

**INDUSTRIAL TRIBUNAL
DECISION NUMBER 2942**

5th October, 2023

Chairman: Sur Joseph Delia

CASE No: 3852/JD

Employment Issue

Between

Timotheus Englebert Schnell

and

Comlux Malta Limited

Subject Matter: alleged unfair dismissal

Application by Mr Timotheus Englebert Schnell, k/a Timo - abridged

Mr Timotheus Englebert Schnell k/a Timo was employed with Comlux Malta Limited as Airbus Captain ACJ 318 based in the Philippines with effect from 7th October 2018 on an indefinite basis.

Notwithstanding having had an excellent work record he was dismissed on the 11th May 2020 with the stated reason given as “termination by mutual agreement”.

The termination of his employment was unjust and illicit and constituted wrongful dismissal and therefore the claimant requested the Tribunal to accord him fair compensation.

Reply from Comlux Malta Limited - abridged

The claimant was assigned to fly an aircraft of Universal Entertainment Corporation, a respondent’s client in Asia. Some discord arose between the

client and the claimant to the extent that the client requested the respondent Company to replace the claimant.

The Company did not have a suitable alternative post available for the claimant, also because Mr Schnell had refused additional training to be upgraded to Line Training Captain.

The respondent offered the claimant an amicable termination of employment, and Mr Schnell had indicated that he was agreeable to such an offer.

The respondent requested the Tribunal to reject all the claims submitted by Mr Schnell.

1. Nature of business and Peculiarity of Client

1.1. Jean Paul Xuereb, the Company's Head of Human Resources, testified that "in business aviation we always ensure that our clients are very much involved with the recruitment process.... Mr Schnell was assigned to work specifically on an aircraft which belonged to a Japanese client.... If the owner decided not to work with Comlux anymore, he either takes the employees with him to the other operator or if we have openings within our Company we try to see if we can fit them within our other aircrafts that are also managed by the Company and belong to another client.

But ... you cannot remove someone to put someone else."¹

This was confirmed also by Mr Marco Battocchio, who at the time of Mr Schnell's dismissal was the respondent's Vice President Flight Operations and was later appointed as the Managing Director of the Company. "Business aviation is very particular. So if the client loses the trust on his pilot – now we are talking about a pilot sitting in the cockpit and flying – you can understand the feeling. 99% of the customers are acting in the same way in business aviation. They don't like, they don't feel safe, they don't feel secure because they don't trust their own pilot and they want to terminate the contract. Simply.

(The customer) is always right. We hire on his behalf the pilots to have a safe flight, a smooth flight, and if he is not happy, yes, we terminate."²

Another confirmation came from the Chief Executive Officer of the respondent, Mr Andrea Zanetto. "We are a management company of aircraft and we are not

¹Sitting of 27th May 2021

²Sitting of 8th February 2022

an airline. No owner wants to change pilot every day like the airline. They want to have the same pilots but they need to trust them and ... not only in terms of the professional capability to fly the aircraft but also to work for the client. In VIP aviation you have very demanding clients and when something breaks it takes weeks before you can eventually recover.... ... This is not about warning letters. Our world is not made by warning letters. It is based on trust, relationship that you build over time. If something breaks it will never come back with our VIP client.”³

“It’s not Captain Schnell that is able in any manner to convince the client that the client’s allegations are incorrect. Unfortunately this is not his job. And the risk of pushing Capt. Schnell to confront the client against his own decision is to lose the contract.”⁴

“So then as a Company we have no option but to terminate that contract of employment because you cannot remove a block to put another block because otherwise you are going to have another issue.

Some clients are more hands-on than others. Mr Nori (Chishima, the client’s representative) is quite hands-on. So just as from the very beginning he wanted to make sure he meets anyone that is going to work for him. So from the recruitment stage throughout the employment he was very hands-on.”⁵ “He wanted to be involved in everything – from the moment we shortlisted the cv’s to him meeting him and to him accepting that we proceed with the contract..”⁶

“The Company had no option but to terminate (Mr Schnell’s) contract. The repercussions were either to lose other employment, which are all the crew on this aircraft and the aircraft management of this aircraft (pilots, cabin attendants, engineers, etc.) or to look at the bigger picture, understand why the client is unhappy and ... move on with that request.”⁷

“Pilots cannot just jump on any other aircraft and fly for another owner.”⁸

To the question posed by Dr Andre` Portelli, who assisted the claimant, as to whether the statement made by Mr Xuereb in his affidavit, that if the Company had countered the client’s request the client would have simply sought another aircraft operator and the Company would have lost a long-term client was an assumption Mr Xuereb replied: “It is not really an assumption. Let me tell you

³ ibid

⁴ Ibid

⁵ Sitting of 27th May 2021

⁶ Sitting of 28th October 2021

⁷ Sitting of 27th May 2021

⁸ Sitting of 28th October 2021

why. Because when I have witnessed a call myself, directly with the client himself, he could have easily lost his temper and say, ‘I will leave you. If you don’t do this I will leave.’ ... This client is very particular and we had to kind of like always be ten steps ahead of what could potentially happen. So we had to hold him like, really treat him like fine china. It was not the first time that he would have threatened us and then he would be fine three days later. So when our CEO spoke to the client and he clearly said, ‘I don’t want him anymore on my aircraft and you ... are not going to convince me in any other way’”⁹

2. Background

2.1. “Mr Schnell was assigned to work as a Captain for the client company Universal Entertainment Corporation on their Airbus ACJ 318 9H-UEC based in Clark, the Philippines. He formed part of the Comlux Aviation Flight Operations team directly managed by Mr Marco Battocchio, VP Flight Operations.”¹⁰

2.2. “There arose some issues between Mr Schnell and the rest of the Flight Operations Team, with instances of unprofessional and inadequate behaviour.”¹¹

“These issues were the reasons behind Mr Chishima’s (the client’s representative) request that Mr Schnell be removed from the team operating the aircraft owned by Mr Chishima’s company.”¹²

2.3.1. Mr Xuereb, “attempted to find an opening for Mr Schnell on other aircraft operated by the Company; however, due to his specific type rating, there was no available alternative for him.”¹³

Mr Schnell’s contract of employment specifies the base where he was to be stationed and that was Manila.

“We do not have any other clients in Asia, at the time and even today.”¹⁴

Therefore, Mr Schnell couldn’t be given another client in Asia.

⁹ Sitting of 28th October 2021

¹⁰ Affidavit of Mr Andrea Zanetto, CEO of the respondent

¹¹ Ibid

¹² Ibid

¹³ ibid

¹⁴ Testimony of Mr Zanetto given during the sitting of 8th February 2022

2.3.2. As to the possibility of offering him a posting outside Asia Mr Battocchio confirmed that at the time of the termination of employment there were three aircraft. “Re the three aircraft, two were under the Maltese registration, so from a legal standpoint and the licence Mr Schnell could fly them. However, one aircraft belonged to the main shareholder and is dedicated to his operations. The third aircraft is registered on San Marino, so technically needs different licence to fly.”

15

2.4. “Over the ‘phone Mr Schnell stated that he was willing to ... resign and be provided with a positive reference letter ... however a short while later he informed me (Mr Xuereb) that he was refusing to sign after all arrangements had been set, after I had sent him a positive letter....”¹⁶

The complainant denied that he reached agreement.

2.5. The respondent alleged that, “From the start Mr Schnell had a conflicting relationship with a previous Lead Captain on the same aircraft, Mr Miguel Angel Moure Souto, who reported that he was not following the instructions given to him and performed poorly with regard to discipline vis-à-vis the Airbus Standard Operating Procedures.”¹⁷

“When he did follow the Lead Captain’s instructions he did so reluctantly. He regularly deviated from the Company Standard Operating Procedures, which could have posed a great danger in light of his role as captain of the aircraft.”¹⁸

“In December 2019, after a specific round of duty, Mr Schnell returned home on his motorbike whilst he sent his luggage using Nationwide’s (local Filipino Handler) car instead of riding in it himself. I spoke with Mr Schnell on this and he admitted to his wrongdoing.”¹⁹

“(The customer) was paying himself transportation to have the crew safe travelling from the airport back and forth, and he was expecting the crew to follow this instruction.”²⁰

¹⁵ Testimony of Mr Battocchio given during the sitting of 21st April 2022

¹⁶ Affidavit of Mr Xuereb (doc. JPX1)

¹⁷ Affidavit of Mr Marco Battocchio, VP Flight Operations

¹⁸ Ibid

¹⁹ Ibid

²⁰ Testimony of Mr Battocchio at the sitting of 8th February 2022.

“Use of the motorbike was a breach of the client’s requests who had kindly asked Mr Schnell to refrain from doing so before or after starting Flight Duty considering his role as captain of the aircraft, because Manila is a very dangerous city due to congested roads and unregulated traffic.”²¹

“One-time Mr Schnell showed up to work with a big scar on his arm which he had gotten after he fell whilst performing motocross sport (offroad dirt-bike/motorcycle racing) despite the client’s concerns about one of his captains’ performing such a dangerous sport.”²²

“On 12th November 2019 during a flight from Anchorage (USA) to Sapporo (Japan) and therefore over the Pacific Ocean with no alternate landing sites in case of an emergency, I expressed my deep disappointment when Mr Schnell ate the same food which I had just eaten a short while before – this is a significant issue because co-pilots must eat different meals at different times to avoid the risk of food poisoning and subsequent incapacitations, with the closest solid land being hours away.”²³

“In February 2020 ... Mr Schnell ... travelled to Malta ... for a training session without approval ... and without informing the client.”²⁴

2.6.1. The process adopted by the respondent to establish whether to terminate the claimant’s employment consisted of: “We (Battocchio and Mr Schnell) discussed about why he decided again to take the bike and use the transportation to send only the luggage instead of using personally the transportation. ... Yeah, the investigation took place in the sense that is a request coming directly from the customer. He expressed intention to terminate the contract and so simply the investigation just to contact the owner, the customer, and get a confirmation that this is intention.”²⁵

2.6.2. “We wanted ... to save the operation of this client with good relationship with the client, so I would never just send a warning letter to my employee just because something is wrong with the client.

2.6.3. We were talking with Captain Schnell multiple times in order to try to find a way to close the gap between the client and our Captain. Instead the gap

²¹ Affidavit of Mr Marco Battocchio, VP Flight Operations

²² Affidavit of Mr Marco Pistorello, Captain at respondent’s, assigned on the same aircraft as Mr Schnell, initially at the same level, then from the 10th February 2019 as Depute Lead Captain, and from the 1st July 2019 as Lead Captain

²³ Ibid

²⁴ Affidavit of Mr Battocchio

²⁵ Testimony of Mr Marco Battocchio during the sitting of 8th February 2022 (pages 7, and 10 of transcript)

increased unfortunately to a point of break. But for all the time until that break broke unfortunately we were trying to find solution because we are not talking about a specific behaviour on flying the aircraft – you did something wrong in flying the aircraft or you stole some money. It is behaviour. In business aviation you have to understand the culture, the wish, the need of your client is more important and more difficult than flying an aircraft. ... So a pilot in business aviation should have the professional capability plus the ability to understand the client’s wishes and behaviours, and this is where unfortunately for some reason that relationship went in a diverge and went wrong. At one point in time the client says, “Stop.” And it was impossible. I may tell you, I tried myself. ... Mr Shishima is a very difficult client. In this case I tried multiple times and at the end there was no way. In fact the title of the email was very clear and I tried even after the email. There was no way I could change the mind.”²⁶

“My decision (to terminate the contract of employment) was based on the fact that ... the client, even after multiple trial for many weeks after this diversion diverged completely and client said, “Stop.” ... I tried with my team to find a way to consider Mr Schnell for any other operation but every single aircraft was manned 100%. ... We had no space whatsoever to fly any place with Mr Schnell.

The investigation is trying to understand again what happened, ask the team to contact Mr Shishima and unfortunately because of the level of crisis that we had I had to contact him directly, check if that was the final decision, try to convince him to give another chance, and finally unfortunately taking the decision to look outside and see any other opportunity which was done without any solution, and finally unfortunately take the decision to sign a letter of termination.”²⁷

“The Comlux and myself could not afford in any manner to lose the client and the operation including the employment of another four people just because I want to confront Timo Schnell ... We are not talking about allegation. We are talking about a decision of the client to stop operating with Capt. Schnell. The CEO of the Company went with the phone to talk – with the video – to talk with the client to try to support our case. Because for us it’s very important to keep the continuity, the knowledge, the capability, what we develop over time. So for us it’s very important to keep even Capt. Schnell in that operation even with some friction. But I could not achieve that. After he (the client’s representative) said, “Stop,” I cannot ask Capt. Schnell what is the reason why

²⁶ Mr Zanetto’s testimony during the sitting of 8th February 2022

²⁷ Mr Zanetto’s testimony at the sitting of 8th February 2022

because it is not consistent with what happened. What happened is not some wrongdoing. It happened that the client decided to stop.

The reason for termination ... is not redundancy because redundancy look like our business was going down. ... The business is still there. His place in that operation was blocked by the owner of the aircraft.

I signed (the mutual agreement letter of the 26th February 2020) because I was fully in agreement and I understood that Capt. Schnell was in agreement. That's why I signed. The text was agreed. Then for some reason he didn't sign."²⁸

3. Considerations

- 3.1. In December 2019, two months before the decision to terminate was taken, the claimant was offered training for Line Training Captain/Training Captain. The role of such a Capt. involved the training of other pilots. This meant that the respondent had full faith and trust in Schnell's technical and interpersonal skillset to enable Schnell to assume responsibility for the safety of the flying of the aircraft and for the wellbeing of the crew during flights.
- 3.2. Since the claimant turned down the offer, "Battocchio wanted to discuss with Schnell why he refused the offer for promotion. During that telephone conversation Battocchio switched his focus to Schnell's use of the motorbike also outside working hours and asked him not to make such use. Schnell accepted."²⁹ The respondent did not deny that the claimant accepted to give up the use of his motorbike. Furthermore such acceptance was made notwithstanding that according to Mr Schnell, Mr Chishima was never in the least concerned when they used to frequent each other and Mr Schnell attended most of such private meetings with his motorbike.³⁰
- 3.3. "Three weeks before the issue of the letter of termination of his employment Schnell was asked by Chishima to organize a dinner event for representatives of Universal Entertainment Corporation, which Schnell did.

²⁸ Ibid

²⁹ Mr Schnell's affidavit received by the Tribunal on 29th September 2022

³⁰ Ibid

Neither the claimant nor the respondent informed the Tribunal what happened during those three weeks which could have justified the complete fallout of the Chishima-Schnell relationship.

- 3.4. Two days prior to the notice of termination the Company acknowledged the communication from Schnell that confirmed that he would be arriving in Malta on Feb. 16 for a simulator training session for his Licence Proficiency Check.”³¹

Certainly, the claimant can't be accused of travelling to Malta without approval.

- 3.5. When Mr Schnell was asked by Adv. Farrugia, who assisted the respondent, why he did not contact Mr Shishima to ask him to explain why he sent the Company the “Timo no longer” email³² Mr Schnell replied that he didn't contact him because he became aware of Mr Shishima's email during the Tribunal proceedings. Pressed further by Adv. Farrugia to explain why he (Mr Schnell) did not contact Mr Shishima once their relationship was so good, friendly, and personal, irrespective of when Mr Schnell learnt about Mr Shishima's damning email, Mr Schnell confirmed that he did not contact Mr Shishima because he was dismissed by Comlux and not by Mr Shishima. And in any case he and his family were migrating to another country, while looking for suitable arrangements for his ailing mother-in-law, and all that in the turmoil of the Covid-19 pandemic³³.

These replies do not convince the Tribunal!

The complainant lost a lucrative employment and was constrained to migrate with his family, live on State unemployment benefit, borrow money, and follow a course leading to a train driver's licence. And he did not bother to ask his good friend Mr Shishima why he demanded Mr Schnell's employer not only to replace him but to dismiss him!

- 3.6. Mr Schnell denied that there were any negotiations between him and the Company regarding the termination of his employment; he testified also that he had, “no clue,” how the settlement agreement draft was brought about.³⁴

This contradicts the testimony of the Company's Head of Human Resources, Mr Xuereb (see 2.4).

³¹ Ibid

³² Doc. Com 1

³³ Testimony of Mr Schnell during the sitting of 10th November 2022

³⁴ Ibid

- 3.7. On the morrow of Schnell's being given the notice of termination the Company advertised a call for applications for full-time employment as A318 Captain based in South East Asia (Doc. TS40) This vacancy was the post that was occupied by the claimant.³⁵ This lends credence to the respondent's claim that Mr Chishima was resolute that he did not want Mr Schnell anymore as the Captain of his principal's aircraft. For the Company, who preferred retaining Mr Schnell, as explained by Mr Zanetto, the CEO, in the last paragraph but two of 2.6.3, the situation reached a point of no return.
- 3.8. The Company did not give Mr Schnell the reason/s for terminating his employment in writing. Neither the notice of termination³⁶ nor the draft settlement agreement dated 26th February 2020, which are the only two documents issued by the Company at the time of its giving notice of termination, bear any such reason/s.
Reason/s for termination of employment ought to be given clearly, officially, and in writing so that the employee concerned may avail himself/herself of due process.
- 3.9. The reasons were given during the Tribunal proceedings (see 2.2, 2.5) These reasons, given by Mr Battocchio, the respondent's Vice President of Flight Operations and Mr Schnell's superior, contradict the explanation given by Mr Zanetto, the respondent's CEO, for the termination of the claimant's employment, as per 2.6.3.
Mr Battocchio emphasized Mr Schnell's shortcomings as a cockpit crew member whereas Mr Zanetto maintained that he couldn't find fault with Mr Schnell and that it was the client's representative's demand to relieve the client from Mr Schnell's services that led to Mr Schnell's employment termination; indeed the client's representative went even further by requesting Mr Schnell's dismissal, a deliberation (the dismissal) which was none of the client's business but was the prerogative of the respondent as the complainant's employer.
- 3.10. The Company had not taken disciplinary action re the list of Mr Schnell's alleged failings given in 2.5. It should have at least issued written warnings because the alleged shortcomings of Mr Schnell as a cockpit crew member

³⁵ Ibid

³⁶ Doc. D

were not minor. The taking of such disciplinary action would have made Mr Schnell very much aware that he was expected to behave more responsibly and professionally, notwithstanding the CEO's testifying that the dismissal was motivated by Mr Chishima's request and not due to any professional failing on the part of the claimant.

3.11. In its note of final submissions the respondent stated that, "There was no procedure to be followed on the occasion of the dismissal because there was no disciplinary matter requiring investigation or feedback from the claimant at all. This was a strictly operational matter consequential to a client's request." – a diametrically opposed version to the testimony of Mr Battocchio.

3.12. Mr Schnell's testimony conflicts with Mr Zanetto's regarding the client's growing discontent with Mr Schnell's services.

Mr Schnell testified that he had an excellent relationship with Mr Chishima whereas Mr Zanetto testified that Mr Schnell did not satisfy the wishes, and needs of the client's representative, and did not empathise with the culture of Mr Chishima (see 2.6.3).

3.13. The tribunal is not satisfied with Mr Schnell's reasons for not contacting the client's representative to see why Mr Chishima requested that Mr Schnell's employment be terminated. Mr Schnell's lack of communication with Mr Chishima on such a serious matter once he got to know the primary reason of his employment's termination tends to imply that Mr Schnell and Mr Chishima fell out. The Company however failed to provide convincing proof of this to satisfy the Tribunal.

3.14. Though the respondent attempted to find a suitable alternative post with the Company after it decided to withdraw Mr Schnell's services from its client it did not provide the Tribunal with convincing evidence of such attempts. 2.6.3 shows Mr Zanetto's attempts at reconciling any differences between Mr Chishima and Mr Schnell and at considering an alternative posting within the Company but Mr Zanetto testified that all the aircraft were linked to particular pilots.

Yet in 2.3.2 Mr Battocchio, who in his affidavit of December 2020 signed as VP Flight Operations but by April 2022 was appointed as the respondent's Managing Director, testified that Mr Schnell could fly one aircraft that was available. He did not say why he did not offer Mr Schnell to be attached to that aircraft. There was another aircraft available but since it was based in

San Marino Mr Schnell would have to obtain a San Marino licence. This requirement however was proven by Mr Schnell to be incorrect.³⁷ And therefore the Tribunal is not convinced that the Company did not have a suitable alternative post for Mr Schnell thus securing his continued employment with the Company.

At the same time, the Tribunal notes that Mr Schnell's refusal of the offer to be promoted Line Captain restricted further the possibility of finding Mr Schnell a suitable alternative placing in the Company.

- 3.15. The dismissal took place in May 2020, two months after the Covid-19 was declared to be a pandemic, with the airline industry being among the worst hit by it, closing employment opportunities for airline pilots.
- 3.16. The Tribunal came to the conclusion that according to the respondent what sealed the decision to terminate Mr Schnell's employment was the respondent client's representative's bidding for the dismissal of Mr Schnell.

The only proof that the respondent submitted to the Tribunal about this was Mr Chishima's email of 10th February 2020 to Mr Fadi El Samad, the respondent's Head of Customer Service, and copied to Messrs Zanetto, Battocchio, Xuereb, and others.

The Tribunal deems such evidence as insufficient. It finds it bewildering for the Company not to have produced Mr Chishima in person or via a virtual platform as a witness so that he might give his version directly to the Tribunal and be crossexamined. This is incomprehensible for the Tribunal especially because in his email Mr Chishima made himself totally available to give his testimony to the Tribunal and yet the respondent did not avail itself of the offer.³⁸

Also, the Tribunal finds it unacceptable for the Company to give a list of alleged offences without submitting a single document as evidence³⁹, especially when two months before the issue of the notice of termination Mr Schnell was offered training to be promoted to Line Training Captain. As an aviation company it marches on records and documentation. It should

³⁷ Doc. TS11

³⁸ "... I pleasure to court to fight with him"

³⁹ Except for the incidents of driving a motor-bike and of refusing a promotion, both of which incidents were corroborated by Mr Schnell; the Tribunal does not need to enter into the merits as to whether these two incidents constitute any wrongdoing since it was eventually made amply clear by Mr Zanetto and confirmed by the Company's final submissions that Mr Schnell was dismissed at the behest of Mr Chishima, the client's representative, and not because of any wrongdoing on the part of Mr Schnell.

allocate the necessary time and resources to maintain the employees' disciplinary record in a context of constructive personal development.

- 3.17. On the other hand the Tribunal finds it equally incomprehensible why the claimant considered it unnecessary to enquire with Mr Chishima, who had given him “the impression that Mr Schnell was a close friend and confidant” of his⁴⁰, why he requested the Company to dismiss him. The Tribunal is not satisfied with the reasons that he gave (see 3.5). Once the claimant learned that Mr Chishima initiated the claimant's employment termination process and if Mr Schnell believed, as he did, that Mr Chishima respected him, the Tribunal wonders why Mr Schnell stayed aloof from Mr Chishima – a strong mitigating factor in calculating the respondent's liability.
- 3.18. The claimant was in the service of the respondent for one year and seven months - a relatively short period that mitigates the respondent's liability.

Decision

The Tribunal examined all the submissions, notes, supporting documentation, affidavits, and transcripts of testimony given during the hearings.

Having made its considerations thereon and assessed all the material in its totality the Tribunal hereby decides that the claimant's dismissal was unfair and that by way of compensation the respondent shall pay the claimant within sixty calendar days from the publication of this Decision seventy-four thousand and four hundred Euros (€74,400.00).

As per legal notice 48 of 1986 of the laws of Malta the representation fees for each party shall be €93.17.

Thus Employment Issue No. 3852/JD is hereby closed.

⁴⁰ Claimant's note of final submission

The Tribunal could not decide this case within the stipulated period of one month from the date of the referral due to the number of deferments.

(Iffirmat)

Joseph Delia

Chairman

Vera Kopja

Graziella Borg

Għas-Segretarju