Federal Court Cour fédérale

Date: 20200325

Docket: T-436-19

Citation: 2020 FC 420

Ottawa, Ontario, March 25, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

AIR CANADA

Applicant

and

**CANADIAN UNION OF PUBLIC EMPLOYEES,
AIR CANADA COMPONENT**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On June 23, 2011, Francisco Diaz Delgado and Meng Liang refused to work when they encountered an unpleasant odour in an aircraft with tail fin number 415 [Fin 415]. The odour was likened to “dirty socks” or “blue cheese”. Mr. Delgado noticed the smell during takeoff and landing. Fin 415’s logbook included an entry, days earlier, noting the same odour.

[2] The Captain of Fin 415 was advised of the unpleasant odour [Fume Event]. He too had noticed it, but considered Fin 415 safe to fly. The maintenance crew also knew of the Fume Event. They believed that it was caused by oil in the air system, were unsure where the oil came from, but also considered Fin 415 airworthy and safe to operate. Mr. Delgado and Mr. Liang nevertheless maintained their refusals to work.

[3] A Health and Safety Officer [HSO] investigated and issued a decision on July 18, 2011. The HSO concluded there was no danger. The HSO noted that the maintenance crew had found a hydraulic leak of Skydrol LD4 jet oil on June 22, 2011, and this was the likely cause of the Fume Event. However, this oil was listed on the Material Safety Data Sheet [MSDS], and did not meet the classification of Dangerous Goods. There was no way of determining whether the leak had in fact caused the odour, but there were no known long-term health effects of inhalation. Nor did Mr. Delgado or Mr. Liang report any illness or symptoms.

[4] On January 4, 2012, Hadin Blaize refused to work due to a similar Fume Event on an aircraft with tail fin number 214 [Fin 214]. Ms. Blaize was informed by the Flight Director that there was a cabin defect log entry for Fin 214 relating to a possible oil leak. Ms. Blaize said that she felt nauseous and found it hard to breathe. She refused to work on the next leg of the flight. The Cabin Crew Manager and Captain investigated, and concluded there was no oil leak or risk. The Captain indicated he would return immediately to the gate if the odour persisted, but Ms. Blaize maintained her refusal to work.

[5] An HSO investigated and issued a decision on March 26, 2012. The HSO concluded there was no danger. The HSO noted that Air Canada had developed strict maintenance and troubleshooting procedures to address "smell events" since November 2011. The airline was therefore well-positioned to identify the cause of the odour, in this case likely Mobil Jet Oil II. Ms. Blaize was given a copy of the MSDS, which explained that there were no adverse health effects from exposure to jet oil under normal conditions. While exposure to decomposing jet oil could lead to headache, nausea, and eye, nose and throat irritation, Ms. Blaize was exposed only briefly to a low threshold of vapours, if any.

[6] Mr. Delgado, Mr. Liang and Ms. Blaize [Employees] appealed the HSOs' decisions to the Occupational Health and Safety Tribunal. An Appeals Officer [Officer] heard the appeals together. The Officer confirmed that no danger existed during the Fume Events [Original Decision].

[7] However, the same Officer upheld an HSO's finding that Air Canada had contravened its obligation under the *Canada Labour Code*, RSC, 1985, c L-2 [Code], to prevent hazards arising from Fume Events [Companion Decision].

[8] The Canadian Union of Public Employees, Air Canada Component [CUPE], brought an application for judicial review of the Original Decision. On June 6, 2017, Justice Susan Elliott overturned the Original Decision and remitted the matter for redetermination by the same Officer (*Canadian Union of Public Employees v Air Canada*, 2017 FC 554 [*CUPE*]). Justice Elliott found that the Original Decision and Companion Decision appeared to be inconsistent, and it

was unclear how the same Officer, considering the same evidence, could find no danger arising from the Fume Events, but also find that Air Canada had failed to take steps to prevent that very danger.

[9] In a decision dated February 7, 2019, the Officer explained how the two decisions could be reconciled [New Decision]. The Officer distinguished between the existence of a danger, which was found to be absent in the Original Decision, and the possibility of a danger, which was found to be present in the Companion Decision. Neither party takes issue with this aspect of the New Decision.

[10] In the New Decision, the Officer also reconsidered his earlier finding in the Original Decision that no danger existed. Considering the preventive purpose of the Code, and the particular circumstances in which flight attendants perform their duties, the Officer held that the Fume Events did give rise to a danger. The Employees' work refusals were therefore justified.

[11] Air Canada seeks judicial review of the New Decision. Air Canada argues that the evidence clearly established the Fume Events did not give rise to a danger, and it was therefore unreasonable for the Officer to conclude otherwise.

[12] A finding of danger cannot be based on speculation or hypothesis. The task of the decision-maker is to weigh the evidence to determine whether it is more likely than not that the danger asserted by an applicant either exists or will exist in the future. Having found that the evidence did not establish the existence of an objective hazard on a balance of probabilities, it

was not reasonably open to the Officer to conclude that a danger existed and the Employees' work refusals were justified.

[13] The application for judicial review is allowed.

II. Original Decision

[14] The Officer issued the Original Decision on August 27, 2015 (*Diaz Delgado et al v Air Canada*, 2015 OHSTC 15), confirming the HSOs' conclusions that there was no danger on either flight. The Officer based his decision primarily on the uncontested evidence of David Supplee, a former certified and lead Airbus mechanic. Mr. Supplee testified that the likely cause of the Fume Events was oil or hydraulic fluid filtering through leaky seals in the jet engine or auxiliary power unit, which became vaporized or pyrolyzed due to heat and then contaminated the recirculated cabin air.

[15] The Officer also heard evidence from Dr. Clifford Weisel, an expert in exposure science. Dr. Weisel testified that oil leak events are rare (1% of flight cycles); pyrolyzed oil can cause cabin air to reach threshold levels, above which exposure may present a risk of adverse health effects; and the Employees therefore had a reasonable expectation that they were being exposed to hazardous and toxic chemicals based on the smell alone.

[16] In addition, the Officer heard evidence from Dr. Robert Harrison, an expert in occupational medicine and toxicology. Dr. Harrison testified that the Employees who refused

work based on the Fume Events and then experienced adverse health symptoms could reasonably have expected to develop acute and/or chronic health problems as a result of their exposure to toxic air contaminants.

[17] Finally, the Officer heard the evidence of Air Canada's expert, Dr. Richard Carl Pleus, a toxicologist. Dr. Pleus testified that the odours were not indicative of hazards, and there was insufficient evidence to establish harmful levels of contaminants.

[18] The Officer posed the following question: at the time the Employees refused to work, were they exposed to a danger as defined by s 122(1) of the Code? The determinative issue was whether the odours indicated a sufficient danger to justify work refusals. At the relevant time, the Code specified in s 122(1) that "danger":

> means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.
>
> Situation, tâche ou risque — existant ou éventuel — susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade — même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats —, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.

[19] The definition of "danger" has since been narrowed, but the words "before the hazard or condition can be corrected" remain:

means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered.	Situation, tâche ou risque qui pourrait vraisemblablement présenter une menace imminente ou sérieuse pour la vie ou pour la santé de la personne qui y est exposée avant que, selon le cas, la situation soit corrigée, la tâche modifiée ou le risque écarté.

[20] The Officer cited the Code's stated purpose in s 122.1 to "prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies". Relying on Dr. Pleus' evidence, the Officer found that the hazard in question was not the unpleasant odour, but the pyrolyzed jet oil or hydraulic fluid. The Officer held that contaminated air can be dangerous to health, and scent is not the determinative factor in assessing danger because "odourless chemicals can in fact be very dangerous to health". The central question was therefore whether the chemicals released into the aircraft cabin, rather than their odour, could reasonably be expected to cause injury or illness before the hazard or condition could be corrected.

[21] The Officer concluded that there was insufficient evidence to establish such a danger. The odour by itself only implied the presence of chemicals. It did not establish that the chemicals were at a level of concentration likely to cause exposure sufficient to meet the statutory definition of "danger". In light of this conclusion, and because Air Canada had taken steps to address Fume Events when notified, the Officer was satisfied that any potential hazard could be corrected before it could cause injury or illness to the Employees.

III. Companion Decision

[22] The Officer also considered two appeals of work refusals by different flight attendants who experienced Fume Events in aircraft cabins on flights in October and November 2011. HSOs investigated and found that Air Canada had contravened s 125.1(f) of the Code and s 5.4 of the *Aviation Occupational Health and Safety Regulations*, SOR/2011-87, as well as s 125.2(1) and s 125(1)(s) of the Code. Air Canada challenged three directions issued by the HSOs under s 145(1) of the Code.

[23] The Officer issued the Companion Decision on August 27, 2015 (*Air Canada v Canadian Union of Public Employees*, 2015 OHSTC 14), the same day as the Original Decision. The Officer upheld two of the three directions on the ground that Air Canada had failed to warn its employees of a hazard arising from Fume Events or investigate the situation.

[24] The Officer observed that, according to the MSDS, jet oil could decompose and give off irritating or harmful fumes, creating symptoms that included headache, nausea, and eye, nose and throat irritation. He therefore found there was a "foreseeable health hazard" once pyrolyzed jet oil was detectible by smell. The Officer held that exposure to pyrolyzed jet oil gave rise to a likelihood of health endangerment.

[25] Air Canada did not seek judicial review of the Companion Decision.

IV. New Decision

[26] Following Justice Elliott's ruling in *CUPE*, the Officer reconsidered his Original Decision and issued the New Decision on February 7, 2019 (*Delgado v Air Canada*, 2019 OHSTC 3). The New Decision was based on the same facts and expert evidence as the Original Decision.

[27] The parties do not take issue with the Officer's explanation of the apparent inconsistency between the Original Decision and the Companion Decision. In the New Decision, the Officer distinguished between the existence of a danger, which was found to be absent in the Original Decision, and the possibility of a danger, which was found to be present in the Companion Decision. The threshold for an employer's obligation to take proper investigative steps, assess employees' potential exposure to hazardous substances, and inform them of foreseeable health hazards is lower than the threshold for establishing the existence of a danger.

[28] In *CUPE*, Justice Elliott questioned whether the Officer had applied the correct standard of proof (citing *Ediger v Johnston*, 2013 SCC 18 at para 36). In the New Decision, the Officer confirmed that he had assessed the alleged danger on the balance of probabilities, not to the level of scientific certainty. The Officer reviewed the evidence a second time and confirmed his previous conclusion that, based on the expert testimony, there was insufficient proof that the Fume Events gave rise to a danger as then defined in s 122(1) of the Code.

[29] Consistent with Justice Elliott's direction in *CUPE*, the Officer considered the statement of purpose in s 122.1 of the Code: to prevent accidents and injuries to the health of employees arising in the course of employment. The Officer concluded that, in the Original Decision, he had given insufficient weight to the Code's preventive purpose and the particular circumstances faced by flight attendants. The Officer then held that a danger did exist, and the Employees' work refusals were justified (at para 110):

> … I concluded above that consideration of the opinions expressed by the expert witnesses did not lead me to a conclusion of danger. However, I must recognize that the combined effect of their opinions, with the other evidence that was proffered, leads to the unquestionable general conclusion that the presence of contaminated air in an aircraft cabin carries the potential to cause illness where certain conditions are met, thus the obligation to investigate under the conditions set by and pursuant to the *Code*. Accordingly, having found that the evidence supports the general conclusion that one can reasonably expect that contaminated cabin air has the potential to cause illness in a context where one cannot predict whether it will tum out to be the case, employees nonetheless could be required to continue working or be forced to remain exposed to the contaminated air, as any other occupant of the aircraft while it remains in operation. Adhering to the purpose of the *Code*, that is why I find that such a finding is sufficient grounds for a finding of "danger" within the meaning of the *Code*.

V. Issue

[30] The sole issue raised by this application for judicial review is whether the Officer's decision was reasonable.

VI. Analysis

[31] The Officer's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2 & 28-33). The Court will intervene only if it is satisfied "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision-maker made the decision, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[32] Air Canada says that establishing the existence of a "danger" under the Code requires both an objective and a subjective element. The actual or potential existence of a hazard, condition, or activity must be established objectively; and employees must have a subjective and reasonable expectation that their exposure will cause injury or illness before the hazard or condition can be corrected. Having confirmed that the evidence was insufficient to establish the objective existence of an actual or potential "danger", Air Canada argues that it was not open to the Officer to find that the Employees had a subjective and reasonable expectation they would suffer injury or illness due to their exposure to chemical substances in the cabin air.

[33] Air Canada maintains that the Officer's decision is inconsistent with binding jurisprudence (*Martin v Canada (Attorney General)*, 2005 FCA 156 [*Martin*] at para 37; *Verville*

v Canada (Service correctionnel), 2004 FC 767 at para 36), and is contrary to Parliament's intent. The Federal Court of Appeal said the following in *Martin* at paragraph 37:

> I agree that a finding of danger cannot be based on speculation or hypothesis. However, when attempting to ascertain whether a potential hazard or future activity could reasonably be expected to cause injury before the hazard could be corrected or the activity altered, one is necessarily dealing with the future. Tribunals are regularly required to infer from past and present circumstances what is expected to transpire in the future. The task of the tribunal in such cases is to weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future.

[34] The Federal Court of Appeal confirmed this test in *Canada Post Corporation v Pollard,* 2008 FCA 305 [*Pollard*] at paragraphs 16 and 17:

> […] for a finding of danger, one must ascertain in what circumstances the potential hazard could reasonably be expected to cause injury and to determine that such circumstances will occur in the future as a reasonable possibility (as opposed to a mere possibility); that for a finding of danger, the determination to be made is whether it is more likely than not that what the complainant is asserting will take place in the future; that the hazard must be reasonably expected to cause injury before the hazard can be corrected; and that it is not necessary to establish the precise time when the hazard will occur, or that it occurs every time.

[35] Put simply, Air Canada says the Officer could not find that the Employees' work refusals were justified without first finding the existence of an objective hazard on a balance of probabilities. According to Air Canada, if the Officer's approach were applied broadly, any flight

attendant could refuse work based on subjective concerns about conditions that do not in fact constitute a "danger" as defined under the Code.

[36] CUPE replies that the circumstances of this case "amply support a finding that there was a 'realistic possibility' or 'reasonable possibility' of injury or illness occurring" on the aircrafts at the time of the work refusals. The cabin air was likely contaminated with pyrolyzed oil, identifiable by a distinctive smell; the evidence tended to show that the chemicals in pyrolyzed oil, at certain concentrations in air, are injurious to health; and the Officer found the mere presence of contaminated air carries a potential to cause illness, thereby establishing the objective element of the danger.

[37] CUPE notes that at least one of the Employees experienced symptoms consistent with exposure to contaminated cabin air, and it was not possible to measure the precise level of that contamination. Given the nature of the workplace (a soon-to-be airborne flight), the Employees could not correct or alter the condition by vacating the premises.

[38] The difficulty with CUPE's position is that the Officer expressly stated that the evidence did not establish the existence of an objective "danger" on a balance of probabilities (at para 102). As noted above, the most the Officer was prepared to find regarding the facts was the following (at para 110):

> I must recognize that the combined effect of [the expert opinions], with the other evidence that was proffered, leads to the unquestionable general conclusion that the presence of contaminated air in an aircraft cabin carries the potential to cause

> illness where certain conditions are met, thus the obligation to investigate under the conditions set by and pursuant to the Code.

[39] However, the Officer did not find that these "certain conditions" were met in this case. On the contrary, the Officer found that the evidence did not support the conclusion that the air contaminants reached a sufficient level of concentration to present a danger to the Employees.

[40] The Federal Court of Appeal ruled in *Martin* and *Pollard* that a finding of danger cannot be based on speculation or hypothesis. The task of the decision-maker is to weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future. In this case, there was insufficient evidence to support the conclusion that it was more likely than not the Employees would suffer adverse health effects due to the air contaminants that caused the unpleasant odour.

[41] The Officer acknowledged the unique circumstances of employees working on an aircraft, and their particular right to refuse work recognized in s 128(3) of the Code:

Employees on ships and aircraft	**Navires et aéronefs**
(3) If an employee on a ship or an aircraft that is in operation has reasonable cause to believe that	(3) L'employé se trouvant à bord d'un navire ou d'un aéronef en service avise sans délai le responsable du moyen de transport du danger en cause s'il a des motifs raisonnables de croire :
(a) the use or operation of a machine or thing on the ship or aircraft constitutes a danger to the employee or to another employee,	a) soit que l'utilisation ou le fonctionnement d'une machine ou d'une chose à bord constitue un danger pour lui-même ou un autre employé;
(b) a condition exists in a place on the ship or aircraft that constitutes	

a danger to the employee, or (c) the performance of an activity on the ship or aircraft by the employee constitutes a danger to the employee or to another employee, the employee shall immediately notify the person in charge of the ship or aircraft of the circumstances of the danger and the person in charge shall, as soon as is practicable after having been so notified, having regard to the safe operation of the ship or aircraft, decide whether the employee may discontinue the use or operation of the machine or thing or cease working in that place or performing that activity and shall inform the employee accordingly.	b) soit qu'il est dangereux pour lui de travailler à bord; c) soit que l'accomplissement d'une tâche à bord constitue un danger pour lui-même ou un autre employé. Le responsable doit aussitôt que possible, sans toutefois compromettre le fonctionnement du navire ou de l'aéronef, décider si l'employé peut cesser d'utiliser ou de faire fonctionner la machine ou la chose en question, de travailler dans ce lieu ou d'accomplir la tâche, et informer l'employé de sa décision.

[42] The Officer then observed that the unique circumstances of working on an aircraft "must be part of the equation in determining whether the refusal action is supported by 'danger' in such cases". While this is undoubtedly true, it does not bridge the gap between the Employees' subjective expectation of illness or injury and the insufficiency of evidence to establish the existence of an objective hazard. The particular right of employees on an aircraft to refuse work recognized in s 128(3) of the Code does not abrogate the requirement, confirmed by the Federal Court of Appeal in *Martin* and *Pollard*, that the potential for illness or injury asserted by the Employees must be more likely than not.

VII. Conclusion

[43] The application for judicial review is allowed, and the matter is remitted to the Occupational Health and Safety Tribunal for redetermination.

[44] If the parties are unable to agree upon costs, they may make written submissions, not exceeding three (3) pages, within twenty-one (21) days of the date of this decision.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the matter is remitted to the Occupational Health and Safety Tribunal for redetermination.

2. If the parties are unable to agree upon costs, they may make written submissions, not exceeding three (3) pages, within twenty-one (21) days of the date of this decision.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Rosalind H. Cooper	FOR THE APPLICANT
James L. Robbins	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fasken Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Cavalluzzo LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT