Federal Court of Appeal  Cour d'appel fédérale

Date: 20210331

Docket: A-109-20

Citation: 2021 FCA 67

CORAM: **STRATAS J.A.**
BOIVIN J.A.
WOODS J.A.

BETWEEN:

CUPE AIR CANADA COMPONENT

Appellant

and

AIR CANADA

Respondent

Heard by online video conference hosted by the Registry on March 11, 2021.

Judgment delivered at Ottawa, Ontario, on March 31, 2021.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BOIVIN J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from a decision of the Federal Court: 2020 FC 420. The Federal Court allowed an application for judicial review of a decision of an appeals officer with the Occupational Health and Safety Tribunal of Canada: 2019 OHSTC 3. The Federal Court remitted the matter to the Tribunal for redetermination.

[2] As will be explained below, this matter was moot in the Federal Court. It is also moot in this Court and we should not determine it on its merits: *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231.

[3] This case arose from certain work refusals of Air Canada flight attendants in 2011-2012. They noticed a strange odour on their aircraft. Air Canada maintenance staff investigated the odour but could not resolve it before the flights. The flight attendants refused to work under subsection 128(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2.

[4] Health and safety officers investigated the refusals and found that there was no danger. Later, an appeals officer with the Tribunal disagreed. He found that the attendants were justified in claiming danger. But he exercised his discretion not to make a contravention direction—a remedy with practical consequences—or any other finding with practical consequences: 2019 OHSTC 3 at paras. 111-115. No one has challenged that particular exercise of discretion.

[5] An issue is moot if the tangible and concrete dispute between the parties has disappeared, rendering the issue academic: *Borowski* at 353 S.C.R. During the hearing in this Court, we raised the issue of mootness with the parties. Both conceded that this matter no longer had any practical consequences. They also acknowledged that this was also the case in the Federal Court.

[6] The parties' concession was well founded:

- The Tribunal's decision in this case imposes no obligations on Air Canada and does not expose it to any liability. The officer found that Air Canada "failed to satisfy properly its obligations under paragraph 125.1(f) of the *Code*" (para. 113). But this does not expose Air Canada to any liability because the limitation period for offences under the Act has expired: s. 149(4).

- The flight attendants' compensation is unaffected. The *Code* says that any findings relating to work refusals do not affect an employee's compensation under other laws: *Code*, s. 131.

- A companion decision of the Occupational Health and Safety Tribunal required Air Canada to investigate the underlying causes of the work refusals at issue in this case: 2015 OHSTC 14. To the extent there are practical consequences, they were addressed in that case.

[7] The parties' only possible interest in this case continuing is jurisprudential. A mere jurisprudential interest fails to satisfy the need for a concrete and tangible controversy: *Borowski* at 353. Even the jurisprudential interest in this case may be moot: as will be explained, the legislation in issue in this case has been changed.

[8] Although we have a discretion to hear a moot case, we should not do so here.

[9] Three considerations guide this discretion:

- the absence or presence of an adversarial context;
- whether there is any practical utility in deciding the matter or if it is a waste of judicial resources; and
- whether the court would be exceeding its proper role by making law in the abstract, a task reserved for Parliament.

(See *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202 at para. 16 citing *Borowski*.)

[10] The first consideration weighs in favour of deciding the moot issue. We do have an adversarial context: both sides, represented by counsel, take opposing positions.

[11] The second consideration strongly weighs in favour of not deciding the moot issue. Deciding it would waste judicial resources. The appeals officer's decision does not impose obligations on either party and does not have any practical consequences.

[12] As well, the jurisprudential issues are not evasive of review: Air Canada says similar proceedings are under way between the parties. As well, Parliament has amended the statutory

definition of “danger” since these proceedings began: *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40, s. 176. Future cases will turn on the new definition.

[13] As for the third consideration, gratuitously interpreting the former wording of the provision in issue, in a case with no practical consequences, just to create a legal precedent, would be a form of law-making for the sake of law-making. That is not our proper task.

[14] The mootness issue assumes greater significance following *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1. There, the Supreme Court underscored that courts must consider expediency and cost-efficiency when considering applications for judicial review and should not grant remedies when they serve no useful purpose: at para. 140, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 55.

[15] The legislative context underscores these concerns. The *Code* requires these types of proceedings to be determined quickly, with minimal judicial oversight: s. 129(1) (a health and safety officer shall investigate “without delay”), s. 146.1(1) (an appeals officer shall conduct the appeal “in a summary way and without delay”) and see also 146.3 and 146.4. Prolonging this matter—one now roughly ten years old—for no practical reason would be indefensible.

[16] Air Canada raised one other issue for our consideration. It noted that this case has a lengthy procedural history, including an August 2015 Occupational Health and Safety Tribunal decision (2015 OHSTC 15) that found the refusals were not justified, a June 2017 judgment of

the Federal Court (2017 FC 554) that remitted the matter, and the decision of the appeals officer in this case. Air Canada says if the matter is moot now, it was moot before the Federal Court when it remitted the matter in June 2017. Air Canada asks us to overturn the Federal Court's June 2017 judgment.

[17] We cannot overturn that judgment. It was never appealed. Thus, it became final: *Canada v. MacDonald*, 2021 FCA 6 at paras. 14-15.

[18] Under the Federal Court's judgment in this case, the Tribunal was to redetermine the matter. Given the fact that this matter is moot, redetermination would be pointless. As well, the matter was moot in the Federal Court and the Federal Court erred by granting a remedy with no practical effect. Therefore, I propose that this Court allow the appeal and set aside the judgment of the Federal Court.

[19] As both parties have pressed this moot matter forward long after it should have been discontinued, I would not award any costs here or below.

[20] This Court's decision should not be taken as any comment, one way or the other, on the reasoning or conclusions of the Federal Court or the appeals officer in this case.

"David Stratas"

J.A.

"I agree
Richard Boivin J.A."

"I agree
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-109-20

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE FOTHERGILL DATED MARCH 25, 2020, NO. T-436-19

STYLE OF CAUSE:	CUPE AIR CANADA COMPONENT v. AIR CANADA
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	MARCH 11, 2021
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	BOIVIN J.A. WOODS J.A.
DATED:	MARCH 31, 2021

APPEARANCES:

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