

MENDIS
v.
AIR LANKA LIMITED AND OTHERS

SUPREME COURT.

FERNANDO, J,

AMERASINGHE, J,

RAMANATHAN J.

S.C. APPLICATION NO. 443/96

9TH SEPTEMBER 1996.

Fundamental rights - Article 12(1) of the Constitution - Post of Second Officer (Flight Engineer) Air Lanka - Failing Recurrent Simulator Check - Air Lanka Manual - Failure to grant a third Check - Termination of Services.

The Petitioner was employed by the 1st Respondent Airline as a Cadet Pilot with effect from 21.7.95 and as a Second Officer (Flight Engineer) with effect from 21.9.95. A Second Officer is required to face a Recurrent Simulator Check every six months. Where an officer fails a Check, his licence would cease to be valid, but the Air Lanka Manual requires him to be given adequate guidance and assistance to regain the required standard. A subsequent failure at a future date will be treated very seriously. The Petitioner failed his first Recurrent Simulator Check. He was given some training after which he presented himself for the repeat Check and was again unsuccessful. He was not given another Simulator Check. After considering his representations and reports by his superiors, his services were terminated. He alleged that there was a failure to properly comply with the Air Lanka Manual and that certain other officers had been given more favourable treatment.

Held:

(1) The Superior officers of the Petitioner substantially complied with the duty to interview him and provided him with the opportunities needed for him to regain the required standard.

(2) The refusal to grant the Petitioner a third chance and the termination of his services were not vitiated by reason of non-compliance with the Air Lanka Manual and/or unequal treatment.

"Even if we were to regard this case with greater indulgence than the 1st respondent did, we would not be entitled to substitute our opinion in place of the considered views of those entrusted with the duty of ensuring the safety of passengers and aircraft".

APPLICATION of relief for infringement of fundamental rights.

Shibly Aziz, P.C. with Mohan Peiris, M.E. Wickramasinghe and Kusal Subasinghe for Petitioner.

R.K.W. Goonesekera with *A. Nanayakkara* for 1st to 4th Respondents.

Cur. adv. vult.

20th September, 1996.

FERNANDO, J.

The Petitioner was employed by the 1st Respondent Airline as a Cadet Pilot with effect from 21.7.95 and as a Second Officer (Flight Engineer) with effect from 21.9.95. His complaint is that his fundamental right under Article 12(1) was infringed by the 1st Respondent in the way it conducted two "Recurrent Simulator Checks" on 19.1.96 and 2.2.96.

The case was argued on the basis that a Second Officer was required to face a Recurrent Simulator Check every six months, and that upon failure at one such Check the following provisions of the 1st Respondent's Manual, though referring to Pilots, was applicable *mutatis mutandis*.

"Should a pilot fail a PPC (Panel Proficiency Check) or EFC [Enroute Flying Check] he will be interviewed by the Train-

ing Captain concerned, and his Chief Pilot. He will be advised that because of his failure, he is without a valid licence. Therefore, he will be reduced to minimum guarantee pay and assigned to the Flight Training Department for necessary upgrading. During this interview, he will be encouraged to divulge any problems which he considers may have contributed to his loss of proficiency and it will be pointed out to him that every effort will be made to assist him in regaining the required standard.

After completing the necessary training and reaching a satisfactory standard, the pilot will report to his Flight Operations Manager. He will receive a letter advising that he has regained the required standard and will be expected to maintain it in the future.

A subsequent failure at a future date will be treated very seriously, and will be handled with the Manager of Flight Standards and Training and the Flight Operations Manager."

It was agreed that upon failing a Check an officer's licence would cease to be valid, unless and until he passed the next (repeat) Check; and that there being no facilities in Colombo for Simulator Checks, the 1st Respondent sends its officers abroad for that purpose but the Checks are conducted by some of its own senior officers who are duly authorised by the Director-General of Civil Aviation. While the Petitioner says that the Simulator Checks are intended to ascertain whether "an officer had the necessary competence in regard to abnormalities, malfunctions and emergencies not usually faced on scheduled flights", the Respondents say they are "intended to assess an officer's knowledge, judgment and skill during normal, abnormal or emergency flight operating situations". It must be noted that a Second Officer does not pilot an aircraft but operates the Flight Engineer's panel behind the Co-Pilot's seat.

The Petitioner faced his first Recurrent Simulator Check after appointment as Second Officer on 19.1.96, and failed. The remarks made by the testing officer, Flight Engineer Daher, under "General Assessment" were:

"Check ride is NOT UP TO SATISFACTORY level. Must do lots of study on abnormals and QRH [Quick Reference Handbook] before coming back for another [Simulator] Check".

Admittedly, the Petitioner was given some training and instruction in Colombo from 29th to 31st January, but not any Simulator training or practice.

He then presented himself for the repeat Check on 2.2.96, and was again unsuccessful. The testing officer, Jansz, recommended that "he be given a couple of additional Simulator details followed by a Simulator Check".

However, he was not given any further opportunity to present himself for another Simulator Check. After considering representations made by him and reports by his superiors, his services were terminated in April 1996.

Mr. Shibly Aziz, P.C., on behalf of the Petitioner devoted the greater part of his submissions to two matters : that the procedures laid down in the Manual (quoted above) in regard to Simulator Checks, were amplified in an Air Canada Manual which had been issued to some Airlanka staff, and should have been followed; and that even after a failure at a repeat Check, an officer should not be dismissed. While the provisions of the Airlanka Manual are part of the contractual terms of employment, the same cannot be said of the Air Canada Manual, in the absence of evidence of intention or practice in regard to its distribution and use. The Air Canada Manual cannot be regarded as binding, but, at most, as guidelines not applicable in the event of inconsistency. The Petitioner had therefore to establish non-compliance with the Air Lanka Manual. As for his other submission, while there is no doubt that dismissal was not mandatory upon a second failure, equally, dismissal was within the discretion of the Airline, particularly having regard to the safety considerations involved.

I must therefore turn to the crucial issues : whether there was compliance with the Airlanka Manual provisions, and whether any discretion thereunder was exercised so as to deny the Petitioner equal treatment.

Mr. Aziz submitted that the 1st Respondent had not given the Petitioner the benefit of an interview, advice, guidance and further Simulator practice in terms of the Manual. The petition particularized three matters : that an adverse report should have been initiated by the Flight Engineer Instructor, discussed with and signed by the Training Captain, and then shown to the Second Officer and his signature obtained; that the pilot should have been interviewed by the Training Captain and Chief Pilot in order to identify his weak areas; and that sufficient practices should have been given to cover all weak areas until the required standard was reached.

He also contended that the 1st Respondent had treated several other officers more favourably:

(a) that a pilot who failed the Recurrent Simulator Check twice, was given Simulator training in between, as well as a third chance to take the Check;

(b) that five Cadet Pilots who had not been successful in their qualifying tests are still in service as Second Officers and First Officers; and

(c) that the 3rd Respondent failed the final Simulator Test during his Airbus A -300 conversion course, but was given two practice sessions thereafter.

There is some dispute as to what happened after the first Check. The Petitioner claims that Daher did not tell him immediately that he had failed, even though there was enough time to debrief him; six hours later Daher called the Petitioner to his hotel room and told him he had failed; and the report was neither shown to him nor countersigned by him. After returning to Colombo, the 4th Respondent, the Chief Instructor Flight Engineer, instructed him to undergo three Cockpit Procedure Trainer sessions with Daher, but he was not given an interview which would have enabled him to discuss the reasons for failure and to agree on the steps, including practices, needed to reach the required standard of competence. Thereafter from 29th to 31st January he was required to attend Cockpit Procedure Training ("which only enables a pilot to practise manual cockpit procedures and not abnormalities which the

instructor had recommended in his report at the (first) Recurrent Simulator Check"). Instead of Simulator training.

It would seem that in relation to a Second Officer there is no "Training Captain" and "Chief Pilot" (as contemplated by the Manual vis-a-vis a pilot); and that in relation to the Petitioner, as a Second Officer, Daher as the Instructor, and the 4th Respondent as the Chief Instructor Flight Engineer, were his equivalent superior officers.

According to Daher, he had debriefed the Petitioner at the hotel after the Check and informed him that he had failed. He gave the reason for his recommendation that the Petitioner should do lots of study on abnormal and QRH: it was because he had found that the Petitioner did not have the necessary knowledge for that Check. He also said that he had discussed the Petitioner's failure with the 4th Respondent and had told him that the Petitioner needed to revise his knowledge of systems and reference material. Accordingly he was given the task of training the Petitioner on that basis, and from 29th to 31st January the petitioner did Cockpit Procedure Training where he was given the opportunity to study normal and abnormal procedures, the Quick Reference Handbook and other relevant subjects.

The 4th Respondent states that after discussion with Daher, he, as the Petitioner's immediate superior, interviewed the Petitioner as to the reasons for failure, gave him a copy of the assessment, and told him that he would be doing three days of ground study in the Cockpit Procedure Trainer. The Petitioner did not at any stage request further Simulator training or divulge any problem which he considered may have contributed to his lack of proficiency.

In his counter-affidavit the Petitioner does not satisfactorily deal with Daher's account of what happened after the first Check. The Petitioner has produced an inter-office memorandum dated 21.12.89 from the then Chief Pilot addressed to "Training Captains and Engineers", which states:

"If an adverse assessment is required on a Simulator report for Second Officers, then this must be countersigned by the Training Captain. Although this assessment will be primarily the

responsibility of the Flight Engineer, he should first discuss any problems encountered, and reach a mutual understanding with the Training Captain on the recommendations to be made."

However, the 4th Respondent has averred that this memorandum was never implemented, and has referred to the fact that the assessment forms approved by the Director-General of Civil Aviation do not provide for such countersigning. I therefore cannot accept that countersigning was mandatory, although it would be a salutary practice which would prevent any dispute as to whether the contents of an assessment were communicated to the officer concerned.

No reason has been suggested why both Daher and the 4th Respondent should have refrained from telling the Petitioner why he had failed; if he was not told, it would only have been natural for him to have asked why, especially as he had to prepare for the repeat Check; and if he really believed that what he needed most was Simulator practice, he would have requested that - but Mr. Aziz conceded that no such request was made. It is therefore more probable that the petitioner was informed by both that what he needed was "lots of study" of the QRH and other Manuals, and knew that Simulator practices were not required.

I hold that Daher and the 4th Respondent substantially complied with the duty to "interview" the Petitioner, told him his shortcomings, advised him of the steps necessary to regain the required standard, and provided the opportunities needed for that purpose. The fact that this was done quite informally is not material, although a more formal procedure might well have avoided uncertainty and dispute.

Turning to the allegation of unequal treatment, it is clear that all but one of the examples cited are in no way comparable. The five Cadet Pilots were not in a comparable position to Second Officers because during a regular flight a Cadet Pilot does not pilot a plane or operate any panel in the cockpit on his own; he is always under supervision, unlike a Second Officer. Further, those five pilots were in fact dismissed when they failed the repeat Check; they were re-employed only after they had filed applications to the Labour Tribunal, and they had to commence training afresh. The Petitioner, by contrast, asks for different

treatment: that he be allowed a third Check, and permitted to continue from where he was. As for the test which the 3rd Respondent (a pilot) failed, that was completely different, being a "type conversion"; and upon failing the first Check he was given one remedial training session, and was successful at the second check. The third example cited is comparable in that the officer concerned was a Second Officer facing a six-monthly Simulator Check; however, unlike the Petitioner, he was successful at the second Check, and did not have to ask for a third. The Respondents admit that he was given Simulator training or practice in between, but the failure to give similar training to the Petitioner is not "unequal treatment" because in the case of the Petitioner, his shortcomings related entirely to his lack of knowledge and the proper remedy was extensive study of the QRH and other Manuals, and not Simulator practice. The allegation of unequal treatment therefore fails.

Mr. Aziz pleaded most eloquently that the Petitioner had performed exceptionally in the course of the selection process leading up to his appointment as Cadet Pilot; that he had an outstanding record of 11 years service in the Air Force; that he had been awarded three medals for gallantry, by three successive Presidents; and that he had risked his life repeatedly in the service of the nation. Indeed, it transpired that he had returned to Colombo soon after his repeat Check on 2.2.96 in order to take part in a rehearsal for the award of the third of those medals. Mr Aziz urged that the 1st Respondent should have allowed him another chance to pass the Check, as recommended by Jansz.

While unreservedly acknowledging the Petitioner's exceptional record in those respects, Mr. Goonasekera submitted that in a commercial airline, the Petitioner's willingness to face risks was not of great importance - the paramount consideration was the safety of passengers; and the refusal to allow a third Check was a proper exercise of discretion. Even if we were to regard this case with greater indulgence than the 1st Respondent did, we would not be entitled to substitute any opinion of ours in place of the considered views of those entrusted with the duty of ensuring the safety of passengers and aircraft. I hold that the refusal to grant the Petitioner a third chance and the termination of his services were not vitiated by reason of non-compliance with the Air Lanka Manual and/or unequal treatment. I must add that I express no opinion on questions that may now be before the Labour Tribunal,