

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Brent Allan Gerald Lukian, Appellant

- and -

Minister of Transport, Respondent

LEGISLATION:

Canadian Aviation Regulations, SOR/96 433, para. 602.31(1)(a)

Contravention for failing to comply with the air traffic clearances

Appeal decision

Herbert Lee, J. Richard W. Hall, Arnold Marvin Olson

Decision: November 28, 2012

Citation: *Lukian v. Canada (Minister of Transport)*, 2012 TATCE 37 (Appeal)

Heard in Edmonton, Alberta, on August 15, 2012

APPEAL DECISION AND REASONS

Held: The Appeal Panel upholds the Review Member's Determination and the monetary penalty of \$750.

The total amount of \$750 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within thirty-five (35) days of service of this Decision.

BACKGROUND

A. TATC File No. W-3674-33

[1] The Minister of Transport (Minister) issued a Notice of Assessment of Monetary Penalty to the Appellant, Brent Allan Gerald Lukian, on February 23, 2010, for a contravention of

paragraph 602.31(1)(a) of the *Canadian Aviation Regulations (CARs)* for failing to comply with the air traffic clearances directed to and received by him from the Fort McMurray Ground Control. Specifically, this violation related to the Appellant's failure to contact Ground Control prior to proceeding on Taxiway Golf from Taxiway Delta on October 7, 2009. The penalty assessed for this contravention was \$750.

B. TATC File No. W-3677-33

[2] The Appellant received a Notice of Assessment of Monetary Penalty, dated February 23, 2010, for a contravention of paragraph 602.31(1)(a) of the *CARs* that occurred on November 10, 2009. This contravention related to the Appellant's failure to contact the tower prior to taking position on Runway 25. The penalty assessed for this contravention was \$750.

C. Review Application

[3] The Appellant requested a review of these Notices, and a Review Hearing occurred in Edmonton, Alberta, on January 26, 2011. The Review Member found that the Minister had proven the contraventions and the monetary penalty of \$750 for each violation was upheld.

[4] On February 20, 2012, the Appellant requested an appeal of these Determinations, and the Appeal Hearing took place in Edmonton, Alberta, on August 15, 2012.

[5] The Appellant provided no formal grounds for appeal.

II. REVIEW DETERMINATIONS

A. TATC File No. W-3674-33

[6] The Review Member found that the Minister had proven this contravention on a balance of probabilities.

[7] The context of the allegation was a flight that occurred on October 7, 2009, in which Mr. Lukian was taxiing from Taxiway Delta to Taxiway Golf, at which point the Air Traffic Controller (ATC) advised Mr. Lukian that permission was needed to taxi onto Taxiway Golf from Taxiway Delta. The Appellant applied the aircraft's brakes, and the aircraft stopped with its nose on Taxiway Golf and its back wheels on Taxiway Delta.

[8] The Review Member found that the aircraft C-GJSE had exceeded its taxi clearance; the Review Member found that this conclusion was supported by Mr. Lukian's evidence that when he stopped the aircraft, its nose was over the line. According to the Review Member, "these lines are established to help organize the traffic flow at airports, allowing an aircraft on an intersecting taxiway to be able to pass without interference."

[9] Based on the evidence before him, the Review Member was satisfied that the Minister proved this allegation on a balance of probabilities, and upheld the monetary penalty of \$750.

B. TATC File No. W-3677-33

[10] The Review Member found that the Minister proved this contravention on a balance of probabilities.

[11] This contravention dealt with the Appellant's failure on November 10, 2009, to "...comply with and acknowledge, to the appropriate air traffic control unit ... all the air traffic control clearances directed to and received by [him], more specifically a clearance to contact tower before taking position on Runway 25".

[12] In reaching his Determination on this issue, the Review Member noted the Appellant's evidence that he was feeling tired that day and should not have been flying. The Appellant noted that he had seen a Doctor on November 9, 2009, because he was "dead tired". The Appellant could not, however, remember his diagnosis.

[13] The Appellant testified that he was not positive that he had received clearance while lining up for Runway 25. He submits that he applied the brakes at this point, but stated that it was too late since the aircraft was already on the runway.

[14] The ATC then asked him if he was lining up for Runway 25, and he answered in the affirmative. The Review Member found that this demonstrated that he had not held short of Runway 25 as the ATC had directed him to do.

[15] The Review Member was satisfied that the aircraft was "in a position the controller was not expecting." On this basis, he determined that the aircraft was on the active runway prior to receiving clearance from Tower Control.

[16] For these reasons, the Review Member found that the Minister had proven this contravention of paragraph 602.31(1)(a) on a balance of probabilities, and confirmed the monetary penalty of \$750.

III. ARGUMENTS

A. Appellant

(1) TATC File No. W-3674-33

[17] The Appellant argued that during the flight in question, he relied on the past practice at the Fort McMurray Airport in which the ATC would give instructions to taxi to McMurray Aviation, rather than issuing a partial clearance. He submits that he should not be penalized for conducting himself in a way that constitutes normal protocol at the Fort McMurray Airport.

[18] The Appellant also expressed concern with the Review Member's Determination insofar as it relied on the existence of a physical line which the Appellant was alleged to have crossed. As stated by the Appellant, "there is no physical line at the intersection of Taxiway Delta and Taxiway Golf".

[19] The Appellant also argued that mitigating factors exist in this instance. For example, he submits that this was a minor violation of the *CARs* that had no impact on airport operations.

(2) TATC File No. W-3677-33

[20] The Appellant states that he was ill with a respiratory infection but that he was given no choice by his employer but to fly. He also submits that the alleged violation had no impact on airport operations, and that there was no other traffic present at this point.

B. Minister

(1) TATC File No. W-3674-33

[21] The Minister alleges that the aircraft's placement on Taxiway Golf was contrary to the permission given by the ATC, who advised the Appellant to contact ground before proceeding from Taxiway Delta to Taxiway Golf. Shortly thereafter, the Appellant informed ground that he was taxiing to McMurray Aviation and proceeded from Taxiway Delta to Taxiway Golf without the necessary authorization.

[22] The Minister notes that the contravention is proven by the evidence given by the Canadian Aviation Daily Occurrence Reporting System (CADORS), the Air Traffic Control compact disc ("ATC CD"), the transcript of the Review Hearing, as well as Mr. Lukian's testimony. Indeed, Mr. Lukian admitted in his testimony that when he stopped the aircraft on October 7, 2009, the aircraft's nose was on Taxiway Golf with its back wheels on Taxiway Delta.

[23] The evidence presented at the Review Hearing demonstrated that the Appellant entered Taxiway Golf without authorization. As such, the Minister submits that this contravention was clearly proven on a balance of probabilities.

[24] The Minister submits that this is a strict liability offence, and intention is not required and should not be considered in determining the occurrence of the offence. The Minister contends that \$750 is the appropriate penalty for a first offence, and that no mitigating or aggravating circumstances exist in this case.

(2) TATC File No. W-3677-33

[25] The Appellant admitted in his testimony during the Review Hearing that he was not completely sure that he had received clearance to enter Runway 25, and he consequently slammed on the brakes. He agreed that he had applied the brakes too late, however, and that the aircraft had already taxied onto Runway 25.

[26] The ATC CD recording for November 10, 2009 demonstrates that the Appellant was given clearance to taxi and hold short of Runway 25. Although he understood the clearance, the Appellant did not hold short, and instead entered Runway 25 prior to receiving clearance from the ATC.

[27] The Minister submits this violation created a potential hazard because of another aircraft having been granted permission to take off.

C. Conclusion

[28] The Minister submits that there is ample evidence to prove these allegations, including the evidence given by Inspector Duhoux, the documentary evidence, the transcript of the exchange between the Appellant and the ATC, as well as Mr. Lukian's own testimony.

[29] The Minister further submits that the Review Member's Determinations on these violations were reasonable, and that he is owed deference by the Appeal Panel. The Minister then noted the Transportation Appeal Tribunal of Canada (Tribunal) decision of *Genn v. Canada (Minister of Transport)*, 2012 TATCE 7 (Appeal), TATC File No. P-3739-02, which notes that deference to a decision-maker requires a respectful attention to the reasons offered or which *could* be offered in support of a decision. Accordingly, the Minister contends that the Appeal Panel should look past the evidence and reasons cited by the Review Member to determine if the evidence that was before him reasonably supports his Determinations.

[30] The Minister submits that the evidence before the Appeal Panel overwhelmingly supports the Review Member's findings that Mr. Lukian contravened paragraph 602.31(1)(a) of the CARs in both instances.

[31] The Minister submits that the sanction imposed at \$750 for each infraction is reasonable, and that no mitigating or aggravating factors exist. As such, the Minister requests that the Appeal Panel dismiss the appeals and confirm the Minister's assessment of two monetary penalties of \$750 each.

IV. ANALYSIS

A. Standard of Review

[32] Prior to reviewing a determination, the Appeal Panel must first determine the standard of review upon which to examine a determination. The Supreme Court held in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 57, that a standard of review analysis need not be repeated if it has been previously determined.

[33] The Federal Court considered the appropriate standard of review for Tribunal decisions at the appeal level in *Billings Family Enterprises Ltd. v. Canada (Minister of Transport)*, 2008 FC 17. The Federal Court determined in this case that the Appeal Panel owes considerable deference to the Tribunal Member when reviewing questions of fact and credibility. However, the Federal Court noted that where issues of law are concerned, no deference is due to the Review Member and the Appeal Panel may make its own findings.

[34] In the cases at hand, the Review Member determined that the Minister had proven both violations on a balance of probabilities. As such, in reviewing the Review Member's findings on these issues, the Appeal Panel must consider if his findings were reasonable. If his findings are found to be within a range of reasonable outcomes based on the evidence that was before him, the Appeal Panel will not interfere with the Review Determinations.

B. TATC File No. W-3674-33

(1) *Proving the Offence*

[35] The ATC transcript demonstrates examples of Mr. Lukian's assertion regarding Fort McMurray Airport's practice of ATC issuing instructions to taxi through to Taxiway Golf and to "monitor ground" instead of "contact ground." Nevertheless, the Appeal Panel notes that one of the challenges of aviation is that one must expect the unexpected. Unfortunately, it seems that Mr. Lukian failed to follow the instructions given to him by ATC, and instead chose to rely on the instructions he was expecting to receive.

[36] Mr. Lukian expressed concern with regard to the Review Member's mischaracterization of the evidence before him, in presuming the existence of a physical line separating taxiways Delta and Golf. Mr. Lukian submits that no physical line exists, and as such, the ATC would not have been able to tell that the aircraft's front tire was on Taxiway Golf.

[37] There was uncertainty at the Review Hearing as to whether or not a physical line existed to separate Taxiways Delta and Golf. No diagram was given to the Appeal Panel to assist in determining this fact. While the Appellant categorically states that there was no line separating the taxiways, the Review Member's Determination places much focus on this line. The Review Member even included a Table of Reference of Airport Signs and Airport Markings for clarification of how this line would look if it existed.

[38] Although the evidence regarding a physical line was unclear, the Review Member made repeated references to the existence of such a line in support of his conclusion to uphold the violation. Even though the Appeal Panel agrees that this may have been in error, there was nevertheless other evidence before the Review Member that strongly supported the occurrence of the violation, including the Appellant's admission of having crossed over onto Taxiway Golf.

[39] Furthermore, the existence of a physical line is not required to prove the violation. Indeed, the Appeal Panel must look past the reasons provided by the Review Member and determine if the evidence that was before him reasonably supported his conclusion. The Supreme Court noted in *Dunsmuir* that it is incumbent on an Appeal Panel to focus on not only the reasons offered for a decision, but also the reasons which *could* be offered in support of a decision.

[40] In this instance, the Review Member placed an undue amount of attention and reliance on the presumed existence of a physical line separating Taxiways Delta and Golf. Nonetheless, the Appeal Panel notes that there was much evidence before the Review Member as to the occurrence of the violation, including the testimony of Inspector Duhoux, documentary evidence, the exchange between the Appellant and the ATC, and, significantly, Mr. Lukian's own testimony.

[41] The AOR (Exhibit M-9) states that "GJSE advises that they are taxiing in, commenced the taxi, departed Delta and turned onto Golf." This statement clearly indicates that the air traffic service (ATS) personnel saw the aircraft exceed its taxi clearance authorization as it departed Taxiway Delta, turned onto Taxiway Golf, and then stopped, with part of the aircraft on each Taxiway.

[42] The Appeal Panel finds that there was sufficient evidence to support the conclusion reached by the Review Member. While the Review Member may have misinterpreted the evidence to some degree, the Appeal Panel does not find that this requires the Determination to be overturned, as there was considerable evidence before the Review Member which demonstrated that the violation occurred.

[43] Based on the evidence before him, the Appeal Panel finds that it was reasonable for the Review Member to find that the violation was proven on a balance of probabilities.

(2) Sanction

[44] However, the Appeal Panel agrees with Mr. Lukian that there are mitigating factors to consider with regard to the appropriate penalty. For instance, the circumstances in this case demonstrate that there was only a slight penetration of an unoccupied runway. Moreover, the aircraft stopped immediately, with only its nosewheel on Taxiway Golf.

[45] The Appeal Panel also notes that there was no impact on aviation safety in this case, and that the impingement of the Appellant's nosewheel onto Taxiway Golf did not create any loss of separation between any other taxiing aircraft. Consequently, airport operations were not affected and no other aircraft were inconvenienced by this occurrence.

[46] Based on these factors, the Appeal Panel finds that the penalty of \$750 imposed by the Minister should be reduced to \$100.

C. TATC File No. W-3677-33

(1) Proving the Offence

[47] The Appellant conceded in his testimony that he was not positive that he had received clearance while lining up for Runway 25. He also agreed in his testimony that when he realized his error he applied the brakes, but was already on the Runway at this point.

[48] The ATC CD contains the radio transmissions between Ground Control and the aircraft. It is clear in this communication that the aircraft is given a taxi clearance to taxi and hold short of Runway 25. The Appellant is heard on the ATC CD indicating his understanding of the clearance. However, the next transmission is from Tower Control asking the aircraft to confirm that they are lining up for Runway 25, to which the Appellant replies in the affirmative.

[49] The ATC CD and the Appellant's evidence convinced the Review Member that this violation was proven on a balance of probabilities, and the Appeal Panel can see no reason to disturb this finding. There seems to be little doubt that this violation occurred. Rather, the Appellant instead argues that mitigating factors existed in this case.

(2) Sanction

[50] The Appellant submits that he was not in good health on the day of the flight, and had in fact visited the doctor the day prior to the violation occurring. There is no room in the aviation

industry for a PIC to actively control the aircraft if he is ill. In such a case, it is incumbent on the PIC to excuse himself from active duty.

[51] The Appellant contended that his employer essentially forced him to fly, and as such, his employer should bear some responsibility for this violation.

[52] However, the Tribunal notes that McMurray Aviation was not proceeded against in this instance. Rather, it was the Appellant who was flying the aircraft on November 10, 2009, and has been charged with a violation of the *CARs*. As such, he is the one who must be accountable for his actions.

[53] Furthermore, the Tribunal notes that the Appellant's attempt to use illness or fatigue as a mitigating factor is not supportable by the *CARs*. Indeed, subsection 404.06(1) of the *CARs* states:

Prohibition Regarding Exercise of Privileges

404.06 (1) Subject to subsection (3), no holder of a permit, licence or rating shall exercise the privileges of the permit, licence or rating if

(a) one of the following circumstances exists and could impair the holder's ability to exercise those privileges safely:

(i) the holder suffers from an illness, injury or disability,

(ii) the holder is taking a drug, or

(iii) the holder is receiving medical treatment;

...

[54] While the Appeal Panel sympathizes with the Appellant, it is nevertheless not prepared to accept Mr. Lukian's exhaustion as a mitigating factor for this violation. Moreover, the Appeal Panel notes that the Appellant ought to ensure that he remains in compliance with subsection 404.06(1) of the *CARs*. While Mr. Lukian may have felt pressure from his employer to fly, this is beyond the appropriate scope of the Tribunal's consideration, and will not be considered a mitigating factor by this Appeal Panel.

[55] Finally, the Appellant claims that this violation had no impact on airport operations. However, the ATC Transcript demonstrates the presence of another aircraft in take-off position as Mr. Lukian's aircraft crossed the Runway Hold Short line and entered the active runway. The Appeal Panel wishes to emphasize that any runway incursion has the potential for serious consequences. As such, the Appeal Panel finds that the \$750 penalty for this violation is reasonable.

V. DECISIONS

A. TATC File No. W-3674-33

[56] The Appeal Panel upholds the Review Member's Determination as to the allegation. However, the monetary penalty of \$750 is reduced to \$100.

B. TATC File No. W-3677-33

[57] The Appeal Panel upholds the Review Member's Determination and the monetary penalty of \$750.

November 28, 2012

(Original signed)

Reasons for the Appeal Decision: J. Richard W. Hall, Chairperson

Arnold Olson, Member

Concurred by: Herbert Lee, Member