

Federal Court



Cour fédérale

Date: 20130104

Docket: T-855-12

Citation: 2013 FC 5

Ottawa, Ontario, January 4, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

**TREVOR S. ANNON AND
LEEANN C. MCLAREN**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The respondents, Captain Trevor Annon and First Officer Leeann McLaren, are pilots with Canadian North Airlines. In 2011, they underwent a Pilot Proficiency Check (PPC) administered by Captain Kyle Franczak who, in turn, was monitored by Inspector Duncan Wilson from Transport Canada.

[2] During the PPC, FO McLaren piloted the plane while Cpt Annon performed the non-flying duties. Cpt Franczak instructed the crew to enter a specific holding pattern on approach to Vancouver International Airport. This manoeuvre engaged the autopilot system on their Dash 8 aircraft. FO McLaren turned an instrument, the “heading bug,” to the right to effect a right turn. However, she turned the bug too far, causing the plane to bank left, not right.

[3] Cpt Annon and FO McLaren attempted to reset the bug, but failed. Concerned about tail winds that would put them off course, FO McLaren suggested they continue their left turn and change their approach. Cpt Annon agreed.

[4] At that point, Inspector Wilson terminated the PPC because the crew had demonstrated an inability to operate the autopilot system on the aircraft. Both pilots were suspended as a result. They sought a review of the Inspector’s decision before the Transportation Appeal Tribunal of Canada (TATC). The TATC allowed their application and referred the matter back to the Minister of Transport for reconsideration.

[5] The Minister now seeks to review the decision of the TATC, arguing that the tribunal erred in its conclusion that the pilots’ actions should not have resulted in a failure. The Minister asks me to quash the TATC’s decision. However, I cannot find any grounds to overturn the TATC’s decision – it was not unreasonable. Therefore, I must dismiss this application for judicial review.

[6] There are two issues. First, I must decide what standard of review to apply to decisions of the TATC. Given my conclusion that the appropriate standard of review is reasonableness, I must then determine whether the TATC's decision was unreasonable.

II. The TATC's Decision

[7] The TATC heard Inspector Wilson's testimony that the pilots were simply unable to operate the autopilot system and that that was enough for them to fail the PPC. He agreed that pilots sometimes make mistakes and must be able to correct them in a timely fashion, but that was not what happened in this case.

[8] FO McLaren explained her error in turning the bug too far. In the circumstances, she felt the safest course was to continue a left turn and perform a parallel, rather than a direct, entry to the airport. Otherwise, tailwinds might have forced them out of protected airspace. Cpt Annon agreed. So did Cpt Franczak.

[9] The TATC concluded that the crew reacted to their error in a safe manner. The pilots discussed the situation, agreed on a course of conduct, and executed it successfully. The Inspector's concern was legitimate, but there was ample time during the test to give the crew another chance to demonstrate their ability to operate the autopilot. The tribunal concluded that the Minister had failed to show that the pilots did not meet the applicable standard and remitted the matter back to the Minister for reconsideration.

III. Issue One – What is the appropriate standard of review?

[10] The Minister argues that the TATC is owed no deference and, therefore, the Court should overturn its decision if it was incorrect. The Minister's position is based on the fact that the decision was made by a single member of the TATC. Further, there is no privative clause limiting judicial review of the tribunal's decisions, which indicates that a correctness standard should apply.

[11] I disagree.

[12] Decisions of the TATC can generally be appealed to a three-member appeal panel. However, the Minister does not have a right of appeal. Therefore, the Minister's only remedy is by way of judicial review.

[13] It is clear that judicial review of decisions of the appeal panel is generally conducted on a reasonableness standard. The appeal panel is regarded as having expertise in transportation matters and charged with making decisions to protect public safety. Similarly, a single member of the TATC is an expert decision-maker serving a similar purpose, suggesting that a reasonableness standard should apply to it, too.

[14] Further, both the appeal panel and the single-member TATC panel generally make decisions based on findings of fact or mixed questions of fact and law. This, too, points toward a reasonableness standard: *Asselin v Canada (Minister of Transport)*, [2000] FCJ No 256 (TD).

However, in cases where issues of jurisdiction arise, they are reviewed on a correctness standard:

Air Nunavut v Canada (Minister of Transport) (2000), [2001] 1 FC 138 (TD).

[15] It appears that the sole difference between a single-member TATC decision and an appeal panel decision is the absence of a privative clause in respect of the former. But this is just one factor to consider; it is not determinative: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 64.

[16] Further, the appeal panel itself must show deference toward the TATC: it would be odd to have a situation in which, in order to succeed, a person seeking to overturn a decision of the TATC would have to persuade an appeal panel that the tribunal's decision was unreasonable, while the Minister could successfully overturn a TATC's decision by showing that it was incorrect. Absent a more explicit indication that that was Parliament's will, fairness suggests that the parties should have parallel remedies.

[17] I am satisfied that the issue here is one of mixed fact and law. The TATC had to review the evidence and measure the pilots' conduct against a standard set out in regulations. The obvious standard of review to apply is reasonableness.

IV. Issue Two – Was the TATC's decision unreasonable?

[18] The Minister maintains that Cpt Annon and FO McLaren simply failed to operate the autopilot properly. Therefore, they failed the PPC. The TATC's conclusion that their corrective

actions were appropriate in the circumstances was not a defensible outcome in the face of those stark facts.

[19] On the contrary, I find that the TATC's conclusion was not unreasonable. The tribunal referred to the Flight Test Guide published by Transport Canada which provided that pilots should be scored a passing grade of "basic standard" even in situations where "major deviations from the qualification standards occur" so long as they are "recognized and corrected in a timely manner". A pilot who receives a "basic standard" score is allowed to repeat the requested sequence later in the PPC.

[20] The TATC considered all of the testimony before it and concluded that the pilots took the safest option in the circumstances, one which allowed them to complete the assigned exercise successfully. They discussed the options and chose an acceptable course. The TATC noted that this kind of decision-making should not be taken away from a flight crew.

[21] In my view, the TATC's decision is intelligible, transparent and justified. It represented a defensible outcome based on the facts and the law.

V. Conclusion and Disposition

[22] Decisions of the TATC should generally be reviewed on a reasonableness standard. Here, the TATC based its decision on the evidence before it and arrived at a conclusion that fell within the

range of defensible outcomes. It was not unreasonable. Therefore, I must dismiss this application for judicial review, with costs.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is dismissed with costs.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-855-12

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA
v
TREVOR S. ANNON, ET AL

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: December 17, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: January 4, 2013

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