

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. 4400 OF 2001

BETWEEN

JOHN SIMPSON WARHAM	Plaintiffs
and the other 22 persons listed in the Schedule to the Statement of Claim	
and	
CATHAY PACIFIC AIRWAYS LIMITED	1 st Defendant
VETA LIMITED	2 nd Defendant

AND

HCA 2822/2002

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 2822 OF 2002

BETWEEN

JOHN SIMPSON WARHAM AND OTHERS	Plaintiffs
and	
CATHAY PACIFIC AIRWAYS LIMITED	1 st Defendant
VETA LIMITED	2 nd Defendant

AND

HCA 299/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 299 OF 2006

BETWEEN

DAMON NEICH-BUCKLEY	1 st Plaintiff
HENDRIK VAN KEULEN	2 nd Plaintiff
BRIAN DAVID KEENE	3 rd Plaintiff
PIERRE JOSEPH ROGER MORISSETTE	4 th Plaintiff
CRAIG MICHAEL YOUNG	5 th Plaintiff
and	
CATHAY PACIFIC AIRWAYS LIMITED	1 st Defendant
USA BASING LIMITED	2 nd Defendant

AND

HCA 1405/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 1405 OF 2006

BETWEEN

JOHN WALLACE DICKIE	1 st Plaintiff
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DOUGLAS GAGE	2 nd Plaintiff
CHRISTOPHER LEO SWEENEY	3 rd Plaintiff
and	
CATHAY PACIFIC AIRWAYS LIMITED	Defendant

AND

HCA 807/2007

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 807 OF 2007

BETWEEN

GEORGE CROFTS	Plaintiff
and	
CATHAY PACIFIC AIRWAYS LIMITED	1 st Defendant
VETA LIMITED	2 nd Defendant

(Consolidated by Order of Master Levy dated 6th day of June, 2008)

Before: Hon Reyes J in Court

Date of Hearing: 2 March 2009

Date of Judgment: 2 March 2009

J U D G M E N T

I. INTRODUCTION

1. This is a trial of preliminary issues.
2. The Defendants (which are related companies) employed the Plaintiffs as aircrew officers for Cathay flights. The Plaintiffs were all employed under similar contracts.
3. Those contracts contained a provision entitling the Plaintiffs to terminate an officer's employment on giving 3 months' notice or payment in lieu of notice.
4. Those contracts also contained provisions setting out the procedures to be followed where the Defendants alleged misconduct on the part of an officer. The latter provisions provided for preliminary investigation of the misconduct alleged; for holding a hearing where the officer being investigated might be heard; and for appeals by the officer against a finding of misconduct.
5. The essential question before me is this:-
 - (1) Suppose that the Defendants believed that the Plaintiffs were guilty of misconduct in carrying out their duties and wished to dismiss them for that reason.
 - (2) Suppose that, for whatever reason, the Defendants did not wish to initiate the requisite disciplinary procedures.
 - (3) On a true construction of the contracts between the parties, could the Defendants bypass the relevant disciplinary procedures and simply terminate the Plaintiffs' employments without cause by giving three months' notice or payment in lieu of notice?

II. BACKGROUND

6. For the purposes of answering the essential question, the contracts between the Plaintiffs and the Defendants may be treated as identical. I shall focus on the terms of the Cathay contracts. Those are entitled "Cathay Pacific Aircrew – Conditions of Service (1999)" (the Conditions).
7. Clause 35.3 of the Conditions provides:-

"An Officer's employment may be terminated at any time after the probationary period by either party, giving to the other party not less than three (3) months' written notice or payment in lieu thereof."
8. "Disciplinary and Grievance Procedures" are found in an Appendix 1 to the Conditions. A copy of Appendix 1 is annexed to this Judgment.
9. On 9 July 2001 the Defendants terminated the Plaintiffs' employments under

Clause 35.3 by paying 3 months' wages in lieu of notice. The Plaintiffs say that such termination was wrongful and so a breach of contract.

10. In their Re-Re-Amended Statement of Claim (RRASOC) the Plaintiffs accuse the Defendants of terminating their employments because of their involvement in the activities of the Hong Kong Aircrew Officers Association (HKAOA), a trade union. The Plaintiffs contend that termination for that reason was illegal by reason of Employment Ordinance (Cap.57) s.21B(2)(b).

11. In RRASOC the Plaintiffs further claim that the Defendants took action against them because of HKAOA's instigation of industrial action in July 2001. That action, called the "Maximum Safety Strategy (MSS)," entailed aircrew officers working to rule in strict compliance with Cathay's operation manuals.

12. In support of the Plaintiffs' contentions, RRASOC quotes various statements by Cathay's management in about July 2001 following termination.

13. RRASOC quotes Mr. Philip Chan Nan Lok (then a Director and Chief Operating Officer of Cathay) as publicly accusing the Plaintiffs of having:-

- (1) disrupted Cathay's operations, its employees, its customers and the reputation of Hong Kong; and,
- (2) shown a lack of "total professionalism".

14. Further, RRASOC quotes Mr. Anthony Tyler (then Cathay's Director of Corporate Development) as publicly stating on 9 July 2001 that the Plaintiffs had:-

- (1) been holding Hong Kong to ransom; and,
- (2) selfishly failed to act in the Defendants' best interests.

15. RRASOC also cites statements of Captain Kenneth Barley (then Cathay's Director of Flight Operations) in September and October 2001 to similar effect. Those statements suggested that the Plaintiffs' employments were terminated as a result of their bad performance records and failing to demonstrate commitment in their work.

16. In their Re-Re-Amended Defence (RRAD), the Defendants plead that, between 5 and 7 July 2001, in the face of MSS, Cathay's management reviewed the employment records of all aircrew officers (including the Plaintiffs). The review was to identify those officers who had attendance problems, who had warning letters on file as a result of previous disciplinary actions, or who were considered by crew control representatives to be unhelpful and uncooperative.

17. The RRAD states that Cathay's management considered whether a given aircrew officer "was working in the interests of the Defendants and could be relied upon in the future to work for those interests". Those considered unreliable were selected for termination.

18. The RRAD denies that the Plaintiffs' employments were terminated because of their involvement in HKAOA's affairs. Nor does the RRAD accept that the MSS constituted a valid trade union activity for the purposes of the Employment Ordinance.

19. The RRAD denies that the disciplinary procedures in the Conditions were applicable. This is because the termination of the Plaintiffs' employment "was not based upon the commission of any offence or misdemeanour by any of them".

20. If the Defendants had been considering disciplinary action against an officer, the RRAD accepts that the Defendants "would be obliged to follow the Disciplinary and Grievance Procedures set out in the [Cathay] and Veta Conditions". But the Defendants maintain that such was not the case here, because the Defendants were not considering disciplinary action.

21. The RRAD admits that Mr. Tyler made the statements attributed to him in the RRASOC.

22. The specific issues which the parties have put forward as preliminary issues are:-

(1) As a matter of law and construction, by virtue of Clause 35.3 of Cathay's Conditions [and the identical provision in the Conditions of Service applicable to the Plaintiffs employed by Veta]:-

(a) Whether [the Defendants] had an unfettered contractual right to terminate the relevant Plaintiffs' contracts of employment without cause, either on the giving to each of the Plaintiffs 3 months' written notice or by payment in lieu of notice, without invoking the provisions for dismissal for 'misconduct' under the Disciplinary and Grievance Procedures (DGP) in Appendix 1 to each of the said Conditions of Service; and,

(b) If not, whether [the Defendants] had an unfettered contractual right to terminate the relevant Plaintiffs' contracts of employment without cause, either on the giving to each of the Plaintiffs 3 months' written notice or by payment in lieu of notice, once the DGP had been carried out with due expedition irrespective of the outcome thereof.

(2)

(a) In the event of misconduct and/or alleged misconduct by the Plaintiffs, whether the Defendants had a contractual right to terminate the Plaintiffs' contracts of employment as contained in the Conditions of Service, either by giving to the Plaintiffs three months' written notice or by payment in lieu of

notice, without first invoking the provisions for dismissal for such misconduct under the terms of the DGP as expressly included in the said Conditions of Service; and,

(b) If not, whether the Defendants had a contractual right to terminate the Plaintiffs' contracts of employment without cause, either by giving to the Plaintiffs 3 months' written notice or by payment in lieu of notice, once the DGP had been carried out irrespective of the outcome thereof.

23. One may be hard-pressed to discern material differences between Issues (1) and (2). I certainly have difficulty in so discerning. It appears to me that whatever subtle distinctions there may be between the 2 issues ultimately boil down to immaterial quibbles.

24. By Issue (1) (advocated by the Defendants) the intention is to emphasise that, whatever the Defendants' management may later have said publicly about the Plaintiffs' unhelpful attitude at work, in actuality the Defendants in their termination letters formally ended the Plaintiffs' employment without giving cause upon making payment in lieu of notice in accordance with Clause 35.2. Mr. Huggins SC (appearing for the Defendants) stresses that the Defendants do not allege any misconduct in relation to termination.

25. By Issue (2) (advocated by the Plaintiffs) the intention is to emphasise that, whatever the Defendants' termination letters may have formally stated, the underlying reality was that the Plaintiffs' were dismissed for alleged misconduct without following the requisite disciplinary procedures in Appendix 1.

26. These proceedings having been around for some years. I did not think that it was worthwhile wasting further time arguing over shades of emphasis. It seemed to me that the essential question was plain. Accordingly to save time and expense, at an earlier directions hearing, I suggested (and the parties agreed) that I treat both Issues (1) and (2) as preliminary issues.

27. For the purposes of this trial of preliminary issues, I shall assume that the underlying reason for the Plaintiffs' dismissal was the Defendants' belief that the Plaintiffs were guilty of misconduct. I stress that this is merely a working assumption. It remains an unresolved factually issue whether the Defendants actually had any such underlying motivation.

III. DISCUSSION

A. Appendix 1

28. It is helpful to begin with an examination of Appendix 1. More particularly, I shall consider the following:-

- (1) What is the rationale for Appendix 1?
- (2) What situations does Appendix 1 cover?
- (3) What are the outcomes of the disciplinary procedures in Appendix 1?

29. The rationale for Appendix 1 is self-evident. In any event, I think that it emerges from Appendix 1, Section 3 headed “General Principles”.

30. An aircrew officer or pilot is a professional. Aspersions against his professionalism should not be made lightly as such may damage his career and livelihood. The procedures in Appendix 1 are intended to safeguard an officer so that he is only found guilty of wrongdoing or misconduct after a fair hearing.

31. In the words of Section 3, the procedures are there to ensure that the Defendants “accord fair and equitable treatment to all officers” (cl.3.4i). Thus, in applying Appendix 1, “principles of common sense and natural justice should be followed” (cl.3.1). Officers are not to be found guilty of misconduct without being afforded “means of representation in all disciplinary matters” (cl.3.4ii) and “a right of appeal” (cl.3.4iii).

32. Section 3 further protects an officer by stipulating that disciplinary proceedings are to be confidential (cl.3.5). This is presumably because even a rumour that proceedings for misconduct are afoot may tarnish a person’s reputation.

33. When are the procedures in Appendix 1 applicable?

34. Appendix 1, Section 8 identifies 5 types of disciplinary action. They are (in order of increasing severity): admonishment, warning, reprimand involving sanctions, dismissal and summary dismissal. I focus on “dismissal” and “summary dismissal” because the Plaintiffs contend that they have been dismissed for misconduct.

35. Clause 8.5a observes that dismissal is “normally reserved for more serious offences or for the repetition of less serious offences”. Clause 8.5c reinforces this by stating that officers will “not normally be dismissed for the first offence except in cases of gross misconduct”.

36. More importantly, cl. 8.5c identifies (in a non-exhaustive manner) 15 cases of what may amount to “gross misconduct” for the purposes of Appendix 1. Of those 15,

the most pertinent for the present purposes would be:-

“iv. Habitual neglect of duty or neglect resulting in serious consequences.

...

vi. Wilful misconduct or disobedience of lawful and reasonable orders.

...

viii. Conduct considered by the Company to be prejudicial to its interests.

...

xiv. Wilful neglect of the Company’s interest.”

37. Those 4 cases extracted from cl. 8.5c are analogous to how, following the Plaintiffs’ termination, the Defendants have publicly described the Plaintiffs’ conduct. Consequently, if the Defendants’ public allegations were correct, the Plaintiffs may have been guilty not just of “misconduct,” but of “gross misconduct” as defined in cl. 8.5c.

38. There is one more aspect of “dismissal”. That is the outcome of a finding of misconduct.

39. According to cl. 8.5b, dismissal is to “take place after the appropriate notice has been given or payment made in lieu of notice”. This must be a reference to the giving of 3 months’ notice of termination or payment in lieu pursuant to Conditions cl. 35.3.

40. Cl. 8.5b therefore envisages that, even though an officer is found guilty of gross misconduct, dismissal is not to be summary. Dismissal will only take effect upon the giving of the 3 months’ notice or payment in lieu of notice stipulated in cl. 35.3.

41. That is to be contrasted with the sanction of “summary dismissal”. According to cl. 8.6, summary dismissal (that is, without notice or payment in lieu) is only to be used “in extreme case of gross misconduct, serious neglect of duty or other offences of comparable gravity”.

B. Relationship between cl. 35.3 and Appendix 1

42. If the underlying reason behind the Plaintiffs’ dismissal was the Defendants’ view that they had engaged in misconduct, I do not think that the Defendants could fairly have acted upon that view without first undertaking the procedures in Appendix 1.

43. Is it sufficient answer to say that, whatever the underlying motive, officially

the Plaintiffs' employments were terminated without cause pursuant to cl.35.3? I do not believe so.

44. In *Johnson v. Unisys Ltd.* [2003] 1 AC 518 (HL), Lord Hoffmann observed (at §35):-

“At common law the contract of employment was regarded by the courts as a contract like any other. The parties were free to negotiate whatever terms they liked and no terms would be implied unless they satisfied the strict test of necessity applied to a commercial contract. Freedom of contract meant that the stronger party, usually the employer, was free to impose its terms upon the weaker. But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self esteem. The law has changed to recognise this social reality.”

45. Lord Hoffmann was referring to employment in the UK. But his remarks must be no less applicable to Hong Kong, where a person's employment has come to be regarded as an important source of one's identity, self-esteem and well-being.

46. Just as in the UK, the Courts here have to be cognisant of that social reality and construe employment contracts in its context. Thus, if (for example) parties have agreed specific provisions giving an employee certain rights before an employer can dismiss him, the Court must be careful in construing the employment contract not inadvertently to undermine or negate such provisions. This is because, absent clear indications to the contrary, the Court must assume that in entering into an employment contract an employee would not have intended provisions protecting the security of his livelihood to be readily by-passed.

47. In my judgment, the law has to look to the objective reality of a situation in determining whether there was a breach of Appendix 1. One looks to substance rather than form. By that I mean that the Court needs to consider all relevant circumstances and evidence at the time when the termination took place to ascertain the actual reason for a particular dismissal.

48. Given the assumed underlying reason for the dismissals here, I do not think that the fact that (read in isolation) the termination letters were silent on the Defendants' motive makes a substantive difference. In other words, cl. 3.5 must be read as modified or constrained by Appendix 1.

49. Mr. Huggins advances a number of contentions in favour of a different reading of the Conditions. Let me consider them.

50. First, the Defendants (Mr. Huggins submits) had a choice to dismiss with cause pursuant to Appendix 1 or to dismiss without cause pursuant to clause 35.3. The Defendants may perform their contractual obligations in the way most favourable to them. Thus, as there were 2 lawful ways of performing the contract, the Defendants were entitled to choose the way (cl. 35.3) which was least burdensome to them.

51. In my view, this submission begs the question. It assumes what it seeks to establish, namely, that cl. 35.3 and Appendix 1 are independent options. But this is not the only possible characterisation of cl. 35.3 and Appendix 1. It is possible (indeed to my mind more likely) that, construing the relevant contract as a whole and in light of the social reality referred to by Lord Hoffmann, Appendix 1 imposes a fetter on cl.35.3.

52. If Mr. Huggins were right, Appendix 1 could always be by-passed through the expedient of giving no official reason for termination. An officer would be afforded no opportunity to refute unjustified allegations of misconduct and protect his source of livelihood. The officer would simply have to accept dismissal without cause. That could have a devastating effect on his reputation. Far clearer words would have to be inserted in the Conditions if they are to be construed as Mr. Huggins submits.

53. I do not think that cl.35.3 can be read as a free-standing option, independent of Appendix 1, enabling the employer to pick and chose whatever is the least convenient course for it. It is more plausible, in light of the “General Principles” of fairness, commonsense and natural justice enounced in Section 3 of Appendix 1, to construe the right to terminate under cl. 35.3 as modified by Appendix 1. I find nothing in the text of cl. 35.3 which is inconsistent with such a reading.

54. Second, Mr. Huggins suggests that the Plaintiffs’ construction of the ambit of cl.35.3 and Appendix 1 would produce an “unreal” outcome.

55. If (Mr. Huggins instances) the Defendants were obliged to follow Appendix 1 procedures, they could simply offer no evidence of misconduct in such proceedings. This would cause any preliminary investigation under Appendix 1 to conclude that there was no case for an officer to answer. In that event, the Defendants could then promptly give notice or payment in lieu without cause under cl. 35.3.

56. I am not persuaded by this argument insofar as it is advanced as an aid to answering Issues (1)(a) and (2)(a).

57. Mr. Huggins' instance comes close to positing bad faith on the Defendants' part. It asserts that the Defendants, having decided to dismiss the Plaintiffs for reasons of misconduct, can evade the consequences of Appendix 1 by offering no evidence, curtailing disciplinary proceedings prematurely, and then dismissing the Plaintiffs anyway for underlying reasons of misconduct.

58. As a matter of construction, I do not think that it can be right to discern what the Conditions mean on a hypothesis that the Defendants may act in bad faith. If the underlying reason for dismissal is alleged misconduct, then it seems to me that the right for the employee to be heard pursuant to Appendix 1 is triggered. Of course, the employer may attempt stratagems to get around the obligation to follow Appendix 1. But the underlying reason would remain the underlying reason and the obligation to give a fair hearing and appeal remain.

59. I note that Mr. Huggins' example is seemingly inconsistent with the reasoning in *Gunton* (discussed more fully below). If Mr. Huggins were right, the proper measure of damages in *Gunton* would not have been dependent on the entire length of disciplinary proceedings as the council could have (on Mr. Huggins' hypothesis) prematurely curtailed such proceedings by offering no evidence. But I accept that the possibility posited by Mr. Huggins was not specifically argued in *Gunton*.

60. Third, Mr. Huggins suggests that reading cl. 35.3 as subject to Appendix 1 would lead to an absurd result. It would mean (Mr. Huggins contends) that an employee who misconducts himself is more secure in his employment than one who does not.

61. I am unable to accept the argument. Plainly, no one likes an employee who engages in misconduct. In actuality, the rogue employee is more likely to be dismissed before the model employee. It is the devil whose employment will be more precarious than that of the angel.

62. Mr. Huggins' real complaint may be that the Appendix 1 proceedings could take longer than 3 months (the period of notice in cl. 35.3) to complete. That would presumably mean that the model employee can be dismissed without cause within 3 months, while the rogue employee must be retained pending completion of Appendix 1 proceedings. That (Mr. Huggins says) must be absurd.

63. I do not find Mr. Huggins' example compelling. I see no real absurdity.

64. On the one hand, an employee may be a rogue, but still be dismissed for reasons unrelated to any misconduct on his part. In that case, he would be as much subject to cl. 35.3 as the model employee. Appendix 1 would not be a bar.

65. On the other hand, where the expressed or underlying reason for dismissal is to be a person's misconduct, the parties have agreed that certain procedures are to be followed. There is no reason why the parties should not be held to their contractual bargain, even if it means that it may take longer to dismiss the rogue due to the requirements of Appendix 1.

66. Let me now consider case authority. There are some similar precedents to the situation here. Two notable cases are *Gunton v. Richmond-upon-Thames London Borough Council* [1981] 1 Ch 448 (CA) and *Cheung Chi Keung v. Hospital Authority* [2006] 2 HKC 339 (Deputy High Court Judge To).

67. In *Gunton*, P was employed by the council. He could be dismissed without cause on 1 month's notice. He could also be dismissed for cause in accordance with Regulations incorporated into his employment contract.

68. The council purported to dismiss P on disciplinary grounds in accordance with the Regulations. At first instance, the judge found that P's employment had been wrongly terminated because not all procedures in the Regulations had been completed.

69. The Court of Appeal held (among other things) that P was entitled to compensation from the date of his wrongful exclusion from service to one month after the day when proper disciplinary procedures would have concluded.

70. Buckley LJ stated (at 470B-E):-

"In the present case, in my view, the council could, on January 13, 1976, have determined the plaintiff's contract of service on February 14, 1976, without assigning any reason, or for any given reason other than a disciplinary reason. They did not, however, do so. It is common ground that the letter of January 13, 1976, purported to relate the plaintiff's dismissal to disciplinary matters. Mr. Mitchell, as I understood his argument, submitted that the circumstance was not significant; the plaintiff received one month's notice, which was all that he was entitled to insist upon. As I have already indicated, I feel unable to accept that view because, in my opinion, the effect of the incorporation in the contract of the disciplinary regulations was to entitle the plaintiff not to be dismissed on disciplinary grounds until the disciplinary procedures prescribed by the regulations have been carried out. Accordingly, in my judgment, the plaintiff was entitled at January 14, 1976, when he was excluded from his employment, to insist upon a right not to be dismissed on disciplinary grounds until the disciplinary procedures were re-commenced and carried out in due order but with reasonable expedition. Consequently, in my view, the period from January 14, 1976, for carrying out those procedures, plus one month, the plaintiff giving credit for one month's salary which he received in respect of the month ended February 14, 1976, and for anything earned in other employment during the period."

71. Brightman LJ stated (at 474A-D):-

“What then is the legal position if a notice of requisite contractual length is given to determine an employee’s contract of service, but such notice is the result of a recommendation improperly made and upon which the defendant could not lawfully act? The plaintiff has suffered a wrong, and so far as damages can do so, he must be put in the same position as if the wrong had not been done. To assess the damages, the invalid notice should be disregarded. It was a nullity. It should be assumed that the council gave, as they could have done, a valid one month’s notice at the earliest permissible date. It was argued that a valid one month’s notice could have been given on the same day as the void one month’s notice, but this proposition would make a complete nonsense of the protection which purports to be afforded by the disciplinary code, and I reject the submission. The council were intending to dismiss on a disciplinary ground. It would be inconsistent with the terms of the contract for the council to be treated as entitled to give a month’s notice until the day when the disciplinary procedures could have been completed.”

72. Shaw LJ delivered on a dissenting judgment. He considered that the Regulations did not deprive the council of the right to determine P’s contract on one month’s notice.

73. From Gunton, I derive the following propositions:-

(1) If the employer’s “intention” (to use Brightman LJ’s word) was to dismiss on disciplinary grounds, on a true construction of the relevant contract the procedures in the Regulations had to be completed before dismissal could be effected.

(2) The fact that following the procedures in the Regulation might take longer than the one month’s notice which the employer could have given for dismissal without cause, was not pertinent. Otherwise, to allow the employer to rely on the one month notice provision would make a “nonsense” (again Brightman LJ’s word) of the protection afforded by the Regulations.

(3) Whatever the outcome of the procedures might have been, the employer would thereafter have been able to give one month’s notice to dismiss P. That is because, if the procedures exonerated P, P could be dismissed without cause upon one month’s notice. On the other hand, if the procedures resulted in findings adverse to P, the employer could dismiss P for misconduct. This proposition follows from the measure of damages in Gunton.

74. Mr. Huggins sought to distinguish Gunton in that there P was expressly dismissed by the council on disciplinary grounds. In contrast, here (whatever the underlying reason may have been) the termination letters purported to dismiss the Defendants without cause.

75. Mr. Huggins submits on the basis of *Reda v. Flag* [2002] IRLR 747 (PC (Bermuda)) that his distinction is an important one. According to *Reda*, the exercise of a power to dismiss without cause is something that does not have to be justified.

76. I do not think that *Reda* advances Mr. Huggins’ case.

77. First, the question here is not one of justifying the purported exercise of a

power to dismiss without cause. The issue is whether the power to dismiss under cl. 35.3 without cause is qualified by Appendix 1. If it is qualified as the Plaintiffs contend, the exercise of the power under cl.35.3 would not be justified.

78. Second, in *Reda*, the appellants in fact contended that they had been dismissed for an “improper collateral purpose,” namely, to deprive the appellants of the benefits of a stock option plan for senior managers. They argued that the contractual power to dismiss without cause could not be used for such purpose. But the Court of Appeal and Privy Council rejected the submission, since on the facts the stock option plan had not been established until after the appellants had been dismissed. The appellants could not conceivably have become contractually entitled to something which only came into existence after they were dismissed.

79. The situation in *Reda* is thus different from that here where the question is whether cl. 35.3 can be used as a soft option to get around an existing safeguard (Appendix 1) in the contract of employment.

80. Third, I do not see why it should make a substantive difference whether a disciplinary ground (such as misconduct) is expressly invoked as a reason for dismissal as opposed to being the actual underlying (but tacit) reason for termination. As far as *Gunton* is concerned, it is unclear to me, for instance, whether when referring to the council “intending to dismiss on a disciplinary ground” Brightman LJ was requiring an express as opposed to an unexpressed (but no less actual) motive. There seems to be no good basis for the distinction which Mr. Huggins seeks to draw.

81. In *Cheung P* was employed by the Authority. He could be terminated without cause on 2 months’ notice. His contract was also subject to disciplinary procedures set out in a Manual. The Authority instituted disciplinary proceedings against P pursuant to the Manual. P claimed that these proceedings had not been completed when he was dismissed. But the Authority had also purported to dismiss P without cause on the giving 2 months’ payment in lieu of notice. There was argument on whether P had been terminated for or without cause.

82. Judge To held (at §34) that it was the Authority’s:-

“prerogative to determine whether to terminate an employee’s employment for cause even where a cause exists or to terminate without cause or without specifying any cause by giving him two months’ notice or payment in lieu of notice”.

83. The judge continued (at §43):-

“I think on the issue whether the termination was for cause or by notice, the question whether the termination was justified or not is irrelevant. The only question is how was the termination brought about. In my view, it is just a question of form. This may sound artificial, but it is no more artificial than the distinction between adequacy and sufficiency of consideration and the distinction between a written contract for disposal of an interest in land which is a valid and an oral contract which is not. This is a case where the form dictates the consequence. Different consequences flow from the two forms of dismissal. If an employee is dismissed for cause, he leaves his employment with a stigma of an under-performer. He does not have a good reference to show to his prospective employers and his former employer cannot pass any unduly adverse comment on his performance. Besides, he is entitled to notice or to payment in lieu of notice. In addition, in the instance case, if the plaintiff were dismissed for cause, he would not be entitled to payment of two months’ salary with allowance and accrued benefits, which are not insubstantial in view of his long service.”

84. The judge distinguished *Gunton* as follows (at §58):-

“The termination [here] was a disciplinary action. The underlying reason for the termination was the plaintiff’s unsatisfactory performance. But that reason was never used as a cause to dismiss him. Instead, the termination took the form of termination by payment in lieu of notice in accordance with the termination clause. On this fact, this case is clearly distinguishable from *Gunton*.”

85. I regret that I am unable to accept the judge’s reasoning.

86. First, if (as Lord Hoffmann has commented) one’s employment is an important aspect of one’s life, it seems odd to me that the validity or otherwise of its termination should fall to be determined on the basis of mere “form” or “artificiality”.

87. Second, I am unable to see any distinction between *Cheung* and *Gunton*. In both, disciplinary proceedings were initiated, but not fully completed. In those circumstances, *Gunton* (which Judge To accepted was good law) has the consequence that an employer may not simply terminate without cause on making a payment in lieu of notice. An employee is entitled to see the disciplinary proceedings completed, before he is dismissed.

88. Third, it may be (as the judge found) that on the facts of *Cheung* the contractual provision allowing 2 months’ notice was not qualified by the requirements of the Manual. In that case, the Authority would indeed have 2 independent options between which it could choose. But it is not apparent to me from the judgment on what precise factual basis the judge so concluded. Nonetheless, his finding does not mean that other contracts have to be read in the same way. Every contract must be construed on its own terms and within its peculiar factual matrix.

89. For those reasons, although I have found the discussion in *Cheung* helpful in clarifying my thinking, I am with respect ultimately unable to follow it as authority.

90. By way of footnote to this Section in my Judgment, I should mention two matters.

91. First, as an aid towards construing the Conditions, Mr. Huggins referred me to Employment Ordinance s.32K which enables an employer to rely on misconduct as a reason for dismissal where it is alleged that an employee has been dismissed in order to deprive the employee of statutory entitlements. However, I do not see that s.32K and its related sections assist one way or another in my task.

92. Second, Ms. Priscilla Leung (appearing for the Plaintiffs) submitted that the Plaintiffs in effect had tenure until retirement. She argued that, if the outcome of completed disciplinary proceedings under Appendix 1 exonerated the Plaintiffs of misconduct, the Plaintiffs could not thereafter be dismissed without cause under cl. 35.3. I cannot accept her submissions. They go against the wording of cl. 35.3, even if that provision is to be read as modified by Appendix 1. In addition, her submissions are not consonant with *Gunton*.

C. Answers to Issues (1) and (2)

93. In light of Section III.B of this Judgment, I would answer the specific questions posed as set out below.

94. Issue (1)(a). No. The right to terminate without cause under cl.35.3 is not unfettered. Clause 35.3 cannot be used to by-pass the procedures in Appendix 1, where the underlying reason behind a dismissal is alleged misconduct.

95. Issue (1)(b). Yes. Following the logic of *Gunton*, once disciplinary proceedings have been carried out and a final outcome is announced, the right to terminate without cause under clause 35.3 may be exercised. This is because, if the outcome of Appendix 1 proceedings is unfavourable to the Defendants, they would be entitled to dismiss without cause under cl.35.3. On the other hand, if the outcome of the proceedings is unfavourable to the Plaintiffs, the Defendants would be entitled to dismiss for misconduct upon giving 3 months' notice or payment in lieu under the terms of Appendix 1 and cl.35.3.

96. Issue 2(a). No. Where the underlying reason for an intended dismissal is alleged misconduct, the Defendants would not be able to terminate by giving 3 months' notice or payment in lieu. They would first have to invoke the Appendix 1 procedures.

97. Issue 2(b). Yes. The Defendants would have a contractual right to dismiss

upon giving notice or payment in lieu. See the answer to Issue (1)(b).

IV. CONCLUSION

98. The preliminary issues are to be answered as I have just set out. I shall now hear the parties on costs and consequential orders.

(A. T. Reyes)

Judge of the Court of First Instance
High Court

Mr Clive Grossman, SC leading Mr Kam Cheung and Ms Priscilla Leung, instructed by Messrs Chiu, Szeto & Cheng, for the 2nd, 4th, 7th, 8th, 10th, 14th, 17th, 18th and 22nd Plaintiffs in HCMP 4400/2001 and the Plaintiffs in HCA 2822/2002, HCA 299/2006, HCA 1405/2006 & HCA 807/2007

Mr Adrian Huggins, SC leading Mr Robin McLeish, instructed by Messrs JSM, for the Defendants in all actions

APPENDIX 1

DISCIPLINARY AND GRIEVANCE PROCEDURES

1. SCOPE AND COVERAGE

- 1.1. These Disciplinary and Grievance Procedures apply to all Officers employed by the Company.

2. DEFINITIONS

DFO	The Director Flight Operations or his/her designated representative
GMA	General Manager Aircrew or his/her designated representative
GMP	General Manager Flying or his/her designated representative
Appeal Authority	DFO, GMA or GMP
Manager Flying	A Manager Flying of the respective Fleet or his/her designated representative
Work Colleague	An Officer listed on the Aircrew Seniority List and/or Aircrew Seniority List (Flight Engineers)
CSD	Corporate Safety Department

3. GENERAL PRINCIPLES

- 3.1. The principles of common sense and natural justice should be followed when applying these procedures.
- 3.2. Each alleged offence will be considered in the light of its own circumstances. Disciplinary action, if any, will be decided upon according to the merits of the case and the Officer's previous record.
- 3.3. Before coming to his/her decision, the Manager Flying should ensure that all reasonable measures are taken or allowed in order to establish facts before recollections fade.
- 3.4. The Company will strive at all times to:
- accord fair and equitable treatment to all Officers
 - give Officers adequate rights and means of representation in all disciplinary matters