



## TRANSPORTATION APPEAL TRIBUNAL OF CANADA

**Citation:** *Kieth Holmes v. Canada (Minister of Transport)*, 2021 TATCE 11 (Ruling)

**TATC File No.:** P-4546-68

**Sector:** Aviation

### BETWEEN:

**Kieth Holmes**, Applicant

- and -

**Canada (Minister of Transport)**, Respondent

**Heard by:** Written submissions

**Before:** Jonathan Dueck, Member

**Rendered:** April 29, 2021

### RULING

**Held:** The application to file new evidence or to reopen the hearing filed by the applicant is dismissed.

## **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] 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.

[3] A Tribunal case management conference was held on February 17, 2021. In attendance were Mr. Patrick Vermette (Chairperson), Mr. Kieth Holmes (applicant) and Mr. Michel Tremblay (Minister's representative).

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

[5] The hearing was held before me by videoconference on March 17, 2021. The respondent was represented by Mr. Michel Tremblay. The applicant, Mr. Kieth Holmes, was self-represented.

[6] At the hearing, the respondent called one witness, Mr. David Rodger, an Approved Check Pilot (ACP) employed by WestJet who conducted the PPC in question. The applicant testified on his own behalf and did not call any additional witnesses; however, he was provided the opportunity and did cross-examine Mr. Rodger. The parties then respectively closed their cases and submitted their respective closing arguments. The proceedings are now closed, and the matter has been under consideration since March 17, 2021.

### **A. Applicant's submission**

[7] 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, on the basis that he had been unfamiliar with the review process, and had missed an opportunity to question Mr. Rodger's credibility.

[8] Mr. Holmes argued that Mr. Rodger had lied under oath during his testimony of the third event of the PPC (RNAV approach), related to Exhibits M-4 and M-7. He claimed that Mr. Rodger testified that, after he had started descending on the approach, Mr. Rodger waited 30 seconds to see if he would correct the approach, then he stopped the flight. Mr. Holmes argued the flight was stopped only after he flew a missed approach, for which he was issued a passing grade of 3 for item 17 on the Flight Test Report (Exhibit M-7). He argued that a further 30 minutes had passed after the time at which Mr. Rodger stated that he had stopped the flight. Mr. Holmes argued that this is corroborated by script R2A (Exhibit M-4).

## **B. Minister's response**

[9] On April 6, 2021, the Minister responded with a request to dismiss the applicant's motion. The Minister submitted that the applicant did not raise any new evidence that hadn't already been presented at the hearing and that he provided a restatement of his previous testimony.

[10] Further, the Minister argued that the motion did not raise any issues of procedural fairness concerning the conduct of the hearing. The applicant had the opportunity to hear all the evidence and testimony presented by Mr. Rodger and elected not to cross-examine the witness at the hearing. The applicant had every opportunity to present evidence and declined the member's offer to produce rebuttal evidence.

[11] The Minister argued that the evidence is now closed and that allowing the reopening of the hearing or admitting evidence available at the time of the hearing would bring the administration of justice into disrepute.

## **C. Applicant's reply**

[12] On April 7, 2021, the applicant submitted that he **did** raise new information by connecting chronologically the missed approach procedure with the RNAV approach and the passing mark he received for item 17 on the Flight Test Report.

[13] The applicant noted that he did not raise issues of procedural fairness because he had only "connected the dots" in Mr. Rodger's statements after the hearing, and he believed that any truths discovered even after the hearing would be heard without prejudice.

[14] The applicant stated that he did not cross-examine Mr. Rodger any further as he did not believe it would be possible to garner the truth and reiterated his belief that he would be able to question the witness after the hearing.

## **II. ANALYSIS**

[15] Neither party cited any legislation or jurisprudence to assist in the determination of this matter. Section 10 of the *Transportation Appeal Tribunal of Canada Rules* allows for the application submitted by Mr. Holmes. This application must also be considered in light of the law, the rules and principles of fairness and natural justice, and jurisprudence in these matters.

[16] Section 15 of the *Transportation Appeal Tribunal of Canada Act* provides that the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it. Neither this *Act* nor the *Rules* deal specifically with reopening a hearing.

[17] The test for administrative tribunals to consider in determining whether to reopen a hearing, endorsed by the Federal Court<sup>1</sup>, is as follows:

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<sup>1</sup> *Murray v. Canada (Attorney General)*, 2013 FC 49. See also *Whyte v. Canadian National Railway*, 2010 CHRT 6.

1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial;
2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

**A. Can the Tribunal accept new evidence or reopen the hearing?**

[18] At the beginning of the hearing, the Tribunal asked the applicant if he had an opportunity to review the documents submitted by the Minister in advance of the hearing and if he was planning to cross-examine the Minister's witness on those documents. The applicant answered yes to both questions.

[19] In his application, the applicant refers to Exhibits M-4 and M-7, both of which were available to him prior to and during the hearing.

[20] Although the applicant stated that he was unfamiliar with the review process, he could have contacted the Tribunal Registry directly or asked for clarification of any process questions he had during the case management conference, or during the hearing.

[21] During the hearing, the applicant had the opportunity to hear all the evidence and testimony presented by the Minister's witness and then he did in fact cross-examine Mr. Rodger for 45 minutes. The applicant had ample opportunity to correct any alleged discrepancies in Mr. Rodger's testimony surrounding the timing and termination of the PPC, when the simulator stopped and why he assessed a passing grade of 3 for item 17 on the Flight Test Report.

[22] The applicant also had every opportunity to present his own evidence. As a result, the Tribunal finds that the hearing was held in accordance with the rules of fairness and natural justice.

[23] The application to reopen the hearing or to file new evidence appears to be based on the applicant's own recollection of the events as they happened during the PPC and not on any new documentary evidence. As a result, the Tribunal is of the view that the evidence is not new, but simply a new version of what he could have presented during the hearing or clarified during the witness's cross-examination. There is nothing to indicate that this information could not have been obtained with reasonable diligence or was not available to him prior to and during the hearing.

[24] As a result, the Tribunal cannot find that first part of the above test has been met, and there is no need to consider the second or third part of the test.

[25] The applicant had every opportunity to prepare and present his evidence during the hearing, and it would not be fair to the respondent to allow the applicant to make additions to his testimony after the hearing is finished.

[26] The Tribunal is of the view that allowing a reopening of the hearing or admitting evidence that was available prior to and during the hearing in the circumstances of the applicant's application would affect public trust in the Tribunal and bring its administration of justice into disrepute.

### **III. RULING**

[27] The application to file new evidence or to reopen the hearing filed by the applicant is dismissed.

April 29, 2021

(Original signed)

Jonathan Dueck  
Member

#### Appearances

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