

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170331

Docket: A-419-15

Citation: 2017 FCA 64

**CORAM: PELLETIER J.A.
WEBB J.A.
NEAR J.A.**

BETWEEN:

**GREATER TORONTO AIRPORTS
AUTHORITY**

Appellant

and

**CANADIAN TRANSPORTATION AGENCY
AND DONNA JODHAN**

Respondents

Heard at Toronto, Ontario, on September 14, 2016.

Judgment delivered at Ottawa, Ontario, on March 31, 2017.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

**WEBB J.A.
NEAR J.A.**

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] On January 13, 2014, Ms. Donna Jodhan returned to Canada from Trinidad aboard a Caribbean Airlines Ltd. (Caribbean) flight. Though she had requested passenger assistance services that were appropriate for a visually impaired person, she was met by a staff member with a wheelchair. She advised the staff member that she did not require a wheelchair; she only needed someone to walk with her so that she could take their arm while she walked. Ms. Jodhan

waited for 45 minutes before she received appropriate assistance to the immigration arrivals area: Appeal Book at 15.

[2] Ms. Jodhan filed a complaint with the Canadian Transportation Agency (Agency) about the lack of appropriate services for a person with a disability. Her complaint identified the Greater Toronto Airports Authority (GTAA) as the service provider and sole respondent. The GTAA responded by asking the Agency to dismiss the complaint against it or alternatively to add Caribbean and Servisair Inc. (Servisair), a disability service provider holding contracts with both the GTAA and Carribbean, as respondents. By letter decision no. LET-AT-A-32-2015 (the Decision), the Agency dismissed the GTAA's request. The GTAA appeals to this Court to set aside the Agency's decision.

[3] For the reasons which follow, I would dismiss the appeal without costs.

I. Facts

[4] The GTAA operates Pearson International Airport (Pearson), which is Canada's largest airport and the fifth busiest airport in North America. Approximately 65 air carriers operate at Pearson.

[5] The provision of services to persons with disabilities is governed by Part VII of the *Air Transportation Regulations*, SOR/88-58 [ATR]. Subsection 146(1) stipulates that Part VII applies only to domestic flights, but the Agency has repeatedly held that while Part VII of the ATR does not apply directly to international flights, the underlying principles do. This means that, in

practice, the service requirements of the *ATR* apply to international flights as well as domestic flights, at least insofar as the Canadian operations of international carriers are concerned.

[6] Subsection 147(1) of the *ATR* requires air carriers to provide disabled persons such assistance as they require from the check-in counter to their seat on a flight and from their seat to the general public area upon arrival. In addition, subsection 147(2) requires that, when a reservation is being made, the air carrier shall, upon request, describe the services that it is required to provide pursuant to subsection 147(1) and to confirm which services the person requests.

[7] The scheme for the provision of services to persons with disabilities in place at Pearson is described in the following paragraphs taken from the GTAA's Memorandum of Fact and Law, supported by references to the GTAA's answer to Ms. Jodhan's application:

13. The air carriers at Pearson Airport participate in the Airport Customer Assistance Program ("ACAP"). The ACAP is a collaborative service model under which the air carriers each contract with a common service provider who provides assistance to passengers with disabilities on behalf of each of the individual air carriers. This service model is common in the aviation industry, as it provides for a more consistent, efficient, and organized service for such passengers.

GTAA's Answer to the Application at paras. 11, 14 [Appeal Book at 37].

14. At the relevant time, ACAP services were delivered by Servisair, which is a company engaged in the business of providing passenger services, ground handling, and other services to air carriers.

15. Specifically, Servisair, through the ACAP, provided assistance at Pearson Airport to persons with disabilities from curbside to gate for departing passengers and from gate to curbside for arriving passengers.

GTAA's Answer to the Application at paras. 11-12 [Appeal Book at 37].

16. At the relevant time, the GTAA was party to a Service Agreement with Servisair (the "Service Agreement"). Under the Service Agreement, the GTAA

licensed Servisair to provide a range of services to air carriers for passengers who required assistance in proceeding through Pearson Airport's terminals. The services provided by Servisair included walking with a visually impaired passenger who required assistance to or from the gate of his or her flight.

GTAA's Answer to the Application at para. 13[Appeal Book at 37].

17. The Service Agreement required that Servisair enter into a separate Carrier Service Agreement with each of the air carriers who required such services for their respective passengers. The terms of the service to be provided to passengers requiring assistance were confirmed in these Carrier Service Agreements.

GTAA's Answer to the Application at paras. 14,16 [Appeal Book at 37-38].

18. The air carriers entered into such agreements with Servisair. The GTAA was not a party to the Carrier Service Agreements.

GTAA's Answer to the Application at paras. 14-16 [Appeal Book at 36-37].

19. It is the responsibility of a passenger either directly or through his or her travel agent to request assistance from the air carrier and to do so within 48 hours of departure. Once this request is received, it is the responsibility of the air carrier to ensure that the assistance is provided on the day of the flight. This means that the air carrier must contact the Servisair dispatch centre to give notice of the passenger's name, flight details, and a summary of the assistance required.

GTAA's Answer to the Application at para. 17 [Appeal Book at 38].

20. Servisair was then responsible for meeting and assisting the passenger identified by the air carrier. Servisair provided ACAP services through its own workforce that was hired, trained, supervised, and paid by Servisair. The employees of Servisair who provided the ACAP services were trained in the proper means of providing assistance to passengers with different forms of disability, including passengers with visual impairments.

GTAA's Answer to the Application at para. 18 [Appeal Book at 38].

21. The GTAA did not receive requests from individual passengers for assistance, nor was the GTAA involved in making the arrangements described above.

GTAA's Answer to the Application at para. 17 [Appeal Book at 38].

II. The decision under review

[8] The Agency's response to the GTAA's request that Caribbean and Servisair be added as respondents and that the complaint against it be dismissed is summarized below.

[9] The Agency first considered the request that Caribbean be added as a respondent.

[10] The Agency began by reviewing the GTAA's responses to interrogatories. The GTAA submitted that the party operationally responsible for providing guidance and luggage assistance at Pearson is Servisair. It explained that its agreement with Servisair included a broad mandate to provide "operational support services" to passengers with disabilities, which includes those with "vision loss." The GTAA also noted that the statutory obligation to provide services to passengers with disabilities rests on Caribbean, which engages Servisair to discharge the obligation. The GTAA further noted that it had no involvement in or knowledge of the events giving rise to Ms. Jodhan's complaint.

[11] After noting that Caribbean normally has obligations towards its passengers with disabilities, the Agency found that, in the particular circumstances of this case, the GTAA had assumed those obligations. The Agency identified four factors which justified its conclusion:

- 1 As a condition of allowing Caribbean to operate from Pearson, the GTAA required Caribbean to sign a contract with Servisair whereby all services for passengers with disabilities would be provided by the latter and not by Caribbean.
- 2 The GTAA dictates the parameters of services provided for passengers with disabilities through a procedures manual that incorporates the ACAP training program. This manual is developed in conjunction with the GTAA and is maintained and updated under the GTAA's direction.
- 3 In light of the foregoing, Caribbean neither controlled which services were available nor how and by whom they were provided. Rather, GTAA had "de facto" control.

- 4 Since both the GTAA and Caribbean fall within the Agency’s jurisdiction, there is no risk that failing to add Caribbean to the application as a respondent would allow the latter to evade Agency oversight.

(Appeal Book at 9.)

[12] Based on these findings, the Agency refused the GTAA’s request to add Caribbean as a respondent.

[13] As for Servisair’s participation in Ms. Jodhan’s application, the Agency held that a transportation service provider operating within the federal transportation network such as the GTAA cannot “escape its statutory responsibilities by relying on a contractor to perform its obligations”: Appeal Book at 10. The Agency found support for its view in section 4 of the *Personnel Training for the Assistance of Persons with Disabilities Regulations*, SOR/94-42 [*Training Regulations*], which provides as follows:

4 Every carrier and terminal operator shall ensure that, consistent with its type of operation, all employees and contractors of the carrier or terminal operator who provide transportation-related services and who may be required to interact with the public or to make decisions in respect of the carriage of persons with disabilities receive a level of training appropriate to the requirements of their function...

4 Le transporteur et l’exploitant de terminal doivent s’assurer que, selon leur type d’exploitation, leurs employés et entrepreneurs qui fournissent des services liés au transport et qui peuvent être appelés à transiger avec le public ou à prendre des décisions concernant le transport des personnes ayant une déficience reçoivent une formation adaptée aux besoins de leurs fonctions...

[14] The Agency concluded from this that the GTAA was responsible for ensuring that its contractors receive the appropriate training and provide the required assistance to persons with disabilities. As a result, the Agency determined that Servisair’s participation was not necessary for the resolution of the dispute.

III. Analysis

[15] The standard of review of the Agency's interpretation and application of its home legislation, including issues related to human rights, as is the case here, is reasonableness: *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 100, [2007] 1 S.C.R. 650 [*VIA Rail*]. Reasonableness is the presumptive standard of review, unless the issue comes within certain narrow exceptions, one of which is "true questions of jurisdiction": *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30, [2011] 3 S.C.R. 654. Questions of contractual interpretation are questions of mixed fact and law, reviewable on the standard of reasonableness: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50-55, [2014] 2 S.C.R. 633. In general, administrative tribunals are given wide latitude in crafting their procedural rules and in applying them: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 27, 174 DLR (4th) 193; *VIA Rail* at para. 231.

[16] It is useful to remember that the question which was before the Agency was whether Caribbean and Servisair should be added as respondents to Ms. Jodhan's complaint. In general terms, the critical issue in deciding whether entities are added or removed as parties is whether their presence is required to determine the matters in issue. That appears to be the test which the Agency invoked when it held that "the participation of Caribbean is not necessary for the resolution of the dispute": Appeal Book at 10.

[17] At this stage, it is not known why Ms. Jodhan did not receive the assistance which she requested. It appears to me to be premature to conclude that the problem lies with the policies for which the GTAA appears to have been found responsible. The problem may lie with the mundane mechanics of service delivery.

[18] Recall that Ms. Jodhan's complaint is that she requested certain services, but that when she disembarked she was met by a service provider who was not equipped to provide her with the services she had requested. The fact that a form of assistance was supplied, even though it was the wrong form of assistance, necessarily means that there was a request for services by Ms. Jodhan, or someone on her behalf, from one of the GTAA, Caribbean or Servisair. Furthermore, it is likely that there were communications between either the GTAA or Caribbean and Servisair.

[19] The failure to provide an appropriate form of assistance following those communications may be the result of poor policy or inadequate training, but it may also be the result of something as banal as error, indifference or carelessness on the part of the relevant employee. It may also be the result of a failure of supervision by that person's immediate supervisor. In other words, the responsibility for the error may lie with the staff who provided the inappropriate service or it may lie nearer those responsible for policy development. It is for the Agency to consider the evidence and to make the appropriate findings of fact.

[20] By declining to add Caribbean or Servisair as respondents, the Agency has made its task more difficult and has imposed a burden on the GTAA which it would not have if Caribbean and Servisair were there to defend their positions.

[21] The GTAA argues that the Agency has in this way breached its right to procedural fairness by declining to add Caribbean and Servisair as parties. In my view, this claim is premature: *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paras. 30-32, [2011] 2 F.C.R. 332. Depending upon the manner in which the Agency decides to proceed (a hearing or a decision on a paper record), the consequences of the Agency's decision for the GTAA's ability to defend its point of view may or may not be impaired. The GTAA certainly has the ability to speak to its contracting parties and is likely able to put their evidence before the Agency in one way or another. Without having the benefit of the Agency's final decision and the reasons given in support of it, it is premature to say if the GTAA's right to procedural fairness has been breached.

[22] The GTAA's appeal focuses on the fact that the Agency has imposed service obligations on it which it says are not imposed by the relevant legislation. The Agency came to its conclusion with respect to the GTAA's service obligations, in part, by reference to the GTAA's contracts with Caribbean and Servisair. The Agency concluded that the GTAA, by compelling Caribbean to use Servisair as its disability services provider and determining the service standards through its procedures manual, had assumed Caribbean's obligations.

[23] This conclusion is one of fact and law which cannot be attacked in this appeal. Subsection 41(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 provides that an appeal from the Agency to this Court lies only on a question of law or jurisdiction. As noted earlier, the Supreme Court has now held that the interpretation of a contract, long thought to be a question of

law, is a question of mixed fact and law. As a result, the GTAA cannot challenge the Agency's interpretation of its contracts in this Court.

[24] The Agency also relied on its interpretation of the *Training Regulations* to find that the GTAA was responsible for providing services to persons with disabilities. After reviewing s. 4 of the Training Regulations, the Agency wrote "...the GTAA has the responsibility to ensure its employees and contractors receive the appropriate training and provide the required assistance to persons with disabilities": Appeal Book, p. 10 The GTAA reads this as a finding that its employees are responsible for providing the required assistance to persons with disabilities. When the sentence quoted above is read in conjunction with s. 4 of the Training Regulations, it could also be interpreting as requiring air terminal operators to provide all persons who provide transportation related services to persons with disabilities an appropriate level of training.

[25] Given that the Agency has not come to any final conclusion on Ms Jodhan's complaint, we are not in a position to resolve the ambiguity in the Agency's interpretation of s. 4. That said, I am not persuaded that the Agency has in fact interpreted the *Training Regulations* in any meaningful sense of that term. The Supreme Court teaches that statutory interpretation must consider the text, context and purpose: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 36 OR (3d) 418. In this case, the Agency has simply pointed to the words of the *Training Regulations* and stated what appears to it to be a self-evident conclusion. Before deferring to the Agency's interpretation of its home legislation, I do not think it unreasonable to ask that the Agency address the task in the way which the Supreme Court teaches it should be done.

[26] As a result, I am of the view that the Agency's interpretation of the *Training Regulations* is but a provisional conclusion which it has relied on for the purposes of this interlocutory motion. It should not be treated as a definitive statement of an airport operator's responsibilities with respect to services for persons with disabilities.

[27] Finally, the GTAA argues that the Agency's conclusion as to its responsibilities for providing services to persons with disabilities amounts to an unlawful amendment of a regulation by way of an adjudicative proceeding. I believe that the GTAA's argument on this point is also premature. Once the Agency has considered the evidence put before it on the substantive issues and has addressed the interpretation of the *Training Regulations* as taught by the Supreme Court, the GTAA may no longer have the same concerns. Until that time, this Court should allow the proceedings before the Agency to proceed without interference.

IV. Conclusion

[28] For these reasons, I would dismiss the appeal. Since both Ms. Jodhan and the Agency have asked that costs not be awarded for or against them, there will be no order as to costs.

"J.D. Denis Pelletier"

J.A.

"I agree
Wyman W. Webb J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

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NEAR J.A.

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