Date: 20090106

Docket: T-197-08

Citation: 2009 FC 12

Ottawa, Ontario, January 6, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CUPE, AIR CANADA COMPONENT

Applicant

and

AIR CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the Canadian Union of Public Employees (Air Canada Component) (CUPE) challenging a decision by Transport Canada refusing to commence a workplace safety investigation under Part II of the *Canada Labour Code,* R.S.C. 1985, c. L-2 (Code), until the completion of the internal complaint resolution process contemplated by s. 127.1.

[2] CUPE contends that there is no requirement that safety complaints must always be dealt with internally before a Health and Safety Officer can initiate an investigation and order remedial action under s. 145. Because Transport Canada took the position that it had no authority to

investigate such a complaint, CUPE says that Transport Canada has misconstrued its jurisdiction and fettered its discretion.

[3] Air Canada says, in reply, that Transport Canada has no residual authority to conduct a safety investigation or to order remedial action under s. 145 of the Code until the internal complaint resolution requirements of the Code have run their course. In the result Air Canada says that Transport Canada's decision was correct.

a. Background

[4] On November 24, 2007 an Air Canada flight attendant (the employee) refused to work aboard an aircraft scheduled to depart from Vancouver. The employee believed that an inoperable cabin communication system created a dangerous work environment which justified a refusal to work under ss. 128(1) of the Code. The aircraft in question was withdrawn from service and, eventually, another aircraft was substituted.

[5] The evidentiary Record indicates that the internal complaint resolution process was engaged by the employee as contemplated by s. 127.1 of the Code. Although the employee expressed concern that the protocol for dealing with such situations was not strictly followed, there is nothing to indicate that her safety concern was dismissed by Air Canada, which effectively accepted the validity of her complaint when it withdrew the aircraft from service. There is also nothing in the Record establishing that the employee was penalized for the position she took beyond the fact that

the cabin crew were not re-assigned that day to another flight and were instead deadheaded on the next available flight home.

[6] On November 25, 2007 the employee made a written complaint to the Air Canada Health and Safety Committee in Winnipeg. That complaint took issue with several alleged lapses in the safety protocol and with the delay at the time in resolving her concern. She also complained about rude and abrupt behaviour by the Captain and maintenance crew and sought an assurance that she would receive full pay for her shift. There is nothing before me to indicate what, if anything, was done by the Health and Safety Committee to address the employee's complaint. But the affidavit of the employer co-chair of that Committee and the employee's supervisor, Patty Whitehall, deposes that she was in the process of carrying out an investigation of the complaint when, on December 21, 2007, CUPE registered a complaint with Transport Canada seeking the involvement of a Health and Safety Officer. That complaint attached the employee's initial complaint, and further alleged violations of ss. 128(10) and 128(13) of the Code concerning the protocol for addressing an employee's refusal to work. CUPE's complaint also indicated that the internal complaint resolution process was "not applicable". The reference in this complaint to ss. 128(13) of the Code appears to have been an attempt by CUPE to involve a Health and Safety Officer immediately on the basis of a supposed ongoing dispute with Air Canada over the employee's refusal to work.

[7] On January 2, 2008 Transport Canada responded to the CUPE complaint by stating:

> This will acknowledge receipt of your complaint against Air Canada dated November 25, 2007, which was received in this office on December 21, 2007.

> A Health and Safety Officer does not have the authority to investigate a complaint prior to completion of the Internal Complaint Resolution Process as stated in section 127.1 of the Canada Labour Code Part II. As a result, the above-mentioned complaint has been returned to you for proper handling.

[8] It is the correctness of this decision that is in issue in this application and, in particular, whether the completion of the internal complaint resolution process is a necessary prerequisite to the initiation of a Health and Safety Officer investigation under s. 127.1 of the Code.

II. Issues

[9] Did the decision by Transport Canada not to investigate CUPE's complaint constitute a jurisdictional error or a fettering of jurisdiction?

III. Analysis

[10] The parties agree, as do I, that the standard of review for a jurisdictional issue of the sort raised here is correctness: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 59.

[11] It is clear from the Record that the employee's initial safety concern arose under the refusal to work provisions in s. 128 of the Code. The formal complaint to the employer as later conveyed to Transport Canada was made, however, under s. 127.1 dealing with alleged contraventions of Part II of the Code. That provision stipulates very clearly that all such matters must be submitted initially to the internal complaint resolution process before other available recourse is sought. The

s. 127.1 internal process contemplates the immediate referral of a complaint to the employee's supervisor. If resolution at that level is unsuccessful either the employee or the supervisor is entitled to refer the matter for a joint health and safety investigation from which a written report is required. If the investigators conclude that a dangerous condition continues to exist, the employer is required to protect all at-risk employees until the danger has been rectified. The Code contemplates the involvement of a Health and Safety Officer only at the point where a safety complaint has not been resolved by the joint internal investigation to the satisfaction of either the employee or the employer. The provisions in s. 127.1 that contemplate the involvement of a Health and Safety Officer in the complaint resolution process are ss. 127.1(8), 127.1(9), 127.1(10) and 127.1(11) which state:

127.1 (8) The employee or employer may refer a complaint that there has been a contravention of this Part to a health and safety officer in the following circumstances:	127.1 (8) La plainte fondée sur l'existence d'une situation constituant une contravention à la présente partie peut être renvoyée par l'employeur ou l'employé à l'agent de santé et de sécurité dans les cas suivants :
(a) where the employer does not agree with the results of the investigation;	a) l'employeur conteste les résultats de l'enquête;
(b) where the employer has failed to inform the persons who investigated the complaint of how and when the employer intends to resolve the matter or has failed to take action to resolve the matter; or	b) l'employeur a omis de prendre les mesures nécessaires pour remédier à la situation faisant l'objet de la plainte dans les délais prévus ou d'en informer les personnes chargées de l'enquête;

(c) where the persons who investigated the complaint do not agree between themselves as to whether the complaint is justified.

c) les personnes chargées de l'enquête ne s'entendent pas sur le bien-fondé de la plainte.

Investigation by health and safety officer

Enquête

(9) The health and safety officer shall investigate, or cause another health and safety officer to investigate, the complaint referred to the officer under subsection (8).

(9) L'agent de santé et de sécurité saisi de la plainte fait enquête sur celle-ci ou charge un autre agent de santé et de sécurité de le faire à sa place.

Duty and power of health and safety officer

Pouvoirs de l'agent de santé et de sécurité

(10) On completion of the investigation, the health and safety officer

(10) Au terme de l'enquête, l'agent de santé et de sécurité :

(a) may issue directions to an employer or employee under subsection 145(1);

a) peut donner à l'employeur ou à l'employé toute instruction prévue au paragraphe 145(1);

(b) may, if in the officer's opinion it is appropriate, recommend that the employee and employer resolve the matter between themselves; or

b) peut, s'il l'estime opportun, recommander que l'employeur et l'employé règlent à l'amiable la situation faisant l'objet de la plainte;

(c) shall, if the officer concludes that a danger exists as described in

c) s'il conclut à l'existence de l'une ou l'autre des situations

subsection 128(1), issue directions under subsection 145(2).	mentionnées au paragraphe 128(1), donne des instructions en conformité avec le paragraphe 145(2).
Interpretation	Précision
(11) For greater certainty, nothing in this section limits a health and safety officer's authority under section 145.	(11) Il est entendu que les dispositions du présent article ne portent pas atteinte aux pouvoirs conférés à l'agent de santé et de sécurité sous le régime de l'article 145.

[12] CUPE contends that ss. 127.1(11), above, recognizes an overarching authority by a Health and Safety Officer to consider a complaint brought under s. 127.1 at any point in the process and to order, where appropriate, immediate remediation under s. 145. CUPE says that the failure by Transport Canada to recognize this aspect of its residual jurisdiction represents a fettering of its jurisdiction. Presumably CUPE would not have been troubled if Transport Canada had said instead that, notwithstanding its right to intervene, it was declining to do so until all internal settlement processes had been exhausted.

[13] Admittedly ss. 127.1(11) is badly written and it completely fails to meet its stated objective of providing "greater certainty". I do not agree with CUPE, though, that this provision was intended to recognize an authority under s. 145 for involving a Health and Safety Officer in the resolution of a s. 127.1 complaint before the exhaustion of the stipulated internal processes. The remedial authority conferred upon a Health and Safety Officer under s. 127.1 is found in ss. 127.1(10). The

powers conferred upon a Health and Safety Officer under s. 145 extend well beyond the scope of those recognized in ss. 127.1(10) such that the likely purpose of ss. 127.1(11) was to incorporate by general reference those additional s. 145 powers. While there was undoubtedly a simpler method for accomplishing this drafting objective, the possibility of simple redundancy cannot be ruled out given that this part of the Code is replete with unnecessary verbiage, poor drafting and a lack of clarity. In any event, I do not think that the combined reading of ss. 127.1(11) and s. 145 is sufficient to overcome the obvious intent of s. 127.1 that complaints of this type must be fully considered internally before the involvement of Transport Canada can be obtained.

[14] The internal complaint resolution provisions of the Code create a succession of steps for resolving an employee safety complaint beginning with an informal discussion and ending with a referral to a Health and Safety Officer. Much of the applicable language of s. 127.1 is mandatory. For instance, ss. 127.1(1) requires that a complaint be directed to the employee's supervisor before any other available recourse is sought. Under ss. 127.1(8) an employee or employer may refer a complaint to a Health and Safety Officer if any one of the following three preconditions is met:

(a) where the employer does not agree with the results of the investigation;	a) l'employeur conteste les résultats de l'enquête;
(b) where the employer has failed to inform the persons who investigated the complaint of how and when the employer intends to resolve the matter or has failed to take action to resolve the matter; or	b) l'employeur a omis de prendre les mesures nécessaires pour remédier à la situation faisant l'objet de la plainte dans les délais prévus ou d'en informer les personnes chargées de l'enquête;
(c) where the persons who investigated the complaint do	c) les personnes chargées de l'enquête ne s'entendent pas sur

not agree between themselves as to whether the complaint is justified.	le bien-fondé de la plainte.

These conditions clearly contemplate an internal investigation by the appropriate health and safety representatives before the engagement of Transport Canada. It is only where the internal investigation has been frustrated by employer inaction or by disagreement that a Health and Safety Officer can be invited to intervene. The obvious intent of these provisions is to allow the parties to pursue a mutually agreeable solution before seeking outside involvement and to provide the Health and Safety Officer with the benefit of a written investigation report or, in the case of disagreement, two reports. In *Re Caponi*, [2002] C.I.R.B. No. 177 at para. 24 the Canadian Industrial Relations Board held that s. 127.1 "sets out a binding internal settlement process" which must be followed before Part II remedies are available. I agree with that view.

[15] I do not agree with CUPE that s. 145 of the Code was intended to create a separate basis for the involvement of a Health and Safety Officer in the resolution of complaints brought forward under s. 127.1. Section 145 is a remedial provision which is only engaged where a Health and Safety Officer is carrying out an investigation authorized by some other provision in the Code. This was the view of Justice Richard in *Gilmore v. Canadian National Railway*, [1995] F.C.J. No. 1601, 104 F.T.R. 74,[1] where he held at paras. 7 to 9:

> 7 Counsel for the applicant relied heavily on the wording of subsection 145(1) of Part II of the Code which reads:

[1] I agree with Air Canada's submission that, although the current language of s. 145(1) differs slightly from its form when *Gilmore* was decided in 1995, there is no substantive difference for the purposes of this issue.

> Direction to terminate contraventions
> 145. (1) Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer may direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally. (my underlining)

> 8 In my view, this subsection, which provides for oral directions, can only relate to contraventions which the safety officer is otherwise authorized to conduct and about which he or she is empowered to make decisions under Part II of the Code[6].

> 9 The roles of the Board and of the safety officer are separate and distinct. The only legislated exception is in respect of matters provided in subsection 129(5) where the Board may review a decision of the safety officer. Pursuant to section 134, the Board has exclusive jurisdiction to deal with contraventions of paragraph 147(a) of the Code (disciplinary measures). Nowhere in Part II of the Code is the safety officer given the remedial power to deal with disciplinary measures taken by the employer by reason of the employee's exercise of his or her rights under that Part. The record shows that the applicant herein made a complaint to the Board, but that it was judged by the Board to be out of time by reason of the provisions of subsection 133(2) of the Code. Subsection 145(1) does not provide the employee with an alternative recourse to a safety officer in such cases.
>
> [Emphasis added.]

I do not agree with CUPE that the Federal Court of Appeal decision in *Martin v. Canada (Attorney General)*, 2005 FCA 156, [2005] F.C.J. No. 752 effectively reverses the holding in *Gilmore*. In *Martin*, the question of the scope of s. 145 of the Code was not squarely in issue and, in any event, the Court at para. 29 found the substantive source of the Officer's authority to be in s. 124 and not in s. 145.

[16] I am satisfied that where an employee initiates a complaint under s. 127.1 of the Code it is necessary to exhaust the internal complaint resolution process before the employee, or the union on the employee's behalf, can request an investigation by a Health and Safety Officer. That is not to say, though, that s. 127.1 of the Code contains the only authority for the initiation of an investigation by a Health and Safety Officer. Sections 128 and 129 allow for such an investigation where an employee has refused dangerous work and where the employer challenges that refusal. Had Air Canada not acquiesced to the employee's complaint in this case by grounding the aircraft in question, there can be little doubt that a Health and Safety Officer would have been required by ss. 129(1) to investigate the matter without delay.

[17] Air Canada took the position before me that, outside of the scope of the refusal to work provisions and s. 141, there is no residual authority vested in a Health and Safety Officer to investigate a workplace safety concern raised by an employee. Indeed, Air Canada submitted in its Brief that "s. 127.1 has restricted the Safety Officer's discretionary investigation powers under s. 141". While there may be very few employee safety concerns that would not fall within the ambit of those provisions, I find it difficult to accept that a Health and Safety Officer confronted with an unresolved workplace hazard could not immediately order its remediation under ss. 145(1) or 145(2) of the Code. In many if not most cases of that type the authority to intervene can be found in ss. 128(13). But, as pointed out by Mr. Robbins, that provision contains a notable gap where the employee's concern relates to a dangerous "condition" involving another employee. There the complainant has no right to refuse to work and, where the employer fails to act, that provision does

not authorize a Health and Safety Officer to intervene. In a situation of an imminent ongoing risk and a recalcitrant employer, the protection afforded by s. 127.1 would provide scant comfort but presumably the right of a Health and Safety Officer to conduct a workplace investigation under s. 141 and to order remediation under s. 145 are sufficient to address this apparent regulatory limitation. It follows that I do not accept Air Canada's argument that a workplace investigation carried out under s. 141 of the Code is necessarily restricted by the internal complaint resolution provisions. Transport Canada can initiate a s. 141 investigation as of right and it is not required to wait for an employee complaint or its internal resolution before exercising that authority.

[18] In this case it is unnecessary to precisely define the limits of Transport Canada's statutory authority and in the absence of any argument from that agency, it would not be prudent to do so. It is sufficient to say that for a complaint of this sort which does not involve a situation of ongoing danger or an investigation under s. 141, the internal complaint resolution process must be exhausted before recourse to a Health and Safety Officer is available under ss. 127.1(8) of the Code. I do not read Transport Canada's letter of January 2, 2008 as saying anything more than that and, therefore, its decision not to get involved was legally correct.

[19] I would only add that I agree with Air Canada that evidence of more expansive investigatory practices in the past by Transport Canada cannot confer upon it a more generous authority than it expressly enjoys under the Code.

IV. Conclusion

[20] This application is dismissed with costs payable to Air Canada. I will accept further Briefs (not exceeding 5 pages) from the parties within 7 days of the date of this Judgment with respect to the quantification of costs.

JUDGMENT

THIS COURT ADJUDGES that this application is dismissed with costs payable to Air Canada. The quantification of the costs payable will be determined upon receipt of further submissions from the parties.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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