Federal Court  Cour fédérale

Date: 20100423

Docket: T-1194-09

Citation: 2010 FC 439

Ottawa, Ontario, April 23, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

AIR CANADA

Applicant

and

CANADIAN UNION OF PUBLIC EMPLOYEES, AIRLINE DIVISION, AIR CANADA COMPONENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Pierre Guénette, an Appeal's Officer appointed pursuant to section 145.1 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code) in which he concluded, among other things, that an Air Safety Report prepared by an Air Canada pilot is an employer report within the meaning of subsection 135(9) of the Code and that Air Canada unlawfully denied access to it. Air Canada seeks to quash the Appeal Officer's decision.

Factual background

[2] The pertinent facts of this case stem from June 14, 2002, when the tail of an Air Canada Airbus 330-343, flight AC875, struck the runway when taking off from Frankfurt Airport in Germany. This caused the plane to return to the airport and it was landed without incident. Following these events, a pilot of AC875 filed an Air Safety Report (ASR) with the Air Canada Flight Safety Department. There were no reported injuries following these events and no injury reports were completed by employees.

[3] However, Elizabeth Niles, the flight attendant who was seated in the flight deck observer seat eventually reported that she was anxious and fearful of flying following the AC875 incident. She reported her health condition and filed an injury report on September 12, 2002. The injury report was reviewed by the Montreal workplace and safety committee (the Committee). As part of its investigation, the Committee requested the ASR filed by the pilot. This request was refused and the Committee was informed that the ASR could not be released unless the consent of the employee who filed it was obtained or it was required by law. The Committee then made a complaint to a Transport Canada Health and Safety Officer on February 26, 2003.

[4] On February 13, 2004, the Health and Safety Officer decided that Air Canada, in not disclosing the ASR to the Committee, was in contravention of subsection 135(9) of the Code with respect to its obligations to give workplace committees access to all or parts of employer reports. Air Canada appealed this decision and on June 18, 2009, the Appeals Officer issued a decision in

which he concluded, amongst other things, that the ASR fell within the category of employer reports under subsection 135(9) of the Code.

[5] Only that portion of the Appeal Officer's decision is subject to this judicial review.

Impugned decision

[6] Over the course of the proceedings, which had 24 hearing days from July 11, 2005 to December 11, 2007, the Appeals Officer heard evidence from ten witnesses. In his decision, he noted the evidence that he retained from the various witnesses. Some of that evidence can be briefly summarised as follows. The employer co-chair of the Committee testified that the purpose of requesting the ASR was to enable the Committee to conduct its investigation and understand why the flight attendant was on the flight deck as this was contrary to an Air Canada policy.

[7] The Director of Flight Safety explained that an ASR is a written, personal account of an incident that is completed by a flight crew, usually a pilot. It will provide factual information about the flight and a summary of the event with respect to what and why it happened. The ASRs are used to promote safety awareness, improve safety training and identify and discuss flight safety issues. He also testified that all types of flight incidents can be reported through an ASR but that it is non-mandatory even though certain categories of flight incidents have to be reported by law either in writing or verbally. The purpose of the policy under which the ASRs fall is to give employees an uninhibited opportunity to report occurrences that could compromise health and safety. For this reason, the identity of the employee who completes an ASR is kept confidential and there can be no

disciplinary action against an employee who does the reporting. Finally, he expressed the opinion that providing ASRs to other organizations would reduce the reporting of flight safety hazards.

[8] The President of the Air Canada Pilots Association also testified to the importance of immunity and confidentiality with regard to ASRs. The Health and Safety Chairperson of the Air Canada Component of the Airline Service Division of the Canadian Union of Public Employees testified that the Committee is bound to confidentiality of some of the reports they receive and that could include ASRs which would prevent them from being disclosed to other parties.

[9] After summarising each party's arguments, the Appeals officer characterised the question before him as requiring him to decide if "Air Canada is in contravention of subsection 135(9) of the Code with respect to the workplace committee right of access to all or parts of government and employer reports, studies and tests that related to the health and safety of employees" (see Decision at paragraph 181).

[10] The Appeals Officer emphasized that one of the rights that the Code provides is the right to know and that it is through the workplace committee that an employee will have the right to access employer reports relating to health and safety. In this case, the ASR will allow the Committee to understand why the flight attendant was asked to occupy the flight deck observer seat which impacted her health during the events of the flight and is the only report written by an employee. The Appeals Officer also accepted that filing ASRs is not mandatory but found that the practice of

filing them in cases of safety incidents or occurrences has been widely adopted by Air Canada employees and they represent a large portion of all safety reports received annually.

[11] He decided that ASRs are employer reports for the purposes of the subsection. He stated that they are an integral part of the Air Canada reporting policy. He also relied on the facts that the form itself is provided by Air Canada and bears its logo. Also, the elements that the ASRs must contain are entirely predetermined by Air Canada. He further found that, even though the ASRs are filed on a voluntary basis, they exist primarily for the benefit of Air Canada and it is Air Canada that developed its own policy (the Air Canada Safety Reporting Policy) which includes ASRs.

[12] With regard to Air Canada's argument that its own policy prevented it from disclosing the ASRs as it provided that they would not be disclosed without the employee's consent or unless required by law, the Appeals Officer found that the provisions of the Code must take precedence over any policies and practices of private parties that would compromise the fulfillment of the paramount objective of Part II of the Code which is to ensure the health and safety of all employees.

[13] In reaching this conclusion, the Appeals Officer relied on a decision where the Federal Court of Appeal held that a party could not rely solely on its own policies and past practices in determining whether information was confidential for the purposes on paragraph 20(1)(b) of the *Access to Information Act* (*Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)*, 2006 FCA 157, [2007] 1 F.C.R. 203 at paragraphs 75 and 76). He found that the same type of reasoning must be applied in this case and

Air Canada's policies and past practice, along with its commitment to confidentiality of ASRs, are not by themselves sufficient to bring the ASRs outside the scope of the Code's express provisions. The Appeals Officer also noted that Air Canada's concerns with regard to confidentiality can still be fulfilled using other methods such as a restricted right of access.

[14] In light of the above reasons, he concluded that the Committee is entitled to be provided with the ASR filed for flight AC875.

Questions at issue

[15] Both parties agree that there is only one question at issue:

a. Was the Appeal Officer's decision that the ASR is an employer report that must be disclosed pursuant to subsection 135(9) of the Code reasonable?

[16] The application for judicial review shall be dismissed for the following reasons.

Relevant legislation

[17] *Canada Labour Code*, R.S.C. 1985, c. L-2.

122. (1) In this Part,	122. (1) Les définitions qui suivent s'appliquent à la présente partie.
"employee" means a person employed by an employer;	« employé » Personne au service d'un employeur.
"employer" means a person who employs one or more employees and includes an	« employeur » Personne qui emploie un ou plusieurs employés — ou quiconque

employers' organization and any person who acts on behalf of an employer;

125. (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(…)
(z.18) provide, within thirty days after receiving a request, or as soon as possible after that, the information requested from the employer by a policy committee under subsection 134.1(5) or (6), by a work place committee under subsection 135(8) or (9) or by a health and safety representative under subsection 136(6) or (7);

135. (9) A work place committee, in respect of the work place for which it is established, shall have full access to all of the government and employer reports, studies and tests relating to the health and safety of the employees, or to the parts of those reports, studies and tests that relate to the health and safety of employees, but shall not have access to the medical records of any person except with the person's consent.

agissant pour son compte — ainsi que toute organisation patronale.

125. (1) Dans le cadre de l'obligation générale définie à l'article 124, l'employeur est tenu, en ce qui concerne tout lieu de travail placé sous son entière autorité ainsi que toute tâche accomplie par un employé dans un lieu de travail ne relevant pas de son autorité, dans la mesure où cette tâche, elle, en relève :
(…)
z.18) de fournir, dans les trente jours qui suivent une demande à cet effet ou dès que possible par la suite, les renseignements exigés soit par un comité d'orientation en vertu des paragraphes 134.1(5) ou (6), soit par un comité local en vertu des paragraphes 135(8) ou (9), soit par un représentant en vertu des paragraphes 136(6) ou (7);

135. (9) Le comité local, pour ce qui concerne le lieu de travail pour lequel il a été constitué, a accès sans restriction aux rapports, études et analyses de l'État et de l'employeur sur la santé et la sécurité des employés, ou aux parties de ces documents concernant la santé et la sécurité des employés, l'accès aux dossiers médicaux étant toutefois subordonné au consentement de l'intéressé.

Applicant's position

[18] The Applicant submits that the Appeals Officer's decision that an ASR is an employer report within the meaning of subsection 135(9) of the Code is unreasonable. The Applicant's grounds are that the decision is unreasonable as the Appeals Officer failed to state the legal test that he used and, in the alternative, the decision is unreasonable as it disregards the language used in the Code.

[19] With regard to the first ground, the Applicant submits that the Appeals Officer failed to state a definition or legal test for "employer report". The Applicant contends that the Appeals Officer failed to interpret the definition within the specific meaning of the subsection and the context of the legislation as he should have done instead of proceeding directly to the consideration of the facts in the absence of a legal test. The Applicant holds that where the meaning of a legal test cannot be ascertained, it must be found to be unreasonable and relies on the decision in *Canadian Union of Public Employees, Air Canada Component v. Air Canada*, 2008 FC 1299, 337 F.T.R. 291.

[20] With regard to the second ground, the Applicant submits that, in the alternative, the definition or test that was used by the Appeals Officer is unreasonable as it disregards the distinction established in the Code between employers and employees and their respective reports, which should inform the interpretation of subsection 135(9). The Applicant advances that the Code provides clear definitions of "employer" and "employee" (s. 122(1)) and there is no ambiguity in those definitions. The Applicant highlights that, apart from the definitions, Part II of the Code

clearly differentiates between employers and employees (for example, see sections 125, 125.1 and 126). The Applicant also relies on sections 19.3 and 19.4 of the *Canada Occupational Health and Safety Regulations*, S.O.R./86-304 (the COHS Regulations) which distinguish between employee reports made under certain sections of the Code and employer reports. Based on those distinctions, the Applicant submits that an employer report within the meaning of subsection 135(9) of the Code must be one prepared by employees acting on behalf of the employer, i.e. management employees.

[21] In light of the proposed distinction, the Applicant submits that an ASR is prepared by an employee, usually a pilot, who is not acting on behalf of management. Furthermore, the Applicant points to evidence provided before the Appeals Officer which confirms that filing an ASR is voluntary. The Applicant distinguishes ASRs from other reports that pilots are required by law and by mandatory company policy to submit. The Applicant emphasizes that the ASR is filed in addition to those only if the pilot wishes to provide more information or in cases where there was no required report and the pilot wishes to provide a voluntary account of the events and make recommendations.

[22] The Applicant further adds that the Appeals Officer's decision disregards the specific intent of subsection 135(9) which limits access to "government and employer reports, studies and tests relating to the health and safety of the employees, or to the parts of those reports, studies and tests that relate to the health and safety of employees" yet at paragraph 225 of the decision, he states that there is a right to all relevant documents relating to health and safety of employees. The Applicant submits that this ignores Parliament's intent which is more limited.

[23] In summary, on this second ground, the Applicant underlines that the Appeals Officer, in deciding as he did, eliminated the distinction between employee and employer reports, widened the reach of the subsection and ignored the evidence with regard to the ASRs. Therefore, the decision cannot stand.

Respondent's position

[24] In response, the Respondent argues that the Appeals Officer was not required to provide a definition or legal test in support of his conclusion. Rather, he was required to interpret the term using the basic principles of statutory interpretation by giving the words their ordinary meaning consistent with the object and the purpose of the legislation. The Respondent says that this is exactly what the Appeals Officer did and there was no error.

[25] The Respondent also relies on the definition of employer under section 122 of the Code which includes "any person who acts on behalf of the employer" and provides a dictionary definition of "on behalf of" meaning "in the interest of or for the benefit of". The Respondent emphasizes that the Appeals Officer found that the ASRs exist for the benefit of Air Canada and are an integral part of the Air Canada reporting system. Accordingly, the Appeals Officer's interpretation is reasonable as it is consistent with the ordinary meaning of the words and the statute.

[26] As for the case, relied on by the Applicant, the Respondent distinguishes it on the basis that the Appeals Officer in that case had given two contradictory definitions and that made his decision

unintelligible. The Respondent holds that there was no such contradiction in the case at bar and the decision is reasonable.

[27] With regard to Air Canada's alternative argument, the Respondent contends that nothing in the subsection suggests that an "employer report" is limited only to one that is authored by the employer and underlines that Air Canada has not offered any statutory or judicial authority for its interpretation. The Respondent urges that the definition adopted by the Appeals Officer is reasonable as it is appropriate to determine whether or not the employee is acting on behalf of the employer or for its benefit. The Respondent further submits that the Applicant's interpretation would lead to an absurd result as documents would not be disclosed simply because they contain information supplied by an employee which would hinder investigations. Although the Respondent denies that ASRs are voluntary, it submits that the issue of whether or not be ASR is voluntary is not determinative in the present case.

[28] As for Air Canada's submissions on the distinction between employer and employee reports and that an employer report must be prepared by an employee on behalf of the employer, i.e. a management employee, the Respondent holds that the Applicant is quite simply wrong. The Respondent underscores that no authority has been cited in support of the argument and that Part II of the Code, unlike Part I, does not distinguish between management and non-management employees. As no such distinction is made, the Respondent proposes that the adoption of Air Canada's position would have the effect of preventing disclosure of all employee authored reports. In view of that, the Appeals Officer's interpretation must be preferred and is reasonable.

[29] The Respondent submits that the Appeals Officer's interpretation is consistent with the views of Transport Canada and Human Resources and Skills Development Canada (HRSDC) as expressed in the publication title "Position Paper on Safety Management System Requirements in the Canadian Aviation Regulations and the Health and Safety Policy Requirements of the Canada Labour Code" (the position paper).

Standard of review

[30] Both parties agree that the Appeals Officer's decision must be held to a standard of reasonableness. They submit that the issue of whether an ASR is an employer report within the meaning of subsection 135(9) of the Code is a question of mixed law and fact as it requires that the Appeals Officer interpret the subsection and then apply the definition to the facts.

[31] I am satisfied that the appropriate standard of review is reasonableness and that deference is owed to the Appeals Officer's decision (*Dunsmuir v. New Brunswick*, 2009 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 47, 53 and 54; *Canada Post Corp. v. Pollard*, 2008 FCA 305, 382 N.R. 173 at paragraphs 10 to 12). Accordingly, the Court will be concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47).

Analysis

[32] It is clear that the Appeals Officer's decision regarding the contravention hinges on his conclusion that an ASR is an employer report within the meaning of subsection 135(9) of the Code. Part II of the Code does not provide a definition of employer report and the Appeals Officer was called upon to decide whether or not an ASR is an employer report. As stated in *Dunsmuir*, the Court is concerned not only with the outcome of the decision but also with how it was reached. Accordingly, the Court must also look to the "existence of justification, transparency and intelligibility within the decision-making process" (at paragraph 47). The Applicant argues that this decision is unreasonable both in terms of how it was reached and in terms of the outcome. However, after having reviewed the evidence and heard this matter, I cannot accept these arguments for the reasons that follow.

[33] As stated in *Dunsmuir*, in reviewing a decision on the standard of reasonableness, the Court must satisfy itself that the decision was within a range of possible, acceptable outcomes in view of the facts and the law of the case. Also in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761 at paragraph 41, the Supreme Court emphasized that reasonableness can entail more than one conclusion and the reviewing court's role is not to re-evaluate the relevant factors.

[34] The Applicant's first argument is that the decision is unreasonable as the Appeals Officer did not explicitly state the test he applied in concluding that an ASR is an employer report. The Applicant makes this argument without any authority to support it and the one case cited is not on point with this issue and offers little guidance.

[35] In the context of an extradition, it was found that a conclusion will not be defensible under the reasonableness standard if the proper analysis was not carried out; a proper analysis requires that the test applied be identified and the relevant facts be considered (*Lake* at paragraph 41). However, I would underline that the case at hand does not bring into play the same interests as an extradition and there is no explicit test to be applied in this case. I do not accept the Applicant's argument that the decision is unreasonable in a case such as this one simply because a legal test was not identified. What is required here is that the Appeals Officer, in the absence of a statutory definition, decides whether an ASR is an employer report within the meaning of Part II of the Code. In doing so, he had to apply the basic principle of statutory interpretation - that is to interpret the expression and give the words their ordinary meaning consistent with the object and the purpose of the legislation.

[36] In reaching his decision the Appeals Officer commented that one of the rights that the Code guarantees is a right to know and that this right is exercised through a workplace safety committee which can gain access to government and employer reports. He also noted that in this case, the ASR could be useful to the Committee as it might explain why the flight attendant was requested to occupy the flight deck observer seat. Finally, he concluded that an ASR is an employer report because it is an integral part of the Air Canada reporting policy; the form itself is provided by Air Canada and bears its logo; the elements that the ASR must contain are predetermined by Air Canada; the ASR, even though filed on a voluntary basis, exists primarily for the benefit of Air Canada; and it is Air Canada that developed its own reporting policy.

[37] As mentioned previously, the Court must also look to the "existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir* at paragraph 47). Although the Appeals Officer did not explicitly state a test, I believe that his reasons show that he adopted an appropriate approach and the justification provided is transparent and intelligible. There is no ambiguity of meaning here even though there is no explicit definition in the statute. The Appeals Officer was not deciding between two possible meanings of "employer report", rather he had to decide if the ASR, based on the facts of this case, is an employer report. He did comment on the nature of the provision and its goal – ensuring employee access, through the Committee, to documents regarding health and safety. He also noted why an ASR might be useful to the Committee as part of its investigation – it is a document related to flight safety incidents and could have information regarding employee health and safety. In my view, this is in keeping with Part II of the Code. Finally, the facts relied upon by the Appeals Officer show that he conceived an employer report to be a report produced for the benefit of the employer based on its own reporting policy.

[38] On the whole, the reasons show that the Appeals Officer's approach reflected the object and the purpose of Part II of the Code and the factors relevant in deciding if the ASR is an employer report are identified. The reasons do not lack justification, transparency and intelligibility and this argument cannot succeed.

[39] Turning now to the Applicant's alternative argument on the reasonableness of the conclusion that an ASR is an employer report. As already mentioned, there is no definition of

employer report provided in the Code, thus it is left to the Appeals Officer to decide if a document is an employer report.

[40] The Code does provide definitions of employer and employee. An “employee” means a person employed by an employer and an “employer” means a person who employs one or more employees and includes an employers’ organization and any person who acts on behalf of an employer (subsection 122(1)). The definition of employee under Part II of the Code does not exclude a person who performs management functions unlike the definition under Part I (see section 3). The Applicant has argued that only a report prepared by a person who performs management functions or requested by an employer should be an employer report but that does not seem to be keeping with the statutory definition under Part II of the Code. Furthermore, the provisions of the COHS Regulations cited by the Applicant do not provide general definitions and do not offer guidance in this matter.

[41] Based on the definition of employer under Part II of the Code, the Appeals Officer’s decision that a document can be an employer report even if authored by a non-management employee is reasonable. He accepted that the employee filing the report – a pilot in this case - was acting on behalf of the employer and for its benefit. This is also a reasonable conclusion in light of the evidence on the ASRs and their use by Air Canada and does not disregard the distinction between employers and employees under Part II of the Code.

[42] The Applicant further argues that an ASR must be distinguished from other reports which are made mandatory by other statutes as the ASR is a voluntary report, used by Air Canada for its own purposes. The Applicant advances that the Appeals Officer ignored the evidence on the voluntary nature of the ASR and this renders his decision unreasonable.

[43] Although the Appeals Officer found that the form is provided by Air Canada and bears its logo and the elements that the ASR must contain are entirely predetermined by Air Canada, this is not sufficient to conclude that he disregarded the evidence on the voluntary nature of the reporting.

[44] Furthermore, the Appeals Officer found that the ASR was a voluntary report. At paragraph 219 of his decision, he writes that "[a]lthough not mandatory, the practice of filing ASRs in cases of safety incidents or occurrences had been widely adopted by Air Canada's employees." Moreover, the question of whether or not the ASRs are mandatory was not determinative in the Appeals Officer's decision. At paragraph 222, he writes "even if they are filed on a voluntary basis, as argued by the appellant, ASRs exist primarily for the benefit of Air Canada." Nor is there any support for Air Canada's argument that the ASR cannot be an employer report because it is not mandatory.

[45] The applicant cites a recent decision from my colleague Justice Near, *Canadian Union of Public Employees, Air Canada Component v. Air Canada*, 2010 FC 103, [2010] F.C.J. No. 93 (QL). I have read carefully the decision and I am of the opinion that it does not deal with the issue that I have to decide here.

[46] There is no evidence also before this Court that the Appeals Officer, in deciding as he did, widened the reach of subsection 135(9) of the Code or ignored the evidence with regard to the ASRs.

[47] The Court considers that the decision is reasonable and falls within the range of acceptable outcomes.

[48] As agreed between the parties, costs in a way of a lump sum for an amount of $5,000 shall be granted to the winning party.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. The Applicant shall pay an amount of $5,000 inclusive of disbursements to the Respondent.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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