Date: 20081121

Docket: T-1759-07

Citation: 2008 FC 1299

Ottawa, Ontario, November 21, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES (CUPE)
AIR CANADA COMPONENT

Applicants

and

AIR CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of the decision of an appeals officer dated August 31, 2007, upholding the decision of a Health and Safety officer dated March 14, 2005 which found that the condition that existed on board Air Canada Flight 101 did not constitute a danger as defined in Part II of the *Canada Labour Code*, R.S.C. 1985 c. L-2 (the Code).

[2] The Canadian Union of Public Employees (CUPE) – Air Canada Component (the applicant), requested the following relief from the Court:

1. An order in the nature of *certiorari*, quashing and setting aside the appeals officer's decision dated August 31, 2007;

2. A declaration that "danger" within the meaning of Part II of the Code existed at the time of the work refusal;

3. An order remitting the matter to the appeals officer for determination in accordance with the direction that the appeals officer issue the remedy sought by the applicant in the appeal; and

4. The applicant's costs in this application.

Background

[3] On March 14, 2005, Ms. Rehab Rivers, a flight attendant employed by Air Canada and a member of the bargaining unit represented by the applicant, was scheduled to work on Flight 101, an A321 aircraft scheduled to fly from Toronto to Vancouver. One of the two air conditioning packs (air packs) on this particular flight was not functioning; air packs ventilate the cabin air of the airplane while it is in flight. Upon learning of the malfunctioning air pack, Ms. Rivers prepared a Flight Report and registered a work refusal wherein she stated:

> Conditions expected to cause injury or illness existed before the hazard or condition can be corrected. Based on previous incident on A321 with only one pack I can say I felt my health and safety was at risk of suffering from poor air quality namely hypoxia.

[4] Another flight attendant took Ms. Rivers' place on the flight. Prior to departing for Vancouver, the captain of the flight informed the crew that the aircraft met all the requirements of the applicable Minimum Equipment List (MEL) and that consistent with the compensation measure set out in the MEL, he would fly the plane at the lower altitude of 30,000 feet and would operate the functioning air pack at full capacity. It appears that Ms. Rivers was not present for this briefing.

[5] Ms. Rivers had, while working on a previous flight on July 17, 2004, reported that she experienced headache, dizziness and nausea while flying from Toronto to Vancouver on an A321 aircraft that had one inoperative air pack.

[6] As a result of Ms. Rivers work refusal, a Health and Safety officer investigated the situation. In a decision dated March 15, 2005 and communicated to the parties March 16, 2005, the Health and Safety officer determined that the condition that existed on board the March 2005 flight did not constitute a danger as defined in Part II of the Code.

[7] The applicant in the within application appealed the Health and Safety officer's decision. The appeal was heard in Toronto over a period of nine days and written submissions were submitted by the parties. In a decision dated August 31, 2007, the appeals officer confirmed the finding of "no danger" rendered by the Health and Safety officer. This is the judicial review of the appeals officer's decision.

Appeals Officer's Decision

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[8] The appeals officer spent a good portion of his reasons summarizing what he had retained from the testimony and evidence provided by the appellant's and respondent's witnesses. At the outset of his decision, the appeals officer framed the issue as whether or not a danger existed for Ms. Rivers on March 14, 2005, at the time of HSO Gass' investigation of her work refusal to work on board an aircraft with one unserviceable air pack. The appeals officer considered the legislation, facts of the case and jurisprudence.

[9] With regards to the facts of the case, the appeals officer observed that Ms. Rivers had admitted during her testimony that prior to her work refusal she did not speak with the captain as to what measures were to be taken to compensate for the failed air pack. The appeals officer also observed that Ms. Rivers had on a previous flight with one operative air pack on July 17, 2004, experienced symptoms that she attributed to a lack of oxygen and that she feared the same symptoms would occur on this flight.

[10] The appeals officer agreed with the applicant that some symptoms could interfere with a flight attendant's ability to respond to an emergency situation, but found "the evidence before [him] did not convince [him] that every time an air pack is inoperative, it will jeopardize the response time of a flight attendant during an on-board emergency." The appeals officer was of the opinion that the

captain's remedial actions were "appropriate to mitigate the unserviceable air pack and to ensure a level of ventilation acceptable in the cabin […]".

[11] The appeals officer then addressed the submission that the failed air pack would have resulted in Ms. Rivers experiencing the same symptoms she attested to having during the July 2004 flight. The appeals officer found on a balance of probability, that "the facts [did] not establish that crew members could reasonably be expected to be injured or become ill every time there is an unserviceable air pack." The appeals officer went on to state that in his opinion, "only a detailed air quality survey made during flights with a full capacity aircraft and one inoperative air pack will provide stronger evidence to determine whether or nor an unserviceable air pack could cause injury or illness to a crew member."

[12] The appeals officer addressed the argument that due to her previous experience in July 2004, Ms. Rivers could reasonably expect that the same symptoms would be experienced during the March 2005 flight. The appeals officer was not convinced of Dr. McGovern's evidence that the symptoms experienced by Ms. Rivers on her July 2004 flight were related to the unserviceable air pack because Dr. McGovern's opinion was based on limited data. That is, the appeals officer felt that Dr. McGovern's attempt to establish a link between the two flights was inconclusive. The appeals officer stated "it is my opinion that an assumption that is not based on significant facts is not a strong argument to consider." The appeals officer also addressed the argument that the words "reasonable expectation" did not require that every time an air pack fails, an injury is caused. He referred to his earlier statement that the presence of an unserviceable air pack [did] not mean that an injury would be caused every time. The appeals officer went on to state:

> Having decided on the link between the two flights, I do not have to address all the evidence submitted in respect of the relationship between an inoperative air pack and the on-board quality, because the factors in place in July 2004 are unlikely the same as those in March 2005.

[13] In conclusion, the appeals officer confirmed the Health and Safety officer's decision of an absence of danger.

Issues

[14] The applicant submitted the following issues for consideration:

1. What is the applicable standard of review?

2. Did the appeals officer err in law and/or jurisdiction by failing to properly interpret and apply the definition of "danger" in Part II of the Code?

3. Did the appeals officer err in law and/or fail to observe principles of natural justice and procedural fairness by holding the applicant to an impossibly high standard of evidence and proof to demonstrate the existence of "danger"?

4. Did the appeals officer make erroneous findings of fact and/or fail to observe principles of natural justice and procedural fairness by reaching factual conclusions without regard to expert evidence, based on his own research, and based on irrelevant considerations in the following respects:

    a. failing to consider expert evidence on the impact of a failed air pack on airplane cabin air quality;

b. failing to consider expert evidence on methodology in occupational medicine;

c. making factual findings without evidence which were in some cases contrary to the evidence before him; and

d. determining without evidence that remedial actions pursuant to the MEL ensured an acceptable level of ventilation.

[15] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the appeals officer err in interpreting and applying the definition of "danger" in the Code?

3. Did the appeals officer err in law in applying an impossibly high standard of evidence to the existence of "danger"?

4. Did the appeals officer err in fact?

5. Did the appeals officer breach procedural fairness?

Applicant's Written Submissions

[16] The applicant submitted that the appropriate standard of review is dependent on the issue in question. With regards to the appeals officer's interpretation of the legislative definition of "danger" as well as the standard of evidence necessary in assessing "danger", the applicant submitted that in *Martin* v. *Canada (Attorney General)*, [2005] F.C.J. No. 752 the Federal Court of Appeal determined the appropriate standard of review is patently unreasonable. However, in light of the

Supreme Court's recent decision in *Dunsmuir* v. *New Brunswick*, [2008] S.C.J. No. 9, the applicant submitted that the new standard of review for these issues is reasonableness. The applicant submitted that for questions of fact, this Court's review power is such that a decision may be overturned if the decision-maker based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. And lastly, breaches of procedural fairness by administrative decision-makers are not subject to a standard of review analysis in some instance (*CUPE* v. *Ontario (Minister of Labour)* (2003), 226 D.L.R. (4th) 193).

[17] The applicant argued that the appeals officer erred in his interpretation and application of the term "danger" in the Code. It was submitted that the inclusion of the words "reasonably be expected" into the legislative definition of "danger" requires that one ascertain in what circumstances a condition, hazard or activity could be expected to cause injury; and establish that such circumstances will occur in the future, not as a mere possibility but as a reasonable one (*Verville* v. *Canada (Correctional Services)*, [2004] F.C.J. No. 940; *Canada Post Corp.* v. *Pollard*, [2007] F.C.J. No. 1745). The applicant submitted that the appeals officer did not conduct this analysis, but instead considered the link between Ms. Rivers' July 2004 and March 2005 flights to determine whether there was a danger in March 2005. This was an error on the part of the appeals officer because it fails to apply the proper test for danger. In short, it was submitted that the appeals officer does not ask whether it could reasonably be expected that an inoperative air pack could cause injury or illness, but yet whether it could reasonably be expected that an inoperative air pack could cause injury or illness every time. It was submitted that the appeals officer's interpretation of

"danger" is inconsistent with the jurisprudence and makes no practical sense in issues of workplace safety.

[18] The applicant also argued that the appeals officer erred in applying an impossible standard of evidence by requiring the applicant to present inexistent ideal data to prove her case. It was submitted that the detailed air quality surveys required by the appeals officer could only be collected by exposing persons to the potential danger that gave rise to the work refusal. It was submitted that this is unreasonable as it is contrary to the health and safety purposes of the legislation. The applicant further submitted that the appeals officer's role is to weigh the evidence before him in making a determination, not to request ideal data that is unavailable (*Martin*, above).

[19] The applicant also submitted that the appeals officer made a number of erroneous findings of fact. It was argued that the appeals officer erred by failing to consider evidence about the impact of a failed air pack on airplane cabin air quality presented by Dr. Walkinshaw. The appeals officer ignored the evidence because according to him, there was no strong link between the unserviceable air pack and the potential hazard, yet Dr. Walkinshaw's evidence went precisely to this point. It was submitted that the appeals officer also erred in failing to consider expert evidence on methodology in occupational medicine, specifically the expert testimony of Dr. McGoveran.

[20] The applicant argued that the appeals officer erroneously dismissed this evidence because it was based on limited data and not the ideal data he suggested. In doing so, the appeals officer dismissed the data integral to Dr. McGoveran's evidence. This data, although not ideal, was customarily relied on in occupational medicine. A tribunal embarks on "forbidden territory" making

medical findings to discount uncontradicted credible evidence when it has not inherent medical expertise (*MacDonald* v. *Canada (Attorney General)*, [2003] FCJ No. 1645).

[21] The applicant also took issue with factual findings made by the appeals officer without evidence to support them including:

- the existence of an "hourly data report on the July 17, 2004 flight";
- symptoms experienced by Ms. Rivers on the March 2005 flight that she actually refused to fly on;
- opinions of expert witnesses that they did not provide; and
- a Wikipedia entry on "C" checks.

[22] And lastly, the applicant submitted that the appeals officer erroneously concluded that remedial actions pursuant to the MEL ensured an acceptable level of ventilation. It was submitted that there was no evidence before the appeals officer to this effect and thus the finding was unreasonable.

Respondent's Written Submissions

[23] The respondent submitted that in light of the Supreme Court of Canada's decision in *Dunsmuir* above, the standard of review for decisions of appeals officers under the Code is reasonableness. The respondent noted the existence of two strongly worded privative clauses and reiterated the firsthand expertise of the decision-maker in rendering his decision.

[24] The respondent submitted that the appeals officer's decision was rational. The appeals officer acknowledged that a reasonable expectation of danger does not mean that every time the condition or activity occurs it will cause a "danger"; however, he also noted that hypothetical or speculative situations were excluded.

[25] It was submitted that there was ample evidence to support the appeals officer's finding of no danger. The evidence before the appeals officer included that an A321 aircraft operating with one air pack meets the guidelines for fresh air as established by the Joint Aviation Authorities, and is legal according to the MEL. It was further submitted that the appeals officer's decision was reasonable given that the pilot flew at a lower altitude and there were no reports of adverse reactions during the flight. It was argued that it was open to the appeals officer to question Dr. Walkinshaw's evidence in light of the fact that his testimony was based on data using an aircraft other than an A321. Moreover, as there was conflicting expert medical evidence before the appeals officer, it was open to him to weigh the evidence. There was nothing unreasonable about the appeals officer's preference for Dr. Bekeris over Dr. McGoveran's evidence in light of Dr. Bekeris' expertise and experience in this field. In conclusion, the respondent submitted that there was no merit to the applicant's argument that the appeals officer erred in fact.

Analysis and Decision

[26] **Issue 1**

What is the appropriate standard of review?

I agree with the parties that the appropriate standard of review for all the issues raised, with the exception of those questions of procedural fairness, As found recently by this Court in *Union of Canadian Correctional Officers* v. *Canada (Attorney General)*, [2008] F.C.J. No. 683, the patently unreasonable standard of review found in the Martin above case is no longer applicable in light of the Supreme Court of Canada's finding in Dunsmuir above. Decision-makers are bound by the requirements of procedural fairness as in *CUPE* above.

[27] **Issue 2**

Did the appeals officer err in interpreting and applying the definition of "danger" in the Code?

The applicant submitted that the appeals officer erred in interpreting and applying the legislative definition of "danger" to the facts of this case. Specifically, the applicant argued that the appeals officer's interpretation of "danger" required that the applicant prove that every time an air pack fails, injury is experienced.

[28] In his decision, the appeals officer stated:

> I agree with J. Robbins that some symptoms could interfere with the ability of a flight attendant to respond to an emergency situation. However, the evidence before me did not convince me that every time an air pack is inoperative, it will jeopardize the response time of a flight attendant during an on-board emergency. [Emphasis added]

The appeals officer went on later in his decision to state:

> Despite the appellant's submissions, on a balance of probability, the facts do not establish that crew members could reasonably be

> expected to be injured or become ill every time there is an unserviceable air pack. [Emphasis added]

The appeals officer also stated:

> J. Robbins referred to the Federal Court decision in *Juan Verville, supra*, when he mentioned that "reasonable expectation" does not mean that every time the condition or activity occurs, it will cause injury." I agree with this statement, which applies to the inoperative air pack. I have said before that the presence of an unserviceable air pack does not mean that every time, it will cause injury or illness to a crew member. Given the absence of a strong link between the unserviceable air pack and the potential hazard that could reasonably be expected to cause injury or illness, I find that R. Rivers was not exposed to danger on March 14, 2005. [Emphasis added]

[29] It appears that there is a contradiction between the first two excerpts and the third. In the first extract of the appeals officer's decision, he indicates that his understanding of the legal test for "danger" requires that the applicant provide evidence to convince him that "every time an air pack is inoperative" it will cause injury. In the third extract of the appeals officer's decision, he appears to acknowledge that the definition of "danger" in the Code does not require that every time the situation arises, an injury or illness is caused. In my opinion, this contradiction is sufficient to put into question the appeals officer's interpretation of the definition of "danger". As a result, I cannot ascertain what meaning the appeals officer gave to the legal test for "danger". This results in the decision being unreasonable. The judicial review is therefore allowed and the matter is referred to a different appeals officer for redetermination.

[30] Because of my finding on this issue, I need not deal with the remaining issues.

[31] The applicant shall have its costs of the application.

JUDGMENT

[32] **IT IS ORDERED that:**

1. The application for judicial review is allowed and the matter is referred to a different appeals officer for redetermination.

2. The applicant shall have its costs of the application.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

Part II of the *Canada Labour Code*, R.S.C. 1985 c. L-2 :

122.(1) In this Part,	122.(1) Les définitions qui suivent s'appliquent à la présente partie.
"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;	«danger » 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.
128.(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that	128.(1) Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :
(a) the use or operation of the machine or thing constitutes a	a) l'utilisation ou le fonctionnement de la machine

danger to the employee or to another employee;	ou de la chose constitue un danger pour lui-même ou un autre employé;
(b) a condition exists in the place that constitutes a danger to the employee; or	b) il est dangereux pour lui de travailler dans le lieu;
(c) the performance of the activity constitutes a danger to the employee or to another employee.	c) l’accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.

FEDERAL COURT

SOLICITORS OF RECORD

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