

2017 CarswellNat 3068
Canada Adjudication (Canada Labour Code Part III)

Hyderi and Concorde Baggage Services Inc., Re

2017 CarswellNat 3068

In the Matter of a Wage recovery Appeal under Division XIV - Part III of the Canada Labour Code, RSC 1985, c L-2, as amended ("Code")

SAYEDJAN HYDERI (Complainant) and CONCORDE BAGGAGE SERVICES INC. (Respondent)

Julie G. Hopkins Adjud.

Heard: May 10, 2017

Judgment: July 5, 2017

Docket: YM2707-10778

Counsel: No one for Mr. Sayedjan Hyderi
No one for Concorde Baggage Services Inc.

Subject: Employment; Public

Julie G. Hopkins Adjud.:

Introduction

1 Mr. Sayedjan Hyderi was employed as a baggage services agent with Concorde Baggage Services Inc. ("Concorde Baggage") for one and a half years when he was summarily dismissed from his employment on July 15, 2016 as a result of an incident that occurred the previous day. He filed a complaint pursuant to the *Code* alleging he was unjustly dismissed. He is seeking reinstatement. In response, Concorde Baggage denied that Mr. Hyderi was unjustly dismissed. It stated he was dismissed for committing a security breach at the Calgary airport that jeopardized life and property and that it was contractually required to dismiss Mr. Hyderi at the request of the Calgary Airport Authority ("Airport Authority") which it did. It also stated that Concorde Baggage is subject to provincial labour standards and is not governed by the *Code*. This last issue goes to my jurisdiction to adjudicate Mr. Hyderi's complaint.

2 For the reasons that follow, I have determined that Concorde Baggage is subject to the *Code* in relation to Mr. Hyderi's employment and that Mr. Hyderi's dismissal was "unjust" within the meaning under the *Code*. As a result, I have ordered damages in lieu of reinstatement and severance to be paid to Mr. Hyderi.

Procedural Matters

3 On March 2, 2017, I was appointed by the Minister of Labour to adjudicate Mr. Hyderi's complaint. After consulting with the parties, I issued a Notice of Hearing dated April 5, 2017 setting the hearing of the complaint for May 10, 2017 in Calgary, Alberta.

4 At the hearing, neither of the parties was represented by counsel. It was agreed by the parties at the outset that the jurisdictional issue would not be determined as a preliminary issue but instead the hearing would proceed on the basis of both the merits and the issue of jurisdiction. I discussed with the parties that my determination of the jurisdictional issue would turn on whether Concorde Baggage was providing services that would render it subject to federal jurisdiction. I discussed with them the types of issues that I would have to consider and I invited the parties to provide me with written submissions on the issue, which they agreed to do, on or before June 12, 2017.

5 At the hearing, Concorde Baggage called two witnesses, Mr. Joe Szabo, Senior Manager at Concorde Baggage; and Mr. Osman Elmi, a Baggage Coordinator with Concorde Baggage. Mr. Hyderi gave evidence on his own behalf. At the end of the hearing, I reserved my decision. I received no written submissions from Concorde Baggage on the jurisdictional issue and only a brief submission on behalf of Mr. Hyderi unrelated to the jurisdictional issue.

Facts

6 Concorde Baggage provides baggage handling services, janitorial services, and plumbing, mechanical and electrical maintenance services to the Airport Authority. Its business operations are limited to Calgary, Alberta. It has approximately 500 employees. The Airport Authority is its sole customer.

7 Concorde Baggage provides all the baggage handling services for the Airport Authority. In relation to departing flights, those services consist of baggage handling from the point where a bag is checked and placed on a conveyor belt until the bag leaves the baggage hall on a conveyor belt and an airline takes control of it. It includes baggage handling that is required as part of the baggage screening process. It has a control room and lunchrooms physically located within the airport and its employees report to work at the airport.

8 The Airport Authority is federally regulated. It requires all of Concorde Baggage's employees to undergo federal government security and background checks. Concorde Baggage is required to meet all relevant Transport Canada regulations and comply with all Airport Authority rules. Mr. Szabo testified that, under the terms of Concorde Baggage's contract with the Airport Authority, Concorde Baggage takes direction for its operations from the Airport Authority. The Airport Authority has the right to require Concorde Baggage to dismiss any employee or manager. It may require the dismissal without providing any reason to Concorde Baggage. The contract was not in evidence before me.

9 Concorde Baggage employees are required to complete an online security awareness program administered by the Airport Authority. Concorde Baggage is required by Transport Canada to provide security refresher courses to its personnel every six months. Employees in Mr. Hyderi's position are issued restricted area passes which allow them to work in the restricted, secured areas of the airport.

10 With the hiring of new employees, in addition to the security training provided by the Airport Authority, Concorde Baggage also provides them with safety training. Mr. Szabo testified that during training, employees are told that when a contingency plan is in place for upset conditions, they are not to take any actions without first having clearance from a manager or the control room. This includes putting bags on a conveyor belt. The clearance itself has to originate from Transport Canada. In evidence were forms signed by Mr. Hyderi on the completion of his safety training indicating the items for which he received training. Concorde Baggage had highlighted the following items as relevant:

- Under the heading "Training for System Recovery" - Baggage systems are not to be used unless given the all clear from the Duty Manager and Crisplant Hotline. The belts may start moving but that is not confirmation that all systems are running. Loading a belt before receiving an all clear may result in jams and or further delays.
- Under the heading "Training for Employee Responsibilities" - To take every reasonable precaution to protect the safety of themselves, other workers in their area and the general public.

11 On July 14, 2016, there was a power outage at the Calgary airport that caused the baggage screening equipment to stop working. Mr. Elmi testified that in accordance with the contingency plan for such circumstances, Transport Canada and the Airport Authority were notified of the event and an electrician was called to assess the problem. When the machines were able to be re-started and the computers were re-booted, Transport Canada tested the screening equipment to ensure that it was working properly before it was put back into service. On the day in question, this testing took a considerable amount of time. The entire delay caused a significant backlog in unscreened checked luggage. In addition, all the luggage that had been previously screened but was still on a conveyor belt at the time of the power outage had to be unloaded and re-screened.

12 Transport Canada instructed Concorde Baggage that until the screening equipment was operational, checked baggage was to be screened at the one set of screening equipment for oversized luggage which had not been affected by the power outage.

13 As part of the contingency plan in place for such circumstances, all employees can be redeployed to assist with moving baggage including managers and janitors. Mr. Elmi testified he radioed the control room to radio Mr. Hyderi to send him and another employee to the check-in area to move bags to the line for oversized luggage.

14 Mr. Hyderi denied having a radio or being contacted by the control room. He says that on the morning of July 14, 2016, at the request of Mr. Elmi, Mr. Hyderi had accompanied some new employees for training at the new international terminal at the airport. When he returned, Mr. Elmi asked Mr. Hyderi to clean the lunchroom and told him that once that was done he could take his break. Mr. Hyderi cleaned the lunchroom and then began walking towards the airport food court for his break. On his way, he saw a fellow employee running. That employee stopped to ask Mr. Hyderi to come help him and Mr. Hyderi followed him to the check-in area.

15 Mr. Elmi and Mr. Hyderi's version of events conflict as to what happened next. Mr. Elmi testified that he received a call from Airport Authority Baggage Management which had been contacted by Transport Canada to say that there was an incident in the ticketing area involving unscreened bags. Mr. Elmi ran up to the ticketing area himself. He saw Mr. Hyderi and asked him what was happening. He was told by Mr. Hyderi that bags were being placed on the conveyor for oversized luggage on the far side of the screening device without first having passed through it. Mr. Hyderi told Mr. Elmi that he had made a mistake but that he was not responsible rather it was the other employee who was. Mr. Elmi did not actually witness what happened.

16 Mr. Hyderi's version of events is that when he arrived at the ticketing area he saw that a Canadian Air Transport Security Authority ("CATSA") employee was working the oversized luggage screening equipment and that it was operating very slowly and luggage was piling up everywhere. The oversized luggage screen was next to a door that opened into a secured area. The other Concorde Baggage employee with Mr. Hyderi asked the CATSA employee manning the oversized luggage screen whether the other employee could unlock the door to the secured area and move luggage that had not been screened into the secured area and down to the baggage hall for further screening. The CATSA employee said he could. Mr. Hyderi said that he and airline staff then handed the luggage through the door to the other employee in the secured area where he loaded it into a luggage bin to take it down to the baggage hall for further screening. Eventually another CATSA employee came over and put a stop to it.

17 When the incident was reported to Transport Canada, it required all luggage in the restricted area to be re-screened because of safety concerns. This exacerbated the delay caused by the power outage. Mr. Szabo stated the incident caused over 100 pieces of baggage to not reach their flight in time for departure and some flights were delayed to wait for baggage. It is not clear to me how much of the delay was caused by the outage and how much was caused by the actions of Mr. Hyderi (and the other employee and the airline employees) but, without doubt, those actions would have contributed to the result. Mr. Szabo stated that Concorde Baggage was fined as a result of this incident but it was not clear from the evidence by whom or the size of the fine.

18 Mr. Hyderi continued to work the rest of his shift. His restricted area pass was not taken from him.

19 The following day, the Airport Authority contacted Wendy Wong, a General Manager at Concorde Baggage, requesting the dismissal of the baggage agents involved in the security breach. When Mr. Hyderi arrived for work, Mr. Elmi told him to report to the office at which time he was summarily dismissed and his restricted area pass was revoked. The other employee was also dismissed. Mr. Szabo testified that the decision was the Airport Authority's and that Concorde Baggage had no choice in the matter. The Airport Authority gave no specific reason for the dismissal and there is no evidence whether it or Transport Canada conducted any investigation into the incident before the dismissal. Mr. Szabo testified that if a restricted area pass is revoked for a security breach it will not be re-issued. Further, all

Concorde Baggage employees, no matter what area they are employed in, are required to have a restricted area pass to perform their jobs. Restricted area passes are issued by the Airport Authority.¹

20 Mr. Hyderi had no previous discipline history or record of security breaches.

21 Mr. Hyderi testified that at the time of his dismissal he was paid \$18.75/hour, that he worked eight hour days, five days a week and made on average \$3000.00/month. This amount did not take into account overtime pay which varied. Although Concorde Baggage noted that Mr. Hyderi was paid on a bi-weekly, as opposed to monthly basis, it did not dispute the hourly wage or average monthly amount.

22 Mr. Hyderi is an immigrant from Afghanistan who speaks English well but has little education. He is middle aged and has worked as an unskilled labourer in the past. He has not been able to find new employment since his dismissal. There was no evidence as to what steps he had taken to actually secure new employment.

Issues to be Determined

23 The following issues must be determined:

- (a) Does the *Code* govern the employment relationship between Mr. Hyderi and Concorde Baggage?
- (b) If it does, was Mr. Hyderi's dismissal "unjust" within the meaning of the *Code*?
- (c) If Mr. Hyderi's dismissal is unjust, what are the appropriate remedies under the *Code*?

Analysis

Does the Code govern the employment relationship between Mr. Hyderi and Concorde Baggage?

24 Concorde states it is not subject to the *Code* because it operates only within Alberta.

25 The *Code* provides that Part III, which contains the unjust dismissal provisions, applies to, among other things, employment in or in connection with any "federal work, undertaking or business".²

26 Section 2 of the *Code* defines a "federal work, undertaking or business" by listing the federal heads of power found under section 91 and subsection 92(10) of the *Constitution Act, 1867*. It also includes federal powers not specifically listed in sections 91 and 92(10) that have been established by case law such as "aerodromes, aircraft or a line of air transportation" (commonly referred to in the case law as "aeronautics").³

27 Aeronautics has been found by the Courts to be a matter of national importance and, therefore, to fall within the federal legislative power to maintain "peace order and good government".⁴ As a result, all aspects of aeronautics are subject to exclusive federal power including purely intra-provincial operations or concerns such as local or provincial airports or airlines.⁵ The federal aeronautics power has been held to encompass "not only the regulation of the operation of aircraft but also the regulation of the operation of airports".⁶

28 Jurisdiction over labour relations and working conditions is also not specifically delegated to either the provincial or federal governments under s. 91 or 92 of the *Constitution Act, 1867*. The case law has established that the federal government has no legislative authority over labour relations except where legislative authority over labour relations is an integral part of its primary competence over some other federal head of power.⁷ Jurisdiction over labour matters is determined based on legislative authority over the operation in question, not over the employee or the employer.⁸ Therefore, for Concorde Baggage to be subject to the *Code*, its operations must fall under a federal head of power defined under the *Constitution Act, 1867* or the case law. There are two possible ways which this could happen: (1) if its

operations are subject to federal legislative authority as provided under section 91 or 92(10) the *Constitution Act, 1867* or the case law (referred to as "direct jurisdiction" in the case law); or (2) although not subject to federal regulation itself, its operations form a vital and integral part of a work or undertaking that is subject to federal legislative authority (referred to as "derivative jurisdiction" in the case law).⁹

29 To assess Concorde Baggage's operations for the purposes of determining whether it is subject to federal jurisdiction, its operations are to be analyzed looking at its normal or habitual activities as a going concern without regard to exceptional factors or circumstances.¹⁰

30 The evidence before me is that Concorde Baggage provides three types of services exclusively for the Airport Authority: baggage handling, janitorial and maintenance services. A single owner can run more than one undertaking or business and can become subject to dual legislative authority.¹¹ The opposite is also true: a single undertaking can have more than one owner.¹² For the purpose of this analysis I am assuming that all three services provided by Concorde Baggage are operationally distinct. There is some evidence before me that in the case of upset conditions, and pursuant to contingency plans, employees from other operations may be called on to assist with baggage handling. However, as noted, the relevant consideration is regular operations and on that basis the operations appear to be run separately and are functionally distinct. In the case of Mr. Hyderi, he performed only baggage handling work and provided no janitorial or maintenance services as part of his employment.

(a) *Direct Jurisdiction*

31 Turning first to direct federal jurisdiction, as stated, airport operations fall within the federal aeronautics power. The issue is, could the federal government exercise its exclusive jurisdiction over the operations of an airport without having jurisdiction over labour relations concerning baggage handling.¹³

32 To answer that question I must consider whether the baggage handling services performed by Concorde Baggage are an "integral element"¹⁴ of the operation of the airport. An activity is an integral element of an airport operation if it has "a direct effect upon [the airport's] operational qualities and, therefore, upon its suitability for the purposes of aeronautics".¹⁵ Therefore, the activity must impact the proper functioning of an airport. So, for example, in the context of labour relations at airports, the actual construction of the airport has been found not to be an integral element of the aeronautics power, neither has porter services¹⁶ nor airport limousine services.¹⁷ On the other hand, airport runway maintenance¹⁸ and emergency response services dedicated to an airport¹⁹ have been. In one case, the secretarial assistant to the airport manager "who is bound to keep records of airport revenue or aircraft movements and maintenance and other records as officials of the federal Government may prescribe" was found to be an integral part of the aeronautics power.²⁰ In respect of labour relations and aircrafts themselves, airplane re-fueling²¹ and aircraft maintenance and repair²² has been found to be part of the core of federal aeronautics power while, outside the area of labour relations, the service of liquor on an airplane has not.²³

33 In my view, the baggage handling services provided by Concorde Baggage are an integral element of the operation of an airport. At their core, airports facilitate the safe and efficient movement of aircraft, passengers, baggage and cargo. Checked baggage is a necessary part of passenger air travel and the secure and orderly handling of baggage is a key aspect of the proper functioning of an airport. This conclusion is supported by the facts of this case where a failure in baggage handling resulted in security issues, flight delays and passengers travelling without their baggage. Baggage handling is qualitatively different from the activities that have been found not to be part of the aeronautics power. Unlike in the case of porters, airport limousines or restaurants and newsstands, it is not merely a matter of choice or convenience for passengers. As a result, I find there is direct federal legislative authority over airport baggage handling services as part of the federal aeronautics power and that Concorde Baggage's baggage handling operation is subject to the *Code*.

34 This result is distinguishable from the result in the Supreme Court of Canada decision in *Tessier* where the Court found there was no direct federal jurisdiction over the loading or unloading of ships (or stevedoring) as part of the federal power over "Navigation and Shipping" under section 91(10) of the *Constitution Act, 1867* or the federal power over "Lines of Steam or other Ships...and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province" under section 92(10).²⁴ In that case, the issue was whether Tessier's employees were governed by federal or provincial occupational health and safety legislation. Tessier was a crane and heavy equipment rental company that also engaged in intra-provincial road transportation, equipment maintenance and repair and stevedoring. All of Tessier's activities took place in the province of Quebec. It claimed that it was a federal undertaking based on its stevedoring activities as stevedoring was either an essential part of "Navigation and Shipping" under section 91(10) of the *Constitution Act, 1867* or of "Lines of Steam or other Ships" under section 92(10).

35 The Court found that the federal power over Navigation and Shipping under section 91(10) must be read in light of section 92(10) which divides legislative authority over transportation and communication works and undertakings based on the territorial scope of their activities. Section 92(10) gives authority to the province over local works and undertakings but excludes those that operate outside provincial boundaries. Therefore, the federal jurisdiction over navigation and shipping is not absolute but depends on the territorial scope of the operations in question. The Court found that since stevedoring is not itself a transportation activity that crosses provincial boundaries, it is not subject to direct federal jurisdiction. It will only be subject to federal jurisdiction if it is integral to a federal undertaking in a way that justifies imposing exceptional federal jurisdiction.

36 Like stevedoring, airport baggage handling is also not an activity that crosses provincial borders. However, unlike the federal power over navigation and shipping found in sections 91(10) and 92(10), which has a territorial aspect, the federal aeronautics power does not. It is not limited by the application of section 92(10) so as to not apply to local or provincial works or undertakings. As mentioned above, the federal power over aeronautics is derived from the federal power to maintain "peace order and good government". The case law is clear that the federal government power over aeronautics "transcended provincial legislative boundaries"²⁵ and once aeronautics was declared a matter of peace order and good government "the provinces cease to have any legislative jurisdiction with regard thereto".²⁶ Therefore unlike stevedoring, the fact that a baggage handling operation only occurs within a province, does not render it outside of the core of the federal aeronautics power.

(b) Derivative Jurisdiction

37 In any event, I would find derivative federal jurisdiction over Concorde Baggage's baggage handling operation on the basis that it is vital and integral to operations of the airport which is a federal undertaking. The focus of this analysis is on the relationship or connection between the activity, the particular employees under scrutiny and the federal operation that is said to benefit from the work of the employees.²⁷

38 Professor Hogg states that:

...a connection between a local undertaking and an interprovincial undertaking, combined with a mutually beneficial commercial relationship, is not enough to make the local undertaking a part of the interprovincial undertaking. The only kinds of commercial relationships that will produce this result are (1) where the local undertaking is managed in common with the interprovincial undertaking (the topic of the previous section of this chapter), or (2) where the local undertaking performs a function that is essential to the delivery by the interprovincial undertaking of the interprovincial services... [footnotes omitted]²⁸

39 Although Mr. Szabo stated that pursuant to the contract with the Airport Authority, Concorde Baggage operates at the direction of the Airport Authority, that evidence is not sufficient to allow me to make a finding that there is common management between the Airport Authority and Concorde Baggage. It alone cannot support a finding of

federal jurisdiction and I refrain from doing so. However, for the same reasons that I gave above as to why baggage handling is integral to the federal aeronautics power, I find that Concord Baggage's baggage handling operation is vital and integral to the operation of the airport which is without doubt a federal work and undertaking. In the result, the *Code* applies to Concorde Baggage's baggage handling operation and governs the employment relationship between it and Mr. Hyderi.

Was Mr. Hyderi's dismissal "unjust" within the meaning of the Code?

40 The purpose of Division XIV, Part III of the *Code*, under which this complaint of unjust dismissal has been brought, is "to conceptually align the protections from unjust dismissals for non-unionized federal employees with those available to unionized employee".²⁹

41 This alignment means that an employer of non-unionized federal employees is required to take a proportional approach towards employee discipline similar to that which is required in the union context. As a result, the determination of an appropriate sanction must be assessed in each case taking a "contextual approach" to balance between the nature of the employee's misconduct and the discipline imposed.³⁰ Not every breach of the employment contract by an employee will warrant summary dismissal, even those involving dishonesty.³¹ As stated by the Supreme Court of Canada in *McKinley* in the context of dishonesty but relevant to the present circumstances:

... the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.³²

42 In *Clarke v Syncrude Canada Ltd.*³³ ("*Clarke*"), the Alberta Court of Appeal accepted that the contextual approach for a proportionality analysis would include consideration of the events themselves and where they fell on the spectrum of relevant misconduct, the employee's position, employment records, and the impact of the misconduct on business relationships. Although *Clarke* concerned a provincially regulated non-union employee, those contextual factors are in substance those considered with federal non-union employees.³⁴

43 The alignment of the protections for non-unionized employees with unionized employees under Division XIV also means an employer of non-unionized federal employees, as part of a proportional approach, is required to use progressive employee discipline similar to that which is required in the union context. Progressive discipline requires the employer to make the employee aware of performance problems, and work with the employee to rectify them. This includes imposing "a graduated repertoire of sanctions before resorting to the ultimate sanction of dismissal".³⁵ As stated by the Federal Court in *Bird v White Bear First Nation*, one must keep in mind "the basic but vitally important reason for which employers governed by the *Code* must engage in a meaningful progressive disciplinary process: to offer the employee an opportunity to respond and to mend his or her ways."³⁶ Dismissal for cause is rarely found to be just in the absence of prior warnings and the imposition of lesser penalties for similar misconduct.³⁷

44 In dismissal cases, the employer has the onus of proving that it had just cause.³⁸

45 A fundamental employment obligation of all employees involved in airport operations must be to maintain security. In my view, however, even a breach security must be assessed in context with a view to the nature and degree of the conduct in question to decide whether it justifies termination.

46 It is not clear what, if any, investigation of the incident in question was performed by the Airport Authority or Transport Canada before Mr. Hyderi's employment was terminated. If there was one, there is no evidence that Concorde Baggage was informed of it or that Concorde Baggage conducted an investigation of its own prior to the

termination. Concorde Baggage stated it had no choice in terminating Mr. Hyderi as it was required to dismiss him at the Airport Authority's request, as a result of its contract. I do not accept that Concorde Baggage can contract out of its legal obligations under the *Code*. It has an obligation to understand the circumstances in question before it dismisses an employee. Even if it were the case that any breach of security justified summary dismissal, which I do not accept, the employer still needs to understand the events in question and the employee's role in them before terminating the employment. That did not happen here.

47 From the evidence before me, whether Mr. Elmi's or Mr. Hyderi's version of events is accepted, it is clear that Mr. Hyderi, along with others, decided to by-pass baggage screening equipment causing unscreened baggage to enter the restricted area of the airport. This security breach exacerbated the delays caused by the power outage by requiring screened luggage to be re-screened so as to remove the possibility created by his actions that unscreened bags would be loaded onto aircraft. The breach also had business implications for his employer. Transport Canada and the Airport Authority, Concorde Baggage's sole customer, were obviously aware of the incident and it resulted in a fine to Concorde Baggage.

48 The evidence of Mr. Szabo was that during training received from Concorde Baggage, employees are told that when a contingency plan is in place they are not to take any actions without first having clearance from managers or the control room. That instruction was not reflected in the written training materials in evidence. The part of the materials relied on by Concorde Baggage to support that this training was provided, quoted above, were simply generic statements related to safety. If such instruction was given, it was not the focus of the training provided as reflected in the documents.

49 Mr. Hyderi's version of events is the only firsthand evidence that I have as to what happened that day. I find him to be a credible witness. I accept that a CATSA employee allowed the door to be opened so the luggage could be moved to the restricted area bypassing the screening equipment and that airline employees were also moving luggage through the door. In my view, it was reasonable that Mr. Hyderi thought his actions were permissible because a CATSA employee responsible for screening baggage gave them his, at least tacit, approval. The fact the breach was committed in plain view and observed by many people including the CATSA employee is inconsistent with the conclusion that Mr. Hyderi was acting in a way that he knew, or was trained to know, was wrong in the circumstances.

50 I also accept Mr. Elmi's evidence that when he got to the ticketing area Mr. Hyderi told Mr. Elmi that he had made a mistake but that it was the other employee's fault. The statement that it was the other employee's fault is consistent with Mr. Hyderi's version of the events because if the baggage was simply being moved to bypass the screening equipment, the actions of the other employee were not the necessary impetus for what happened. In my view, Mr. Elmi misunderstood or misremembered what Mr. Hyderi was telling him when he testified that Mr. Hyderi said he had placed baggage on the conveyor belt to by-pass the screening equipment. Even if Mr. Elmi's version of events was correct, the fact remains that the actions of Mr. Hyderi and others would have had the tacit approval of the CATSA member operating the oversized baggage screening equipment.

51 I find Mr. Hyderi's actions, although misguided, were a bona fide attempt to assist with resolving a situation that arose during upset conditions. Further, they were not deemed to be so serious at the time that his restricted access pass was immediately revoked. Rather, he was allowed to continue working his shift and it was only revoked with the termination of his employment the following day. There is no evidence of any ongoing security threat posed by Mr. Hyderi. That said, Mr. Hyderi's actions are still clearly a security breach in a job where security is a paramount concern and where his actions created a potential risk to people and property.

52 The question I must decide is whether the security breach in this case is a fundamental violation of the employment relationship such that it abrogates the obligation of the employer to use progressive discipline and justifies summary dismissal. Taking into account all the above and considering that Mr. Hyderi has no previous disciplinary history, I find that summary dismissal was not a proportionate response to Mr. Hyderi's actions. His misconduct was not so grave as to override the requirement of progressive discipline. It was an immediate and isolated response to exceptional circumstances. It occurred in public and in the view of a CATSA employee who did nothing to stop matters. His actions

were the same as other airline employees who were also trying to alleviate the situation. The result of his actions was delay and cost and perhaps reputational risk to his employer but not any real threat to the public or property as no unscreened bags were allowed to be loaded on aircraft. There were intermediate disciplinary steps available to the employer that would have been appropriate in the circumstances, such as an unpaid suspension and written warning as well as remedial training. I find that Mr. Hyderi was unjustly dismissed.

If Mr. Hyderi's dismissal is unjust, what are the appropriate remedies under the Code?

53 The *Code* provides a range of available remedies for unjust dismissal:

242 (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.

54 The purpose of these powers is to "make whole" an employee who was unjustly dismissed.³⁹

55 Although Mr. Hyderi seeks reinstatement, I do not think that reinstatement is a feasible remedy in this case given the evidence before me that to resume his employment, Mr. Hyderi requires a restricted area pass. That pass has to be issued by an outside party to this proceeding, the Airport Authority. Given the evidence before me, it is unclear whether the Airport Authority can or would again issue Mr. Hyderi a restricted area pass. The Airport Authority and the issuance of a pass are matters over which I have no jurisdiction.

56 As a result I will award damages in lieu of reinstatement. The objective of an award of damages is to place the aggrieved party in a position as near as possible to what he or she would have been in had the contract been performed. It is not limited to damages in lieu of reasonable notice.⁴⁰

57 Mr. Hyderi was employed by Concorde Baggage just over a year and a half and made on average \$3,000.00/month before deductions not including overtime. The job itself was a desirable position for an unskilled labourer offering good working conditions and regular hours. The evidence was that Mr. Hyderi had not found replacement employment at the time of the hearing. He is a middle aged immigrant who speaks English well as a second language but with a low level of education. I accept that it would be difficult for him to find a replacement position with the similar advantages to his job as a baggage service agent. He had not found a new position by the time of the hearing but I have no evidence of steps he had taken to find a new job if any. In the circumstances, I award him damages in the amount of \$10,000.00 which, although an amount roughly equivalent to three months of gross wages, other entitlements and overtime, is to reflect the difficulty of finding a similar position for a man in his circumstances.

58 Pursuant to the *Code*. I am also awarding severance⁴¹ which I calculate as five days of wages assuming eight hour days at \$18.75/hour for a total amount of \$750.00. In the event any amount was paid to Mr. Hyderi pursuant to provincial labour legislation for severance, that amount may be deducted from the severance payment.

Conclusion

59 In conclusion, I find that Concorde Baggage is subject to the *Code* in relation to Mr. Hyderi's employment, that Mr. Hyderi was unjustly dismissed within the meaning of the *Code* and he is entitled to damages in lieu of reinstatement in the amount of \$10,000.00 and severance in the amount \$750.00.

Footnotes

- 1 Canadian Aviation Security Regulations, 2012, SOR/2011-318, s 3.
- 2 Section 167
- 3 *Dart Aerospace Ltd. v Duval*, 2010 FC 755, para. 21
- 4 *Johannesson v Municipality of West St. Paul*, [1952] 1 SCR 292 ("Johannesson"); *Quebec (Attorney General) v Canadian Owners and Pilots Association*, [2010] 2 SCR 536, 2010 SCC 39 ("COPA"), paras. 28-30.
- 5 *Ibid.*
- 6 *Air Canada v Ontario (Liquor Control Board)*, [1997] 2 SCR 581, para. 72.
- 7 Labour relations being presumptively a matter of provincial jurisdiction pursuant to the provincial power over property and civil rights under s. 92(13) of the *Constitution Act, 1867: Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, [2012] 2 S.C.R. 3, 2012 SCC ("Tessier"), para. 14; *Construction Montcalm Inc. v The Minimum Wage Commission*, [1979] 1 SCR 754, p. 768 both cases citing *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the "Stevedores Case").
- 8 *Canada Labour Relations Board et al. v. Yellowknife*, [1977] 2 S.C.R. 729.
- 9 *Tessier; United Transportation Union v Central Western Railway Corp.*, [1990] 3 SCR 1112; *Northern Telecom Limited v Communications Workers of Canada et al*, [1980] 1 SCR 115; *Construction Montcalm; Stevedore's Case*.
- 10 *Tessier*, para. 19.
- 11 *Canadian Pacific Railway v British Columbia (Attorney-General)*, [1950] AC 122 (PC).
- 12 Hogg, *Constitutional Law of Canada*, Vol 1, 5th ed Supp. Scarborough, Ont.: Thomson/Carswell, 2007 (loose-leaf updated 2015, release 1) ("Hogg"), p. 22-12.
- 13 *Tessier*, para. 15; *Construction Montcalm*, p. 768.
- 14 *Construction Montcalm*, p. 170-171.
- 15 *Construction Montcalm*, p. 170-171; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, para. 74.
- 16 *Allcap Baggage Services Inc. v IAM, Local 2413*, 1990 CarswellNat 996.
- 17 *Re: Colonial Coach Lines Ltd. et al and Ontario Highway Transport Board* (1976), 62 DLR (2d) 270.
- 18 *City of Kelowna v CUPE, Local No. 338* (1974), 42 DLR (3d) 754 ("City of Kelowna"); *The Town of the Pas*, 1999 Canlii 185222 (CIRB) ("The Town of the Pas").
- 19 *City of Saskatoon* (1997), 106 di 19; and 39 CLRBR (2d) 161 (CLRBR no. 1217) as cited in *The Town of the Pas*.
- 20 *City of Kelowna*.
- 21 *Butler Aviation of Canada Limited v IAM*, [1975] FC 590 (CA).
- 22 *Field Aviation Company Limited v Alberta (Industrial Relations)* 1974, 49 DLR (3d) 234 (AltaSCAD).
- 23 *Air Canada v Ontario (Liquor Control Board)*, [1997] 2 SCR 581, para. 72.

- 24 *Tessier*, para. 40
- 25 *Johannesson*, p. 309
- 26 *Johannesson*, p. 312
- 27 *Tessier*, para. 38
- 28 Hogg, p. 22-15.
- 29 *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770, 2016 SCC 29 ("*Wilson*"), para. 46.
- 30 *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, 2001 SCC 38 ("*McKinley*") at para 53.
- 31 *McKinley*.
- 32 *McKinley*, para. 48.
- 33 2014 ABCA 362, para 17.
- 34 *Bird v White Bear First Nation*, 2017 FC 477, para. 30 ("*Bird*").
- 35 *Bird*, paras 38-46 citing *Wilson*.
- 36 2017 FC 477, para. 42.
- 37 *Payne v Bank of Montreal*, 2013 FCA 33, para. 48.
- 38 *McKinley*, para 33.
- 39 *Air Spray (1967) Ltd. v Paulsen*, 2013 FC 1026 ("*Paulsen*").
- 40 *Paulsen*, para. 41.
- 41 Code, s. 235: (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of
- (a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and
 - (b) five days wages at the employee's regular rate of wages for his regular hours of work.