



# The Cathay Pilots Union

## Report on the Pre-Trial Hearing Held on 2<sup>nd</sup> March 2009

Dear CPU Member

The hearing commenced in court #19 at the High Court, Queensway at 10:00 and was adjourned at 11:45 until 16:30 when Justice Reyes handed down his judgment. It was an open court hearing so all documents, evidence and the actual proceedings themselves are a matter of public record.

The crux of the matter to be decided was, under the terms of the contract of employment and in the event of dismissal for disciplinary reasons, can CPA bypass the Disciplinary and Grievance Procedure ("DGP") and simply give its pilots 3 months' notice of termination under clause 35.3 of the contract?

Put another way, can clause 35.3 be read as a stand alone term or is it modified by the DGP provisions in the case of dismissal for misconduct?

For the purposes of the pre-trial determination Justice Reyes made the assumption that *The 49ers'* dismissals were for misconduct. As Justice Reyes put it in his judgement, "I stress that this is merely a working assumption. It remains an unresolved factual issue whether the Defendants actually had any such underlying motivation."

The arguments that the CPA lawyers put forward in support of their position were interesting to say the least.

Firstly, they argued that they were entitled under the Employment Ordinance and under the clause 35.3 to give their pilots notice of termination without giving any reasons whatsoever. The EO argument failed because this hearing was about breach of the contract, not about their rights under the EO. Their 35.3 argument was unlikely to be successful given the numerous statements both in their pleadings to the court and in the media regarding *The 49ers'* supposed "misconduct". In any case, for the purposes of this determination it was being assumed that dismissal was for misconduct so, again, the argument failed.

They then put forward a proposition that the dismissal of *The 49ers'* was nothing to do with misconduct, i.e. they did it just because they could under clause 35.3, and that their later public statements were after the event and, therefore, did not relate to the condition of the actual dismissals. This somewhat novel idea fell foul of the "improper collateral purpose" principle in that you cannot use one provision of a contract to bypass another and thereby obtain an advantage.

Next they put forward what they called the "soft way" and the "hard way" proposition. Under the "soft way" they argued they could simply dismiss under 35.3. Under the "hard way" they would go through the DGP but still end up with the same result as, irrespective of the outcome of the DGP, they would then just dismiss under



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35.3 anyway. In effect they were arguing that going through the DGP would just be a waste of time.

The CPA lawyers then took this argument a step further. In order to shorten the DGP they proposed that CPA management could simply, commence the DGP, immediately find that there was no case to answer under the first step of the process, dismiss the charges and then terminate anyway under 35.3. This particular argument was one of their more repulsive proposals. In his judgement Justice Reyes characterised this as coming "close to positing bad faith on the Defendants' part."

This is very polite judicial language. Put more directly the CPA lawyers were saying, "it doesn't matter what protections you put in the contract of employment, management will seek to find a way around them and terminate your employment anyway at its sole discretion." This shows a very disturbing lack of respect for employees and their contract of employment and stands in stark contrast to the CPA vision statement that, "We are a socially ... responsible company" - let alone a supposed career airline.

You may be interested to know that Nick Rhodes (the Director Flight Operations), Richard Hall (the General Manager Aircrew) and Sten Kroutil (the Flight Crew Personnel and Industrial Manager) were in the public gallery listening to the proceedings. They were also members of the Star Chamber team. It would be interesting to know if they endorse the arguments as put by their lawyers.

There then followed some legal debate on the actual interaction between the DGP and clause 35.3. CPA argued that, had it been the intention that the DGP should modify 35.3 to such an extent that it could not be used in the manner that they had proposed, then the contract should specifically state this. Justice Reyes opined the opposite view that under the principle of *contra proferentem*, where there is such an ambiguity, the contract should be interpreted against the party that unilaterally imposed the term; furthermore that, if their proposal were to stand, then it would have had to have been specifically stated in the contract that 35.3 could be read in isolation. In the event, CPA's argument failed.

After further legal debate focussing mainly on precedent, Justice Reyes retired to consider his judgment. This was handed down at 16:30.

He ruled that, in the event of dismissal for misconduct, CPA must first follow the DGP and that, if they do not, they act in breach of contract.

**This is a fantastic result as it means effectively the breach of contract leg of *The 49ers'* case has been won.**

However he also ruled that, irrespective of the outcome of the DGP, CPA still has the right to terminate the contract without cause under 35.3. This demonstrates how serious a weakness exists not only in the contracts of employment of CPA pilots but also, possibly more importantly, in labour legislation as a whole in Hong Kong.



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Significantly, 80% of the costs of the hearing were awarded in our favour.

Justice Reyes then directed that, given his judgement on this issue, both parties should now consider what steps should be taken next to deal with further issues. He directed that this should be completed within 14 days ("and I mean 14 days").

Attached to this report is a copy of Justice Reyes' draft judgement and a SCMP article.

This is an enormous step forward and has established the second leg of *The 49ers'* claim. After almost 8 years and despite CPA management's efforts to the contrary, we have finally succeeded in having the first of the substantive issues heard in open court and, moreover, the result is immensely favourable to *The 49ers* and all Cathay pilots.

Thanks to all the supporters who were able to attend the hearing and, in particular, to Becky Kwan and the FAU Exco who were also present.

Best wishes  
*The CPU Admin*

