

Date: 20070911

Docket: A-290-06

Citation: 2007 FCA 279

**CORAM: DÉCARY J.A.
SEXTON J.A.
SHARLOW J.A.**

BETWEEN:

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

Appellants

and

AIR CANADA

Respondent

Heard at Toronto, Ontario, on September 11, 2007.

Judgment delivered from the Bench at Toronto, Ontario, on September 11, 2007.

REASONS FOR JUDGMENT OF THE COURT BY:

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on September 11, 2007)

SHARLOW J.A.

[1] The merger of Air Canada and Canadian International Airlines Limited on January 4, 2000, and the resulting combination of their respective unionized workers, has caused a number of difficulties. One difficulty that apparently remains unresolved is the introduction, in January of 2001, of certain amendments to the In Flight Safety Manual. Those amendments are at the root of this appeal.

[2] The appellants were of the view and still believe that the amendments to the In Flight Safety Manual gave rise to certain risks to the health and safety of cabin personnel. The appellants made a complaint under the internal complaint resolution process mandated by section 127.1 of the *Canada*

Labour Code. When the complaints were not resolved to the satisfaction of the appellants, the complaints were referred to a health and safety officer under subsection 127.1(8).

[3] The duties and powers of a health and safety officer are described in subsections 127.1(9), (10) and (11) of the *Canada Labour Code*, which read as follows:

<p>(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).</p> <p>(10) On completion of the investigation, the health and safety officer</p> <p style="padding-left: 20px;">(a) may issue directions to an employer or employee under subsection 145(1);</p> <p style="padding-left: 20px;">(b) may, if in the officer's opinion it is appropriate, recommend that the employee and employer resolve the matter between themselves; or</p> <p style="padding-left: 20px;">(c) shall, if the officer concludes that a danger exists as described in subsection 128(1), issue directions under subsection 145(2).</p> <p>(11) For greater certainty, nothing in this section limits a health and safety officer's authority under section 145.</p>	<p>(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.</p> <p>(10) Au terme de l'enquête, l'agent de santé et de sécurité :</p> <p style="padding-left: 20px;">a) peut donner à l'employeur ou à l'employé toute instruction prévue au paragraphe 145(1);</p> <p style="padding-left: 20px;">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;</p> <p style="padding-left: 20px;">c) s'il conclut à l'existence de l'une ou l'autre des situations mentionnées au paragraphe 128(1), donne des instructions en conformité avec le paragraphe 145(2).</p> <p>(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.</p>
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[4] Subsections 145(1) and (2) of the *Canada Labour Code* read as follows:

<p>145. (1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the</p>	<p>145. (1) S'il est d'avis qu'une contravention à la présente partie vient d'être commise ou est en train de l'être, l'agent de santé et de sécurité peut donner</p>
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employer or employee concerned, or both, to

- (a) terminate the contravention within the time that the officer may specify; and
- (b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

[...]

(2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,

(a) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to

- (i) correct the hazard or condition or alter the activity that constitutes the danger, or
- (ii) protect any person from the danger; and

(b) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

à l'employeur ou à l'employé en cause l'instruction :

- a) d'y mettre fin dans le délai qu'il précise;
- b) de prendre, dans les délais précisés, les mesures qu'il précise pour empêcher la continuation de la contravention ou sa répétition.

[...]

(2) S'il estime que l'utilisation d'une machine ou chose, une situation existant dans un lieu de travail ou l'accomplissement d'une tâche constitue un danger pour un employé au travail, l'agent :

a) en avertit l'employeur et lui enjoint, par instruction écrite, de procéder, immédiatement ou dans le délai qu'il précise, à la prise de mesures propres :

- (i) soit à écarter le risque, à corriger la situation ou à modifier la tâche,
- (ii) soit à protéger les personnes contre ce danger;

b) peut en outre, s'il estime qu'il est impossible dans l'immédiat de prendre les mesures prévues à l'alinéa a), interdire, par instruction écrite donnée à l'employeur, l'utilisation du lieu, de la machine ou de la chose ou l'accomplissement de la tâche en cause jusqu'à ce que ses instructions aient été exécutées, le présent alinéa n'ayant toutefois pas pour effet d'empêcher toute mesure nécessaire à la mise en oeuvre des instructions.

[5] The health and safety officer, Mr. Jacques Servant, decided not to issue a direction under subsection 145(1) or (2). Instead, with respect to two of the complaints, he accepted an “assurance of voluntary compliance” from Air Canada with respect to the establishment and training of local health and safety committees. The remaining complaints were effectively dismissed.

[6] Mr. Servant’s decision is set out in a letter dated May 7, 2001, the key parts of which read as follows (Appeal Book, page 310):

Our concerns as a Health and Safety Inspector relate to the local Health and Safety committees. Our investigation indicates a lack of knowledge/education of the workplace committee members. CUPE trained the employee representatives and Air Canada does not train the employer representatives. Counselling and training must be conducted together to understand the intent of the legislation. A good education program is the key to creating an effective workplace committee. The administrative roles and responsibilities of those involved in the workplace committee must be clearly understood. Committees are required by law to establish rules and procedures relating to the terms of office of members and to their operation.

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.

[7] The appellants believe that the investigation of their complaints was biased and flawed in a number of respects, and that the resulting decision of Mr. Servant is similarly flawed. The parties have agreed that, for the purposes of this appeal, the Court should assume that these complaints are

justified. The appellants filed a notice of appeal of his decision under subsection 146(1) of the *Canada Labour Code*, which reads as follows:

146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.

146. (1) Tout employeur, employé ou syndicat qui se sent lésé par des instructions données par l'agent de santé et de sécurité en vertu de la présente partie peut, dans les trente jours qui suivent la date où les instructions sont données ou confirmées par écrit, interjeter appel de celles-ci par écrit à un agent d'appel.

[8] An appeals officer, Mr. Douglas Malanka, considered the matter and concluded that he lacked the statutory authority to consider an appeal of a decision by a health and safety officer not to issue a direction under section 145. The appellants commenced an application for judicial review of the decision of Mr. Malanka. On June 1, 2006, Justice Hughes dismissed the application for judicial review but gave the appellants an extension of time for filing an application for judicial review of the decision of the health and safety officer, Mr. Servant (2006 FC 673). The appellants now appeal the decision of Justice Hughes.

[9] The appellants argue that the decision of Justice Hughes is based on an incorrect interpretation of subsection 146(1) of the *Canada Labour Code*, and that Justice Hughes afforded the decision of Mr. Malanka too much deference on the question of the interpretation of that provision. In the alternative, the appellants argue that if section 146(1) was correctly interpreted by Justice Hughes and Mr. Malanka, it is a breach of section 7 of the *Canadian Charter of Rights and Freedoms* and should be amended by a judicial “reading in” of words that would permit the appellants to pursue their appeal of the decision of Mr. Servant not to issue a direction.

[10] We are all of the view that the interpretation of subsection 146(1) adopted by Justice Hughes and Mr. Malanka is correct. Subsection 146(1) of the *Canada Labour Code* grants an employer, an employee or a trade union a right to appeal any direction by a health and safety officer under section 145, but does not grant anyone a right to appeal a decision by a health and safety officer not to issue a direction. We do not consider it necessary to consider the issue of the standard of review that was or should have been applied by Justice Hughes in reviewing the decision of Mr. Malanka.

[11] We see no merit in the argument of the appellants that section 7 of the Charter is breached by subsection 146(1) of the *Canada Labour Code*. It is well established that there is no constitutional right to appeal, even in matters with a significant effect on the life, liberty and security of the person (*Kourtessis v. Canada (Minister of National Revenue)*, [1993] 2 S.C.R. 52 (per Justice La Forest); *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at paragraph 136; *Huynh v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 976; *Canada (Secretary of State) v. Luitjens* (1992) 142 N.R. 173 (F.C.A.)). Section 7 of the Charter does not require Parliament to provide a statutory right to appeal a decision of a health and safety officer. Nevertheless, Parliament has provided a statutory right to appeal the issuance of a section 145 direction by a health and safety officer. We see no basis for concluding that, because of section 7 of the Charter, the existence of that limited right of appeal means that there must also be a right to appeal the decision of a health and safety officer not to issue such a direction.

[12] This appeal will be dismissed with costs.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-290-06

An appeal from the order of the Honourable Mr. Justice Hughes, of the Federal Court, dated June 1, 2006.
File no.: T-776-02.

STYLE OF CAUSE: PAMELA SACHS, CANADIAN UNION OF PUBLIC
EMPLOYEES, AIRLINE DIVISION, AIR CANADA
COMPONENT, OCCUPATIONAL HEALTH AND
SAFETY COMMITTEE OF LOCAL 4004 (TORONTO) Appellants
and
AIR CANADA Respondent

PLACE OF HEARING: Toronto, Ontario.

DATE OF HEARING: September 11, 2007

**REASONS FOR JUDGMENT
OF THE COURT BY:** (DÉCARY, SEXTON & SHARLOW J.J.A.)

**DELIVERED FROM THE
BENCH BY:** SHARLOW J.A.

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