION AUTHORITY

Defendant

Appearances:

Mr. Ruggles Ferguson and Luan Da Costa for the Claimant
Dr. David Dorsett for the Defendant

2023: January 23rd
June 5th
October 27th (Reissued)

DECISION

[1] **DRYSDALE, J.:** On 29th January 2020 the Claimant filed a Fixed Date Claim seeking a determination of whether a record of failure on an Aircraft Proficiency Check/Instrument Proficiency Check (APC/IPC check) on March 2nd, 2018 during

simulator training exercises should be expunged from his record as a pilot on the basis that there was a violation of natural justice in the decision making process.

The Claimant's Affidavits

- [2] The Claimant deposed that he is an experienced pilot with over 15 years' experience and is employed by LIAT (1974) Limited. As part of his continuous training, he is required to undergo simulator training exercises including APC/IPC checks every 6 months.
- [3] On March 2nd 2018 for the purpose of training, he underwent an APC/IPC check which was conducted by Captain Donnie Emmanuel as agent of the Defendant. During the examination a failure result was recorded against him and placed on his record. Prior to this examination, he had done over 30 APC/ IPC checks without a failure ever being recorded against him. Immediately upon being informed that he had failed, he protested and challenged the failure. He also pressed for the failure to be removed from his record which he believes was actuated by malice.
- [4] At a debriefing session held on 7th March 2018 the failure recorded against him was confirmed by the chief pilot and other supervisors of LIAT. This was done without allowing him an opportunity or adequate opportunity to be heard or to present his case challenging the said failure. He was also denied the opportunity to have two representatives present. As a result of the decision, he was informed that he would be required to undertake remedial training.
- [5] Thereafter, by letter dated 19th March 2018 the Claimant requested the Defendant's intervention to ensure that he was afforded a reasonable opportunity to contest the said failure but the same was denied. The Claimant asserts that instead the Defendant conducted its own investigation into the matter without any reference to him and concluded the said failure to be genuine.

[6] This recorded failure adversely affects his professional career, reputation and job promotion within LIAT and further and more importantly all future job prospects within the airline industry. The Claimant states that he has consistently tried to settle the matter amicably, but the Defendant has unreasonably and irrationally ignored his requests. Accordingly, the Claimant entreats the Court to grant the following reliefs:

- a) 'A declaration that the decision of the Defendant to deem as 'genuine' the failure recorded against the Claimant on March 2nd, 2018 during an APC/IPC check under the supervision of Captain Donnie Emmanuel, without allowing the Claimant any or any adequate opportunity to be heard, is unfair, unreasonable, irrational and in clear breach of the principles of natural justice.
- b) A declaration that the Claimant has a right to appeal or challenge the said failure recorded against him by Captain Emmanuel who at all material times was the agent of the Defendant.
- c) A declaration that the Claimant has a right to be heard and to bring along representatives of his choice to assist him to present his case at any review and/or hearing of an appeal challenging the said failure recorded against him.
- d) An Order directing the Defendant to conduct a proper review and/or hearing of the appeal of the Claimant against the said failure in accordance with the principles of fairness and natural justice.
- e) An Order in the form of certiorari quashing the decision of the Defendant to deem the said failure as "genuine"
- f) Such further or other relief as this Honourable Court deems just.'

The Defendant's Affidavits in Response

- [7] The Defendant addressed the allegations in two affidavits, the first one by Sylvester Dardaine, Director of Flight Safety, and the other by Donald McPhail, Director General. In the first affidavit, the Defendant asserts that Captain Donnie Emmanuel was not its servant or agent. The Defendant states that Captain Emmanuel is and was at all material times an employee of LIAT (1974) Limited. Further that Captain Emmanuel never had any contractual or agency relationship with it. Thus, having never employed him, Captain Emmanuel does not represent it and was not under any obligation to report to it.
- [8] The Defendant stated that Captain Emmanuel is a Check Airman whose designation remains valid until 31st October 2019. That as a Check Airman his role and function are to conduct tests for LIAT's pilots to ensure that they meet the proficiency requirement of LIAT's internal Operations Manual. The Defendant states further that, should Captain Emmanuel's employment with LIAT come to an end, his designation, which is contingent upon his employment with LIAT would likewise come to an end.
- [9] The Defendant states that the testing of pilots is a matter internal to each holder of an Air Operator Certificate (AOC). That the Operations Manual of LIAT covers the training of pilots and how people who fail their required tests are treated and includes opportunities for retraining and retesting. Therefore the concerns of the Claimant, including that of his records, are matters to be dealt with internally by him and LIAT.
- [10] The Defendant states that it only came into the knowledge of the grievances the Claimant had with Captain Emanuel when his attorneys wrote to it by letter dated 19th March 2018. The Defendant reiterated that the decision to fail the Claimant was not one made by it and that any challenge the Claimant seeks to mount with respect to his failure should be directed to the entity that failed him, his employer.

- [11] In a subsequent affidavit dated 12th October 2020, the Defendant acknowledges receipt of a letter from counsel for the Claimant dated 19th March 2018 seeking intervention in a matter involving the Claimant and his employer. The Defendant deposed that by letter dated 18th April 2018, a response was appended to that letter. However, on 12th October 2020 instructions were given to the Defendant's attorneys to the write to counsel for the Claimant, advising that the Defendant had withdrawn its letter of 18th April 2018 and any decision contained therein.

THE ISSUES

- [12] Having examined the pleadings and the law I find that the following issues distil themselves for determination:
- i. Whether the decision to fail the Claimant is subject to judicial review:
 - ii. Whether the retraction of the decision has rendered this matter as academic

ANALYSIS

Whether the decision to fail the Claimant is subject to judicial review

- [13] The Defendant has raised the issue of whether this is an apt matter for judicial review. The Defendant submits that it is a creature of statute and that it is not a prescribed function to interfere in employer-employee disputes. The Defendant contends that the decision complained about is not a decision of it but rather a gratuitous act unrelated to a statutory function. The Defendant submits that the Claimant requested a favour of it being that it should look into a matter involving his employer and the Defendant obliged. The Defendant likens this 'decision' to a decision of the authority to send a birthday card upon the Director General learning that the Claimant was about to celebrate his birthday and thus not one susceptible to judicial review.
- [14] The Claimant argues that where there is an adverse decision the affected party must be afforded an opportunity to be heard. That having a failure recorded against him

by Captain Emmanuel who at the material time was the agent of the Defendant amounts to an adverse finding which therefore entitles him to be heard on that fail.

[15] Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.’¹ Thus the court in this role is tasked with the responsibility of determining whether the decision was made ‘in accordance with the principles of legality, fairness and rationality, and is therefore legally sound’² and not the correctness of that decision.

[16] In order to be eligible for review an aggrieved party must demonstrate that the decision maker falls within the ambit of either a public body performing a public function or a body performing a public function. The landmark case of **R v Panel on Takeovers and Mergers, ex parte Datafin plc**³ is authority for this. In that case the Panel on Take-overs and Mergers was a self-regulating unincorporated association which devised and operated the City Code on Take-overs and Mergers prescribing a code of conduct to be observed in the take-overs of listed public companies. The panel had no direct statutory, prerogative or common law powers, nor were its powers based solely on consensus, but they were supported and sustained by certain statutory powers and penalties introduced after the inception of the panel. The panel rejected the Claimant’s complaint that two companies had acted in concert with each other. The Claimants sought leave to apply for judicial review of the panel’s decision but leave was refused on the ground that the court had no jurisdiction to entertain the application. On appeal the court found that:

‘in determining whether the decisions of a particular body were subject to judicial review, the court was not confined to considering the source of that body’s powers and duties but could also look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a

¹ Per Lord Brightman in *Chief Constable of The North Wales Police v Evans* [1982] 3 All ER 141 at 154

² *Judicial Review in the Commonwealth Caribbean* by Rajendra Ramolgan

³ [1987] QB 815

public duty and the body was exercising public law functions the court had jurisdiction to entertain an application for judicial review of that body's decisions. Having regard to the wide-ranging nature and importance of the matters covered by the City Code on Take-overs and Mergers and to the public consequences of non-compliance with the code, the Panel on Take-overs and Mergers was performing a public duty when prescribing and administering the code and its rules and was subject to public law remedies.'

- [17] More recently Dyson LJ in the case of **R (Beer) v Hampshire Farmers Markets Ltd**⁴ explored the development of this area of law following the **R v Panel on Takeovers and Mergers** case above and expressed:

'... the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted ...'

- [18] The Defendant is a regional regulatory authority dealing with matters of civil aviation, safety and security in accordance with international standards. Part of the role and function of the Defendant and in pursuance of its statutory powers is to promote training and other services and programmes necessary for the development of civil aviation in participating states. Based on the statute, the source of the Defendant's powers, it clearly exercises public law functions. Further the Defendant has exclusive authority for these matters and in fact is quite monopolistic in this regard. Given the source of the Defendant's powers coupled with nature of the powers, and

⁴ [2004] 1 WLR 233

the grave public importance of the functions exercised being inter alia to ensure that pilots are aptly suited and qualified to continue to safely traverse the friendly skies which has public law consequences, as well its exclusive statutory authority which spans across several islands, I find that the Defendant is a body whose decisions can be reviewed.

- [19] The second limb concerns whether there exists a reviewable decision. This issue rises and falls with whether Captain Emmanuel was an agent of the Defendant. The parties disagree on whether there was an agency relationship between Captain Emmanuel who was the designated Check Airman was supervising the testing of the Claimant and the Defendant. Agency 'is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties'⁵ Undeniably Captain Emmanuel is an employee of LIAT (1974) Ltd and not the Defendant. However as explained by the learned authors in Halsbury's Laws of England⁶, the relationship of principal and agency may either be express or implied and may arise wither by words or conduct of the parties. In a more expansive disposition, it was stated:

'The relation of agency typically arises whenever one person, called the 'agent', has authority to act on behalf of another, called the 'principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. If an agreement in substance contemplates the alleged agent acting on their own behalf, and not on behalf of a principal, then, although they may be described in the agreement as an agent, the relation of agency will not have

⁵ International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co (1958) 100 CLR 644

⁶ Volume 1

arisen. Conversely the relation of agency may arise despite a provision in the agreement that it shall not.

In addition to describing a person employed to create contractual relations between two parties, the word 'agent' is used in at least two other senses. Thus it is often used in business in a non-legal sense to refer to a distributor, as in the case of the appointment of a 'sole selling agent', 'exclusive agent', or 'authorized agent'. The relation so established between the appointor and appointee is usually that of vendor and purchaser and no contractual relationship is established between the appointor of the agent and third parties by the sale of goods by the so-called agent to those third parties. The word 'agent' is also frequently used to describe the position of a person who is employed by another to perform duties often of a technical or professional nature which they discharge as that other's alter ego and not merely as an intermediary between the principal and the third party. Thus a solicitor may be their client's agent for the purpose of instituting or continuing legal proceedings on the client's behalf. Similarly where a person other than a servant is permitted by the owner of a vehicle to drive it for the owner's purposes, the driver will be the owner's agent for the purpose of making the owner vicariously liable for the driver's negligence in driving.

The relation of agency is created by the express or implied agreement of principal and agent. The relation can also be created by ratification by the principal of the agent's acts purportedly done on the principal's behalf. Express agency is created where the principal, or some person authorized by them, expressly appoints the agent, whether by deed, by writing under hand, or orally. Implied agency arises from the conduct or situation of the parties, or by operation of law, for example from necessity.'

- [20] The evidence is that Captain Emmanuel who conducted the testing of the Claimant in addition to being a pilot and employee of LIAT is also a designated Check Airman.

A close perusal of the Operations Manual of LIAT Volume 3 Part 1, Section 5.2.2 reveals that 'a pilot chosen by the company to carry out duties as a Check Airman must be designated by name and approved by the ECCA.' Moreover section 2.4.1 of the said Operations Manual classifies a Designated Pilot Examiner as 'a Check Airman who is also authorised by the ECCA to conduct skills tests and Proficiency Tests on behalf of the ECCA.' I note further that per the Operations Manual that whilst there are two other categories of Check Airman for airplanes and simulator only the Check Airman for pilots have been expressly stated to be an agent for and on behalf of the Defendant.

- [21] It is a mandatory requirement for LIAT as the holder of an AOC to 'have a training programme manual approved by the authority containing the general training and record keeping policies.'⁷ This is a prerequisite for LIAT to obtain and maintain the ability to be granted an AOC. The Operations Manual contains the requisite training manual and as previously indicated was approved by the Defendant. Thus the Defendant must have been aware of the terms therein and the resultant effects. Therefore considering that a person could only act as a Check Airman for pilots if approved by the Defendant; the approval of the Operations Manual by the Defendant; the intentional differentiation between the types of Check Airman designation, with only the Check Airman for pilots being deemed to be an agent of the Defendant it is only logical that the Defendant was aware of the role and function of Captain Emmanuel as a Check Airman and consented and approved to Captain Emmanuel being its agent. Thus, the Defendant by its words and conduct cannot now resile from its position that rendered Captain Emmanuel as its agent. Therefore, I find that, the decision of Captain Emmanuel is deemed to be a decision of the Defendant.

Whether the retraction of the decision has rendered this matter as academic

⁷ See section 9.1.1.11 of the Civil Aviation Regulations 2004

[22] The Defendant raised the jurisdictional issue of whether consequent upon the retraction of the decision captured in the letter of 18th April 2018 has rendered these proceedings as academic. The Claimant counters that the retraction of the decision is an attempt to pull the rug under the Claimant's feet. The Claimant submits that in any event this retraction has no material change on the case as the failure remains on the Claimant's record. The Claimant argues that had the Defendant gone further in affording him an opportunity to challenge the decision then and only then would the retraction have been effective in putting an end to this case. However, as it stands, the only effect of the retraction concerns the issue of the right to be heard.

[23] The Claimant by letter dated 19th March 2018 wrote to the Defendant requesting that 'ECCA intervenes to ensure that Captain Jolie is afforded a reasonable opportunity to contest his 'failure' recorded against him.' In the letter the Claimant set forth certain grievances since the recorded failure which included but is not limited to a denial of an opportunity to attend a debriefing with experienced representatives, the failure to afford him an opportunity to present his case, the procedure in which the debrief was conducted and that he attended the same under protest. The letter also highlighted that the Claimant was required to attend ground school training on 12th March 2018 which he did, and remedial simulator training which was scheduled for 25th March 2018. The letter also expressed that the decision to record a failure against him by the Defendant's agent was actuated by malice. Two other letters decrying the failure to afford him an opportunity to be heard were exhibited to that letter.

[24] By letter dated 18th April 2018 the Defendant responded and advised that:

'ECCA has reviewed the concerns expressed and has scrutinized the facts and procedure directly and indirectly relevant to the matter, and having communicated with LIAT (1974) Ltd. has found no evidence of any irregularity, unfairness, prejudice, malice or distortion with the conduct and

results of the IPC/APC Check. Accordingly therefore the failure lodges against your Client is deemed genuine.'

[25] The Claimant cites the decision of 18th April 2018 as being violative of his natural justice particularly his right to be heard and relied on this to initiate these proceedings. Having reviewed the response from the Defendant quoted above, it seems that the Defendant conducted an investigation without any involvement of the Claimant. On the face of it therefore, when these proceedings commenced the claim appeared ripe for review and was properly before the court. However, an action which may present a live controversy at the time of filing may subsequently be rendered academic by later events.

[26] An academic case is one where is no extant or justiciable dispute so that remedy requested would be of no practical use or value. Generally, the Courts decline jurisdiction over such cases unless there are exceptional circumstances. The locus classicus for considering whether the Court should allow a party to pursue an academic point was articulated in the case of **R v Secretary of State for the Home Department ex parte Salem.**⁸ In that case Lord Slynn of Hadley stated:

"... in a case where there is an issue involving a public authority as to questions of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House, there is no longer a list to be decided which will directly affect the rights and obligations of the parties inter se... **The discretion to hear disputes, even in the area of public law, must be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so as for example (but only by way of example) where a discrete point of statutory construction which does not involve detailed consideration of the**

⁸ [1999] 1 AC 450

facts, and where large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future"
(emphasis mine)

[27] Having looked at the case I find that there is no practical effect in quashing the decision, it already being withdrawn. The Claimant has also admitted that the retraction of the decision has rendered the issue of the right to be heard before that decision was made as moot and thus there is no need to belabour this point. Notwithstanding this in relation to this narrow point relating to the quashing of the decision I have examined whether there are any exceptions which would still require a determination of this issue. Unfortunately, there are no exceptions to the stated general rule which exist in this case. The issues are personal to the Claimant and are not of public importance. There is also no group of persons affected or likely to be affected by these issues. Thus, there is unlikely that this will be a recurring issue which will require the court's attention but is evading review.

[28] However, for a case to be rendered as moot, the entirety of that case must have been resolved or is no longer actionable by the court. Whilst the issue of whether the decision should be quashed is now of no moment the case in and of itself is not moot. This is because although the Defendant withdrew its decision to deem genuine the failure, no attempts were made to review the matter as requested by the Claimant. This is particularly important as given the status LIAT (1974) LTD. it being in administration and it being likely that the Claimant would be in a position to apply for employment with a different airline. This means that the Claimant's records will become subject to review and may well affect any employment prospects if the recorded failure was not done lawfully. With the Claimant's reputation and competency being called into question, I find that the Claimant has a justifiable interest in the outcome in the matter. Thus, I find that there is still a live issue and as such the entirety of this case has not been rendered as moot.

[29] The Claimant submits that the Defendant has the authority to review the decision of its agent. I agree with this submission. Section 16(3) of the Interpretation Act that expresses that '[w]here an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or as are incidental to the doing thereof.' Given the nature of this matter and the statutory powers of the Defendant, the power to review a decision of its agent in these circumstances is clearly a power that is reasonably incidental for the proper exercise of its functions. Thus, there is no need for a specific expressed statutory provision to determine whether its agent exercised his discretion properly.

[30] The Claimant has petitioned the court for an order directing the Defendant to conduct a proper review of his recorded failure in accordance with the principles of natural justice. This in essence is a request for mandamus. Mandamus is a discretionary remedy and is usually granted in circumstances to compel the performance of a public duty. As indicated the Defendant has failed to properly consider the request to review the decision or taken any material action in relation thereto. Thus, the matter remains in abeyance. Given that several years has elapsed since the request with no material action on the part of the Defendant it is clear that unless compelled to perform its function that the Defendant will not be minded to take any action. I find therefore that the Claimant is entitled to a review of the decision by the Defendant's agent and will make an order compelling that the Defendant do so in accordance with the principles of natural justice.

ORDER

[31] In light of the forgoing the order of the Court is as follows:

- (a) The Defendant shall afford the Claimant an opportunity to be heard concerning his recorded failure in accordance with natural justice principles which review shall be undertaken within 60 days from the date of this order.

(b) Costs to be assessed if not agreed.

PS: The judgment was delivered on the 5th June 2023 with reasons to be given on the said day. Due to administrative issues, the court's reasons were not sent to counsel on the day the court's order was pronounced. In the interest of fairness and preserving the parties' right of appeal, and in keeping with the original intention of the court, the judgment takes effect from the date of reissue, that is on the 27th October 2023

Jan Drysdale

High Court Judge

By The Court

Registrar