Federal Court of Appeal | Cour d'appel fédérale

Date: 20141209

Docket: A-405-13

Citation: 2014 FCA 288

CORAM: **NADON J.A.**
GAUTHIER J.A.
SCOTT J.A.

BETWEEN:

AIR CANADA

Appellant

and

MARLEY GREENGLASS AND CANADIAN TRANSPORTATION AGENCY

Respondents

Heard at Montréal, Quebec, on October 7, 2014.

Judgment delivered at Ottawa, Ontario, on December 9, 2014.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: GAUTHIER J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] On August 2, 2013, the Canadian Transportation Agency (the Agency) rendered its Final Decision (Decision No. 303-AT-A-2013 or the "Final Decision") concerning the application of Mrs. Marley Greenglass (the applicant) made pursuant to subsection 172(1) of the *Canada Transportation Act*, S.C. 1996, c.10 (the *Act*) against Air Canada's policy which allows the carriage of pet dogs in aircraft cabins particularly as it affects individuals, such as the applicant,

who have an allergy to dogs. At paragraphs 62 to 68 of the Final Decision, the Agency ordered Air Canada to comply with the following accommodation measures:

> **CONCLUSION**
>
> [62] The Agency therefore orders Air Canada to develop and implement the policies and procedures necessary to provide the following appropriate accommodation and to provide the requisite training to its staff to ensure the provision of the appropriate accommodation.
>
> **With respect to dogs carried as pets**
>
> [63] On aircraft with air circulation/ventilation systems using HEPA filters or which provide 100 percent unrecirculated fresh air:
>
> - a seating separation that is confirmed prior to boarding the flight and that provides a minimum of five rows between persons with a dog allergy disability and pet dogs, including during boarding and deplaning and between their seat and a washroom; or
>
> - a ban on pet dogs in the aircraft cabin in which a person with a disability as a result of their allergy to dogs is travelling.
>
> [64] On aircraft without air circulation/ventilation systems using HEPA filters or which do not provide 100 percent unrecirculated fresh air:
>
> - a ban on pet dogs in the aircraft cabin in which a person with a disability as a result of their allergy to dogs is travelling.
>
> [65] When advance notification of less than 48 hours is provided by persons with a dog allergy disability, a ban on pet dogs is to be provided if no person travelling with a pet dog has already booked their travel on the selected flight. If a person travelling with a pet dog has already been booked on the flight, persons with a dog allergy disability must be provided with the same flight ban accommodation within 48 hours on the next flight available on which there is no person with a pet dog already booked. If the next available flight is beyond the 48-hour period, persons with a dog allergy disability must be given priority and provided with the accommodation measures applicable when the 48-hour advance notice is given by the person with a dog allergy disability.
>
> **With respect to service dogs**
>
> [66] On aircraft with air circulation/ventilation systems using HEPA filters or which provide 100 percent unrecirculated fresh air:

- a seating separation that is confirmed prior to boarding the flight and that provides a minimum of five rows between persons with a dog allergy disability and service dogs, including during boarding and deplaning and between their seat and a washroom.

[67] On aircraft without air circulation/ventilation systems using HEPA filters or which do not provide 100 percent unrecirculated fresh air:

- give the booking priority to whoever of the person with a dog allergy disability and the person travelling with a service dog first completed their booking. A person with a dog allergy disability and a person travelling with a service dog will not be accepted on the same flight using an aircraft that does not have HEPA filters or which does not provide 100 percent unrecirculated fresh air.

[68] Air Canada has until September 16, 2013 to comply with this order.

[2] On October 10, 2013, Pelletier J.A. granted leave to Air Canada to appeal the Agency's Final Decision and on November 29, 2013, Air Canada filed its Notice of Appeal.

[3] The facts underlying this appeal are simple. In short, on a flight from Toronto to Phoenix, Arizona, the applicant was seated in a row directly behind a passenger accompanied by a dog. The presence of the dog caused "health issues" for the applicant, resulting in her flight being delayed. She took medication and put on a charcoal filter mask to prevent things from getting worse. Ultimately, the dog was moved, but by that time the applicant was feeling unwell and had to increase her medication throughout the flight. During the flight, the applicant had a second "attack" and it took her several days to recover.

[4] On February 7, 2012, the applicant filed her application against Air Canada's policy providing for the carriage of pets in aircraft cabins as it relates to her dog allergy.

[5] On March 6, 2012, the Agency adjourned her application pending the adjudication of a decision in an investigation into WestJet, Air Canada and Air Canada Jazz's policies with respect to persons whose allergy to cats results in a disability for the purposes of the *Act*.

[6] On June 14, 2012, the Agency issued its final decision regarding cat allergies (the "Cat Allergy Decision"). As part of this decision, the Agency determined the appropriate accommodation measures that the airlines had to adopt for persons allergic to cats (Decision No. 227-AT-A-2012).

I. The Decision under Review

[7] In addition to its Final Decision, the Agency made three other decisions which are relevant to this appeal as they form part and parcel of the Final Decision. These decisions are referred to as: the Initial Opening Pleading Decision, rendered on January 16, 2013; the Second Opening Pleading Decision, given on March 7, 2013; and the Show Cause Decision, rendered on June 5, 2013. A brief review of these decisions is necessary to fully understand the Final Decision and the issues which arise in this appeal.

A. *The Initial and Second Opening Pleading Decisions*

[8] On January 16, 2013, the Agency opened pleadings in the applicant's application and gave her an opportunity to complete her application following which Air Canada would have the opportunity to file a response.

[9] The Initial Opening Pleading Decision (this decision is numbered No. LET-AT-A-10-2013) set out a three step process for resolving applications through formal adjudication: first, the applicant would have to establish that she was a person with a disability for the purposes of the *Act*; second, the applicant would have to establish that she had encountered an "obstacle", i.e. that she needed, and was not provided with, accommodation; third, the Agency would determine whether the obstacle was an undue obstacle and whether corrective measures were therefore required to eliminate it.

[10] With respect to the third step, the Agency explained that an obstacle will not be considered "undue" if the service provider can justify its existence by showing that the removal of the obstacle would be unreasonable, impractical or impossible, such that any formal accommodation would cause the service provider undue hardship.

[11] The Initial Opening Pleading Decision found, on a preliminary basis, that the accommodation measures ordered by the Agency in the Cat Allergy Decision constituted the appropriate accommodation needed to meet the disability-related needs of persons who are disabled by an allergy to dogs.

[12] The Agency asked the applicant to provide a letter or medical certificate from a physician or allergist giving answers to a number of questions posed by the Agency. The Agency also requested that the applicant describe in detail how Air Canada's policy to allow the carriage of pets in the aircraft cabin affected her ability to engage in air travel.

[13] The applicant did not respond to the Initial Opening Pleading Decision as required. Consequently, the Agency closed her file (this decision is numbered No. LET-AT-A-28-2013).

[14] On February 21, 2013, the applicant resubmitted her application and informed the Agency that she was seeking the same accommodation which the Agency provided for those suffering from cat allergies in its Cat Allergy Decision.

[15] On March 7, 2013, the Agency reopened the applicant's file and sent the Second Opening Pleading Decision to the parties (this decision is numbered No. LET-AT-A-46-2013). In this decision, the Agency again set out the findings in the Cat Allergy Decision and noted the applicant's request that the accommodation measures adopted in that decision be provided to individuals with a dog allergy disability.

[16] On April 4, 2013, Air Canada filed its response to the Second Opening Pleading Decision in which it raised the issue of its obligations with respect to service dogs. On April 7, 2013, the applicant filed a reply to Air Canada's submissions and pleadings were considered closed.

B. *Show Cause Decision*

[17] On June 5, 2013, the Agency issued its Show Cause Decision (this decision is numbered No. LET-AT-A-82-2013) in which it made three final determinations and one preliminary determination.

[18] First, the Agency determined that the applicant was a person with a disability within the meaning of the *Act*. Second, it determined that the same accommodation which it provided to individuals in the Cat Allergy Decision was appropriate in this case. The Agency noted that Air Canada had submitted an internet article from the website "My Health News Daily" (published on July 26, 2012) which indicated that there were differences between cat and dog dander. More particularly, the article indicated that cat protein was so small and light that it could remain airborne for many hours. The article then quoted Dr. Mark Larche, Immunology Professor at McMaster University, to the effect that dog allergens do not remain airborne in the same way that cat allergens do. Based on this article, Air Canada submitted that the five row seating separation between cats and individuals with an allergy to cats, as recommended in the Cat Allergy Decision, may not be necessary for persons with a dog allergy.

[19] The Agency dismissed this argument in the following terms at paragraph 46 of the Show Cause Decision:

> Although the article submitted by Air Canada states that dog allergens are different than cat allergens in terms of the manner that they stay airborne, Air Canada did not file any evidence that specifies how the airborne features of dog allergens differ from those of cat allergens and the implications of any differences for persons with a dog allergy disability. Air Canada has not filed reasons that would support a finding that different measures are required to meet the needs of persons with a dog allergy disability as compared to those with a cat allergy disability based on differences in the manner in which the allergens stay airborne. Moreover, Air Canada provided no evidence that dog dander particles would not be effectively captured by HEPA filters or that an airflow of 100 percent fresh air would not rid the cabin of such particles.

[20] The Agency therefore concluded that, when at least 48 hours advance notification was provided by persons with a dog allergy disability (or best efforts were made when less than 48 hours notice is given), the appropriate accommodation with respect to service dogs was a seating

separation of a minimum five rows between dogs and individuals with a dog allergy on aircraft with either High Efficiency Particulate Air (HEPA) filters or which provide for 100 percent unrecirculated fresh air. For non-HEPA or unrecirculated fresh air aircraft (such as Bombardier Dash 8's), the appropriate accommodation was to provide the booking priority to whomever completed their booking first, whether it be the individual with the service dog or the person suffering from a dog allergy.

[21] Third, the Agency concluded that Air Canada's current policy with respect to the carriage of dogs in aircraft cabins constituted an obstacle to the mobility of individuals with a dog allergy, including the applicant.

[22] Lastly, the Agency preliminarily concluded that Air Canada's policy relating to the carriage of dogs in the aircraft cabin constituted an undue obstacle to the applicant's mobility and that of other individuals suffering from a dog allergy. The Agency requested that Air Canada show cause why this preliminary finding should not be finalized and the applicant was provided with the opportunity to reply to any submissions made in that regard by Air Canada.

C. *Final Decision*

[23] In its Final Decision, the Agency finalized its preliminary finding from the Show Cause Decision with respect to Air Canada's policy constituting an undue obstacle to the applicant's mobility and that of other persons with a dog allergy. Before reaching its conclusion, the Agency refused to consider the additional submissions made by Air Canada with respect to the Agency's determination in the Show Cause Decision concerning the appropriate accommodation in this

case. In brief, Air Canada argued that a key report, namely that of Dr. Sussman entitled "Report Addendum: Cat and Dog Dander in the Aircraft Cabin, May 23, 2008"referred to in both the Show Cause Decision and the Cat Allergy Decision, needed to be amended in order to take account of the specific situation of individuals with a dog allergy. Similarly, the Agency refused to consider further submissions made by the applicant concerning the need to amend Dr. Sussman's report.

[24] The main part of the Final Decision addressed the interpretation and application of a set of regulations from the United States Department of Transportation entitled *Nondiscrimination on the Basis of Disability in Air Travel*, 14 C.F.R. § 382 (2008) (the "U.S. Regulations"). Because of the conclusion which I have reached with regard to Air Canada's arguments on procedural fairness, I need not address nor discuss the Agency's findings on specific components of the U.S. Regulations.

II. Appellant's Submissions

[25] Air Canada makes a number of submissions as to why this appeal should be allowed. It says that the Agency reversed the burden of proof and made a decision in the absence of evidence, thus violating procedural fairness. It also argues that the Agency's refusal to consider its arguments regarding alternative appropriate accommodation violated procedural fairness. Lastly, it argues that the decision is unreasonable in that the effect of the Final Decision is that Air Canada will be forced to discriminate against people requiring service dogs in a manner that is specifically prohibited by the U.S. Regulations. Again, because of the conclusion that I have reached on the procedural fairness issue, I need not address Air Canada's last submission.

III. Standard of Review

[26] As indicated above, I intend to restrict my analysis to the procedural fairness issues raised by Air Canada. In this respect, there can be no doubt that these issues must be assessed against a standard of correctness (See *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at paragraphs 79 and 83).

IV. Analysis

[27] In my view, the procedural fairness issues which Air Canada raises stem mainly from the wording of the Initial and Second Opening Pleading Decisions by which the Agency attempted to set the 'ground rules' pursuant to which it would adjudicate the applicant's application. As it turned out, the process resulted in a denial of procedural fairness to Air Canada. It goes without saying that this result was not intentional. However, in the end, it appears that form took over substance and the process became rigid and inflexible. Air Canada was prevented from submitting evidence on a number of crucial issues such as obstacle and appropriate accommodation. This situation occurred by reason of the approach taken by the Agency and the manner in which it communicated its 'game plan' to the parties.

[28] Because I conclude that in the particular circumstances of this case Air Canada was deprived of procedural fairness, I would allow this appeal. My reasons for so concluding are as follows.

[29] I begin with page 10 of Appendix A of the Initial Opening Pleading Decision where the Agency informed the parties that it was the applicant's burden to establish her need for

accommodation and that her need was not met by Air Canada's policy. The text found at page 10 of Appendix A is as follows:

> It is the Applicant's responsibility to provide sufficiently persuasive evidence to establish their need for accommodation and to prove that this need was not met. The standard of evidence that applies to this burden of proof is the balance of probabilities.

[30] The Agency repeated this statement at paragraph 37 of the Show Cause Decision.

[31] This theme was reiterated by the Agency in a decision (Decision No. 430-AT-A-2011) rendered on December 15, 2011, which forms part and parcel of its Cat Allergy Decision where, at paragraph 225, it said that "the Applicants have not provided persuasive evidence that seat row separation is ineffective and the burden, at the obstacle phase, lies upon them to show that this is the case".

[32] The above language suggests that it was up to the applicant to prove her need for accommodation and that her need had not been met by Air Canada. However, at page six of the Initial Opening Pleading Decision, the Agency appears to be saying something different. There it states that the applicant must establish her need for accommodation if that need differs from the Agency's preliminary finding of appropriate accommodation in the Cat Allergy Decision. In other words, the Agency seems to be saying that the applicant need not do anything unless she wants accommodation other than what the Agency found in the Cat Allergy Decision. The relevant passages read as follows:

> – The applicant will have until February 6, 2013 to establish that she is a person with a disability, and that she requires an accommodation measure that is different from the Agency's preliminary finding of appropriate

> accommodation to meet her disability-related needs and those of persons with a disability as a result of their allergies to dogs, should this be her view;
>
> – The respondent will have until February 20, 2013 to respond to the applicant's submissions on disability and obstacle/appropriate accommodation, and to file undue hardship arguments with respect to the Agency's preliminary finding of appropriate accommodation and any other alternative suggested by the applicant and to propose another form of accommodation;
>
> – The applicant will then have until February 25, 2013 to file a reply.

[33] To make matters slightly more complicated, at page two of the Second Opening Pleading Decision, which allowed the applicant to reinstitute her application, after indicating that the applicant was requesting the same accommodation provided in the Cat Allergy Decision, the Agency proceeded to inform Air Canada that it had until March 28, 2013 (this date was extended to April 4, 2013) to file submissions in response to the applicant's submissions on disability and obstacle/appropriate accommodation and to file undue hardship arguments. The relevant passages read as follows:

> On February 21, 2013, Mrs. Greenglass filed the attached application and Disability Assessment Form in regards to her allergy to dogs. Mrs. Greenglass requests that the aforementioned accommodation determined by the Agency for persons with a cat allergy disability be provided by Air Canada to persons with a dog allergy disability.
>
> The respondent has until March 28, 2013 to respond to the applicant's submissions on disability and obstacle/appropriate accommodation, and to file undue hardship arguments with respect to the Agency's preliminary finding of appropriate accommodation and to propose another form of accommodation, following which the applicant will have until April 4, 2013 to file a reply.

[34] The difference in substance between the two texts reproduced immediately above is that, at the time of the Initial Opening Pleading Decision, the applicant had not indicated that she was

adopting the accommodation described by the Agency in the Cat Allergy Decision, whereas at the time of the Second Opening Pleading Decision, she had done so.

[35] Air Canada argues that the Agency reversed the burden of proof when it allowed the applicant to import the Cat Allergy Decision without any supporting arguments or evidence. It submits a number of legal arguments in support of this position. I am far from convinced, on the authorities, that Air Canada's assertion is correct. However, I am satisfied that Air Canada was misled by the two opening pleading decisions, the relevant passages of which I have already reproduced. More particularly, the implication of the Agency's direction to Air Canada that it would have to respond to the applicant's submissions by March 28, 2013 is that there would actually be submissions made by the applicant on the questions of obstacle/appropriate accommodation.

[36] With hindsight, it is clear to me that the Agency considered that the applicant had already made her submissions when she adopted the accommodation determined in the Cat Allergy Decision. Therefore, Air Canada should not have waited for the applicant's submissions, but should have responded to the accommodation measures determined by the Agency in the Cat Allergy Decision on the understanding that those measures had been put forward by the applicant and that they would be adopted by the Agency unless rebutted.

[37] However, also with the benefit of hindsight, it is obvious to me that Air Canada plainly misunderstood the Agency's opening pleading decisions and did not, prior to the rendering of the

Show Cause Decision, adduce any evidence concerning obstacle/appropriate accommodation other than the internet article described above.

[38] I am satisfied that Air Canada understood that the applicant was obliged to demonstrate why she required the measures prescribed by the Agency in the Cat Allergy Decision, i.e. a seat separation of at least five rows on planes with HEPA filters or with systems which provide 100 percent unrecirculated fresh air and the exclusion of all dogs from the planes without such systems, and not a different form of accommodation. As the applicant adduced no evidence, Air Canada did not adduce the evidence which it says it could have produced to counter the importation of the Cat Allergy Decision. In particular, Air Canada argues that it would have submitted evidence to the effect that less disruptive measures could be implemented to accommodate both those travelling with dogs and those suffering from dog allergies. However, as events unfolded, that evidence was not submitted because of the Agency's refusal to entertain it.

[39] The only evidence which Air Canada did adduce was the internet article. In the Show Cause Decision, the Agency considered that article and held that it did not explain how the airborne features of dog allergens differed from those of cat allergens and the consequences or implications of any difference for persons such as the applicant. Therefore, there was no evidence to support the view that different measures of accommodation would suffice to meet the needs of persons with a dog allergy disability. The Agency further held that there was also no evidence that dog dander particles would not be effectively captured by HEPA filters or that an airflow of 100 percent unrecirculated fresh air would not rid the cabin of such particles.

[40] In the absence of any evidence on the part of Air Canada, the Agency concluded that the accommodation measures which it had ordered in the Cat Allergy Decision constituted the appropriate accommodation needed to address the needs of persons who were disabled by reason of an allergy to dogs, whether they be service dogs or pets.

[41] After finding that Air Canada's policy with respect to the carriage of dogs in an aircraft cabin constituted an obstacle to the applicant's mobility and that of other persons with a dog allergy, the Agency turned to the question of whether the obstacle was undue. To this question, it gave a preliminary answer which was that Air Canada's policy constituted an undue obstacle to the mobility of the applicant and of other persons with a dog allergy disability. Consequently, at paragraph 89 of the Show Cause Decision, the Agency indicated that it would provide Air Canada with an opportunity to submit evidence with regard to this preliminary finding. It stated, at paragraph 90, that "Air Canada is required to show cause why the Agency should not finalize its preliminary finding with respect to undue obstacle regarding the appropriate accommodation to be provided to persons with a disability due to an allergy to dogs".

[42] In response, Air Canada made detailed submissions regarding the operational conflict that the Agency's proposed accommodation created with the U.S. Regulations and further argued that the burden created by those measures was undue since less intrusive measures could be put in place while still fulfilling the needs of persons such as the applicant. More particularly, Air Canada argued that as its goal was to minimize situations where it would have to displace or remove a passenger from a flight, particularly where that person was a person with a disability, it

intended to propose alternatives with regard to the carriage of dogs on board aircrafts that were not equipped with HEPA-type filters.

[43] Air Canada concluded its submissions by requesting that the Agency remove its conclusion in the Show Cause Decision that a person with a dog allergy disability and a service dog could not be accepted on the same aircraft if that aircraft did not have HEPA filters or did not provide 100 percent unrecirculated fresh air.

[44] However, in its Final Decision, the Agency refused to consider the above submissions on the ground that they had not been filed within the time given to Air Canada to do so. The Agency explained that it had given Air Canada an opportunity to provide evidence and submissions regarding the question of obstacle and appropriate accommodation when it rendered its Second Opening Pleading Decision, adding that the purpose of the Show Cause Decision was not to give Air Canada a second chance to address the same question, but rather to allow it to comment on the Agency's preliminary finding of undue obstacle. Consequently, Air Canada's submissions, as well as those made by the applicant on the same topic, were deemed out of time and, as a result, not considered.

[45] Thus Air Canada was unable, for all intents and purposes, to either adduce evidence or provide submissions with regard to the important questions of obstacle and appropriate accommodation. Air Canada argues, and I agree entirely, that the Agency's rationale seems to have been that the undue character of the proposed accommodation could be examined in a vacuum independent of the existence of other possibly less intrusive remedies.

[46] It appears to me that in the grander scheme of things, fairness required that Air Canada be given the opportunity to make submissions with regard to alternative accommodation, even at the "undue obstacle" stage of the Agency's inquiry. It is safe to say that had the Agency allowed Air Canada to make these submissions, they would not have had any impact on the applicant's application other than to the extent that different measures of accommodation might have been found.

[47] It is clear that there was a breakdown in communications between Air Canada and the Agency. Air Canada understood from the two opening pleading decisions that it was to respond to the applicant's submissions on, *inter alia*, obstacle and appropriate accommodation. When the applicant made no submissions, Air Canada believed that it had nothing to which it needed to respond. This explains why it submitted practically no evidence other than an internet article. This, in due course, led to further procedural problems.

[48] I have no hesitation in saying that common sense has not prevailed in the present matter. The Agency determined important issues, not only for the applicant and all those having dog allergies, but also for Air Canada. It did so without the benefit of any real evidence being adduced by the parties and, more particularly, by Air Canada. This was the result of Air Canada's apparent difficulty in fully understanding the meaning of the various directions given by the Agency in its opening pleading decisions.

[49] Had common sense prevailed, one would have expected the Agency, at some point in time, to realize that it was disposing of these important issues without, in effect, the full

participation of Air Canada. I concede, as I must, that the Agency is entitled to establish its rules and procedures. However, in the end, the rules and procedures are there to serve the interests of justice. In my view, justice in this case required that Air Canada be given the opportunity of adducing evidence on the issues of obstacle, appropriate accommodation and undue hardship. That has not really taken place in this case.

V. Disposition

[50] Consequently, I would allow the appeal, set aside the Final Decision, rendered by the Agency on August 2, 2013 and return the matter to the Agency for reconsideration in the light of these reasons. In view of the particular circumstances of this case, I would not make any order as to costs.

"M Nadon"

J.A.

“I agree.
Johanne Gauthier J.A.”

“I agree.
A.F. Scott J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-405-13
(APPEAL FROM DECISION NO. 303-AT-A-2013 OF THE CANADIAN TRANSPORTATION AGENCY DATED AUGUST 2, 2013, FILE NO. U3570/13-01171)	
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CONCURRED IN BY:	GAUTHIER, SCOTT JJ.A.
DATED:	DECEMBER 9, 2014

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