



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Alan Bishop v. Canada (Minister of Transport)*, 2020 TATCE 7 (Appeal)

TATC File No.: H-4290-68

Sector: Aviation

BETWEEN:

Alan Joseph Bishop, Appellant

- and -

Canada (Minister of Transport), Respondent

Heard in: Vancouver, British Columbia, on October 16, 2019

Before: Arnold Olson, Member (chairing)

Andrew Wilson, Member

Deborah Warren, Member

Rendered: February 26, 2020

APPEAL DECISION AND REASONS

Held: The appeal is dismissed. The Minister of Transport's decision to refuse to issue Mr. Alan Joseph Bishop's B73C pilot proficiency check is upheld.

I. BACKGROUND

[1] By Notice of Refusal to Issue or Amend a Canadian Aviation Document (Notice) dated November 16, 2016, Transport Canada (TC) advised Mr. Alan Joseph Bishop that his B73C pilot proficiency check (PPC) would not be issued, pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*, as the qualifications or conditions necessary for the issuance were not met or fulfilled.

[2] The Notice stated:

During the flight test that occurred on 14 November 2016, you demonstrated that you did not meet the required standard to maintain your qualifications on the B73C aircraft type. In accordance with TP14727 – *Aircraft Type Rating and PPC Flight Test Guide*, your PPC attempt was assessed as FAIL due to “Technical skills and knowledge revealing unacceptable levels of technical proficiency and/or depth of knowledge”, as described in the attached Flight Test report.

[3] The flight test report noted a below-standard score of “1” on item 21 (PNF Duties), and stated “Extended flaps beyond Flap Placard Limiting Speeds while acting as PM (PNF)” (Exhibit M-4).

[4] A review hearing before the Transportation Appeal Tribunal of Canada (Tribunal) took place on September 12, 2017 in Toronto, Ontario. In a determination dated February 19, 2018, the review member upheld the Minister of Transport’s decision to refuse to issue Mr. Bishop’s B73C PPC.

A. Grounds of Appeal

[5] On March 21, 2018, Mr. Bishop requested an appeal, stating the following grounds:

This PPC event should not have been allowed to occur in the first place and to the extent that it was allowed to occur, it should be invalidated, for the following reasons:

- (i) My own stated concerns about proceeding with the PPC, as scheduled, were set aside during the training events leading up to the PPC and on the day of the PPC, by both the Operator and the ACP [approved check pilot].
- (ii) The ACP was influenced by the Operator.
- (iii) My right to refuse to undergo the PPC was disregarded. I was coerced into conducting the PPC.
- (iv) The Member may have erred in allowing a determination in support of the Operator’s assertion that a licence holder’s right to refuse to undergo a PPC, is subordinate to an Operator’s right to schedule a PPC.
- (v) The Member asserted several items in the determination document, that are factually incorrect, contradictory, or ambiguous and of substantial bearing in the determination conclusion.

[6] At the appeal hearing, Mr. Bishop added a sixth ground of appeal:

- (vi) The matter of professional jeopardy can inform on items (i), (iii) and (iv) of this appeal and needs to be examined more closely in the context of these appeal elements.

As is clear from its terms, this is not actually a separate ground of appeal, but rather an additional argument in support of the previously referenced grounds. Thus, we decline to consider it further

as a separate ground. However, the appeal panel assures the appellant that we fully appreciated the significance of the PPC and the matter of professional jeopardy in the context of considering the remaining grounds.

II. ANALYSIS

[7] The appropriate standard of review for an appeal panel of this Tribunal was established by the Federal Court in *Billings Family Enterprises Ltd. v. Canada (Minister of Transport)*, 2008 FC 17, and more recently in *Canada (Attorney General) v. Friesen*, 2017 FC 567. The standard of reasonableness applies to findings of credibility, fact, and mixed fact and law, and an appeal panel must give considerable deference to the review member. On questions of law, the standard is one of correctness, and an appeal panel is entitled to take its own view.

[8] An appeal panel is to analyze both the reasons and the findings of a review member. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada stated at paragraph [47] that:

Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.

[9] Mr. Bishop did not dispute that his PPC performance was correctly graded as a “fail” in accordance with the standards set out in TC’s *Approved Check Pilot Manual*, TP 6533 (the “ACP manual”)(Exhibit M-1). Rather, he contended that the PPC should not have occurred in the first place and his grounds of appeal concern events that transpired before the PPC began. He argued that these prior events provide reason for the appeal panel to send the matter back to the Minister for reconsideration.

[10] The panel has examined Mr. Bishop’s fourth ground of appeal which would require us to balance a licence holder’s “right to refuse” to undergo a PPC against an operator’s “right to schedule” a PPC. We find the appellant’s request for clarity on this issue is not properly before the Tribunal and therefore decline to consider it. Furthermore, because several of the grounds of appeal are so intertwined with each other as to be inseparable, the arguments of this self-represented appellant are most fairly heard by answering the following questions:

A. Did the review member err by finding that there was no evidence that Mr. Bishop was coerced by the operator? Does such coercion, if it existed, fall within the scope of the PPC and constitute a reason to refer the matter back to the Minister?

[11] The member’s finding, at paragraph [49], that there was no evidence presented to indicate that Mr. Bishop had been coerced to proceed with his PPC flight test, is a finding of fact. As such, the standard of reasonableness applies and an appeal panel must give considerable deference to the review member.

[12] Mr. Bishop argued that his affidavit (Exhibit A-1) speaks to repeated references to mounting concerns about undergoing a “jeopardy ride” with a weak partner. He voiced these concerns to Captain Lewis, training captain, about his training progression. Section 3.2 of the affidavit refers to his communication to Captain Riari, the ACP for Mr. Bishop’s check ride, in

which he states: “... I expressed significant concern...and objected to undergoing the PPC...”. Sections 3.3 and 3.4 refer to his phone conversation with assistant manager of training Captain Sinclair, in which he states “... I did not feel confident...”. Nevertheless, Captain Sinclair advised that “... we had no alternative but to proceed *that day*...”. Section 3.5 states “I was allowed no alternative to proceeding with the PPC ... **I was coerced**...” [emphasis added].

[13] Section 7 of the affidavit refers to Mr. Bishop’s email to Captain Sinclair in which he expresses concern that he and the other First Officer candidate “... are not going to be sufficient resources to each other during our PPC. ... I’m still seeing both of us still commit[ting] numerous ‘PPC busting’ errors ... I’m not at all comfortable with what I see developing here ... I don’t want to knowingly go into a PPC on the 14th this way ...”.

[14] Moreover, Mr. Bishop argued that his own testimony at the review hearing contained many other references to the concerns he voiced about undergoing the PPC. His concerns expressed in testimony are summed up in his statement that “... it was obvious that there was a drum beat, an impetus, a momentum that precluded anything but us proceeding to the PPC.”

[15] On the other hand, the Minister contended that Mr. Bishop never stated a refusal to proceed with the PPC. Captain Sinclair stated that candidates are not obligated to proceed if they don’t feel suitably prepared; it is the choice of the candidate whether they proceed. Moreover, Captain Riar testified that “every individual going for a flight test has a right not to do a flight test”.

[16] The Minister argued that coercion, if it existed at all, is not within the ambit of the PPC, therefore not the business of TC or the Tribunal. As such, it cannot be considered a reason to refer the matter back to the Minister. Mr. Bishop failed the PPC because he extended the flaps beyond flap placard limiting speeds—not once but three times. He exceeded the maximum aircraft structural airspeeds. The recommendation by Captain Lewis to proceed to the flight test was a training matter and not relevant to the flight test itself. Conversations that Mr. Bishop had with Captain Sinclair about his state of readiness, or whether he felt compelled to proceed, all occurred outside the flight test. These are internal company matters and do not relate to the role of the Minister’s delegate—the ACP, whose sole responsibility is to conduct the flight test.

[17] The appeal panel notes ample evidence that Mr. Bishop’s concerns were swept aside and that he was unequivocally directed to proceed with the PPC. Captain Sinclair confirmed that once “recommended for the PPC” **there is no option** for the candidate to decline or refuse, apart from sickness or extenuating circumstances. No choice or option but to proceed was offered to Mr. Bishop. In the context of a hierarchical airline structure, Captain Sinclair’s direction to First Officer Bishop was clear: *proceed, now*. On the other hand, the panel also notes the testimony of the ACP, Captain Riar, who stated that Mr. Bishop did not explicitly refuse or object to taking the PPC. The ACP testified that he had “determined that there was a mutual understanding to proceed with the PPC”, and that Mr. Bishop had agreed to do so. Similarly, Captain Sinclair’s evidence was the “assumption” that the flight check was going ahead as scheduled and that Mr. Bishop had agreed to do it.

[18] The review member found insufficient evidence to indicate that Mr. Bishop had been coerced; however, he did not refer to any specific definition of “coercion”. The appeal panel

refers to *Black's Law Dictionary*, ninth edition, which defines coercion as “compulsion by physical force or threat of physical force”. The panel agrees with the review member that coercion does not describe the situation at hand. However, although Mr. Bishop did not explicitly refuse to proceed with the PPC, it is fair to say that he clearly felt pressured to do so.

[19] Apart from the matter of coercion, the appeal panel looks to the role of ACPs and the responsibilities delegated to them by the Minister in order to determine the scope of the PPC itself, the jurisdiction of the regulator, and in turn the Tribunal. The ACP manual, Chapter 3, at section 3.1, states that “[t]he role of an ACP is to evaluate the knowledge and skills of candidates to determine whether they meet the required standard for a PPC...”. The appeal panel finds that the ACP is an evaluator. As a result, matters of candidate readiness or coercion by the operator are outside their evaluative role and the scope of the PPC, and therefore do not constitute a reason to refer the matter back to the Minister. We agree with the Minister that any question of compulsion or coercion of an employee would be a matter of employment or labour law, as the case may be, and is not properly before this Tribunal.

B. Did the review member err by finding that there was no evidence that the ACP was influenced by the operator?

[20] The appeal panel finds that whether the ACP was influenced by the operator is a finding of mixed fact and law, to which a standard of reasonableness applies, and that considerable deference is to be accorded the review member.

[21] The review member stated at paragraph [45] of the review determination that no evidence was provided to indicate that Captain Riar was influenced or controlled by the operator with regard to the conduct of the PPC. However, Mr. Bishop asserted that the member erred by making this statement and ignored testimonial evidence that the ACP was indeed influenced. Mr. Bishop argued that the ACP was pressured by Captain Sinclair, to whom he reported, when in his role as a training captain. Mr. Bishop maintained that Captain Sinclair directed the ACP to ignore Mr. Bishop's concerns and to follow through with the PPC, a check ride that never should have taken place. He argued that this direction from Captain Sinclair constituted **influence** by the operator and is exactly what is addressed in the ACP manual at section 1.8.10:

It must be stressed that any effort by an Operator or organization employing the services of an ACP to **influence** or obstruct the ACP in the course of fulfilling their obligations to the Minister will result in the invalidation of the flight checks conducted by the ACP. [emphasis added]

The appellant contends that the ACP manual is clear: because the ACP was influenced by the operator, the resulting PPC must be invalidated.

[22] The Minister argued that the telephone conversation between Captain Sinclair and the ACP is simply not relevant to the flight test itself. The matter of **when** a PPC is to be conducted, as opposed to how the candidate is evaluated during a PPC, cannot be construed as “influence” within the context of section 1.8.10. Captain Sinclair's testimony clearly indicates that he did not believe he had influenced the ACP in that telephone call. In cross-examination by Mr. Bishop, the ACP, Captain Riar, testified: “Did I assist the operator? No, I mean, I just went there to do the PPC that you were recommended to do.” Moreover, the ACP testified that he said: “Okay guys, are we going to proceed with the PPC? And there [were] no objections at that point.” The Minister maintains there is no evidence to support an assertion that the operator influenced the

ACP within the meaning of section 1.8.10 and, even if there was influence, it is negated by agreement from the candidates that the PPC could begin.

[23] The appeal panel looks to the ACP manual to determine the meaning of “influence”. We note that the heading of section 1.8.10 is “Conflict of Interest”. ACPs are acknowledged to be in a “perceived conflict of interest” insofar as they are simultaneously employees of the operator while at the same time delegates of the Minister when performing their checking duties. They are instructed to avoid situations of **real** conflict of interest, such as having a financial interest in a company, family ties, or accepting privileges or favours that could bias ability to conduct their duties. They are instructed to declare any real conflict of interest and to conduct their evaluations in an impartial manner. This section is clearly aimed at eliminating, to the extent possible, any influence that could create bias or partiality in the **evaluation** of candidates.

[24] Therefore, the appeal panel agrees with the review member that there was no evidence of influence over the ACP. Further, the panel finds that even had there been influence, it was not the kind contemplated within the meaning of section 1.8.10 of the ACP manual.

C. The appellant claims that the review member erred by making certain assertions that are incorrect, contradictory or ambiguous.

[25] Mr. Bishop argued that several statements made by the review member were not properly drawn from testimony. For example, he claimed that the member erred by attributing to Captain Lewis, assertions that the crew could refuse to undergo the PPC or reschedule to a later date, and that to do so would not be held against them by the operator. The appeal panel notes Captain Lewis’ statement in cross-examination at page 193 of the review hearing transcript:

Q. ... Could [the crew] decline to do their flight test on the scheduled day until a captain becomes available if they felt that that was very important for them?

A. They could, yes, that’s an option.

Q. If it was a genuine concern and this request was made, would it be held against them by the company?

A. No, I wouldn’t think so.

On the basis of the above exchange, the appeal panel finds that the review member correctly relied on Captain Lewis’ testimony.

[26] Mr. Bishop also argued that Captains Lewis, Sinclair and Riar were unable to completely recall facts or events and noted several inconsistencies in their testimonies. He maintained that the review member erred by referring to these witnesses as “credible and reliable”. The appeal panel responds that, as previously stated, on findings of credibility, an appeal panel must give considerable deference to a review member. Having reviewed Mr. Bishop’s claims, the appeal panel finds no reason to dispute the review member’s characterization of these witnesses as credible and reliable. Moreover, these disputed conversations and events were essentially corporate matters, outside the scope of the PPC itself and would, in any case, not be relevant to the Minister’s decision to refuse to issue the PPC.

D. Conclusion

[27] Mr. Bishop does not dispute that he failed the PPC. However, he asserts that for several reasons, the PPC should never have occurred in the first place. In fairness to the self-represented appellant, the appeal panel has formulated Mr. Bishop's grounds of appeal into issues that we have considered on the merits, based on the proceedings of the review hearing. On the first question, we found that the review member did not err in finding that there was insufficient evidence that Mr. Bishop had been coerced. The appeal panel concluded that the ACP is an evaluator and that matters of determining candidate readiness or coercion by the operator fall outside their evaluative role, are therefore outside the scope of the PPC, and do not provide a reason to refer the matter back to the Minister.

[28] On the second question, we agreed with the review member that there was no evidence of influence over the ACP. Further, the appeal panel found that even had there been influence, it was not the kind contemplated within the meaning of section 1.8.10 of the ACP manual.

[29] Finally, we determined that the review member's statements, claimed by the appellant to be inaccurate, were in fact reasonably drawn from testimony. We found no reason to dispute the member's characterization of the Minister's witnesses as credible and reliable. In summary, we find that the review member's review determination was reasonable.

III. DECISION

[30] The appeal is dismissed. The Minister of Transport's decision to refuse to issue Mr. Alan Joseph Bishop's B73C pilot proficiency check is upheld.

February 26, 2020

(Original signed)

Reasons for the appeal decision: Arnold Olson, Member (chairing)

Concurred by: Andrew Wilson, Member

Deborah Warren, Member

Appearances

For the Minister: Catherine Newnham

For the Appellant: Self-represented