Federal Court

Cour fédérale

Date: 20140130

Docket: T-2056-13

Citation: 2014 FC 108

Toronto, Ontario, January 30, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES

Applicant

and

CANADA (MINISTER OF TRANSPORT)

Respondent

and

SUNWING AIRLINES INC. **Respondent**

REASONS FOR ORDER AND ORDER

[1] The applicant, the Canadian Union of Public Employees ("CUPE"), seeks an Order staying two decisions pending judicial review.

[2] Both decisions relate to an October 18, 2013 Exemption granted to Sunwing Airlines Inc. ("Sunwing") by the Minister of Transport Canada (the "Minister"). The Exemption allows Sunwing

to operate its aircraft with 1 flight attendant for every 50 passenger seats installed on the same deck, rather than the 1:40 ratio prescribed by section 705.104 of the *Canadian Aviation Regulations*, SOR/96-433. The consequence of this Exemption is that fully-loaded Sunwing flights can operate with four rather than five flight attendants. Although CUPE has brought a separate application for judicial review of the Exemption in Court file T-1950-13, the union has not sought a stay of that decision pending the hearing of the application. The practical effect of a stay in this application, however, would be to prevent Sunwing from implementing the Exemption pending the outcome.

[3] The Minister imposed a number of conditions precedent to implementation of the Exemption including condition 11, which required Sunwing to successfully perform a partial demonstration of its aircraft evacuation procedures in accordance with criteria listed including, "using the Sunwing normal and emergency operating procedures". In order to conduct a successful partial evacuation demonstration, the cabin crew was required to open two of the four floor-level emergency exits and deploy the exit slides so that they were ready for use within 15 seconds.

[4] A total of four partial evacuation demonstrations were conducted on November 22 and 27, 2013 before the same four Transport Canada Cabin Safety Inspectors ("Transport Canada Inspectors" or "Transport Canada"). The first three demonstrations were unsuccessful. On the first demonstration, only one of the doors was opened within the 15 second limit due to a semi-transparent film covering the window in one of the doors, which prevented the flight attendant at that door from seeing whether the exit area was blocked.

[5] The second demonstration was completed within 15 seconds, but was unsuccessful because of a mistake in the set-up. The third demonstration was unsuccessful, according to Transport Canada, because the time limit had not been met. Sunwing was of the opposite view. Transport Canada sought to send video footage of the demonstration to Ottawa for a second opinion, but was prevented from doing so due to Internet connection issues. Although Sunwing was of the opinion that the third demonstration had been successful, it indicated that it would perform a fourth partial evacuation demonstration.

[6] After the third demonstration, Transport Canada Inspectors observed that two flight attendants had entered the cabin and issued oral "blocking commands" before assessing and opening the exits, rather than issuing the oral blocking commands as they made their way to the exits, or proceeding directly to the exits to assess and open them.

[7] Oral blocking commands involve flight attendants instructing able-bodied passengers to hold other passengers back and not advance while the attendants assess and open the doors. The rationale, apparently, is that this prevents the attendants from being pinned against the doors by frantic passengers while the attendants are attempting to open them. While Transport Canada's Flight Attendant Manual Standard ("FAMS") requires flight operators to consider the use of oral commands in their evacuation procedures, their inclusion is not mandatory. Sunwing's evacuation procedures did, however, specify that the issuance of a blocking command was mandatory in all unprepared evacuations. The Transport Canada Inspectors at the demonstrations considered that this contributed to delays in assessing and opening the exits, which appeared to hinder the crews in efficiently evacuating the aircraft.

[8] Ms. Darlene MacLachlan, Transport Canada's Technical Team Lead, stated on cross-examination that the issuance of the blocking command had been identified by Transport Canada as a concern on all three partial evacuation demonstrations, but that Transport Canada had focused on other concerns with those tests first.

[9] Mr. Luc Mayne, one of the four Transport Canada Inspectors, indicated to Sunwing's representatives that requiring all flight attendants to issue an oral blocking signal in all cases was an "old school" approach, which, contrary to the purpose of the evacuation procedures, was slowing down the evacuation of the aircraft and did not enhance the safety of the crew or the passengers. Mr. Mayne related a personal experience in which he had faced an actual evacuation situation as a flight attendant. He had been at the front of the aircraft when the cabin crew received the "evacuate" signal. He stated he had made it to the back of the aircraft before any passengers got out of their seats.

[10] Based on Mr. Mayne's experience, Sunwing's representatives' own assessment of the video footage of the third partial evacuation demonstration, and a timed test of the first portion of the emergency evacuation procedure minus the oral blocking command, Ms. Patricia Brady, Sunwing's Director, Cabin Safety and Training, and Mr. Mark Williams, President of Sunwing, were persuaded to revise Sunwing's evacuation procedures by making the issuance of oral blocking commands discretionary rather than mandatory. Mr. Mayne advised that he would give immediate verbal approval to the revision of the emergency procedures, and that the revision to the flight attendant manual should be documented in writing by filing a cabin safety bulletin with Transport Canada for approval.

[11] Sunwing explained the revised evacuation procedures to the crew members who were performing the fourth partial evacuation demonstration, which was successful. The November 27, 2013 decision by Transport Canada to approve Sunwing's fourth partial evacuation demonstration is the first of two decisions for which the applicant seeks a stay.

[12] While operators have the discretion to determine when and which shouted commands should be issued during evacuation procedures, these must be set out in their flight attendant manual pursuant to subsection 705.139(1) of the *Canadian Aviation Regulations*. The Minister must approve those parts of the flight attendant manual, and amendments to those parts, that relate to the safety and emergency information contained in Part A of the FAMS pursuant to subsection 705.139(3) of the *Canadian Aviation Regulations*. This approval was also a condition precedent to the Exemption granted to Sunwing.

[13] As per Mr. Mayne's recommendation, Sunwing submitted Cabin Safety Bulletin No. 2013-10 ("Cabin Safety Bulletin") entitled "Oral Shouted Commands" for the Minister's approval on November 29, 2013. The Cabin Safety Bulletin was approved that same day by Mr. Mayne on behalf of the Minister.

[14] This November 29, 2013 decision to approve Sunwing's amended evacuation procedures is the second decision for which the applicant seeks a stay.

[15] The tripartite test for determining whether a stay should be granted was set out by the Supreme Court of Canada in *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]:

a) There is a serious issue to be tried;

b) The party seeking the stay would suffer irreparable harm should the stay not be granted; and

c) The balance of convenience favours a stay.

Serious Issue

[16] The applicant submits that the motion raises a number of serious issues to be tried. Chief among these is the question of whether the Transport Canada Inspectors acted reasonably in finding the fourth partial evacuation demonstration to be successful on the basis that Sunwing had not used the Sunwing normal and emergency operating procedures, as required by Condition 11 to the Exemption, but rather the amended emergency procedures which had been recommended by Transport Canada after the third partial evacuation demonstration, and which had not previously been subjected to a formal risk assessment. The applicant also questions the justification for the decision to amend the emergency procedures.

[17] Bearing in mind that the threshold with respect to whether there is a serious issue to be tried is a low one, *RJR-MacDonald*, above, at para 44, I accept that there are one or more serious issues in respect of this application for judicial review. In my view, the matter turns on whether the applicant will suffer irreparable harm and where the balance of convenience lies between CUPE and Sunwing.

Irreparable harm

[18] The applicant submits that the decisions under review create an immediate, material risk for both CUPE's members and for the public at large, which, in itself, amounts to irreparable harm. The applicant concedes that clear and cogent evidence of irreparable harm is required, but argues that in cases involving personal safety where the harm is grave, there does not need to be a high probability of an accident occurring and a "wait and see" approach is not appropriate. The applicant further submits that the loss of flight attendant positions at Sunwing is a secondary irreparable harm.

[19] The applicant's submissions regarding the harm to the personal safety of CUPE's members and the public at large require that a conclusion of irreparable harm be made on the basis of an inference that the blocking command prevents harm. However, evidence of irreparable harm must be "at a convincing level of particularity that demonstrates a real probability that unavoidable, irreparable harm will result unless a stay is granted" *Glooscap Heritage Society v Minister of National Revenue*, 2012 FCA 255 [*Glooscap*] at para 31. No such evidence was provided. Moreover, only harm suffered by the moving parties qualifies under this branch of the test: *Glooscap,* at para 33. For the purposes of this motion, I will assume that the moving party includes the union's members. Since there is no evidence to establish irreparable harm to the personal safety of CUPE's members, the applicant has not met this branch of the test on the basis of this argument.

[20] The applicant concedes that they are unable to point to any examples of situations in which the blocking command expedited emergency aircraft evacuations, prevented injury or saved lives. Their argument is based on the precautionary principle: "better be safe than to be sorry". I can conceive of several precautions that are obvious to ensure aviation safety, such as prohibiting the

flight crew from consuming alcohol or non-prescription drugs before flights. Leaving the decision as to whether to use any sort of shouted command to the discretion of trained flight personnel depending on the circumstances would appear to be, at first impression, a sensible approach. That is a question to be determined on the hearing of the application. For the purposes of this motion, it is sufficient that the applicant has failed to demonstrate how maintenance of the blocking command in the short term would prevent irreparable harm.

[21] The applicant has also failed to provide evidence to establish that the union will suffer irreparable harm from the loss of flight attendant positions at Sunwing. The applicant relies on Mr. William's statement that Sunwing would need to recruit and train up to 200 additional flight attendants to staff its flights if the motion is granted, to argue that CUPE's members have suffered job losses. However, this does not establish that Sunwing has terminated any CUPE members as a result of the two contested decisions, or that CUPE members have been hired as flight attendants and then dismissed. The applicant has not provided jurisprudence which stands for the proposition that individuals suffer irreparable harm by not being hired, and has not provided evidence that any flight attendants that were not hired by Sunwing for the current winter season as a result of this change in procedure were unable to obtain comparable employment elsewhere.

[22] Thus, the applicant has not established a real probability that it will suffer irreparable harm unless the stay is granted.

Balance of convenience

[23] The balance of convenience weighs against granting the stay.

[24] The applicant submits that the balance of convenience favours granting a stay because of the serious safety ramifications and the public loss of confidence created by the two decisions. However, the applicant provides no evidence to support either argument.

[25] On the other hand, the respondent Sunwing has provided evidence that Sunwing Travel Group as a whole would suffer more than $50 million in lost revenue for March and April 2014 alone, that Sunwing would suffer more than $8 million in lost revenue for March 2014 alone, and that Sunwing would incur $1.1 million in out-of-pocket expenses to the end of May 2014. The applicant disputes the respondent's calculations. For the purposes of this motion, I don't need to determine with any certainty what exact amounts Sunwing and its parent company would lose in revenue and profits or incur in additional expenses. It is sufficient that I conclude, as I have, that the Sunwing costs are real and calculable, whereas the applicant's are entirely speculative. Further, I accept the respondent's argument that even if the application for judicial review is heard and determined by December 2014, and there is no indication that this would be the case, the stay will have been in place for 75% of the period for which the Exemption was granted.

[26] For foregoing reasons, the applicant's motion is dismissed.

[27] The respondent Minister and Sunwing have requested costs. I have no difficulty in awarding costs to Sunwing for its success on this motion. The Minister's role in this matter is less clear. The

Minister stressed in argument that the decisions to change the evacuation procedures were ultimately taken by Sunwing and not by Transport Canada. In reply, the applicant submitted that the Minister's role was analogous to that of a tribunal approving actions taken by one party to a controversy. While I am not convinced that is correct, as the questions under review refer to decisions made by Transport Canada personnel, it seems to me that the Minister's role is that of a neutral arbiter of best practices in the interests of public safety. In the result, I will exercise my discretion not to award costs to the Minister.

ORDER

THIS COURT ORDERS that:

1. The applicant's motion is dismissed;

2. The November 27, 2013 and November 29, 2013 decisions shall remain in effect pending the outcome of the underlying judicial review application;

3. The respondent Sunwing shall have its costs of this motion in accordance with the normal scale; and

4. The respondent Minister shall bear her own costs.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2056-13

STYLE OF CAUSE: CANADIAN UNION OF PUBLIC EMPLOYEES v CANADA (MINISTER OF TRANSPORT) AND SUNWING AIRLINES INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 28, 2014

REASONS FOR ORDER AND ORDER: MOSLEY J.

DATED: JANUARY 30, 2014

APPEARANCES:

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