



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Kieth Holmes v. Canada (Minister of Transport)*, 2021 TATCE 13 (Review)

TATC File No.: P-4546-68

Sector: Aviation

BETWEEN:

Kieth Holmes, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on March 17, 2021

Before: Jonathan Dueck, Member

Rendered: May 12, 2021

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has proven on the balance of probabilities that the applicant, Kieth Holmes, does not meet the qualifications or conditions necessary for the issuance of a Canadian aviation document, pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*.

I. BACKGROUND

[1] By notice of refusal to issue or amend a Canadian aviation document, dated August 28, 2019, Mr. Kieth Holmes was advised that the Minister of Transport (Minister) had refused to issue his B73C Pilot Proficiency Check (PPC), pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*.

[2] Appendix A of the Notice states that the grounds for the Minister's decision was that:

During the flight test that occurred on 18 August 2019, you demonstrated that you did not meet the skill standard required in a Pilot Proficiency Check (PPC). In accordance with TP14727 – PILOT PROFICIENCY CHECK AND AIRCRAFT TYPE RATING - Flight Test Guide (Aeroplanes) First Edition (Revision 1), your PPC attempt was assessed as FAILED due to unacceptable following of SOPs, rules and regulations with respect to technical skills and knowledge, as described in the attached Flight Test report.

[3] The attached Flight Test Report (Exhibit M-7) indicated that Mr. Holmes received a mark of 2 on item 10 – Cruise and on item 13 – Holding, as well as a mark of 1 on item 16 – RNAV.

[4] By letter received by the Transportation Appeal Tribunal of Canada (Tribunal) on September 19, 2019, Mr. Holmes requested that the Tribunal review the Minister's decision.

[5] On February 22, 2021, the Tribunal informed the parties of the videoconference review hearing date set down for March 17, 2021.

[6] On March 18, 2021, and by further submission on March 25, 2021, Mr. Holmes made a request with the Tribunal to file new evidence or to reopen the hearing. The Tribunal dismissed this request in the interlocutory decision *Kieth Holmes v. Canada (Minister of Transport)*, 2021 TATCE 11 (Ruling), rendered on April 29, 2021.

II. ANALYSIS

A. Legal framework

[7] The Minister based its decision on paragraph 6.71(1)(b) of the *Aeronautics Act*, which states:

6.71 (1) The Minister may refuse to issue or amend a Canadian aviation document on the grounds that

[...]

(b) the applicant or any aircraft, aerodrome, airport or other facility in respect of which the application is made does not meet the qualifications or fulfil the conditions necessary for the issuance or amendment of the document; or

[...]

B. Was the decision to refuse to issue the PPC reasonable?

[8] The Minister's position was that the applicant had not been successful in the completion of three exercises during the PPC flight test. The Minister's representative called one witness, Mr. David Rodger, an Approved Check Pilot (ACP) employed by WestJet who conducted the PPC in question. Mr. Rodger is authorized to conduct Pilot Proficiency Checks on the B737 (Exhibit M-1).

[9] The applicant, Mr. Kieth Holmes, was self-represented. During his testimony, Mr. Holmes was unfocused and did not clearly testify to the three flight test items in question. In addition, during his testimony and closing argument, Mr. Holmes expressed his displeasure in the way that he was subjectively graded by Mr. Rodger during the PPC.

Overview of the PPC

[10] The Minister's representative stated that the simulator used during this PPC was properly maintained and released for service (Exhibit M-2). This was not contested by the applicant.

[11] B737 Recurrent Check Ride R2A (Capt – F/O) script (Exhibit M-4) was used for the PPC and was valid for the period from July 1, 2019, to December 31, 2019. Mr. Rodger testified that PPC scripts are developed by WestJet and then approved by Transport Canada (TC).

[12] The Flight Test Report completed by Mr. Rodger indicates that Mr. Holmes received a mark of 2 on item 10 – Cruise and on item 13 – Holding, as well as, a mark of 1 on item 16 – RNAV. These will be addressed individually below.

[13] Mr. Rodger testified that the ACP notes (Exhibit M-6) were handwritten during the PPC and then typed up (for legibility) several days after the event. The ACP notes include statements such as “[e]verything was a rush” and “[n]on existent CRM”. Mr. Holmes objected to the fact that he had only received a copy of the ACP notes as part of the Minister's disclosure package and to the fact that they were typed, not handwritten, suggesting they were documented long after the PPC. The Tribunal finds that the ACP notes were developed and provided to the applicant in an appropriate manner.

[14] Mr. Rodger testified that the crew was briefed in accordance with the Minimum Pre-ride Briefing Requirements (Exhibit M-5) and they were told not to rush and to take their time; however, he stated that it appears that these instructions were lost on Mr. Holmes. From the start, everything was a rush.

[15] Mr. Rodger testified that there was no attempt by Mr. Holmes to create an atmosphere of cooperation or teamwork. He was very abrupt and dismissive of the First Officer to the point that it was obvious to him and the First Officer that the First Officer's input was not wanted or valued. Within the first 30 minutes of the PPC, during the setup phase, the First Officer tried a couple of times to make suggestions but was very briskly shot down, which set the tone for the entire PPC.

[16] Mr. Rodger testified that the aircraft was taxied around corners in excess of the requirements specified in subsection 4.6.2 of the WestJet B737 Flight Operations Manual

(Exhibit M-8). As an example, a 45-degree turn was made at 22 knots, which exceeded company policy by 12 knots, thereby adding additional side loads on the landing gear and tires. This was an example of not complying with Standard Operating Procedures (SOPs) and company policy.

[17] Mr. Rodger testified that on several occasions Mr. Holmes performed Pilot Not Flying (PNF) duties when he was Pilot Flying (PF). As PF, Mr. Holmes reconfigured the fuel panel and pressurization panel without informing or consulting with the First Officer.

[18] While I find that Mr. Rodger's testimony specific to his ACP notes provided an overview of the tone and tenor in the cockpit during the PPC, only evidence and testimony specific to each of the Flight Test Report items were used in the determination of each of the three flight test items in question.

[19] The issue before this Tribunal is whether the Minister was justified in refusing to issue or amend a Canadian aviation document, in this case a B73C Pilot Proficiency Check, to Mr. Holmes and whether there are grounds to refer the matter back to the Minister for reconsideration.

C. Airspeed control during item 10 – Cruise and item 13 – Holding

(1) Item 10 – Cruise

[20] The Flight Test Report stated:

10. Cruise: Major Error. Poor practical understanding and poor following of SOPs and regulations. Set and flew 210 kts when below 3000' within 10 miles of an airport. No attempt to correct speed deviation.

[21] Mr. Rodger testified that, while flying below 3,000 feet above ground level (AGL) and within 10 nautical miles of an airport, Mr. Holmes set and maintained an airspeed of 210 knots even though the speed limitation was 200 knots.

[22] While the Minister's representative did not specifically refer to Exhibit A-2 during the hearing, the TP 14727 – *Pilot Proficiency Check and Aircraft Type Rating – Flight Test Guide (Aeroplanes) (Flight Test Guide)*, item 10 – Cruise, sets out the performance criteria for this exercise, which states in part:

Performance Criteria

Base the assessment on the candidate's ability to:

[...]

f. maintain proper aircraft control and flight within operating limitations;

g. maintain assigned heading, tracks or bearings within ± 10 degrees, and altitude within ± 100 feet:

[...]

[23] At no time did Mr. Holmes dispute the fact that he set and maintained an airspeed of 210 knots. However, he stated that it was within his rights to fly plus or minus 10 knots based on paragraph g. of the performance criteria, which he argued outlines the plus or minus 10 knots speed tolerance. The Tribunal notes that, in fact, paragraph g. only speaks to tracks or bearing

and altitude tolerances not, airspeed tolerances. Therefore, I cannot find that paragraph g. would allow Mr. Holmes to maintain an airspeed above the airspeed operating limitations.

[24] A more appropriate question is, did he meet the requirements of paragraph f. by maintaining proper aircraft control and flight within operating limitations? This will be addressed below.

[25] The Tribunal notes that neither party referred to Section 602.32 Airspeed Limitations of the *Canadian Aviation Regulations* which is directly relevant to this exercise, and which states:

602.32 (1) Subject to subsection (2), no person shall

[...]

(b) operate an aircraft at an indicated airspeed of more than 200 knots if the aircraft is below 3,000 feet AGL within 10 nautical miles of a controlled aerodrome unless authorized to do so in an air traffic control clearance.

[...]

(2) Item 13 – Holding

[26] The Flight Test Report stated:

13. Holding: Major Error. Poor practical understanding and poor following of SOPs and regulations. Cleared to hold at WC NDB. Entered and flew the hold at 210 kts. No attempt to correct speed deviation.

[27] The flight was cleared to hold at the White Rock (WC) non-directional beacon (NDB) at 4,000 feet (Exhibit M-4).

[28] Mr. Rodger testified that Mr. Holmes set and maintained 210 knots in the hold at 4,000 feet. Mr. Rodger stated that at 4,000 feet, the regulatory requirement is to maintain a maximum speed of 200 knots in the hold.

[29] At no time did Mr. Holmes dispute the fact that he set and maintained an airspeed of 210 knots instead of the regulatory required maximum speed of 200 knots in the hold. He stated that it was within rights to fly plus or minus 10 knots based on the *Flight Test Guide*, item 13 – Holding which states in part:

Performance Criteria

Base the assessment on the candidate's ability to:

[...]

j. maintain the appropriate airspeed/V-speed within ± 10 knots, altitude within ± 100 feet, headings/tracks/course within $\pm 10^\circ$ or within $\frac{1}{2}$ scale deflection of the course deviation indicator, as applicable and accurately tracks radials, courses, and bearings; and

[...]

[30] Mr. Holmes also referred to TP 14371 Transport Canada *Aeronautical Information Manual* (TC AIM) Revision 2020-2, section 9.7.3 Speed Adjustment – Radar-Controlled Aircraft (Exhibit A-1) which states in part, “[p]ilots complying with a speed adjustment are expected to maintain a speed within 10 KIAS of the specified speed.”

[31] The Tribunal notes that TC AIM Revision 2019-1 was in effect at the time of the PPC, however, the wording in Exhibit A-1 is unchanged.

D. Did the applicant exceed the regulatory airspeed and operating limitations during low-level cruise and hold procedure?

[32] Mr. Rodger testified that there is a requirement to comply with air traffic control (ATC) clearances as part of a PPC. If the ATC clearance is 200 knots, then you are supposed to fly at 200 knots. It is also a requirement to comply with the regulations and if the regulations say 200 knots, you are supposed to fly at 200 knots. There is an allowance for a plus or minus airspeed fluctuation in turbulence, or if you are hand flying the airplane. That does not mean that you can set 210 knots and tell the autopilot to fly at 210 knots when the assigned airspeed is 200 knots. To do so is non-compliant.

[33] Mr. Holmes confirmed to the Tribunal that the PPC was flown with the autopilot ON.

[34] Mr. Rodger testified that airspeed limitations ensure airspace protection. If you are flying a holding pattern at 210 knots instead of 200 knots, you will use up more airspace. As an example, if you are close to the airport and you are flying at 210 knots instead of 200 knots, the separation between you and the aircraft ahead of you will be reduced.

[35] Mr. Rodger testified that if Mr. Holmes needed to fly at 210 knots for operational reasons, he should have asked ATC for permission before doing so.

[36] Mr. Rodger testified that during the PPC debriefing, he asked Mr. Holmes if he knew what the airspeed limitations were for both of these scenarios and he provided the correct answer. He said that it confirmed his suspicion that Mr. Holmes knows the rules and regulations, but just chooses not to follow them.

[37] Mr. Holmes testified that he was permitted to set and fly at an airspeed of 210 knots, as it was within 10 knots of the appropriate airspeed. However, he provided no evidence that shows that he made any effort to maintain the **assigned** airspeed or ask ATC for an airspeed of 210 knots in either scenario, per the rules and regulations. His only assertion is that Mr. Rodger was incorrect in his application of the *Flight Test Guide*'s 4-Point Marking Scale – Grading Matrix.

[38] Based on the Minister's testimony and the applicable regulations and policy, I find that the Minister has proven that the applicant exceeded the regulatory airspeed and operating limitations for each scenario, showing a poor following of SOPs, rules and regulations, by setting and maintaining the airspeed above the appropriate airspeed.

[39] After having concluded that the applicant demonstrated a poor following of SOPs, rules and regulations, the next issue that must be determined is whether item 10 – Cruise and item 13 – Holding warranted a mark of 2.

[40] The 4-Point Marking Scale – Grading Matrix of the *Flight Test Guide* defines a mark of 2 pertaining to "Technical Skills and Knowledge" as:

- **Major error**

- Poor practical understanding
- Poor following SOPs, rules and regulations

[41] A major error is defined as an “action or inaction that is **consequential** to the completion of a task, procedure, or manoeuvre”; and “Undesired Aircraft State (UAS) **did not occur**” (Exhibit A-2). UAS is defined as “an aircraft position, speed, attitude or configuration that results from a flight crew error, action or omission **which clearly reduces safety margins**” (Exhibit A-2).

[42] The Tribunal believes that Mr. Holmes is incorrect in his assertion that the final assessment of these flight test items as a mark of 2 should be based solely on the plus or minus deviation criteria listed in the *Flight Test Guide*. When assessing the Technical Skill and Knowledge of the candidate, the ACP is required to assess how he follows the SOPs, rules and regulations, which include the airspeed limitations specified in the *Canadian Aviation Regulations*.

[43] Based on the testimony and evidence, the Tribunal finds that Mr. Rodger was correct in assessing each of these flight test items as a mark of 2, major error, for failing to correct airspeed deviations or ask ATC for a higher airspeed for operational reasons thereby exceeding the regulatory airspeed and operating limitations for each scenario by showing a poor following of SOPs, rules and regulations. I agree with the Minister that the errors were consequential to the procedures, and the UAS did not occur.

Item 16 – RNAV Approach

[44] The Flight Test Report indicated a mark of 1 for this exercise and stated the following:

16. RNAV Approach: Critical Error. Unacceptable following of SOPs. During RNAV Y 07 YXX Approach [*sic*] set Field Elevation in the MCP then descended in V/S. Safety of flight compromised.

[45] While not specifically referencing the *Flight Test Guide* during his testimony, Mr. Rodger testified that Mr. Holmes made a critical error as a result of unacceptable following of SOPs while conducting an Area Navigation (RNAV) approach.

[46] Mr. Rodger testified that during an RNAV Y Runway 07 into CYXX, Mr. Holmes set Field Elevation in the Mode Control Panel (MCP) and then selected and descended in Vertical Speed which caused the safety of flight to be compromised.

[47] Mr. Rodger explained that there are several descent modes: (1) “VNAV” that respects altitude constraints and (2) “Vertical Speed” that provides no altitude constraint protection other than the altitude set in the MCP.

[48] Mr. Rodger testified that during an RNAV approach, the WestJet requirement (Exhibit M-8) is that the MCP altitude must be set to the next altitude constraint until you commence the approach, at which time, once you are on a published portion of the approach, you can select Field Elevation for the airport that you are descending to and descend in Vertical Navigation (VNAV). He went on to explain that once Field Elevation is set in the MCP, there is no

allowance to descend in any mode other than VNAV. If you are descending in any mode other than VNAV, you do not have bottom end protection and there is the potential of the aircraft flying into the ground.

[49] In this case, Mr. Rodger testified that Mr. Holmes set Field Elevation in the MCP and then selected and descended in the Vertical Speed mode. Mr. Rodger testified that this was contrary to the WestJet SOPs and placed the aircraft into an undesired state, thereby compromising flight safety. By selecting Vertical Speed with Field Elevation set in the MCP, there was no bottom end protection and there is the potential of the aircraft flying into the ground.

[50] Mr. Holmes testified that following the hold, he was cleared for the approach, as illustrated in the approach plate (Exhibit A-3) and crossed the IKURI waypoint in Lateral Navigation (LNAV) and Altitude Hold. It was then that he selected Vertical Speed mode. Mr. Holmes testified that he does not understand why Mr. Rodger believes that he placed the aircraft into an undesired state, thereby compromising flight safety.

[51] Mr. Rodger testified that he let Mr. Holmes fly in Vertical Speed mode for between 30 seconds and one minute to see if he would correct the situation. No correction was made and the PPC was terminated.

[52] There is some discrepancy in testimony concerning at what point the PPC was terminated. Mr. Rodger testified that it was terminated after seeing no corrective action between 30 seconds and one minute after Vertical Speed mode was selected and Mr. Holmes believes that the PPC was terminated after completing the RNAV approach and subsequent go-around procedure. This discrepancy is not relative to the determination of this issue, and whether a critical error was made during this exercise.

[53] Mr. Rodger pointed to the WestJet B737 Flight Operations Manual (Flight Operations Manual), section 4.12.1.4 Descent Constraints (Exhibit M-8), which states in part:

On descent in VNAV with all procedural constraints on the LEGS page in BOLD font, set MCP altitude to ATC issued clearance limit or approach field elevation and monitor VNAV descent to verify compliance with altitude constraints.

CAUTION: Should VNAV be replaced with any other pitch mode, then the MCP altitude shall be reset to the next required altitude constraint.

[54] Mr. Rodger testified that when asked why he selected Vertical Speed when Field Elevation was set in the MCP, Mr. Holmes responded that, “he just wanted to finesse it”. He said that it confirmed his suspicion that Mr. Holmes knows the SOPs, but he just chooses not to follow them.

[55] Mr. Holmes testified that he believes that the Flight Operations Manual, section 4.12.1.4 Descent Constraints, only refers to descents and does not apply to the approach portion of the flight. To support this belief, he referred to section 4.13.23.4 VNAV Use (Exhibit A-4), which states in part, “VNAV PATH must be annunciated no later than the FAF OR as specified on the approach chart, whichever comes first”.

[56] The Tribunal believes that evidence and testimony presented during the review hearing show that the cautionary note under section 4.12.1.4 Descent Constraints **does apply** in this situation as it would in any other phase of flight to have, as Mr. Rodger testified, bottom end protection. Therefore, the Tribunal finds that the Minister has proven that the applicant demonstrated an unacceptable following of SOPs, rules and regulations, by selecting Vertical Speed mode with Field Elevation set in the MCP.

[57] The next issue that must be determined is whether item 16, RNAV, warranted a mark of 1.

[58] The 4-Point Marking Scale – Grading Matrix of the *Flight Test Guide* defines a mark of 1 pertaining to “Technical Skills and Knowledge” as:

- **Critical error**
- Unacceptable practical understanding
- Unacceptable following SOPs, rules and regulations

[59] A critical error is defined as an “action or inaction that is **consequential** to the completion of a task, procedure, or manoeuvre”; and “Undesired Aircraft State (UAS) **occurred**” (Exhibit A-2).

[60] Based on the testimony and evidence, the Tribunal finds that Mr. Rodger was correct in assessing this flight test exercise as a mark of 1, critical error, for failing to comply with the requirements of the Flight Operations Manual, section 4.12.1.4 Descent Constraints. By selecting Vertical Speed with Field Elevation set in the MCP, there was no bottom end protection setting up a scenario whereby there was the potential of the aircraft flying into the ground, reducing safety margins and creating a UAS.

III. DETERMINATION

[61] The Minister of Transport has proven on the balance of probabilities that the applicant, Kieth Holmes, does not meet the qualifications or conditions necessary for the issuance of a Canadian aviation document, pursuant to paragraph 6.71(1)(b) of the *Aeronautics Act*.

May 12, 2021

(Original signed)

Jonathan Dueck
Member

Appearances

For the Minister: Michel Tremblay
For the Applicant: self-represented