

2020 CarswellNat 372
Canada Arbitration

Sort and Pacific Coastal Airlines Ltd., Re

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**IN THE MATTER OF AN ADJUDICATION UNDER
DIVISION XIV-PART III OF THE CANADA LABOUR CODE**

Mr. Sigmund Bering Sort (the "Complainant") and
Pacific Coastal Airlines Ltd. (the "Respondent")

Sylvia P. Skratek Adjud.

Judgment: February 10, 2020

Docket: YM2707-11317

Counsel: Mr. Sigmund Bering Sort, for Complainant
Mr. Scott A. McCann, for Respondent

Sylvia P. Skratek Adjud.:

BACKGROUND

1 A complaint dated March 20, 2018 was filed by Sigmund Bering Sort (the "Complainant") against Pacific Coastal Airlines Ltd. (the "Respondent" or the "Employer") under Part III of the *Canada Labour Code* (hereafter "the *Code*") alleging that he was unjustly dismissed from his position as an Airline Transport Pilot. By letter dated August 1, 2018 the Minister of Labour appointed Sylvia P. Skratek as the Adjudicator of Mr. Sort's complaint.

2 The Adjudicator scheduled a hearing in this matter on February 25-28, 2019. At the request of the Complainant and with the agreement of the Respondent the hearing was rescheduled for December 9-13, 2019. The hearing was convened in Vancouver, British Columbia and proceeded as provided at Section 242 under Division XIV-Part III of the *Code*. At the hearing both parties had full opportunity to make submissions and present evidence to prove their respective cases. The record was closed at the conclusion of the evidentiary presentations and the presentation of closing arguments.

STATEMENT OF THE ISSUE

3 The issue raised by this appeal is whether Sigmund Bering Sort was unjustly dismissed from his employment as an Airline Transport Pilot for Pacific Coastal Airlines Ltd. If so, then what is the appropriate remedy?

STATEMENT OF THE FACTS

4 Pacific Coastal Airlines Ltd. is the sixth largest airline operating at Vancouver International Airport based on total outbound seats, and the third largest based on take offs and landings. It provides regular schedule, charter, and cargo services throughout British Columbia and in Alberta.

5 Mr. Sort began his employment with Pacific Coastal Airlines Ltd. on April 11, 2016 in a temporary full time position which was scheduled to terminate on September 30, 2016. It was a seasonal position as a B1900 First Officer. He reported to Ryan Evans, Assistant Chief Pilot 704 Operations. By letter dated September 28, 2016 the Complainant was offered a permanent full time position as a B1900 First Officer effective September 1, 2018.

6 Prior to his employment with Pacific Coastal Airlines Ltd. the Complainant had aviation employment with the Royal Canadian Air Force (RCAF), Orca Airways, BC West Airlines, Western Airlines and, the Qualicum Flight Center. He held a number of different positions with these employers including Site Commander, Tow Pilot, Glider Pilot, Flight Safety Officer, Line Captain, Flight Instructor, Commercial Pilot, and Chief Flight Instructor. His flight experience included a number of different aircraft with several thousand hours of flight time. He possesses a Class 1 Medical, Airline Transport Pilot's Licence (ATPL), Canadian Passport, and Airport Security Pass. He has received several awards including: the Canadian Forces Medal, Canadian Decoration for long service and good conduct; three Canadian Forces Flight Training School's Recognition for Flight Instructor Dedication and Excellence; three Canadian Forces Flight Training School's/Canadian Wings Aviation Training Centre's Flight Safety Award for Dedication.

7 On May 5-8, 2016 the Complainant participated in BE02 Simulator Training. At the conclusion of the Training it was determined that he had completed the Training to Proficiency Standards. On May 9, 2016 the Complainant passed the Pilot Proficiency Check. On May 12, 2016 the Complainant's Aircraft Flight Training Record-IFR indicated that he had completed the Training to Proficiency Standards. He completed the Line Indoctrination Review on June 3, 2016.

8 On November 1, 2016 the Complainant received a Pasco Points award in recognition of his outstanding contribution on a flight to Bella Cooola that had to be diverted due to bad weather conditions. Chief Pilot Ryan Evans signed the award on behalf of the Airline.

9 On May 8-9, 2017 the Complainant participated in BE02 Simulator Training. Once again it was determined that the training was completed to Proficiency Standards. On May 10, 2017 the Complainant failed the Pilot Proficiency Check. There was a Remedial BE02 Simulator Training

that the Complainant "...completed to standard". After the Remedial Training he passed the Pilot Proficiency Check.

10 The Complainant expressed an interest in being upgraded to Captain and a review of his performance was undertaken in late 2016 through mid 2017. Peer evaluations were conducted by six captains all of whom determined that he was not ready for an upgrade. A summary of the evaluations included a statement that "...Sigmund excels in being professional and customer focused while consistently demonstrating a positive attitude. His commitment to ensuring passenger satisfaction is recognized by myself and multiple Captains and is praised. Additionally, his ability to employ strong Crew Resource Management through open communication and the promotion of teamwork, cooperation, and collaboration is recognized and commended. Sigmund's overall attitude towards the job and the Company are excellent and I am confident this will aid in future success and development at Pacific Coastal Airlines."

11 In late 2017 Acting Chief Pilot Alex Banbury met with the Complainant and presented a proposal designed to assist him in his development toward future upgrade opportunities. The proposal required the Complainant "...to continue to fly the line for the next 3 months, during which time I will be requesting feedback for the Captains you fly with...objective feedback from individuals who fly with you over multiple legs...This 3 month evaluation period will end March 15, 2018 by which time we will schedule a series of line checks with at least one Training Captain or schedule you for recurrent simulator training..." The Complainant thanks Captain Banbury and requests that if anyone has any questions, concerns or suggestions regarding his work that they approach him in a positive, constructive manner.

12 On February 3, 2018 Captain Banbury, who has now been appointed Chief Pilot-704, notifies the Complainant that he has been scheduled for the "...sim recurrent instead of the line check pairing as we near the end of the 3 month evaluation period...a good performance through this recurrent training is required in order to be considered for upgrade..."

13 On March 6-7, 2018 the Complainant participated in BE02 Simulator Training. At the conclusion of the Training it was determined that he had completed the Training to Proficiency Standards. On March 8, 2018 there is a record of the Complainant completing a BE02 Simulator TIL-LOFT as a First Officer with Alex Banbury as the Captain. The Complainant received Satisfactory Marks in all areas with one exception.

14 On March 14, 2018 Captain Banbury wrote a private and confidential memo to the Director of Flight Operations Mr. Darcy Coonfer with a copy to Manager of Employee Services Ms. Caitlin Spelliscy regarding the Complainant's Training Performance. In that letter he expresses concerns with the Complainant's overall performance and determines that "Although Sigmund has been assessed as competent to operate as a First Officer in each individual training event, I have assessed his overall performance as below the standard required to operate as a First Officer at Pacific

Coastal Airlines in consideration of his overall training file." Captain Banbury outlines specific examples that he maintains show that the Complainant is not able to maintain the standard that is required of a Pacific Coastal Airlines First Officer. Captain Banbury concludes that:

Based on the specific examples listed above as well as an overall evaluation of his performance over three independent training events, it is my assessment that Sigmund has demonstrated an inability to maintain the standard required to execute his duties as a Pacific Coastal Airlines First Officer. It is apparent from his training records that he has been unable to correct mistakes made from one training session to the next, and that he has required additional training in order to achieve the required standard. Furthermore, Sigmund has demonstrated a reluctance to hold himself accountable for his mistakes. I believe that his attitude toward the training department in this regard has been a contributing factor in his inability to improve overall performance. In the interest of safety, I am unable to assure that Sigmund will perform his required duties when operating as a First Officer, in particular when workload is increased and when dealing with a potential emergency situation.

15 Captain Banbury removed the Complainant from his flying duties and recommended that his employment be terminated in the interest of aviation safety. By letter dated March 19, 2018 the Complainant was notified that his employment was terminated for cause, effective immediately. On March 20, 2018 the Complainant filed his complaint under Part III of the *Canada Labour Code* alleging that he was unjustly dismissed from his position as an Airline Transport Pilot.

The Respondent's Position

16 The Employer submits that its decision to terminate the Complainant was reasonable in light of the potential harm that was posed by his lack of competence and submits that this determination should be afforded deference by this Adjudication Board. The Employer relies on the arbitral principle of deference to management decisions that is found in job selection cases and provides citations to support its reliance. The Employer acknowledges that the principle is not applicable in matters of disciplinary action however this matter is not a disciplinary case but rather involves an assessment of the employee's skills and abilities. Absent a finding of malice or bias in the decision making it is not appropriate for the Adjudicator to determine whether or not the Complainant was safe to continue flying for the Employer. The Employer submits that its assessment that the Complainant lacked the abilities and skills necessary to be a pilot should be given deference. The Respondent sets forth citations to prior cases regarding the applicable principles derived from the airline context that focus primarily on the potential for harm. After Captain Banbury observed the Complainant during his 2018 recurrent training he undertook a good faith review of the Complainant's overall record. After that review Captain Banbury and Darcy Coonfer agreed that the Employer had lost confidence in the Complainant's ability to operate reliably in a safe fashion. There were no further steps that had to be taken. A loss of confidence

justifies termination where public safety is at issue. The Employer submits that it had just cause to terminate the Complainant's employment and that his complaint should be dismissed.

17 In the event that it is determined that the Complainant was terminated without cause the Employer submits that any remedy should take into account that the Complainant is not seeking reinstatement and even if he were reinstatement is not an appropriate remedy. The employment relationship is no longer viable. Additionally the Complainant's employment agreement sets forth that he could be terminated without cause and limits the damages that would be provided if that were to occur: wages in lieu of notice and severance pay not exceeding his entitlement under the *Code*.

The Complainant's Position

18 The Complainant submits that the Respondent has not met its burden of proof that his termination was just. It has not shown that its decision to terminate his employment was reasonable, objective, free from any personal biases and taken for the sole purpose of ensuring the effective operation of the business. Furthermore the termination was procedurally flawed and did not comply with the concept of progressive discipline. While the Respondent has based the termination on safety concerns it is noteworthy that there was no expert opinion evidence to support the Respondent's position that the Complainant was not safe to fly. It is not enough to simply say that its senior officers had authority and in their judgment, decided that the Complainant was not safe to fly. Personal opinions regarding the Complainant's fitness to fly do not legally determine that issue. There is a lack of objective evidence to make the case that the Complainant was unsafe to fly. Additionally there is no expert opinion evidence to support the Respondent's position that remedial training for the Complainant would not have been effective.

19 The Complainant responds to each of the issues raised by the Respondent regarding his flight and simulator training results. He submits that other than through an inappropriate application of a standard of perfection, there is very little evidence to indicate that he was not perfectly safe to fly. It is natural and normal for pilots to score imperfectly on these training exercises and the whole point of recurrency testing and training is to restrengthen pilots' skills' standards. These training exercises are intended to guard against regression and to provide an opportunity to train back up to standard. The Complainant emphasizes that he is not the only pilot that made errors on simulated testing of emergency events and provides a review of several other pilots who had test results that were worse and where their transgressions were greater than his. He further notes that his most recent test results were superior to earlier testing. In most categories he tested at a 3 or a 4 out of 4 rather than the bare minimum 2. The allegation that he had regressed is simply not correct. It is also noteworthy that the Respondent saw fit to promote the Complainant to a permanent First Officer position after some of the earlier test results that it now attempts to rely on as demonstrating that he was unsafe. Overall the Complainant has displayed a positive trajectory of results in flying the Beech 1900 particularly considering that he had not been exposed to this aircraft before he was

hired by the Respondent. The Complainant cites several very positive comments in his training record and provides examples of actual real-life flying experiences in which he performed very well in emergency situations.

20 The Complainant further submits that the Respondent did not adequately consider the possibility of remedial training or progressive discipline. There is no good evidence nor is there any expert opinion evidence to the effect that issues arising out of the Complainant's performance on training and testing exercises could not have been adequately dealt with through remedial training.

21 The Complainant is fully licensed and qualified by Transport Canada to fly. The Respondent did not communicate any concerns to Transport Canada nor did it write to Transport Canada to suggest that his license be restricted. If there were legitimate concerns about his safety as a pilot then there was a positive duty to communicate this to Transport Canada.

22 The Complainant sets forth several reasons that he believes were underlying his termination focusing on an element of personal animus and bias. The particulars include some trivial incidents, issues related to an inadequate/obsolete GPS systems, and "secret peer" evaluations. In his testimony at the hearing he stated that he had brought a number of his perceived safety issues including GPS, KLN, plus other safety management systems to the management of Pacific Coastal Airlines and he believes that these matters are underlying the decision to terminate him. He believes that there was a willful search for finding fault with him.

23 In conclusion the Complainant requests damages in an amount to be determined as well as compensation for a total loss of income and benefits of approximately \$51,875.

Discussion

24 The Termination of Employment letter dated March 19, 2018 that was presented to Mr. Sort stated that:

...this decision is a result of a review of your pilot training files following your most recent simulator training completed from March 6 to March 8, 2018. Our Chief Pilot-704 Operations has determined that your overall performance is below the standard required to safely operate as a First Officer at Pacific Coastal Airlines.

The decision was made after Chief Pilot Banbury had participated in training with Mr. Sort during the time period of March 6-8, 2018. Although Mr. Sort had achieved higher marks in the great majority of the areas than he had in previous trainings Captain Banbury was concerned about what he perceived to be Mr. Sort's regression from previous training events that had required re-training to meet the minimum required Basic Standard. Captain Banbury expressed his concerns in a Private and Confidential letter to Darcy Coonfer in which he cited specific examples from Mr. Sort's initial training and correlated the examples with similar instances in recurrent training sessions. It is a bit

puzzling that if there were these concerns from prior training sessions regarding the Complainant's abilities then why had Captain Banbury developed a plan with Mr. Sort in December of 2017 that would assist him in the achievement of his goal to be upgraded to Captain? The plan had Mr. Sort flying "...the line for the next 3 months, during which time I will be requesting feedback from the Captains you fly with....objective feedback from individuals who fly with you over multiple legs..." Captain Banbury's email ended with "Sigmund, I appreciate that you are keen to progress to the Captain position at Pacific Coastal and it is my hope that this process will help us reach that goal". The Adjudicator recognizes that Captain Banbury did not review the Complainant's past training sessions until after March 8, 2018 however that suggests that there were no concerns or complaints regarding the Complainant's skills and abilities brought forward by any other employee at the airlines. There was no reason that the Complainant should be dissuaded from pursuing his desire to be upgraded to Captain.

25 As noted on his updated resume Mr. Sort had flown over 1500 hours on the Beech 1900 at the time of his termination. During his employment with Pacific Coastal Airlines from 2016-2018 there was no evidence presented that there was any objective feedback from any of the Captains who had flown with him during that time period nor was there any evidence that Captain Banbury had received "...objective feedback from individuals who fly with you over multiple legs..." as promised in his plan of December of 2017. Captain Banbury had served as the trainer for Mr. Sort's initial training in 2016 and indicated that the training had been completed to proficiency standards. The Line Indoctrination Records for the period of May 13, 2016 through June 2, 2016 indicated that Mr. Sort met a standard of 3 (out of 4) in all elements being reviewed by Training Captains Symonds, Dhaliwal, Brown, Watkins, Banbury, Mears, Diner, and Mittlestead. Subsequent training in May of 2017 was also completed to proficiency standards. Peer performance evaluations that were conducted by several Captains during July and August of 2016 through September of 2017 without Mr. Sort's knowledge indicated that while there was a need for improvement in some areas he excelled in other areas. The evaluations were designed to evaluate his readiness for an upgrade from First Officer to Captain. Comments from the Captains included: *I enjoy working with Sigmund. He is someone that is valuable to PCA in the future. ...Some more time would be valuable before upgrade; Excellent person + Attitude overall but is still too behind the aircraft to be PIC when with a new FO for example; Meets expectation for a First Officer; Continual Improvement needed for Captain level; Sigmund performs to an acceptable level at a First Officer level with less than a year experience...He currently lacks what is needed for command.* None of the peer evaluations were shared with Mr. Sort and he was provided with a limited overview of the positive and negative comments within them regarding his abilities. It is clear that none of the Captains thought he was ready to be upgraded to a Captain but none of the Captains expressed a concern about his abilities as a First Officer.

26 Captain Banbury was approved as the Chief Pilot for Pacific Coastal Airlines by letter dated January 26, 2018. As the Chief Pilot he is responsible for the professional standards of the flight crews under his authority. His duties include, but are not limited to, developing or implementing

all required approved training programs for flight crews, issuing directives to flight crews, and supervision of flight crews. The Adjudicator recognizes that Captain Banbury has several pilots under his supervision and that there is a heavy burden on him to make certain that safety is not compromised. With that burden however comes a responsibility to objectively assess the abilities of the flight crews under his supervision. Objectivity is missing in the assessment of Mr. Sort. It is unclear as to why the Recurrent Training that occurred in March of 2018 set off alarm bells. Mr. Sort had achieved his highest marks in the two years that he had participated in the training. The March 8, 2018 record of the Complainant's completion of the BE02 Simulator TIL-Loft during which Chief Pilot Banbury served as the Captain shows Satisfactory Marks in 44 of the 45 areas being examined. Chief Pilot Banbury testified that he had requested additional feedback from Trainer Doug Brown regarding Mr. Sort's performance but when the written comments are reviewed it is clear that they are applicable only to the one exception, item 9.2, Organization and briefing of approach. It is true that over the years there were comments on all of his training documents regarding areas for improvement but as Mr. Sort's documents illustrated such comments are not unusual. A review of the notebook of pilot testing documents leads to the conclusion that perfection is not the standard but rather that proficiency is the standard. Mr. Sort met the proficiency standards in all of his trainings. He either met, or was above, the standard with an occasional notation of a basic standard that required a debriefing. This is consistent with many of the pilot testing documents that were put into evidence on behalf of the Complainant.

27 The Adjudicator has reviewed the authorities provided by the Respondent and does not disagree with the assertion that management's determination should be given deference. That determination however must be based on proven facts not assertions or personal opinions. In *Strand v Northern Air Charter Inc*, [2003] CLAD No 256 the pilot had been the subject of complaints from crew and medical staff that were addressed on three separate occasions. Additionally there was an incident in which the co-pilot was concerned with the quality of the pilot's flying. In *Cotirta v Missinippi Airways Ltd*. [2011] CLAD No 346 there were complaints from customers and other pilots regarding the skills and abilities of the pilot. In *Morin v Canadian Helicopters Western, a division of Canadian Helicopters Ltd*, [2002] CLAD No 464 there were several incidents that had resulted in counseling conversations or discipline with the pilot. In *Milling v Fort Frances Air*, [2000] CLAD No 585 other pilots refused to fly with the complainant. In this matter Mr. Sort has met the Proficiency Standards. There was no objective evidence to support a conclusion that he was unsafe to fly. The objective feedback "...from individuals who fly with you over multiple legs..." as promised in his plan of December of 2017 was not put into evidence leading to a question as to whether 1) it was ever obtained or 2) it supported Captain Banbury's assertions.

28 It was no secret that from the beginning of his employment the Complainant wanted to become a Captain. He was very assertive in his approach but he always expressed his disappointment professionally. He was very appreciative of the efforts to assist him and readily agreed to the plan that had been developed by Captain Banbury in December of 2017. This is not a

situation where the pilot in his role as First Officer was the subject of complaints from customers and other staff. This is not a situation where other pilots refused to fly with him. While there were two performance expectations issued to the Complainant during his time with the Pacific Coastal Airlines the Respondent confirmed that those were not taken into consideration in making its determination to terminate his employment. The determination was not supported by proven facts or objective evidence regarding the skills and abilities of the Complainant.

29 None of the above however leads to the conclusion that Captain Banbury may not terminate Mr. Sort's employment. It is clear from Captain Banbury's testimony and his communications with Mr. Coonfer and Ms. Spelliscy that he personally believed that Mr. Sort was unsafe to fly. He personally believed that Mr. Sort was regressing rather than progressing. These beliefs do not make for a successful employee/employer relationship. When that relationship has been irrevocably damaged it may be ended by an employer. As specified in Mr. Sort's employment agreement at the heading Termination of Employment:

This employment contract may be terminated at any time without cause by either party. In the event of termination of your employment by the Company for reasons other than cause, you will be provided with termination notice, or wages in lieu of notice, and severance pay in accordance with and not exceeding the termination pay obligations pursuant to the *Canada Labour Code*...

The *Canada Labour Code* sets forth at Section 240 (4)

- (4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to
 - (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
 - (b) reinstate the person in his employ; and
 - (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

While the employment agreement allows for a without cause termination there is a different view as to whether an employer may terminate an employee without cause under the *Canada Labour Code*. As cited by the Complainant the Supreme Court of Canada in *Wilson v Atomic Energy of Canada Ltd.*, (SCC July 14, 2016) ruled that Division XIV of the Code prevents federally regulated employers from terminating non-managerial employees with more than 12 months of service without reasons thereby overriding the common law principle that an employer may terminate for any reason by providing the employee with reasonable notice of termination. In effect Mr. Sort's "without cause" termination must be viewed as an unjust dismissal under the *Code*. The

contradictions between the *Code* and the employment agreement would warrant resolution but for the fact that Mr. Sort is not seeking reinstatement to his position. He acknowledges that the employment relationship has been irreparably damaged and seeks a remedy that is consistent with the *Code*. He is entitled to the benefits set forth under the *Code* including: compensation not exceeding the amount of money that is equivalent to the remuneration that would have been paid and any other like thing that it is equitable in order to remedy or counteract any consequence of the dismissal.

Remedy

30 The parties agreed that the Adjudicator should not make a determination regarding remedy until such time as the mitigation issue is resolved.

31 Mr. Sort has provided a breakdown of he lost wages and benefits that he is claiming:

March 19, 2018 through June 1, 2019	1 year, 2.5 months	\$43,500
June 2, 2019 through October 10, 2019	4.5 months	\$6375
Non-salary benefits		\$2000

Total Lost Wages and Benefits: \$51,875

32 Mr. Sort has also claimed that he is entitled to Punitive/Aggravated/Exemplary Damages in an unspecified amount for the impact "that a termination of employment based on an allegation of unsafe flying could have on Mr. Sort's airline career due to his age proximity to mandatory retirement".

33 All matters related to compensation and damages are hereby remanded to the parties for resolution. In the event the parties cannot resolve the matters within thirty (30) days of the issuance of this decision then they shall submit to the Adjudicator their positions regarding any outstanding determinations of compensation for lost wages and benefits as well as damages.

34 As a preliminary determination regarding remedy the Adjudicator concludes that Mr. Sort shall not be reinstated to his position as First Officer with Pacific Coastal Airlines due to the breakdown in the employee/employer relationship that he has acknowledged. The Adjudicator further orders that all records regarding his termination be purged from all of the Employer's files, digital or paper.