Date: 20060601

Docket: T-776-02

Citation: 2006 FC 673

BETWEEN:

PAMELA SACHS, CANADIAN UNION OF PUBLIC EMPLOYEES, AIRLINE DIVISION, AIR CANADA COMPONENT, OCCUPATIONAL HEALTH AND SAFETY COMMITTEE of LOCAL 4004 (TORONTO)

Applicants

and

AIR CANADA, DOUGLAS MALANKA, JACQUES SERVANT

Respondents

REASONS FOR ORDER

HUGHES J.

[1] This is an application made by the union representing airline employees of Air Canada for judicial review in respect of a decision of an Appeals Officer under the *Canada Labour Code* dated April 18, 2002 (Decision number 02-004). It was held that the Officer did not have jurisdiction to hear an appeal of a determination of a Health and Safety Officer that a danger did not exist in the workplace. In the alternative, an extension of time for instituting proceedings for judicial review of the decision of the Health and Safety Officer, is sought.

[2] In the year 2000 Canada's two major airlines were merged, Canadian International Airlines was merged into Air Canada. As part of that merger the surviving entity, Air Canada, was required to obtain a single Air Operator Certificate before intermingling of flight crews was to be permitted. Part of that operation required that a single Manual to be used by flight crews dealing with matters including health and safety issues was to be created. In addition to the production of a new Manual, cabin personnel from both airlines were to be trained in the procedures set out in that Manual.

[3] Late in 2000 a Manual was prepared said to incorporate the best of procedures from both airlines. The union representing cabin personnel obtained a copy of the Manual on November 10, 2000. On December 7, 2000 the union was advised that Air Canada intended that the new Manual be effective as of January 3, 2001. The union had a number of concerns relating to the health and safety aspects of the new Manual and whether sufficient personnel could be adequately trained by January 3, 2001. A meeting was held between representatives of Air Canada and the union following which, on December 22, 2000 the union submitted a letter with a substantial appendix outlining in detail its concerns.

[4] Air Canada, in letters of December 29, 2000 and January 3, 2001, expressed a willingness to continue a dialogue with the union and working with them.

[5] On January 2, 2001 the union filed a complaint with Transport Canada requesting that implementation of the Manual be delayed and directions be given to halt what the union perceived as contraventions of the *Canada Labour Code*. That same day Transport Canada responded stating, erroneously, that certain internal resolution procedures needed to be instituted first. Further that

same day the union responded in writing pointing out the error. Later, but still on the same day, Transport Canada responded in writing stating “we do not believe that the dangers exists.” The next day in a telephone conversation, Transport Canada informed the union that an investigation was underway. This statement was subsequently confirmed by letter from Transport Canada to the union dated January 19, 2001.

[6] The investigator appointed under the provisions of section 127.1(9) of Part II of the *Canada Labour Code* was a person whom the union alleges was not fair, impartial or unbiased. According to the uncontradicted evidence before this Court, that person was heard to state that the chairperson of the union’s health and safety branch was one of the people in the airline industry that she hated most, and that the investigator “rolled her eyes and muttered disparaging comments” about that chairperson during a presentation she made at another occasion. This person, the union alleges, could not make an unbiased report.

[7] The investigator made investigations and produced a report under cover of a Memorandum dated March 14, 2001. That report indicates that the investigator spoke only to Air Canada representatives and appears to have made no effort to speak to the union or to flight crew employees. This, the union alleges, constitutes procedural unfairness.

[8] The union alleges, therefore, that the report is a nullity since, the investigator was biased and the procedure followed was fatally flawed.

[9] The investigator's report was essentially adopted by the Health and Safety Officer of Transport Canada. In two instances where it was found in the report that concerns may exist, Air Canada provided an assurance of voluntary compliance (AVC). In a letter to the union dated May 7, 2001 that Officer concluded:

> *To ensure that occupational health and safety becomes part of the overall corporate decision making process, Managers in each department of the company must be aware that decisions regarding changes on-board aircraft may affect the aircrew's work and create hazards in their workplace. Decisions and initiatives shall be discussed with the policy committee. These concerns were conveyed to Air Canada by requesting assurances of voluntary compliance.*
>
> *We could not find any evidence that Air Canada has contravened the employer's general duty to ensure that the safety and health at work of every person employed by the employer is protected. In fact, by having a required flight attendant manual where safety and emergency procedures are set out demonstrates that the employer assumes his responsibilities under section 124.*
>
> *Our investigation reveals that the employees' workplace representative in Dorval received verbal complaints regarding Transmittal # 147. These complaints should have been sent to Management. When there are health and safety concerns raised by the employees regarding implementation of changes in the flight attendant manual, they shall be raised at the local health and safety committee meetings.*
>
> *The 'union committee' submitted its written comments to Air Canada on December 22, 2000. We regret to inform you that, this does not constitute a recognized committee according to the Canada Labour Code, Part II. These comments were reviewed and did not demonstrate that danger existed with the points mentioned in the transmittal. When employees have concerns regarding health and safety, they shall address them through the policy or work place committee as appropriate.*

[10] The union filed an appeal under section 146 and 146.1 of the *Canada Labour Code* from that decision. The appeal was conducted by an Appeals Officer appointed under section 140 (1) of the *Code*. That Officer, in a letter dated June 7, 2001 to the union's solicitors stated:

> *The Code does not authorize an appeals officer to review an AVC (assurance of voluntary compliance) accepted by a health and safety officer.*
>
> *Therefore, this office cannot investigate into or comment on the appropriateness of a decision by a health and safety officer to accept an AVC instead of issuing a direction in a given situation.*

[11] That letter amplified a decision by the Officer dated April 18, 2002. In that decision the Appeals Officer addressed the concerns raised by the union in this judicial review proceeding including at the following paragraphs:

> *While a definition in the Canada Occupational Health and Safety Regulations is not necessarily binding in respect of terms found in the Code, I take from subsection 140. (1) and subsection 122.1 (purpose clause of the Code) that health and safety officers must be capable of exercising the discretion available to them in the Code. It seems to me that if an employer or employee feels that the investigation of a health and safety officer is biased or fundamentally flawed, their recourse is to complain to the Department of Human Resources Development Canada or directly to the Minister of Labour. I expect that the employer or employee could also seek judicial review.*
>
> *Paragraph 127.1 (10) (a) and subsection 145.(1) of the Code explicitly provides health and safety officers with the discretion whether or not to issue a direction in the case of a contravention of Part II. Section 145.(1) has existed in some form since at least 1984, section 127.1 was added when the Code was amended in 2000. While not definitive, it seems to me that, if the absence of appeal of a decision not to issue a direction in respect of a contravention was proven over this time to constitute a serious omission, Parliament had an opportunity in 2000 to revise and include an appeal process. They did not.*
>
> *In this regard, it makes some sense to me that Parliament provided health and safety officers with discretion to issue directions because contraventions to the Code can range from minor to serious. In the case of less serious contraventions, the discretion provided to health and safety officers in paragraph 127.1(10)(a) and section 145.(1)of the Code permits officers to obtain compliance via alternative enforcement strategies, such as accepting an AVC.*

> *Finally, even if I were to conclude from this that appeals officers have the implicit authority suggested by Ms. Symes, the problem I have is that I can find no authority under the Code to remedy the situation. Specifically, section 146.1 of the Code only authorizes an appeals officer to issue a direction in the case of danger and does not address contraventions. Seemingly, Parliament would have given the appeals officer authority to issue a direction in respect of a contravention, or to return a file to the health and safety officer, if this had been Parliament's intent when the Code was amended in 2000. Subsection 146.1(1) reads:*
>
> *For deciding the issue, I found the arguments on both sides to be compelling. I am sympathetic with the argument made by Ms. Symes that the absence of a mechanism in the Code to appeal an investigation of a health and safety officer that is biased or fundamentally flawed is somewhat contradictory to the IRS provisions and purpose clause of Part II. Untested evidence in the case, (reference paragraph [3]), suggests that the health and safety officer at Transport Canada may not have investigated CUPE's complaint of danger in the presence of employees and employers in connection with the officer's finding of no-danger. If this were the case, CUPE's motivation to pursue this is understandable.*
>
> *However, try as I might, I cannot persuade myself that the Code implicitly authorizes an appeals officer to review a decision by a health and safety officer not to issue a direction, whether or not the officer's investigation is biased or flawed. Regrettably, I find that I do not have jurisdiction to hear the appeal and the file is now closed.*

[12] The union seeks judicial review of the Appeals Officer's decision of April 18, 2002 and raises the following issues:

1. Did the Appeals Officer err in finding that, under the *Code*, he had no jurisdiction to hear the appeal?
2. If the Appeals Officer did not err, is section 146(1) of the *Code* of no force and effect as a violaton of section 7 of the *Canadian Charter of Rights and Freedoms*?
3. If the Officer did not err, and section 146 (1) does not violate the *Charter*, should an extension of time be granted so that the union may seek leave to apply for judicial

> review in respect of the decision of May 7, 2001 of the Chief, Aviation Occupational Health and Safety, Transport Canada.

Issues # 1 Did the Appeals Officer err in his finding that under the *Code*, he had not jurisdiction to hear the appeal?

[13] The Court must first embark upon the task of establishing the standard of review applicable to the decision under review. As instructed by the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R 982 at paragraph 27 the Court must adopt a "pragmatic and functional" approach in determining where in the "spectrum" the decision at issue stands, whether towards the "more exacting end" or the "more deferential end." To be of assistance the Supreme Court invited inquiry in respect of four factors (i) Privative Clauses (ii) Expertise (iii) Purpose of the Act as a whole, and the Provision in Particular (iv) Nature of the Problem.

[14] Here as to (i) Privative Clauses, there is a strong privative clause set out in section 146.4 of the *Code*.

> *146.4 No review by certiorari, etc. – No order may be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an appeals officer in any proceeding under this Part.*

[15] This is a strong clause indicating that a high degree of defence is warranted (see eg. *Canadian Freightways Ltd. v. Canada (Attorney General)* [2003] F.C.J. No 552, 2003 FCT 391 at para 18)

(ii) Expertise

[16] The Officer is a person designated under the provisions of section 145.1(1) of the *Code* and is given a broad range of powers, duties and immunity under subsection (2):

> *145.1 (1)* ***Appointment*** *– The Minister may designate as an appeals officer for the purposes of this Part any person who is qualified to perform the duties of such an officer.*
> *(2)* ***Status*** *– For the purposes of sections 146 to 146.5, an appeals officer has all of the powers, duties and immunity of a health and safety officer.*

[17] This provision again indicates that a high degree of deference is warranted.

(iii) Purpose of the Act as a Whole and the Provisions in Particular

[18] The *Canadian Labour Code*, Part II clearly states its purpose in section 122.1:

> *122.1 Purpose of Part – The purpose of this part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.*

[19] The provisions under review deal with appeals of decisions or directions relating dangers in the workplace. Part II, including the appeals provisions, acts as a *Code* providing for the identification of perceived dangers, the mutual resolution of such issues failing which, a health and safety officer may investigate, make decisions and issue directions where appropriate with a mechanism for appealing those decisions and directions. The thoroughness of the *Code* in this respect indicates a high degree of deference.

(iv) The Nature of the Problems

[20] The problem that faced the Appeals Officer and is before the Court relates to the jurisdiction of that Officer and, in particular, whether that Officer can consider, on appeal, a situation where the Health and Safety Officer did not make a decision or issue a direction but where that Officer accepted an assurance of voluntary compliance in lieu of a decision or direction.

[21] Jurisdictional issues have often driven the Court to ascribe a lower degree of deference to a decision of a tribunal. However, as expressed by the Ontario Court of Appeal in *Ontario Public Service Employees Union v. Seneca College of Applied Arts*, May 4, 2006, Docket C43274 per Laskin JA for the Court at paragraphs 29 to 32:

> *Unfortunately, in its decision, the Divisional Court did not undertake this pragmatic and functional analysis. Instead, it seemed to take the view that because the question in issue was, in its opinion, a question of jurisdiction and a question of law, the standard of review must be correctness.*
>
> *That is not a sound view. Simply because the court labels an issue "jurisdictional" does not automatically mean that the standard of review of a tribunal's decision on that issue is correctness. As Evans J.A. pointed out in Via Rail Canada Inc. v. Cairns (2004), 241 D.L.R. (4th) 700 at para. 33 (F.C.A.), "Conceptual abstractions, such as 'jurisdictional question', now play a much reduced role in determining the standard of review applicable to the impugned aspect of a tribunal's decision."*
>
> *In other words, a court's finding that an issue has a jurisdictional aspect does not obviate the court's obligation to do a pragmatic and functional analysis. See Voice Construction, supra at paras. 20-22; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R 236 para. 21; ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] S.C.C. 4 paras. 22-23. The "jurisdictional" nature of the issue is but a factor in that analysis or more often, the characterization of the outcome of that analysis. See Via Rail, supra at para. 36 and Pushpanathan, supra at para. 28.*

> *The purpose of the pragmatic and functional analysis – of considering the four contextual factors – is to ascertain the legislature's intent. See Dr. Q, supra at para 26. Did the legislature intend that a reviewing court give deference to the Board's decision, and if so, what level of deference? Or, put in terms of jurisdiction, did the legislator intend this issue to be exclusively within the Board's jurisdiction to resolve? See U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 at 1089-1091*.

[22] Thus a jurisdictional question does not always lead to a low level of deference or to the so called "correctness" standard, although a lower to moderate level of deference may be indicated.

A "PRAGMATIC AND FUNCTIONAL" ANALYSIS

[23] The Court must view the provisions of Part II of the *Code* as a whole, taking into account that the issue is that of jurisdiction and, in particular, what may constitute a "decision" or "direction" for purposes of the Appeal Officer's jurisdiction. Those words are to be taken in the context of Part II of the *Code* and within the meaning afforded to them by those working day to day within the *Code*. A pragmatic and functional analysis leads to a reasonably high level of deference to be afforded to the decision of the Appeals Officer. While that decision should be analysed, the Court should not, at the end of the day, simply substitute its own analysis for that of the Officer unless there is clear and compelling reason to do so.

[24] A review of the Appeals Officer's reasons indicates that he made a thorough review of the relevant provisions of Part II of the *Code* respecting appeals to an Appeals Officer and jurisdiction in respect thereof. The Union has argued here that two bases provide that an analysis must go further than that conducted by the Officer. They are:

1. By implication, where there is provision made in a statute for an appeal, those provisions are to be interpreted in such a way so as to provide for an equal access by all potentially affected parties to the appeal process.
2. The appeal provisions must be interpreted in light of section 7 of the *Charter* such that "security of the person" is recognized so as to give equal access to appeal to all potentially affected parties.

Point 1

[25] The union argues that where an appeal provision such as the one at issue, is provided by statute it would be a violation of the "principles of natural justice" to interpret those provisions other than providing for equal access to all parties potentially affected. In so doing the union relies upon a judgment of Berger JA in *Prefontaine v. Canada (Minister of National Revenue – M.N.R*) [2001] A.J. No 1444, 2001 ABCA 288 particularly at paragraph 7 where he says *"… where the Legislature chooses to provide a mechanism for appeal, that mechanism, in my opinion, must function in a manner that respects the principles of natural justice."* That decision dealt with whether a Trial Judge who had given a decision should also be the person deciding whether leave to appeal should be granted. Berger JA held that another judge must do so.

[26] That is not the issue here. Here the *Code* provides an avenue of appeal by the employer where the employer has been required to do something, by decision or direction. Where no decision or direction has been made, an employee may, under certain conditions as set out in section 128 refuse to work. Judicial review is also available. As stated by Linden JA for the Federal Court of Appeal in *Canada (Secretary of State) v. Luitjens* (1992), 142 NR 173 (leave to appeal refused [1992] SCCA No. 253) at page 176:

> *It is permissible for Parliament to constitutionally deny the right to appeal. The principles of fundamental justice do not mandate endless hearings and appeals at every stage of a process. … In this case, Parliament undoubtedly felt that there were sufficient other avenues of appeal and review available, and that an appeal at this preliminary stage was unwarranted."*

[27] In the present case, the *Code* has carefully constructed certain avenues of appeal while leaving other resources available. No implicit right to appeal can be read in.

Point 2

[28] The union argues that the provision for appeal in Part II of the *Code* must be read in light of section 7 of the *Charter* which provides for "security of the person." It argues that since the new Manual deals with, among other things, health and safety issues, and Part II of the *Code*, section 122.1, expressly states that its purpose is to prevent accidents and injury to health, the appeal provisions must be given a large interpretation so as to afford access to all potentially affected persons.

[29] *Charter* principles are to be prevalent in interpreting a statute, but only where the statute provides for more than one interpretation. The Court cannot rewrite a statute when no reasonable ambiguity exits. The Supreme Court of Canada has made this clear in *Slaight Communications Inc. v. Davidson*, [1989], 1 S.C.R 1038 per Chief Justice Dickson for the majority at paragraph 87:

> *Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.*

[30] Also in *Hills v. Canada (Attorney General)* [1988] 1 S.C.R 513, Justice L'Heureux-Dube for the majority said at paragraph 93:

> *Appellant, while not relying on any specific provision of the Charter, nevertheless urged that preference be given to Charter values in the interpretation of a statute, namely freedom of association. I agree that the values embodied in the Charter must be given preference over an interpretation which would run contrary to them (RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110).*

[31] The provisions of Part II of the *Code* respecting appeals are not such that they are capable of more than one reasonable interpretation. They are clear. The *Charter* does not have to be invoked in order to arrive at the proper interpretation.

[32] Therefore, in answer to Issue # 1, I find that the Appeals Officer did not err in finding that he had no jurisdiction to hear the appeal.

Issue # 2 If the Appeals Officer did not err, is section 146 (1) of the *Code* of no force and effect as a violation of section 7 of the *Canadian Charter of Rights and Freedoms*?

[33] This issue raises a constitutional question. The record shows that appropriate notices were served on the appropriate Attornies General. None have chosen to participate at this stage.

[34] In arguing this issue the union says that if the right of appeal to Appeal Officers in the *Code* is available only to an employer in respect of whom a direction or decision has been made, then it

does not provide for adequate “security of the person” in respect of employees thus, must be struck down.

[35] I reiterate at this point the discussion in these reasons in respect of Point 1 raised by the union as to access to a right of appeal. It is not necessary that there be equal access to every avenue of redress provided by a statute as long as reasonable redress is afforded. Here an employee may refuse to work in appropriate circumstances and may seek judicial review where appropriate. The principles of section 7 of the *Charter* are not violated by section 146 (1) of the *Code*.

Issue # 3 Should an extension of time be granted for the union to seek judicial review of the decision of May 7, 2001?

[36] The underlying decision is that of May 7, 2001. The Health and Safety Officer essentially adopted the report of the investigator, in finding that no danger existed and that assurances of voluntary compliance should be accepted. The union seeks to challenge this decision on the bases of bias and lack of fundamental fairness, as previously discussed. However, no proceedings for judicial review of that decision have yet been instituted.

[37] The union says that no proceedings for judicial review of the May 7, 2001 decision were instituted since it believed that an appeal to an Appeals Officer was much more appropriate and it believed that that Officer had jurisdiction to deal with this matter. By Order of this Court dated September 12, 2002, the union was permitted to argue that it should receive an extension of time to seek judicial review of the May 7, 2001 decision, if necessary. It is now necessary.

[38] The criteria to be considered in granting an extension of time, or not, have been well established in this Court (eg. *Alcorn v. Commissioner of Corrections* [1999], 163 FTR 1 at paras 34-43). They are:

1. Has a continuing intention to seek judicial review been demonstrated, and has a reasonable explanation for the delay been given?
2. Has an arguable case been shown?
3. Is there prejudice to any other party?

[39] As to the first of these criteria, the union has shown a continuing intention to challenge the decision of May 7, 2001. It believed that an appeal was an appropriate way to do so. By Order of this Court, above, it was given leave to seek an extension of time for judicial review if necessary. The delays incurred since then, including orders of the Ontario Superior Court staying proceedings such as this, afford a reasonable explanation for any subsequent delay.

[40] As to the second of the criteria, the Court is not to determine the case rather, it simply has to decide if it is arguable. The threshold is low. I find that, on this issue, this criterion has been met.

[41] As to the third of these criteria, Air Canada has argued that the matter has become moot. The Manual has been implemented and, in the ensuing years, has been changed. The union argues that there are points of principle that arise out of the decision sought to be challenged and that it should be allowed to argue those points. I find that there will be no serious prejudice suffered by Air Canada should an extension of time be granted.

[42] Therefore, an extension of time of thirty (30) days from the date of these reasons shall be afforded to the Applicants, or any of them, to seek judicial review of the decision of May 7, 2001. The provisions of paragraphs 4 and 5 of the Order of the Court dated September 12, 2002 shall apply.

Costs

[43] Success is divided. Air Canada has found itself in the position of defending a statute which it did not draft, no assistance has been afforded by the government. It is appropriate to order that no costs shall be awarded.

"Roger T. Hughes"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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