

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20091203

Docket: A-46-09

Citation: 2009 FCA 356

**CORAM: BLAIS C.J.
NOËL J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

CUPE, Air Canada Component

Appellant

and

AIR CANADA

Respondent

Heard at Toronto, Ontario, on December 3, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on December 3, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on December 3, 2009)

LAYDEN-STEVENSON J.A.

[1] The appellant, Canadian Union of Public Employees (Air Canada Component) (CUPE), appeals from the judgment of Barnes J. of the Federal Court (the application judge) dismissing its application for judicial review. CUPE sought judicial review of Transport Canada's refusal to commence a workplace safety investigation under Part II of the *Canada Labour Code*, R.S.C. 1985,

c. L-2 (the Code) prior to the completion of the internal complaint resolution process provided for in s. 127.1.

[2] The factual context concerns an Air Canada flight attendant's refusal to work on an aircraft because of an inoperable cabin communication system. The flight attendant alleged that the circumstances created a dangerous work environment justifying a refusal to work under subsection 128(1) of the Code. The aircraft in question was grounded and another aircraft was substituted.

[3] The flight attendant took issue with the manner in which the situation had been handled and complained to the employee co-chair of the Air Canada Health and Safety Committee (the Committee). She copied the manager and employer co-chair of the Committee as well as her union president. Nearly one month later, the employee co-chair (on the flight attendant's behalf) registered a complaint with Transport Canada and requested the involvement of a Health and Safety Officer (HSO). Relying on subsections 128(10) and 128(13) of the Code, the complaint stated that the work refusal procedures were not followed. Transport Canada declined to intervene on the basis that it lacked jurisdiction.

[4] Barnes J. reviewed Transport Canada's determination that it lacked jurisdiction to appoint an HSO "to investigate a complaint prior to completion of the Internal Complaint Resolution Process as stated in section 127.1 of the [Code] Part II" on a standard of review of correctness.

[5] In our view, on the record before him, Barnes J. correctly found:

- the grounding of the aircraft satisfied the employer's obligation under subsection 128(8) of the Code to take immediate action to protect the employee;
- the complaint therefore was grounded in section 127.1 rather than section 128 of the Code;
- section 127.1 stipulates that alleged contraventions of the Code must be submitted to the internal complaint resolution process before other recourse is sought and its language is mandatory;
- the intent of section 127.1 is to allow the parties to pursue a mutually agreeable solution before seeking outside involvement and to provide the HSO with the benefit of a written investigation report or, in the case of disagreement, two reports;
- section 145 of the Code is a remedial provision which is engaged only when an HSO is carrying out an investigation authorized by some other provision of the Code;
- where an employee initiates a complaint under section 127.1 of the Code, it is necessary to exhaust the internal complaint resolution process before the employee, or the union on the employee's behalf, can request an investigation by an HSO;
- Transport Canada's decision not to get involved was legally correct.

[6] These conclusions are sufficient to dispose of the appeal. We need not comment on the application judge's *obiter* remarks and we decline to do so. The appellant's further argument that Transport Canada ought to have exercised discretion to consider the appointment of an HSO because the internal complaint resolution process was frustrated is not supported by the record.

[7] The appeal will be dismissed with costs.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-46-09

**(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE BARNES DATED
JANUARY 6, 2009, DOCKET NO. T-197-08)**

STYLE OF CAUSE:

CUPE, AIR CANADA
COMPONENT v.
AIR CANADA

PLACE OF HEARING:

TORONTO, ONTARIO

DATE OF HEARING:

DECEMBER 3, 2009

REASONS FOR JUDGMENT OF THE COURT BY:

(BLAIS, NOËL & LAYDEN-
STEVENSON JJ.A.)

DELIVERED FROM THE BENCH BY:

LAYDEN-STEVENSON J.A.

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