TATC File No. P-3770-33
MoT File No. EMS 73371

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Minister of Transport, Appellant

- and -

Jeff Paul Bickerstaff, Respondent

LEGISLATION:
subsection 605.84(1) of the Canadian Aviation Regulations, SOR/96-433, pursuant to section 7.7 of the Aeronautics Act, R.S.C. 1985, c. A-2

Appeal decision
Elizabeth MacNab, Laura Safran, John Badowski

Decision: July 10, 2014

Citation: *Canada (Minister of Transport) v. Bickerstaff*, 2014 TATCE 25 (Appeal)

Heard in: Vancouver, British Columbia, on April 30, 2014

APPEAL DECISION AND REASONS

Held: The appeal is allowed in part and the monetary penalty is increased from $100 to $700.

The total amount of $700 is payable to the Receiver General of Canada and must be received by the Transportation Appeal Tribunal of Canada within thirty-five (35) days of service of this decision.

I. BACKGROUND

[1] On February 7, 2011, the Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty (Notice) to the respondent, Jeff Paul Bickerstaff, pursuant to section 7.7 of the *Aeronautics Act*, R.S.C., 1985, c. A-2, for an alleged contravention of subsection 605.84(1) of the *Canadian Aviation Regulations*, SOR/96-433 (*CARs*). The Notice alleged that Mr. Bickerstaff flew a Bell 206 Helicopter that did not meet the airworthiness requirements of the subsection in that the Tension-Torsion Straps were beyond their calendar life, and assessed a

monetary penalty of $1,000. The Transportation Appeal Tribunal of Canada (Tribunal) received Mr. Bickerstaff's request for review on March 4, 2011 and a hearing was held in Vancouver, British Columbia, in four sessions between May 23, 2012 and April 26, 2013. On July 31, 2013, the review member issued his determination in which he found that while Mr. Bickerstaff had admitted all the factual elements of the offence, there were mitigating factors and consequently he reduced the monetary penalty from $1,000 to $100. The Minister's request for an appeal was filed on September 3, 2013 and was limited to appealing the reduction of the penalty.

II. STATUTES AND REGULATIONS

[2] Section 14 of the *Transportation Appeal Tribunal of Canada Act* sets out the nature of an appeal before an appeal panel of the Tribunal:

> **14.** An appeal shall be on the merits based on the record of the proceedings before the member from whose determination the appeal is taken, but the appeal panel shall allow oral argument and, if it considers it necessary for the purposes of the appeal, shall hear evidence not previously available.

[3] Subsection 8.1(3) of the *Aeronautics Act* sets out the powers of an appeal panel in disposing of an appeal:

> **8.1** (3) The appeal panel of the Tribunal assigned to hear the appeal may dispose of the appeal by dismissing it or allowing it and, in allowing the appeal, the panel may substitute its decision for the determination appealed against.

[4] Subsection 605.84(1) of the *CARs* provides:

> **605.84** (1) Subject to subsections (3) and (4), no person shall conduct a take-off or permit a take-off to be conducted in an aircraft that is in the legal custody and control of the person, other than an aircraft operated under a special certificate of airworthiness in the owner-maintenance or amateur-built classification, unless the aircraft
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> (*a*) is maintained in accordance with any airworthiness limitations applicable to the aircraft type design;
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> (*b*) meets the requirements of any airworthiness directive issued under section 521.427; and
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> (*c*) except as provided in subsection (2), meets the requirements of any notices that are equivalent to airworthiness directives and that are issued by
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> (i) the competent authority of the foreign state that, at the time the notice was issued, is responsible for the type certification of the aircraft, engine, propeller or appliance, or
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> (ii) for an aeronautical product in respect of which no type certificate has been issued, the competent authority of the foreign state that manufactured the aeronautical product.

III. REVIEW DETERMINATION

[5] The review member hearing this matter found that Mr. Bickerstaff had admitted that he had contravened the regulation and so limited his determination to dealing with the possible defences to that contravention and to the amount of the penalty. He found that no defence of officially induced error could be based on the statements of an aircraft maintenance engineer (AME) on the grounds that such persons are not responsible for either the administration or

enforcement of the *CARs*. He also found that there was no defence of due diligence under section 8.5 of the *Aeronautics Act*, since, while Mr. Bickerstaff took a number of steps towards such diligence, he failed to take all the necessary steps, which would have included seeking Transport Canada approval as set out in the letter from Bell Helicopter as a condition of an extension to use the time-expired Tension-Torsion straps. He found, however, that there were mitigating circumstances not considered in assessing the penalty, and consequently reduced it from $1,000 to $100.

IV. GROUNDS FOR APPEAL

[6] The grounds for appeal are as follows:

1. The review member erred in fact and in law in significantly reducing the sanction imposed by the Minister.
2. Such other grounds in fact and in law that the transcript of the proceedings may disclose.

V. ARGUMENTS

A. Appellant

[7] The appellant submitted written arguments supplemented by an oral presentation.

(1) Standard of Review

[8] The appellant's representative submitted that the standard of review was established as reasonableness by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*). That case also held that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process". On that basis, the role of the appeal panel is to determine whether the decision under review falls within a range of possible outcomes that are defensible in respect of fact and law. In *Farm Air Ltd. v. Canada (Minister of Transport)*, 2011 TATCE 20, TATC File No. C-3621-09 (Appeal), the appeal panel quoted the Federal Court of Canada's decision in *Billings Family Enterprises Ltd. v. Canada (Minister of Transport)*, 2008 FC 17 (*Billings*), which explicitly dealt with the standard that a Tribunal appeal panel should meet when reviewing an initial review determination. The Court held that considerable deference should be given to the review member's findings of fact and credibility, and that an appeal panel should not interfere with a determination so long as it is within a range of reasonable outcomes based on the evidence before that member.

[9] The appellant's representative submitted that the review member made unreasonable findings of fact that should be overturned by the appeal panel, arguing that too little weight was given to the aggravating factors and too much weight to factors that the review member characterized as mitigating so that his conclusion was not within a range of reasonable outcomes based on the evidence before him.

(2) Aggravating and Mitigating Factors

[10] The appellant's representative pointed out that in paragraph [44] of his determination, the review member noted that the Minister had submitted that there were seven aggravating factors listed as follows:

> 1) The Applicant knew that the straps were expired;
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> 2) The Applicant had bought new straps;
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> 3) The Applicant had requested a letter of no objection from Bell Helicopter;
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> 4) Bell Helicopter informed the Applicant he needed authorization from an applicable authority;
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> 5) The Applicant did not get authorization from Transport Canada;
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> 6) The Applicant flew the aircraft anyway;
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> 7) The Applicant did not use the other alternatives he had secured to avoid violating the *CARs*.

[11] The appellant's representative pointed out that, in making his determination, the review member found in paragraph [60] that the Minister had argued that there were aggravating factors, but had not considered those factors in establishing the penalty as the minimum suggested in the *Aviation Enforcement Procedures Manual* (Manual).

[12] While agreeing with the review member that the respondent had acted properly in obtaining the letter of non-objection from Bell Helicopter, the appellant's representative submitted that the respondent had not followed the recommendation in the letter that he obtain authorization from the applicable authority, Transport Canada in this case. He argued that the only purpose of obtaining the letter was to verify that it would be safe to fly the aircraft with time-expired Tension-Torsion straps. He also submitted that the respondent's actions in obtaining insurance and changing the aircraft's registration did not meet the threshold of the due diligence defence set out in section 8.5 of the *Aeronautics Act* and, consequently, that the review member should not have considered these actions as mitigating factors.

[13] The appellant's representative submitted that the testimony of the respondent that he was not aware of the *CARs*, amounting to a statement that he was ignorant of the law for 40 years, should be considered as an aggravating factor and, taken together with his other actions (contacting Bell Helicopter, arranging for a trailer and hangar and contacting the RCMP), as an argument supporting his position that these actions were not taken as an attempt at due diligence but for the purpose of obtaining his aircraft and operating it safely.

[14] The appellant's representative submitted that the review member's determination reducing the penalty was not within a range of reasonable possibilities for a number of reasons: he misinterpreted and misapplied the aggravating factors relied upon by the Minister in assessing the amount of the penalty; he did not give enough weight to the respondent's failure to obtain authorization from Transport Canada; he did not give enough weight to the respondent's admission that he was unaware of the regulations; and finally, he considered as mitigating factors actions taken by the respondent for another purpose.

(3) General Deterrence

[15] The appellant's representative referred to *Canada (Minister of Transport) v. Wyer*, [1988] C.A.T.D. No. 123, CAT File No. O-0075-33 (Appeal) (*Wyer*), as establishing the principles to be applied by the Tribunal in considering the penalty that should be imposed for a contravention. These principles included both personal and general deterrence. He submitted that the review member, in reducing the penalty to $100, had not given adequate consideration to these principles.

(4) Schedule to the Aviation Enforcement Procedures Manual

[16] The appellant's representative pointed out that the penalty assessed against Mr. Bickerstaff was that suggested for a first contravention of subsection 605.84(1) of the *CARs* in the schedule of the Manual that sets out recommended penalties. While he recognized that the Manual is not binding on the Tribunal, he submitted that it is used throughout the country to promote consistency in the assessment of penalties and should have been given some weight by the review member when analyzing the sanction in paragraph [63] of his determination.

[17] Finally, the appellant's representative pointed out that, since the respondent had not appealed the review member's determination, he could not challenge it on the basis of defences that were rejected nor could he challenge the amount of the penalty of $100.

B. Respondent

[18] The respondent referred to his spotless record with Transport Canada as a mitigating factor and stated that he had never before violated a regulation. He suggested that he should be able to rely on the advice of an AME, who is licensed by Transport Canada, without having to confirm that the advice is accurate by consulting further with Transport Canada officials. Further, noting that the letter from Bell Helicopter referred to an “authorized party” rather than to Transport Canada, he submitted that he took the phrase used in the letter to refer to a licensed AME who was a director of maintenance.

[19] The respondent submitted that he had done everything reasonably possible to make sure that the aircraft could be operated. It had its annual inspection and he had it insured. He referred to the e-mail from a Transport Canada official (Exhibit A-32) that said his error was not having the AME sign the log entry for the time-expired straps and suggested that this was really only a technical error.

[20] He responded to the appellant's arguments concerning the deterrent effect of the penalty by saying that such arguments were weak in view of his excellent record. He concluded by asking the appeal panel to deny the appeal or to reduce the penalty to $1.

C. Appellant in Reply

[21] The appellant's representative objected to the arguments raised by the respondent on the basis that, since he had not appealed, he was limited to arguing that the review member's determination fell within the range of reasonable outcomes and could not raise new arguments

such as asking that the penalty be reduced to $1. The appeal panel agreed that the respondent could not raise new issues but noted that, while not couched in legal language, his arguments as to mitigating circumstances fell within the scope of arguing the reasonableness of the review member's determination.

[22] The appellant's representative also pointed out that while the respondent had submitted that it was not unreasonable to assume that an AME was an “approved authority”, he had also admitted during the review hearing that he assumed it to be correct that it is the Minister of Transport who has the authority to make regulations affecting aviation.

VI. ANALYSIS

[23] The basis for an appeal hearing is set out in section 14 of the *Transportation Appeal Tribunal of Canada Act* as follows:

> **14.** An appeal shall be on the merits based on the record of the proceedings before the member from whose determination the appeal is taken, but the appeal panel shall allow oral argument and, if it considers it necessary for the purposes of the appeal, shall hear evidence not previously available.

[24] Essentially, this means that the appeal panel must reach its decision on the basis of the evidence that was before the review member at the initial hearing and no other information will be considered. The appellant's representative submitted that much of the argument made by the respondent should not be considered since the respondent had not appealed the review member's determination and he ought not to be able to reargue the matter at the appeal stage. The appeal panel took the position that the respondent could refer to matters that related to determining whether the reduction of the penalty should be upheld. The panel also notes, however, that its decision should be based on the record of the proceedings before the review member and finds that a reference to matters that have been discussed in that record is appropriate from either party in an appeal.

(1) Standard of Review

[25] As pointed out by the appellant's representative, the Supreme Court of Canada determined in *Dunsmuir* that the standard for judicial review is reasonableness on matters of fact and matters of mixed fact and law, and correctness for questions of law. Reviewing a decision of an appeal panel of this Tribunal in the *Billings* case, the Federal Court of Canada held that a review member was owed considerable deference on determinations relating to facts and credibility and that an appeal panel should not interfere with such a determination so long as it fell within a range of reasonable outcomes based on the evidence that was before the review member. *Dunsmuir* also decided that once a standard of review had been determined, it did not need to be re-examined in subsequent matters. The reasonableness standard has been adopted in relation to matters before an appeal panel of the Tribunal, most recently in *Sellars v. Canada (Minister of Transport)*, 2013 TATCE 16, TATC File No. A-3895-33 (Appeal). Indeed, the appeal panel is not aware of any matter where it has been ignored and sees no reason not to apply this standard of review in the present matter. On this basis, the question to be resolved is whether the reduction of the penalty by the review member falls within a range of reasonable outcomes based on the evidence that was before him.

(2) Aggravating and Mitigating Factors

[26] In paragraph [44] of his determination, the review member listed seven aggravating factors referred to by the Minister's representative in his argument, including the respondent's knowledge that the Tension-Torsion straps were time-expired, the request for a letter of no objection from Bell Helicopter and the failure to use the alternatives he had arranged to avoid contravening the regulations. In paragraph [60], he noted that the Minister, through the Supervisor's Recommendation set out in Exhibit A-15, pointed out these aggravating factors but did not consider them in assessing the minimum recommended penalty.

[27] In paragraph [61] of his determination, however, the review member found that these aggravating circumstances could also be viewed as mitigating. Since the respondent knew the straps were time-expired, he sought advice from the manufacturer. He had made arrangements to store or move the helicopter if he could not make the flight. Further, his actions in changing the registration of the helicopter and obtaining insurance for it demonstrate some diligence on his part. The review member concluded that, while these actions were not sufficient to establish a due diligence defence, they did amount to mitigating factors that, taken together with the respondent's spotless 40-year record, justified a reduction in the penalty assessed against him.

[28] The appeal panel notes that the appellant's representative submitted that since the review member found that the mitigating factors did not amount to a due diligence defence under section 8.5 of the *Aeronautics Act*, they should not be considered. This argument ignores the distinction between a defence and mitigation. If a due diligence defence is successful, it leads to a decision that there was no contravention, whereas a finding that there were mitigating circumstances leads to a conclusion that there was such a contravention but there are circumstances that justify a lesser penalty.

[29] At the appeal hearing, the appellant's representative submitted that the respondent's aim was to fly the aircraft safely and that the actions that the review member found to be mitigating were undertaken for this purpose only and not to avoid a contravention of the regulations. The appeal panel rejects this argument. It seems clear that there can be several motives behind any action. The underlying aim of any aviation activity is that it will be carried out safely and, in order to do so, a pilot such as the respondent will take actions that attempt to comply with the regulations. That these actions may be inadequate in achieving compliance does not take away their mitigating effect.

[30] The appellant's representative also submitted that the respondent's statement at the review hearing that he had never heard of the *CARs* should be taken into account as an aggravating factor in determining an appropriate penalty. He argued that the statement was evidence that he was not aware of the aviation regulations. It is clear, however, from the respondent's evidence and actions that he was aware that there were regulations governing aviation activities as, for example, in requiring an aircraft to be registered and to undergo an annual inspection. It is a reasonable assumption that the respondent's statement referred to the acronym "*CARs*" rather than the fact of the existence of the regulations.

[31] The appellant's representative submitted that the review member's findings did not fall within a range of reasonable outcomes when the various aggravating factors mentioned in his

argument were taken into account, in that he misinterpreted and misapplied the aggravating factors relied on by the appellant to impose the sanction. He referred specifically to the respondent's failure to obtain Transport Canada's authority to operate the flight as set out in the Bell Helicopter letter. This failure, however, forms the basis of the contravention and a fact that is the cause of a contravention cannot be said to further aggravate that contravention.

[32] The appeal panel finds that the review member's assessment that there were mitigating factors falls within the range of reasonable outcomes. Upon analysis as outlined above, the respondent's actions are capable of at least two interpretations and the review member, who had the advantage of seeing and hearing the witnesses, interpreted the evidence relating to the actions of the respondent as including actions that could be taken as mitigating his improper and unauthorized undertaking of the flight.

[33] The appeal panel notes that the respondent suggested that he should be able to rely on the advice of a licensed AME who told him that he could sign off the notation regarding the Tension-Torsion straps in the log. The appeal panel cannot accept this as a mitigating factor. While a pilot may not be aware of all the regulations affecting maintenance and approvals by an AME, he should be aware of what his own responsibilities are with regard to maintenance performance and notations.

(3) General Deterrence and the Schedule of Sanctions

[34] The appellant's representative submitted that the review member's reduction of the penalty from $1,000 to $100 was not within a range of reasonable outcomes because he failed to apply the principles relating to general deterrence and failed to give adequate weight to the Manual.

[35] The formative decision regarding the determination of an appropriate penalty by the Tribunal is that of an appeal panel of the Civil Aviation Tribunal, the predecessor of this Tribunal, in the *Wyer* case. This decision listed the matters to be considered as (a) denunciation, (b) deterrence, (c) rehabilitation, and (d) enforcement recommendations. It further pointed out that deterrence had two facets, one relating to preventing the individual from reoffending and the other generally aimed at preventing contraventions by the aviation community. The appeal panel explained:

> General deterrence conveys to other members of the aviation community, fear of the consequences should one offend and, as well, demonstrates the merits of not offending. It is to be hoped, that a person with an attitude thus conditioned to regard conduct as reprehensible, will not deliberately commit such an act.

[36] *Wyer* also discussed the effect of recommended sanctions as set out in the Manual. At the time, the administrative monetary penalty was a newly established enforcement tool and the Manual, in laying out a range approach to penalties, was seen as attempting to establish an enforcement policy “which recognizes that the laws will be fairly and equally enforced and that all persons and corporations are equal in the eyes of the law”. The appeal panel acknowledged, however, that the Tribunal was not bound by the Manual but viewed it only as guidance in an attempt to achieve uniformity of approach. It also recognized that in individual matters, there might well be aggravating or mitigating factors that would influence the amount of the penalty to

be assessed and that ultimately, a determination of penalty involves a balancing of various policy considerations implicit in the sentencing principles and in the aggravating or mitigating factors of the individual case.

[37] In the years since 1988, both the number of contraventions subject to the administrative monetary penalty and the maximum penalty have substantially increased but the goals set out in *Wyer* have remained consistent. In reducing the penalty by a factor of ten, the review member was taking into account what he found to be mitigating factors. He did not, however, consider the other purposes related to the enforcement of the regulations, notably that of general deterrence and the associated consistency of penalty. While neither the review member nor the appeal panel is bound by the guidelines set out in the Manual, the determination of an appropriate penalty must take into account both the individual circumstances of the particular matter being considered and the general purposes of enforcement in order to reach a conclusion that is within a reasonable range of possible outcomes. The guidelines, although not binding, have a function in establishing this range. Except in the most exceptional circumstances, the penalty should not be reduced to an amount that renders it nugatory nor should it be increased beyond the amount that is suggested for a subsequent offence.

[38] In this matter, both the investigating officer and his supervisor were aware that there were factors that could be considered as aggravating the offence but did not see fit to increase the suggested penalty on that account. The review member found that there were mitigating circumstances that should have been taken into account and reduced the penalty from $1000 to $100. The appeal panel finds that, while it was within the range of reasonable outcomes to find that there were mitigating circumstances, the extent of the reduction was not within that range. The suggested penalty must be accepted as being established in consideration of all the elements set out in *Wyer* and all of those elements should have been considered by the review member. The Manual suggests that an appropriate variation in respect of either aggravating or mitigating circumstances should be up to 30 per cent. While recognizing that it is not bound by this recommendation, the appeal panel finds that the circumstances of this matter are not so exceptional as to justify a more substantial reduction. The panel finds, therefore, that a penalty of $700 will adequately take into account the mitigating factors found by the review member.

VII. DECISION

[39] The appeal is allowed in part and the monetary penalty is increased from $100 to $700.

July 10, 2014

(Original signed)

Reasons for the appeal decision: Elizabeth MacNab, Member

Concurred by: John Badowski, A/Chairperson

Laura Safran, Member