Federal Court Cour fédérale

Date: 20180711

Docket: T-1827-17

Citation: 2018 FC 723

Ottawa, Ontario, July 11, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

BRADLEY FRIESEN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Bradley Friesen is an experienced helicopter pilot who is known for his online publication of videos of the British Columbia landscape taken from the sky. He received a $1,000 fine from the Minister of Transport for contravening section 602.01 of the *Canadian Aviation Regulations*, SOR/96-433 [Regulations]. The Minister found that sliding a helicopter

between skaters playing hockey on a frozen Upper Consolation Lake was “negligent” and “likely to endanger the life or property of any person”.

[2] A review member of the Transportation Appeal Tribunal of Canada [TATC] upheld that finding and penalty, but the latter decision was reversed by a first appeal panel.

[3] The Attorney General of Canada brought an application for judicial review of the first appeal panel’s decision and Justice Richard Mosley found that it contained two determinative errors: i) the first appeal panel erred in its treatment of Mr. Friesen’s expert evidence; and ii) it also erred in extending the applicable standard of care to that of “an experienced helicopter pilot conducting a specialized maneuver involving people on the ground” (*Canada (Attorney General) v Friesen*, 2017 FC 567 [*Friesen FC*]). As a consequence, Justice Mosley did not see necessary to consider the appeal panel’s treatment of the defence of due diligence, as it was entwined with the two other errors that he considered determinative. He directed that a different appeal panel revisit the first appeal panel’s conclusion that Mr. Friesen exercised due diligence once the two key errors that he found were addressed.

II. Impugned Decision

[4] A second appeal panel [which will hereinafter be referred to as the Appeal Panel] dismissed Mr. Friesen’s appeal and upheld the review member’s decision and penalty. The only issue addressed by the Appeal Panel was the defence of due diligence raised by Mr. Friesen; it did not re-examine Mr. Friesen’s expert evidence, nor did it reassess all of the evidence applying

the proper standard of care. The Appeal Panel concluded that the defence of due diligence had not been established.

[5] The Appeal Panel noted that the review member accepted but assigned diminished weight to the expert evidence given by John Swallow, an experienced Royal Canadian Air Force pilot who stated that, apart from not undertaking the manoeuvre at all, Mr. Friesen had taken all applicable safety measures prior to carrying out the manoeuvre. The review member also found that in order to have ensured a sufficient margin of safety, the hockey players themselves had to determine whether they had to move from their designated positions during the stunt. Having thus shifted the responsibility for obtaining a safe outcome to the hockey players, Mr. Friesen created a likelihood of danger that was not the action of a reasonable and prudent pilot. Finally, the review member found that the danger was not sufficiently mitigated by due diligence on Mr. Friesen's part, since he did not seek relief from the *Regulations* by applying for a Special Flight Operations Certificate [SFO Certificate], nor did he create a wider gap between the skaters to preclude the necessity of them having to move, on their own initiative, to avoid a safety risk.

[6] The Appeal Panel then moved to review the first appeal panel's decision and the decision of this Court in *Friesen FC*. With respect to the applicable standard of review that the first appeal panel applied, Justice Mosley found that it was an error to characterize the review member's handling of the expert evidence as a question of law, subject to the standard of correctness. He also found that it was reasonable for the review member, being a specialist in aeronautics and transportation safety, to closely scrutinize the expert evidence. The first appeal panel should not have rejected the review member's own assessment of risk based on the first appeal panel's own

review of the video and slides. In addition, Justice Mosley found that it was an error for the first appeal panel to have elevated the standard of care to that of "an experienced helicopter pilot conducting a specialized maneuver involving people on the ground". It was correct for the review member to have applied the standard of the "prudent pilot", which in fact exceeded that of the "reasonable person".

[7] In reconsidering the matter, the Appeal Panel accepted the findings of this Court in *Friesen FC* and found itself bound not only by the applicable standard of care, but also by the findings of the review member that Mr. Friesen had been negligent in contravention of section 602.01 of the Regulations. It therefore confined its review to the question of whether the defence of due diligence was available to Mr. Friesen pursuant to section 8.5 of the *Aeronautics Act*, RSC 1985, c A-2, so as to preclude the contravention of section 602.01 of the Regulations. Section 8.5 states:

Defence	**Moyens de défense**
8.5 No person shall be found to have contravened a provision of this Part or any regulation, notice, order, security measure or emergency direction made under this Part if the person exercised all due diligence to prevent the contravention.	**8.5** Nul ne peut être reconnu coupable d'avoir contrevenu à la présente partie ou aux règlements, avis, arrêtés, mesures de sûreté et directives d'urgence pris sous son régime s'il a pris toutes les précautions voulues pour s'y conformer.

[8] The Appeal Panel first noted that upon reviewing the exercise of due diligence, the review member referred to the fact that Mr. Friesen failed to seek a SFO Certificate to obtain relief from the Regulations, and failed to create a wide enough gap between the hockey players to avoid them needing to move beyond their positions in order to escape danger. It also accepted

the first appeal panel's findings that due diligence means reasonable diligence, which does not equate to a guarantee against error, and that reasonableness is a question of fact dependent on the circumstances.

[9] The Appeal Panel reviewed all of the evidence and accepted the testimony of the experienced stunt coordinator who confirmed that all stunts involve risk. It also found that Mr. Friesen knew that his stunt involved some risks.

[10] But, more importantly, the Appeal Panel found that, in view of the inherent risks and despite the preventative actions taken by Mr. Friesen, a prudent pilot would have sought to consult in advance with Transport Canada instead of sending, after the fact, a video of the stunt and a list of the safety measures taken. The Appeal Panel did not accept the reasons provided by Mr. Friesen for why he did not apply for a SFO Certificate: he was concerned that SFO Certificates were only available to commercial operators and he believed that the delay incurred in applying for one would have made the stunt impossible, as a result of changing weather and ice conditions. The Appeal Panel held that a prudent pilot would have pursued this additional precautionary step.

III. Issues and Standard of Review

[11] This application for judicial review raises the following questions:

A. *Did the Appeal Panel fail to observe a principle of natural justice or procedural fairness by refusing to allow the parties to present submissions on reconsideration?*

B. *Did the Appeal Panel err in confining its review solely to the question of whether Mr. Friesen exercised due diligence in conformity with section 8.5 of the* Aeronautics Act*?*

C. *Did the Appeal Panel err in concluding that the defence of due diligence was not met by Mr. Friesen?*

[12] Although the duty of procedural fairness applies differently in different administrative contexts (*Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 36-39), the standard of review for such issues is generally found to be correctness (*Fitness Industry*, above at paras 34-35).

[13] The standard of review to be applied to the two other questions raised by this application is that of reasonableness (*Friesen FC*, above at paras 47-48).

IV. Analysis

A. *Did the Appeal Panel fail to observe a principle of natural justice or procedural fairness by refusing to allow the parties to present submissions on reconsideration?*

[14] Mr. Friesen argues that the Appeal Panel violated a principle of natural justice and procedural fairness by failing to allow the parties to file further submissions and to afford them a new hearing. Mr. Friesen does not suggest that the Appeal Panel should have held a *de novo* hearing, but he states that it "should have invited further written submissions of the parties or perhaps further evidence they wished to add by way of affidavit materials". Implicitly referring to some of the factors enumerated by the Supreme Court of Canada for deciding what procedural protections must be provided in a given case (*Baker v Canada (Minister of Citizenship and*

Immigration), [1999] 2 SCR 817 at paras 23-27), Mr. Friesen adds i) that the matter in issue is of considerable importance to him, with the potential to impact his reputation as a highly skilled and experienced helicopter pilot; and ii) that TATC review members and appeal panels exercise quasi-judicial functions, so rules of natural justice apply to their procedures.

[15] First, the sanction imposed upon Mr. Friesen in these proceedings is relatively minor. It does not interfere with his liberty interests, it does not involve a suspension of his licence, nor does it have any impact on his ability to pursue his profession.

[16] Second, this judicial review is the fourth opportunity Mr. Friesen has had to make written and oral submissions and to raise all arguments he saw fit to defend his case. The reasons issued by the review member, by both appeal panels and by this Court in *Friesen FC* all demonstrate that his evidence was assessed and that his submissions were fully considered. Procedural fairness does not necessarily require that written and oral submissions be allowed at every step of the administrative process. Rather, the proceeding as a whole must be considered in order to determine whether procedural fairness has been met (*Taiga Works Wilderness Equipment Ltd v British Columbia (Director of Employment Standards)*, 2010 BCCA 97 at para 39; *Baker*, above at para 21). Applying these principles to the present case, it becomes clear that Mr. Friesen has had ample opportunity to present his case fully and fairly.

[17] Third, it is true that section 14 of the *Transportation Appeal Tribunal of Canada Act*, SC 2001, c 29 [Act], dictates that the Appeal Panel shall allow oral argument, but Mr. Friesen had the opportunity to present oral submissions during his appeal. The decision under review was a

reconsideration of the appeal heard by the first appeal panel. Justice Mosley did not direct the Appeal Panel to redo the appeal hearing but only to reconsider the case taking into consideration the two errors he identified. Besides, the Act contemplates flexibility in the process and implicitly suggests that proportionality should be considered:

Nature of hearings	**Audiences**
15 (1) Subject to subsection (2), the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it, and all such matters shall be dealt with by it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.	**15 (1)** Sous réserve du paragraphe (2), le Tribunal n'est pas lié par les règles juridiques ou techniques applicables en matière de preuve lors des audiences. Dans la mesure où les circonstances, l'équité et la justice naturelle le permettent, il lui appartient d'agir rapidement et sans formalisme.

[18] For these reasons, I am of the view that the duty of procedural fairness should be set at the lower end of the spectrum and that the Appeal Panel did not err in exercising its discretion not to allow additional written and oral submissions in reconsidering the matter. It acted in the name of flexibility and proportionality.

B. *Did the Appeal Panel err in confining its review solely to the question of whether Mr. Friesen exercised due diligence in conformity with section 8.5 of the* Aeronautics Act*?*

[19] Mr. Friesen takes issue with the fact that the Appeal Panel confined its review to the question of whether he met the defence of due diligence. I agree with him that the Appeal Panel was tasked with reconsidering all of the issues raised by the appeal in light of the evidence adduced, without repeating the two errors identified by this Court.

[20] The Appeal Panel started its analysis by stating:

> [20] In view of the Federal Court's acceptance of the "prudent pilot" standard of care and the findings of the review member upon further scrutiny of the evidence that the appellant had been negligent in contravention of section 602.01 of the *CARs*, we confine our review to the question of whether the defence of due diligence is available to the appellant …
>
> [My emphasis.]

[21] The Appeal Panel did say that it limited its review to a single issue. However, it is not clear whether that is because it felt that this Court had disposed of the two other issues in a final ruling, or if it simply afforded deference to the findings of the review member, who had scrutinized the evidence.

[22] If it is the former, the Appeal Panel misunderstood this Court's reasons in *Friesen FC.* The role of a superior court in a judicial review of an administrative decision is not to substitute its own decision in place of an administrative decision-maker's, but rather to verify the legality and reasonableness of the decision rendered, and to return the file to the administrative decision-maker if it finds that an error was made and that the decision was illegal or not within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Canada (Citizenship and Immigration) v Yansane,* 2017 FCA 48 at para 15; *Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47). The Appeal Panel was asked to reconsider the case, but to afford deference to the review member's assessment of the expert evidence and to apply the proper standard of care.

[23] However, if it was the latter, it would simply mean that the Appeal Panel applied the proper standard when reviewing the review member's decision. As stated by Justice Mosley in paragraph 57 of his reasons: "[T]he treatment of the expert evidence was a question of mixed fact and law which should have been reviewed by the Appeal Panel on a reasonableness standard." So was the more general question as to whether the appellant had been negligent in contravention of section 602.01 of the Regulations.

[24] Considering the way that the Appeal Panel summarizes its findings on both issues, I choose the latter:

> [27] In view of the inherent risks of the helicopter manoeuvre and despite the preventative actions taken by the appellant, a prudent pilot would have sought to consult in advance with Transport Canada as to applicable safety measures by applying for a [SFO Certificate].

[25] With respect to the weight given to the expert evidence by the review member, Mr. Friesen reargued before me that it was an error for him to substitute his own opinion in place of a qualified expert's. He relies on the decision of the Supreme Court of Canada in *R v Lavallée*, [1990] 1 SCR 852, where Justice Wilson states that it is an error for a trial judge presiding over a criminal matter to instruct a jury to completely ignore the testimony of an expert. Not only is this precedent inapplicable to a decision-maker who has equal expertise to that of the expert witness, but Justice Mosley specifically found in *Friesen FC* that it was reasonable for the review member, being an expert in aeronautics and transportation safety, to give limited weight to the testimony of an expert who stated that the Applicant's stunt was totally without risk.

[26] While I agree with the Applicant that the Appeal Panel was tasked to reconsider both the issues of negligence and that of the defence of due diligence, which are indeed entwined, I am of the view that it did, while affording the review member's findings on negligence the appropriate deference.

C. *Did the Appeal Panel err in concluding that the defence of due diligence was not met by Mr. Friesen?*

[27] The Applicant argues that the Appeal Panel took into account irrelevant considerations or failed to take into account relevant considerations when it found that the Applicant should have applied for a SFO Certificate in order to meet the defence of due diligence. This consideration is irrelevant, argues the Applicant, because the review member found that: "[Mr. Friesen] could have applied for the [SFO Certificate] and did not do so." In so ruling, argues the Applicant, the review member accepted that a SFO Certificate could have been obtained (which was not established on the evidence) and that the manoeuvre was therefore not negligent. If the failure to apply for a SFO Certificate is removed from the equation, all that the Appeal Panel would have been left with was the following uncontradicted evidence:

1. The Applicant is an experienced helicopter pilot;
2. He had performed previous helicopter stunts;
3. He had tested the ice thickness of the site of the manoeuvre on the day preceding the manoeuvre and on the day of the manoeuvre;
4. He retained skilled skaters to participate in the stunt and ensured that each of them and an experienced stunt coordinator had a previous run through of the stunt;
5. He conducted a safety briefing for the participants as to the workings of the helicopter and the proposed skid and stunt;

6. He ensured first aid materials were available in the event of an incident.

[28] The Applicant further states that the Appeal Panel misinterpreted the findings of the review member when it stated that the Applicant had shifted the responsibility for obtaining a safe outcome to the hockey players. In the Applicant's view, the review member held that there was a sufficient gap between them for the helicopter to pass, even if the skaters had not moved. Their moving further to the side, along with their decision to move before the Applicant gave the signal to "break", only served to increase the safety margin for the players.

[29] With respect, I do not agree with the Applicant.

[30] The Appeal Panel considered the entire record and concluded, by applying the standard of the prudent pilot, that the defence of due diligence had not been met. In doing so, it accepted that due diligence means reasonable actions and reasonable diligence, and that reasonableness is a question of fact dependent on all the circumstances. It must reflect the actions of a reasonable professional possessing the expertise suitable for the activity.

[31] The Applicant had the burden to convince the Court that this finding was outside the range of possible, acceptable outcomes given the evidence that the review member and the Appeal Panel had at their disposal.

[32] In my view, the possibility that the Applicant could have obtained a SFO Certificate does not necessarily lead to the conclusion that (i) a SFO Certificate would have been obtained; or (ii) that the manoeuvre could not, after the fact, be found to be negligent.

[33] At the review hearing, Transport Canada's witness explained the process to obtain a SFO Certificate. He stated that the Applicant may have received one if he had applied, and that had he been granted a SFO Certificate and followed any specifications and requirements stipulated therein, he would not have contravened section 602.01 of the Regulations.

[34] Had the Applicant applied for a SFO Certificate, he may have been refused, or he may have received one that was conditional upon additional safety measures, such as providing a wider gap between the hockey players or having them break a few seconds earlier. A further possibility is that, had the Applicant obtained a conditional SFO Certificate, he may have failed to meet all of the mandated conditions.

[35] The Respondent rightfully points to the fact that paragraph 602.14(2)(*b*) of the Regulations makes it a strict liability offence to operate an aircraft at a distance of less than 500 feet from a person except when conducting a take-off, approach or landing. One must assume that operating an aircraft within 500 feet from a person is inherently dangerous, especially when it is not a necessity.

[36] In light of all the circumstances of this case, it was reasonable for the Appeal Panel to have found that, given that the Applicant is not an expert in all aspects of aviation safety,

applying for a SFO Certificate would have been a reasonable additional step for him to take in order to minimize the risks inherent to his stunt.

V. Conclusion

[37] For the reasons discussed above, the Applicant's application for judicial review is dismissed and costs are granted in favour of the Respondent.

JUDGMENT in T-1827-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. Costs in the amount of $500, all-inclusive, are granted to the Respondent.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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