Jolyon Brunin Ellis … **Appellant**

AND

Royal Brunei Airlines … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 20 of 2011)

Before: Mortimer P, Davies and Leonard JJ A.
5th December, 2011.

Mr Christopher Sawan ak Jiran of Sheikh Noordin Mohammad & Associates for the Appellant.
Ms Elaiza Hanum Merican binti Idris Merican of Abrahams Davidson & Co for the Respondents

Cases cited in the Judgment:

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 at 283; 16 ALR 363

Gunton v London Borough of Richmond upon Thames [1980] 3 All ER 577

Malik v Bank of Credit; Mahmud v Bank of Credit [1977] UHKL 23; 1998 AC 20; [1997] 3 All ER 1,

Leonard, J.A.

On 3 October 2011, the Senior Registrar awarded to the appellant damages in the sum of $48,378.79 for wrongful dismissal, the respondent having admitted liability. Being dissatisfied with the sum awarded the appellant appeals against the Senior Registrar's decision on the ground that she erred in fact and law. He also appeals against the Official Registrar's selection of 3% as the appropriate rate of interest up to judgment. That part of the appeal is not opposed and the respondent agrees that a rate of 6% be substituted.

Under an employment contract made on 14 March 2003 *('the contract'*) the appellant entered into the employ of the respondent Royal Brunei Airlines Sdn Bhd *('RBA'*) as a pilot for 3 years, starting on 10 June 2003. The contract was renewable. At the time of his dismissal he was similarly employed, on a 3 year renewable contract which would expire on the 9 June, 2006. RBA in a letter dated 4th January 2005 gave him 3 months' notice of dismissal, specifying that his employment would end on 4 April 2005. There is an express clause in the contract, clause 8.1, which reads:

"8.1. Employment may be terminated by three months' notice on either side."

Clause 9 of the same contract is in the following terms:

> *"9. This Agreement shall be read in conjunction with the Company's Employment Regulations which are deemed to be incorporated in it. These Regulations may be amended from time to time by the Company, to take into account changing circumstances leading to a need to vary the conditions of employment."*

Though no reason is given in the letter giving notice of dismissal, it is common ground that, as had been pleaded by the respondent in its defence, it was based on a number of alleged acts of misconduct, one of which was alleged insubordination. The employment regulations ('*ER'*) incorporated into the contract provide for a disciplinary enquiry procedure which, it is common ground, was not followed. RBA conceded below that it was not open to the respondent to rely on clause 8.1 of the contract to terminate the appellant's employment in circumstances where the respondent had considered the appellant to be guilty of misconduct but no disciplinary enquiry had been conducted and that the termination pursuant to clause 8.1 was in breach of the express terms of the contract and was thus wrongful. The relevant express term is clause 9. Thus, like the dismissed employee in *Gunton v London Borough of Richmond upon Thames* [1980] 3 All ER 577, the appellant here *"was entitled to insist on a right not to be dismissed on disciplinary grounds until the disciplinary procedures were commenced and carried out in due order but with reasonable expedition",* per Buckley L.J. on page 90 of the report at g. Liability having been admitted the issue before this court is the quantum of damage. Section 74 of the Contracts Act, Cap 106 reads:

> *"74. (1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."*
>
> *(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."*

Had the contract run its full course, it would have come to an end on 9 June 2006. The Senior Registrar held that the breach of contract took place on 4 January 2005 when the contract still had 14 months to run. She found after considering the evidence and the submissions of the parties that "… *a 4 months period would be a reasonable time for the parties to conclude the disciplinary enquiry and appeal from start to finish."* The appellant had argued for twelve months and the respondent for two. An appellant seeking on appeal to overturn a finding of fact would need to show that the finding was plainly wrong. In the present case the appellant has failed to satisfy us that there is any ground for interfering with the Senior Registrar's finding.

Following *Gunton,* the Senior Registrar held that the appellant was entitled to his salary and allowances during the four month period of the disciplinary proceedings as well as the three months' salary and allowances to which he was entitled in lieu of notice under clause 8.2 of the contract. She was mindful of the statement in *Gunton* that

> *"Where a servant is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages 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, he would have determined the contract at the earliest date at which he could properly do so."* (Per Buckley LJ at p. 509, at h.)

The Senior Registrar found that as the appellant had been unable to obtain further employment he had been unable to mitigate his loss. Having calculated the total damages at $81,115.00 she took into account the sum of $32,736.21 already paid to the appellant, so that the net sum payable was $48,378.79.

It was the appellant's case that he was entitled to further damages to compensate him for the loss of the remainder of his contract term and for the loss of a further three year contract. In addition he claimed damages for loss of future employment prospects. On the evidence before her, the Senior Registrar rejected those claims. As to damages for the loss of the remainder of the contract term and the possibility of a renewal for a further 3 years she had found on the evidence that whatever the outcome of the disciplinary proceedings, once they were over the respondent would have dismissed the appellant under clause 8.1 of the contract, as it was entitled to do, so that those claims must fail. Mr Sawan contended before this court that the respondent would not have been so entitled if at the end of the disciplinary proceedings the appellant had been exonerated because to dismiss him under clause 8.1 would have been in breach of the implied obligation of mutual trust and confidence [see Gunton (supra); *Malik v Bank of Credit; Mahmud v Bank of Credit* [1977] UHKL 23; 1998 AC 20; [1997] 3 All ER 1, *Loh Nyuk Choi v Standard Chartered Finance (Brunei) Sdn Berhad*. Civil Appeal No 17 of 2008].

Mr Sawan faced an insuperable obstacle to his argument, namely the established principle enunciated in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 at 283 ; 16 ALR 363,* that where the contract is a formal one complete on its face, if a term is to be implied it must be reasonable and equitable; necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; so obvious that "it goes without saying"; capable of clear expression; and *must not contradict any express term of the contract* (emphasis supplied). What Mr Sawan appeared to be suggesting was that a dismissal under clause 8.1 in such circumstances would be unfair. The concept of unfair dismissal is unknown to the law of Brunei. It is because the common law courts refrained from recognising such a concept that in the United Kingdom the legislature has introduced it and constructed an elaborate statutory scheme for dealing with it. There is no such legislation here.

Complaint was also made by Mr Sawan that the appellant was not allowed to adduce evidence to show that in disciplinary proceedings he would have been exonerated. However, according to Mr Sawan the Senior Registrar's ruling to exclude such evidence was upheld on appeal by Lugar Mawson J., and the trial proceeded on that basis. Lugar Mawson J's decision was not appealed and the issue was not before us in the present appeal.

As to loss of future employment prospects, the Senior Registrar found that there was insufficient evidence to support a finding that the wrongful termination had affected the appellant's prospects of finding other employment. She found on the evidence before her that the only *"negative feedbacks*" following the appellant's job applications were his age (57 at the time of dismissal) and the fact that he was only type-rated to fly 757 and 767 aircraft whereas other airlines operated other types for which he was not qualified. In the circumstances she found on the appellant's evidence that a recommendation from the

respondent (which was not given) would not have assisted him. Mr Sawan failed to persuade us that that finding was plainly wrong so that we must interfere. Had he succeeded on the factual issue he would have, relying on *Malik* have sought damages for loss of employment prospects due to the stigma attached to being wrongfully dismissed for misconduct but in view of the undisturbed finding on the relevant issue of fact the argument is academic.

The appellant has failed to establish before this court that the Senior Registrar's findings of fact are plainly wrong so that we should interfere. As this court has repeatedly indicated, an appellant seeking to overturn findings of fact faces an uphill task.

The appeal is dismissed save that there will be a consent order that the rate of interest up to judgment be 6% per annum. There will be an order that the Respondent's costs be taxed if not agreed and paid by the appellant.

Mortimer, P.

Davies, J.A. **Leonard, J.A.**