Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Tracey Rathwell v. Air Canada, 2011 OHSTC 15

Date: 2011-06-30
Case No.: 2008-32
Rendered at: Ottawa

Between:

Tracey Rathwell, Appellant

and

Air Canada, Respondent

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer
Decision:	The decision is rescinded and a direction is issued
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the appellant:	Mr James L. Robbins, Counsel, Cavaluzzo Hayes Shilton McIntyre & Cornish LLP
For the respondent:	Ms Nicola Sutton, Counsel, Fasken Martineau DuMoulin LLP

REASONS

[1] This is an appeal brought pursuant to ss. 129(7) of the *Canada Labour Code* (the Code) by Ms Tracey Rathwell of a decision of no danger rendered by Ms Rochelle Blain, Health and Safety Officer (HSO), Transport Canada, on October 31, 2008, following her investigation into a work refusal pursuant to ss. 129(1).

[2] The hearing into the appeal was held in Vancouver, BC, on November 3 to 5, 2009, May 17 to 20, and September 13 to 17, 2010, and in Montreal, QC, on September 29, 2010.

Background

[3] On October 26, 2008, Ms Rathwell refused an assignment to sit at the L2 position jumpseat on the Embraer 190 aircraft for flight AC 544. Her refusal was based on the fact that she had been injured during a rough landing when sitting in the same position while secured into the seat on a previous flight on October 23, 2007. Ms Rathwell insisted that the jumpseat lap belt and shoulder harness on the Embraer 190 do not engage to keep her secure when she experiences lateral movement.

[4] The Embraer 190 is equipped with three jumpseats: Left forward (L1), left aft (L2) and right aft (R2). All of the jumpseats are fitted with lap belts and shoulder harnesses. The L2 position is the closest to an exit door and is the only jumpseat facing forward.

[5] On October 23, 2007, while assigned to the L2 jumpseat during a rough landing, Ms Rathwell described that she sustained injuries when the aircraft swerved on touch down and the shoulder harness did not sufficiently restrain her laterally which resulted in her hitting the exit door. She had raised her arm to protect her head and sustained arm, shoulder and back injuries.

[6] Air Canada safety and emergency procedures require flight attendants to be assigned to a jumpseat. The L1 and L2 positions are priority working positions on the Embraer 190, meaning that a flight attendant must be seated at the L2 position during taxi, take off and landing.

[7] At the time of the work refusal, Ms Rathwell advised that the L2 jumpseat, including the lap belt and shoulder harness, operated normally and in accordance with its regular operation. There were also no defects logged at the time of the work refusal.

[8] On the day of the refusal, Ms Curran-Burden, Manager, Cabin Crew Performance, contacted Transport Canada, in the presence of Ms Jean, employee co-chairperson of the Vancouver work place health and safety committee, and advised HSO Lisa Mah of Ms Rathwell's continued work refusal.

[9] On October 31, 2008, HSO Blain wrote a letter to outline her determination that the circumstances on which Ms Rathwell's refusal was based constituted a normal condition

of employment within the meaning of ss. 128(2) of the Code, and that accordingly there would be no investigation under s. 129. HSO Blain testified that she did not consider any possibility to reduce the risk of injury on the part of the employer. The letter advised Ms Rathwell that she could pursue the matter via the Internal Complaint Resolution Process under s. 127.1 of the Code and stated that the decision was subject to judicial review provisions of the *Federal Court Act*.

[10] Since the work refusal, the L2 position on the Embraer 190 has been the subject of a hazard assessment by Air Canada, a review by the Vancouver work place health and safety committee, an Assurance of Voluntary Compliance and an investigation and report by Transport Canada.

[11] Furthermore, since the refusal and after consultation with Transport Canada, Air Canada made attempts to mitigate and optimize the protection of flight attendants in the L2 jumpseat. Air Canada recommended bracing position changes to flight attendants through their "Globe system" in December 2009 and May 2010 and via an insert into an employer policy under "Publication 356" on September 9, 2010. Air Canada's management testified that they continue to monitor the situation by tracking and trending injuries resulting from contact with the door by flight attendants while seated and harnessed at the L2 position. They also continue to assess the effect of mitigating measures.

Issues

[12] I must determine the following issues:

i) Whether the appellant was exposed to a danger as defined under the Code when she exercised her right to refuse to work.

ii) If a danger existed, whether the danger was a normal condition of employment so as to preclude the appellant from exercising her right of refusal under the Code.

Submissions of the parties

[13] The parties' final submissions were received on November 26, 2010.

Appellant's submissions

[14] The appellant's case consisted of evidence from the appellant and three other witnesses; Ms Jean, Flight Attendant and employee co-chairperson of the Vancouver work place health and safety committee; Ms Pelletier, Flight Attendant and former employee co-chairperson of the Montreal work place health and safety committee, and Union Representative; Mr Yannaconne, P.E., Senior Engineer, Forensic Safety Group, who was qualified as an expert witness.

[15] The appellant took issue with HSO Blain's decision that the circumstances on which the work refusal was based amounted to a normal condition of employment. In the appellant's view, this was incorrect.

[16] The appellant argued that the investigation failed to comply with the ss. 129(4) requirement to make a finding as to whether danger exists, and it erroneously purported to deprive Ms Rathwell of her right to appeal pursuant to ss. 129(7).

[17] The appellant submitted that the HSO decision was in fact the result of an investigation pursuant to ss. 129(1). The HSO determined that the normal condition of employment was, in this case, not a danger. Accordingly, the Appeals Officer has jurisdiction to hear an appeal pursuant to ss. 129(7).

[18] According to the appellant, a danger did exist at the time of the work refusal. Despite the compliance with airworthiness regulatory requirements, the L2 position is dangerous due to its design and proximity to the door. There is a history of injuries to flight attendants in the L2 position because the restraint system did not prevent them from hitting the door. There is a history of numerous concerns raised by flight attendants with respect to the L2 door, and the physical characteristics of the L2 position.

[19] Furthermore, the appellant submitted that the HSO's finding that the Embraer L2 jumpseat shoulder harness and proximity to the door constituted a normal condition of employment within the meaning of ss. 128(2) is incorrect and unreasonable. This finding would make it normal for Air Canada to provide its employees with unsafe equipment which does not protect its employees in all circumstances. The finding also considered it normal for Air Canada to provide flight attendants with equipment the safety of which is disputed within the work place health and safety committee, that was being investigated by Transport Canada, and which is the subject of an Assurance of Voluntary Compliance hazard assessment.

[20] The appellant submitted that steps taken by Air Canada to protect flight attendants sitting at the L2 position in the form of advisories regarding the brace position were insufficient at the time of the work refusal. This is demonstrated by injuries which occurred after those steps were taken.

[21] The appellant argued that Air Canada deliberately set up the circumstances wherein Ms Rathwell would feel unsafe as a form of discipline.

[22] With respect to the applicability of Part XIX of the *Canada Occupational Health and Safety Regulations* (COHS Regulations) the appellant submitted that since the injuries sustained in the L2 position can only occur while the airplane is in operation, the *Aviation Occupational Safety and Health Regulations*, (AOSH Regulations) are applicable, not the COHS Regulations. In any event, even if the COHS Regulations did apply, the appellants submit that the actions taken by Air Canada in their hazard assessment are inconsistent with Part XIX.

[23] For all the above reasons, the appellant requested that there be a declaration that danger existed in the circumstances of the work refusal and that Air Canada should be given specific directions to make modifications either to the restraint system, the position of the L2 jumpseat, or to provide padding for the L2 door and handle in order to prevent injury occurring from impact.

[24] Moreover, the appellant submitted that a direction to investigate will not be sufficient because Air Canada has already demonstrated that it will not conduct a fair and unbiased investigation into the matter.

Respondent's submissions

[25] The respondent's case consisted of evidence from the following witnesses; Mr Bradley, Service Training Specialist; Ms Lambert, Senior Director, Customer Service and Safety; Ms Jourdain, Manager, Employee Safety and Wellness; Mr Lee, Chief Engineer, AEO.

[26] The respondent argued that HSO Blain's inquiry was an investigation and the HSO correctly made the determination that no danger existed within the meaning of s. 122 of the Code. However, it is further argued that whether there was a danger or not there was still no right to refuse work because it was a normal condition of employment.

[27] The respondent submitted that there was no danger since the history of injuries showed that they were infrequent and minor in nature.

[28] Moreover, any occasional injuries resulting from contact with the L2 door are not inconsistent with its purposeful design to absorb impact. Additionally, the L2 jumpseat and restraints were certified and compliant with airworthiness requirements. Therefore, the respondent submitted that the results of a Transport Canada report dated March 19, 2009 that assessed the level of protection offered for a seated occupant from injury due to a head-strike impact with surrounding cabin features represented an acceptable level of risk and no danger.

[29] According to the respondent, it did not fail to ensure its employees were personally protected, to the extent it was reasonably practicable, from injury resulting from impact with the door while properly restrained in the L2 jumpseat. This is so because the likelihood of injury in the future was only a mere possibility; and there was only a mere possibility that the appellant would be severely injured while properly seated.

[30] The respondent submitted that not every danger will be sufficient to justify a refusal to work. Rather, where a danger constitutes a normal condition of employment then it does not warrant invoking the right to refuse to work. The respondent contended that the requirement for the appellant to sit in the L2 jumpseat was not unexpected and was therefore a normal condition of employment. Furthermore, the jumpseat was fully operative and functioning properly on the day of the refusal.

[31] The respondent contended further that being exposed to low impact and minor strain injuries are normal in the course of employment as a flight attendant. In addition, they argued that Air Canada has mitigated the hazard by conducting investigations, publishing recommendations regarding proper bracing positions, and by continuing to monitor the issue.

[32] It is argued further by the respondent that there needs to be a balance between the cost of mitigation and the risk in determining whether additional measures should be taken by the employer.

[33] The respondent denied that the circumstances of the work refusal were set up as a means of discipline.

[34] With respect to the applicability of Part XIX of the COHS Regulations, the respondent submitted that since the potential danger arising from occupation of the L2 jumpseat can only occur when the aircraft is in operation the AOSH Regulations apply. Furthermore, the respondent submits that they are in compliance with the AOSH Regulations.

Appellant's reply

[35] The appellant argued that since the respondent admitted that the HSO "made a determination that no danger existed within the meaning of section 122" it is no longer contested that the appeals officer has jurisdiction to hear this appeal pursuant to ss. 129(7).

[36] The appellant argued that the respondent has no basis in law for stating that the determination of danger turns on whether the employer has done what is reasonably practicable and that it is inappropriate to use this in the context of determinations of danger and normal condition of employment.

[37] The appellant argued that while the respondent's submissions with respect to the L2 door are incorrect, they do indicate that Air Canada admitted that there is a need for occupants of the L2 position to be protected from hitting the door and that neither the harness nor brace position are sufficient to prevent impact with the door.

[38] The appellant argued that the respondent employed flawed reasoning in their contention that injury from the L2 jumpseat is only a mere possibility. They argued that the respondent ignored a number of strain injuries and concerns raised about the L2 position which allowed them to come up with a superficial low rate of injury per departure. Moreover, it is argued that using this analysis there would never be a right to refuse dangerous work at Air Canada because the rate of injury per departure is so low that injury in any circumstance would be relegated to a mere possibility.

[39] The appellant does not dispute that it must show a reasonable possibility of injury and contended that this reasonable possibility is met when the injury actually occurred, as is the present case.

[40] The appellant argued that Air Canada's contention that the injuries suffered by flight attendants are trivial and a normal condition of employment is to suggest that the Code does not protect the health and safety of employees. It is submitted that there is no basis in law to suggest that being injured is in itself a normal condition of employment and this is inconsistent with the language and purpose of the Code.

[41] According to the appellant, the respondent's admission that it continued to monitor and track the issue is a clear indication that the condition is not normal.

[42] Concerning the respondent's contention that the right to refuse is limited to when equipment is unserviceable or the circumstances were unexpected, the appellant submitted that this has no basis in law. The Code has no such restrictions on the right to refuse.

[43] In conclusion, the appellant submitted that Air Canada did not exhaust all alternatives to the extent reasonably practicable for mitigating the danger at the L2 position.

Analysis

[44] The subject of my jurisdiction to hear this matter was raised by the respondent at the onset of the hearing. It is my view that on the basis of *Canada* and *Vandal et al*[1] a determination that the hazard involved with the L2 jumpseat, which was the basis of Ms Rathwell's work refusal, constituted a normal condition of employment is equivalent to a finding of "no danger" within the meaning of s. 122 of the Code.

[45] In view of that, I find that Ms Rathwell is not precluded from appealing the decision of no danger and I have jurisdiction to hear this appeal pursuant to ss. 129(7) of the Code.

[46] Before turning the issue of the danger, I would like address the issue raised by the appellant that the employer deliberately set up the circumstances wherein Ms Rathwell would feel unsafe as a form of discipline. This issue is not related to whether or not a danger exists for the employee at the time of the refusal. Furthermore, it is the jurisdiction of the Canada Industrial Relations Board as stipulated under s. 133 of the Code to inquire into the circumstances of an alleged violation of this nature. As a result, I will not give the issue any consideration.

[1] 2010 FC 87

Was Ms Rathwell exposed to a danger as defined under the Code when she exercised her right to refuse to work?

[47] My determination on the issue of "danger" shall be based on an interpretation of the term as it is defined under ss. 122(1) which reads as follows:

> "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

[48] The Federal Court and the Federal Court of Appeal in *Verville* and *Canada*[2] and *Martin* and *Canada (Attorney General)*[3], determined that to find that a "danger" exists:

- There has to be a hazard, condition or activity that can reasonably be expected to cause an injury or illness to an employee, which may not happen immediately upon exposure, but needs to happen before the condition or activity is altered.
- The definition does not require that the "danger" cause an injury every time the hazard, condition or activity occurs. The French version, "susceptible de causer" indicates that it must be capable of causing injury at any time but not necessarily every time.
- It is not necessary to establish precisely the time when the hazard, condition or activity will occur, but only to ascertain in what circumstances it could be expected to cause injury and establish that such circumstances will occur in the future, not as a mere possibility, but as a reasonable one.

[49] Moreover, Madame Justice Gauthier, in the Federal Court *Verville* decision, noted that:

- Reasonable expectation of injury cannot be based on hypothesis or conjecture, but if a hazard, condition or activity is capable of coming into being or action, then it should be covered by the definition.
- There is more than one way to establish that one can reasonably expect a situation to cause injury. It is not necessary to have proof that someone else has been injured in exactly the same circumstances; a reasonable expectation could be based on expert opinions or even the opinion of ordinary witnesses having the necessary experience.

[2] 2004 FC 767
[3] 2003 FC 1158 and 2005 FCA 156

- A reasonable expectation of injury could even be established through an inference arising logically or reasonably from known facts.

[50] Consequently, to determine whether a danger existed for Ms Rathwell, I will have to ask myself whether the potential hazard of being required to sit in the L2 jumpseat with its proximity to the L2 door combined with the failure of the seat's belt and harness system to restrain employees in lateral movement can reasonably be expected to cause an injury.

[51] Though *Verville* states that it is not necessary to show that someone has been injured in the same circumstances to prove that the situation will reasonably be expected to cause injury, in this case the evidence points to a prior instance of injury.

[52] Ms Rathwell testified to suffering a disabling injury on October 23, 2007, while seated in the L2 jumpseat. She had followed proper procedures with respect to bracing positions and use of the seat belt and harness, but after the wheels touched down the plane swerved and she was unable to maintain the brace position. She was displaced forward and to the right and then to the left and came across the door. The harness did not sufficiently restrain her. Her hand came up instantly to protect her head, and she hit the door with her upper arm, hand and thigh.

[53] Ms Rathwell testified that this landing was harder than usual but not the hardest she had ever had. She had similar or harder landings maybe once a year. No one else was injured on that flight and she was unaware of any maintenance issues arising from the flight. As a consequence of Ms Rathwell's injury she felt increasingly sore for several days. She attempted to treat herself with Tylenol and hot shower and ice for her neck. She continued to work but avoided using her left arm. She testified that the pain was so bad that she was unable to pull open a full drawer of soft drinks. She worked through the pain and was tough. After a day she realized that she needed help.

[54] Medical attention was sought by Ms Rathwell from a physician in Vancouver. The physician referred her to a chiropractor and physiotherapist for treatment. She filed a workers compensation claim with Worksafe BC for lost time and eight weeks of treatment which she stated was accepted on appeal. She also saw her family doctor before returning to work on October 31, 2007. She testified that she was diagnosed with soft tissue injury to her left shoulder, neck, back, and had bruising where she hit the door.

[55] As well, prior to Ms Rathwell's October 2007 injury, the evidence points to other flight attendants being injured while seated and restrained in the L2 position and using the bracing position. Of particular note, on November 21, 2006, Ms Innocente hit her head and her eye on the L2 door protuberance during mild turbulence and while properly harnessed and braced. Ms Innocente sustained a black eye. On May 27, 2007, Mr Scott-Haywood also hit his head on the L2 door protuberance hard and sustained an injury.

[56] There were also other reported head and limb injuries resulting from contact with the L2 door reported in 2008 after Ms Rathwell's injury while seated and restrained in the L2 position and using the bracing position. Ms Martinez hit her head several times on the door hard on June 16, 2008 causing her deep pain on the side and back of her head.

[57] Moreover, there were many concern forms put into evidence within which flight attendants brought to the attention of Air Canada the inability of the harness at the L2 jumpseat to restrain them in side to side movement and the close proximity of the hard L2 door to the occupant in the L2 jumpseat.

[58] All of the other flight attendants who reported injuries to their heads or their limbs stated that the L2 jumpseat was too close to the door and suggested various modifications such as more space between the jumpseat and the door, padding on the door, or modifications to the harness.

[59] Mr Yannaconne, an expert in mechanical engineering and occupant restraint systems, testified that the restraint system in the rear of the aircraft, where the L2 position is located, requires some level of protection for non-crash lateral movement such as fishtailing or turbulence. He further stated that harnesses such as those used at the L2 position do not prevent against lateral acceleration of the occupant or the force with which the occupant may hit a surface within the hazard's strike envelope[4]. Therefore, the occupant at the L2 position during turbulence or hard landings can be forced forward prior to the harness locking and then can accelerate along a lateral arc like a tether ball.

[60] Due to this lack of lateral restraint, Mr Yannaconne testified that hard or protuberant surfaces in the strike envelope of the occupant are a concern when considering occupant protection systems. In this case, he testified that the unpadded door surface and handle in close proximity to the L2 jumpseat were considered to not be a "friendly" surface.

[61] According to Mr Yannaconne, the restraint system at the L2 position would allow a flight attendant to be injured; the extent of their injuries only depends on how hard they hit a surface within the strike envelope. Moreover, he also testified that the bracing positions that rely on the flight attendant's muscles to hold them back may also increase strain injuries in the turbulent situations.

[62] As well, the respondent's own witness, Ms Jourdain also testified that she knew from her own investigation that flight attendants could injure themselves on the door while seated and restrained in the L2 position and using the bracing position.

[63] Thus, this is not a case where my task is to ascertain whether or not a hypothetical hazard or dangerous condition is capable of coming into being at some point in the future. It is clear to me that it has occurred. I would agree with the appellant that there is

[4] strike envelope – While restrained, it is the area surrounding the seated occupant, when the body is in a state of motions, which could result in the striking of a part of the body on a fixed object within the area.

considerable evidence that flight attendants have been injured in turbulence or rough landing situations when seated in the L2 jumpseat due to a failure of the harness to properly restrain them from moving side-to-side, the ineffectiveness of the brace position to properly protect them from this movement, and the likelihood of coming into contact with the hard L2 door and handle.

[64] When determining whether or not a danger exists, as per the meaning of the Code, the foremost principle that must guide me in my analysis is its preventative purpose. The purpose provision in Part II of the Code is as follows:

> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[65] As stated above in *Verville* and *Martin*, for something to be considered a danger it does not need to cause injury every time the hazard, condition or activity occurs. It just has to be capable of causing injury at any time.

[66] In addition, there is no requirement in the Code definition of danger that it be frequent. Therefore, I would reject the respondent's argument that the infrequency of the injuries should persuade me towards a finding of no danger.

[67] Furthermore, the respondent admits that there have been past injuries to flight attendants sitting in the L2 jumpseat where the harness failed to protect them from coming into contact with the L2 door during turbulence or rough landings. However, they contend that because these injuries have not been severe this hazard should not be considered a danger.

[68] The definition of danger under the Code does not require that the possible injury be severe in order for it to be considered a danger. With the purpose of prevention in mind and considering that there are no requirements of severity enacted in the definition of danger, I find that it is not my place to draw arbitrary lines of severity on the facts of this case. It is enough that injuries, such as those described above in paragraphs 52 to 55, were not inconsequential, have already occurred and there is a reasonable possibility that they will happen again.

[69] On the day of Ms Rathwell's work refusal on October 26, 2008, she was required to sit in the L2 jumpseat. Up until this time, Air Canada had the flight attendants assume a bracing position when sitting in the L2 jumpseat. I am satisfied from the evidence of many flight attendants, including Ms Rathwell, as well as the evidence of Mr Yannaconne that this bracing position was not enough to alter the hazard to bring it out of the realm of what constitutes a danger.

[70] The evidence before me has indicated that although the flight attendants were assuming the recommended bracing position, during turbulence or rough landings they were on occasion thrown out of the bracing position and came into contact with the L2

[71] As a result, based on all the above I believe that Ms Rathwell, on being required to sit in the L2 jumpseat on the date of her refusal, would be exposed to a hazard while sitting in the jumpseat with a harness that does not protect her from lateral movement while in close proximity to the hard surface of the L2 door. I also find that based on the circumstances described above there is reasonable possibility that if she was required to sit in the L2 jumpseat and the plane experienced turbulence or a rough landing, Ms Rathwell could reasonably expect to be injured because:

i) Injuries have already occurred;
ii) other flight attendants are concerned about being injured in the L2 jumpseat; and
iii) the L2 harness fails to protect occupants from hitting the L2 door from a design perspective.

[72] Therefore, on this issue I conclude that at the time of Ms Rathwell's work refusal a danger did exist.

[73] Having found that a danger did exist at the time of Ms Rathwell's work refusal, I will now turn to whether this danger constituted a normal condition of employment and thus barred Ms Rathwell from exercising her right under the Code to refuse dangerous work.

Is the danger a normal condition of employment?

[74] I must determine whether at the time of Ms Rathwell's refusal, the danger she was exposed to was a normal condition of employment pursuant to para. 128(2)(b) of the Code and accordingly if she was precluded from exercising her right to refuse the dangerous work.

[75] The Code does not define "normal condition of employment". However, the Code does lay out principles that must guide the employer in its intervention, the priority to be given to measures to be taken to protect employees, and the employer's general obligation in sections 122.1, 122.2 and 124 of the Code. Those provisions are as follows:

> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.
>
> 122.2 Preventative measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal on ensuring the health and safety of employees.
>
> […]

> 124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

[76] Furthermore, the Federal Court in *P&O Ports Inc. and Western Stevedoring Co. Ltd.* v. *International Longshoremen's and Warehousemen's Union, Local 500*[5], upheld the Appeals Officer's interpretation in that case with regard to a danger that constituted a normal condition of employment. Like the Court, I am in complete agreement with the interpretation of this notion by the Appeals Officer, which is reproduced at paragraph 46 as follows:

> […]
>
> [152] I believe that before an employer can say that a danger is a normal condition of work, he has to identify each and every hazard, existing or potential, and he must, in accordance with the Code, implement safety measures to eliminate the hazard, condition, or activity; if it cannot be eliminated, he must develop measures to reduce and control the hazard, condition or activity within safe limits; and finally, if the existing or potential hazard still remains, he must make sure that employees are provided with the necessary personal protective equipment, clothing, devices and materials against the hazard, condition or activity. This of course, applies, in the present case, to the risk of falling as well as to the risk of tripping and slipping on the hatch covers.
>
> [153] Once all these steps have been followed and the safety measures are in place, the "residual" hazard that remains constitutes what is referred to as the normal condition of employment. However, should any change be brought to this normal employment condition, a new analysis of that change must take place in conjunction with the normal working condition.
>
> [154] For the purposes of this case, I find that the employers failed, to the extent reasonably practicable, to eliminate or control the hazard within safe limits or to ensure that the employees were personally protected from the hazard of falling off the hatch covers.
>
> […]

[77] Similarly and more recently in *Canada and Vandal et al.*, the Federal Court affirmed the reasoning of this Tribunal on what constitutes a normal condition of employment in the context of correctional officers having to escort inmates. In *E. Vandal et. al.* v. *Correctional Service of Canada*[6] this Tribunal stated that:

> [302] There is also an important distinction to be made between such a danger and a danger that constitutes a normal condition of employment that would preclude a refusal to work. The latter presupposes that the employer has first determined that a danger exists during escorts and has then taken all of the measures necessary to protect its employees, i.e. it has identified and controlled all of the factors that could have a major negative impact on the

[5] 2008 FC 846
[6] OHSTC-07-009

> duty of conducting escorts. At that point there is nothing more the employer can do to protect its employees any further.

[78] Thus, in order to determine whether the danger of sitting in the L2 jumpseat with a harness that does not properly restrict lateral movement and accordingly does not protect the occupant from hitting the hard surface of the nearby L2 door is a normal condition of employment, I need to take into consideration the steps taken by Air Canada to mitigate this danger.

[79] It is Air Canada's position that because the history of injuries showed that they were infrequent and minor in nature, they have taken appropriate preventative measures in the circumstances. These measures were to make modifications to the bracing position and then publish recommendations. During the phasing in of this strategy injuries continued to occur. Action to make physical alteration to eliminate, reduce or provide protection from the hazard was rejected. Consideration was given to provide padding to cushion against head contact with the door however, it was rejected because it was deemed not to be cost effective given the risk i.e. given the frequency and severity involved with this particular hazard.

[80] Nevertheless, Air Canada continues to investigate and monitor the hazard at the L2 jumpseat position by tracking and trending injuries. This indicates its concern is ongoing and also an openness to additional mitigation measures. However, from the evidence of Ms Lambert and Ms Jourdain, the respondent will not take further steps unless Transport Canada give them instructions to do so.

[81] Air Canada submitted a Transport Canada report dated March 19, 2009, which concluded that the L2 seat installation, including restraint system, is compliant with airworthiness requirements. This report recommended that no modification to design take place.

[82] Conversely, the appellant's expert witness, Mr Yannaconne, provided an opinion regarding the hierarchy of mitigation strategies involving hazard prevention measures. He described types of preventive measures against hazards in the following priority sequence:

i) Eliminate the hazard;
ii) guard against it;
iii) provide a warning; and
iv) training.

[83] The above engineering design hierarchy, as it applies to occupational health and safety, was not disputed by Ms Jourdain, Air Canada's safety manager. As well, Mr Yannaconne's opinion is in line with widely accepted occupational health and safety prevention strategies. For instance, Part XIX of the Canada Occupational Health and Safety Regulations states, from most to least reliable, the following preventative measures to address assessed hazards:

i) Eliminate the hazard;
ii) reduce the hazard,
iii) provide personal protective equipment, and
iv) through administrative procedures.

[84] The most reliable mitigation solution, according to Mr Yannaconne, would be to move the seat away from the door, so that the door is outside the strike envelope. In his view, this would be an aggressive approach but not impossible.

[85] According to Mr Yannaconne, the next most reliable solution would be an improved restraint system; these improvements he believes are reasonably feasible. In his opinion, adding a manual lock or changing a reel does not entail the design or testing steps that are required in changing a seat or airframe, because it would simply be a matter of replacing one component with another that is already in use in the Air Canada fleet. I note from the testimony of Ms Lambert that when Air Canada previously acquired two Boeing 767s from another airline, the restraint systems were modified by removing belts and replacing them with belts with automatic retractors when a concern was raised by the Vancouver work place health and safety committee.

[86] Mr Yannaconne also suggests the use of padding as a means of guarding against the L2 door. In his opinion, it is feasible to add padding to the door in order to reduce the risk of injury to flight attendants. I note again from the testimony of Ms Lambert that in another safety related circumstance which involved Airbus 320 aircraft, Air Canada added protective padding in that situation.

[87] It is Mr Yannaconne's opinion that the brace position would be the least reliable solution. He stated that the purpose of the brace position required of flight attendants is to pre-position the body so as to be in a better position to take forward impact. As well, the purpose of the chin-to-chest bracing position for forward facing seats is to help rid of rapid motion and reduce the likelihood of neck injury. The purpose of the hand and feet bracing positions is to reduce flailing movement of hands and feet. Furthermore, all bracing positions for flight attendants at the L2 position are designed for forward movement; a brace position for lateral movement to the left would be a brace against the door so as not to develop relative velocity to the door. He stated that this is an inadequate solution because the motion affecting a flight attendant at the L2 position is unpredictable, caused by turbulence, fishtailing and crash events.

[88] According to Mr Yannaconne, use of the brace position in combination with the type of retractor on the Embraer aircraft L2 harness can actually aggravate the risk to the occupant from lateral movement. By bracing, the occupant slows acceleration and therefore delays the lock up of the retractor. He stated that even if a person was aware of the likelihood of acceleration in a forward direction, bracing would start losing

[7], depending on the occupant's physical strength, ability, size, position and duration of the event.

[89] The conclusion provided by Mr Yannaconne was that there needs to be a systemic approach to occupant protection; the brace position is part of the system but so is the restraint mechanism. He stated that the brace position is not a substitute for the restraint mechanism; it simply reduces speed and range of motion, to put the occupant in the optimal position for what would likely take place in an event.

[90] Air Canada relies on the Transport Canada report which recommends no modification to the L2 seat, including the restraint system. However, in my view the evidence of Mr Yannaconne regarding the ongoing hazard and the practical measures to eliminate, reduce or protect it was persuasive. The challenges put to him during cross examination did not reveal any discernable flaw in his reasoning.

[91] I find that the employer has failed, to the extent reasonably practicable, to eliminate, reduce and protect against the danger identified in Ms Rathwell's work refusal. Air Canada has shown that it has recognized that a hazard existed at the L2 jumpseat position. It has also shown that it attempted to control the hazard by publishing recommendations and then mandating brace positions. However, these control measures were not effective at reducing the hazard in the circumstances and the danger therefore still exits.

[92] Furthermore, there is evidence that Air Canada was aware of a protective solution such as providing padding for the L2 door but chose to dismiss this solution on the basis that they found it to be too expensive. As well, the evidence of Mr Yannaconne pointed to the suitability of an improved restraint system to address the hazard. As discussed above, there is evidence that Air Canada has previously modified a restraint system on aircraft to alleviate a safety related concern.

[93] The evidence therefore indicates that there were further measures that Air Canada could take that were reasonably practicable in order to eliminate, reduce or protect against the danger at the L2 jumpseat position. Since the danger still reasonably exits, I do not accept that the possibility of occupants of the L2 jumpseat hitting a hard surface of the door is a normal condition of employment.

[94] For that reason, on the date of Ms Rathwell's refusal she was not precluded from exercising her right under s. 128 of the Code to refuse dangerous work.

[7] g-force - a unit of force equal to the force exerted by gravity; used to indicate the force to which a body is subjected when it is accelerated

Decision

[95] For all the above reasons I hereby rescind the decision that a danger did not exist rendered by HSO Blain on October 31, 2008.

[96] I hereby direct the employer to take measures to protect Ms Rathwell from the danger that existed on October 26, 2008 and still exists today as per the direction appended to this decision.

Michael Wiwchar
Appeals Officer