Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en santé et sécurité au travail

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Canada Labour Code
Part II
Occupational Health and Safety

R. Abood, J. Chan, C. Ouelette, D. Rai and B. Singh
applicants

and

Air Canada
e*mployer*

Decision No: 03-002
January 9, 2003

Appeals officer Douglas Malanka inquired into the circumstances of the decision of health and safety officers G. Garron and G. McCabe, made September 14, 2001 pursuant to subsection 129.(4) of the *Canada Labour Code* (hereto referred to as Part II or the *Code*), that a danger did not exist for Air Canada employees, Messrs. R. Abood, J. Chan, C. Ouelette, D. Rai and B. Singh. At the same time, and with the agreement of parties, appeals officer Douglas Malanka reviewed the decision of health and safety officer M. Grinblat made October 16, 2001 that a danger under the *Code* did not exist for Air Canada employee Mr. C. Matos. Mr. Matos refused to work essentially for the same reason as in the previous refusals to work. Hearings were held on May 22, 2002 in Toronto, Ontario and on June 4, 2002, in Mississauga, Ontario.

Appearances

Ms. C. V. Elias, Counsel, Air Canada Component, Canadian Union of Public Employees (CUPE);
Ms. France Pelletier, Component Health and Safety Chairperson, CUPE;
Ms. D. Salt, Toronto Local 4092, Health and Safety Committee, CUPE;

Ms. R. Henderson, Counsel, Air Canada;
Ms. K. MacKenzie, In-Flight Manager, Air Canada;
Mr. Yves Duguay, Senior Director, Corporate Security and Risk Management, Air Canada

Mr. G. Garron, health and safety officer, Human Resources Development Canada.
Mr. G. McCabe, health and safety officer, Human Resources Development Canada.
Ms. M. Grinblat, health and safety officer, Human Resources Development Canada.

[1] Air Canada discontinued its regularly scheduled flights to Israel following the September 11, 2001 terrorist attacks in the United States of America (USA). On September 13, 2001, the Company decided to resume its air service to Israel but subsequently cancelled the flight.

[2] The next day, September 14, 2001, Air Canada listed flight 886 to Tel Aviv to depart at its regularly scheduled departure time of 23:55 hours. The five (5) member flight attendant crew assigned to Air Canada Flight 886 (Lester B. Pearson International Airport, Toronto, Canada to Tel Aviv, Israel) arrived at the airport and refused to work. They complained that Tel Aviv was not a safe destination because of the ongoing terrorist action present in Israel, and because of the September 11, 2001 terrorist attacks in the USA. They feared that they could be exposed to terrorism and injured during their layover in Israel.

[3] Their continued refusals to work were investigated by health and safety officers Greg Garron and Gerald McCabe. Mr. Singh added that it was more dangerous for him as he is often mistaken for a middle-east person as a result of his light brown skin colour, and Mr. Abood added that it is more dangerous for him as he was a Canadian born in Iraq. Following their investigation, health and safety officer Garron decided that a danger did not exist for any of the employees and informed parties of his decision on September 18, 2001.

[4] On October 14, 2001, Air Canada crew member Charles Matos was assigned to Air Canada Flight 886 (Lester B. Pearson International Airport, Toronto, Canada to Tel Aviv, Israel). Mr. Matos refused to work because he feared the turmoil in Israel and the lack of security guards at the Daniel Hotel where he was to stay during his layover in Israel. He added that there is an animosity directed towards Americans, and since he looks and sounds American, he would be targeted. Mr. Matos further complained that there was no contingency plan in place to evacuate crews from Israel should an incident occur. His continued refusal to work was investigated by health and safety officer Mariana Grinblat. Following her investigation, officer Grinblat decided that a danger did not exist for Mr. Matos. She informed parties of her decision on October 16, 2001.

[5] Prior to the hearings, Ms. Elias and Ms. Henderson provided the appeals officer with their respective books of submissions and of authorities. During the hearings, Ms. France Pelletier, Component Health and Safety Chairperson, CUPE, Ms. K. MacKenzie, In-Flight Manager, Air Canada, and Mr. Yves Duguay, Senior, Director of Corporate Security and Risk Management, Air Canada, testified. Health and safety officers Garron, McCabe and Grinblat also submitted reports and testified at the hearing. I retain the following from the submissions and testimonies.

[6] The five crew members who refused to work on September 14, 2001 were met and briefed by an Air Canada Cabin Personnel Manager and by a manager from of Air Canada's Corporate Security and Risk Management group regarding security. The Corporate Security and Risk Management manager provided the crew members with:

- a letter from Mr. Yves Duguay, Senior, Director of Corporate Security and Risk Management; and,

- a copy of Air Canada's Corporate Security and Risk Management Travel Advisory Bulletin, YUL (359)-01-2, updated on September 14, 2001.

[7] The letter from Mr. Yves Duguay, Senior, Director of Corporate Security and Risk Management, dated August 28, 2001 addressed security in Tel Aviv. It stated that Mr. Duguay had traveled to Israel the week of July 23, 2001 and met with authorities there. In his letter, Mr. Duguay concluded that Air Canada operations in Tel Aviv were secure. He also confirmed that the Daniel Hotel in Herzliya was more secure than the Sheraton in Tel Aviv and so crews would subsequently be housed at the Daniel Hotel. The letter confirmed that arrangements had been made with the Daniel Hotel so that no crew would be roomed at the lobby level and that crews would be able to use the business lounge.

[8] The Travel Advisory Bulletin provided to the crew cautioned that two important dates would be celebrated by Palestinians during the month of September and could result in renewed violence in Jerusalem and the occupied territories. It cautioned employees regarding travel to Jerusalem, the West Bank and Gaza, certain areas in northern Israel, including the Lebanese border, and Jaffa, a part of metropolitan Tel Aviv. Employees were further cautioned to avoid large crowds, open markets, bus stations and public buses. The bulletin highlight that Air Canada had consulted with Canadian and Israeli officials and concluded that the level of risk/threat in Israel has not increased as a result of the terrorist attacks in the USA.

[9] In the case of Mr. Charles Matos's refusal to work, Ms. Marianne Hurley, Cabin Personnel Manager, Air Canada, met with Mr. Matos and provided him with a copy of the Mr. Duguay's August 28, 2001 letter, a copy of Air Canada's Corporate Security and Risk Management Bulletin, YUL (359)-01-2, updated on September 18, 2001, and a copy of health and safety officer Garron's decision on the previous refusals to work by flight crew employees on September 14, 2001. The September 18, 2001 bulletin essentially repeated the previous bulletin dated September 14, 2001, but added that Israeli and Palestinian authorities had agreed to cease hostilities and resume talks in the next 48 hours. Lisa Whitton, Manager, Air Canada was alleged to have told Mr. Matos that Air Canada has a contingency plan to evacuate crews, but could not divulge it for security reasons.

[10] Mr. Yves Duguay, Senior, Director of Corporate Security and Risk Management testified that he joined Air Canada in August of 2000. Prior to that, he served in the Royal Canadian Mounted Police (RCMP) as a commercial crime investigator and gained expertise related to investigations, intelligence gathering and analysis. Mr. Duguay testified that he was responsible at Air Canada to identify risks for Air Canada and its employees, including acts of terrorism or fraud, and to establish strategic and tactical plans to proactively and reactively deal with them.

[11] Mr. Duguay testified that the risk of terrorism in Israel has more or less existed since 1947. To monitor the risk of terrorism in Israel and to corroborate intelligence information, he makes use of:

- Open sources such as Travel Advisors issued by the United Kingdom, the Untied States and Canada's Foreign Affairs. These are typically available on the world wide web;
- News papers and wire services like CNN, BBC, and the Jerusalem Post;
- National and international government department and agencies officials in Canada and Israel, including Transport Canada and Foreign Affairs officials;
- National and international police forces in Canada, Paris, Rome and Israel, including the RCMP, Israeli Police; and
- Hotel and Airport liaison officials.

[12] Regarding the Daniel Hotel, Mr. Duguay testified that he visited Tel Aviv after the June 2001 bombing of the Dolphinarium disc in Tel Aviv. He surveyed the Sheraton Hotel in Tel Aviv and consulted with various officials. He then visited the Daniel Hotel in Herzliya which is approximately 10 kilometres north of Tel Aviv. Following his review, he decided that security at the Daniel Hotel was superior for several reasons including the fact that:

- Access to the hotel and garage was controlled;
- The hotel was monitored by close circuit video cameras which were continually monitored by a security guard;
- 3 plain clothes security officers were on duty 24 hours a day.

[13] With regard to transporting crew members from the Ben Gurion airport to the Daniel Hotel, Mr. Duguay stated that the Ben Gurion airport is one of the most secure airports with layers of security radiating out. When crew members arrived at the airport, they were met by an Air Canada manager who briefed them on local conditions. During the week following the attacks in the United States, Air Canada managers accompanied the bus as it transported crews to the Daniel. Mr. Duguay noted that the bus driver was almost always the same person, the bus driver used the main thoroughfare and the driver was equipped with a cell phone and security numbers to call at all times.

[14] Mr. Duguay said that when he returned to Canada, he met with Air Canada senior management and discussed possible measures to evacuate Air Canada crews from Israel should there be a general increase of conflict in the Middle East or should Tel Aviv become a target for serious terrorist attacks. After looking at the risks related to evacuating crew members by road, the security level in the Tel Aviv area, the Israeli infrastructure available in Tel Aviv and Herzliya, and the high level of security of Israeli forces, they agreed that crews should remain in their hotel in Herzliya until they could be evacuated safely. According to Mr. Duguay, Air Canada was responsible for communicating this to crews. Notwithstanding this, Mr. Duguay said that he had met with the Air Canada pilots' association and briefed them.

[15] Under cross examination, Mr. Duguay conceded that officials in Canada and Israel cannot always share information with him regarding on-going investigation of terrorist activities or threats. However, he consults with them regarding general alerts of increasing terrorism that arise during his intelligence gathering. Following the September 11, 2001 terrorist attacks in the United States, the general consensus was that the level of risk for terrorist actions had not escalated and that everything appeared secure and quiet. He attributed this to the fact that Premier Arafat had condemned the terrorist attacks on the USA. He further pointed out that a cease fire was announced on September 18, 2001 and this was used to update the existing Air Canada travel advisory shown to Mr. Matos. With regard to the alleged bomb in Herzliya, Mr. Duguay stated that he learned from Israeli police that the incident was related to a criminal extortion attempt and not to a terrorist action.

[16] Finally, Mr. Duguay pointed out that Air Canada flies to several destinations in the world such as Cyprus where terrorists activities may take place. He also noted that Air Canada resumed flights to the USA on September 14, 2001 when USA air space was reopened.

[17] Ms. Pelletier, Component Health and Safety Chairperson, CUPE, testified that she attended a meeting on October 4 and 5, 2001 where CUPE and several other unions were generally briefed on security measures put in place following the terrorist attacks in the USA on September 11, 2001. The meeting included officials of Air Canada, Transport Canada and CSIS. She recalled asking Air Canada corporate officials regarding contingency plans but did not receive a specific answer.

[18] Ms. K. MacKenzie, In Flight Manager, Air Canada, testified at the hearing that Air Canada provides flight attendants with general instruction and training regarding layover destinations where risks, including bomb threats, hijackings and evacuations, may exist to employee health and safety. She further confirmed that Air Canada continually updates its employees regarding hazards reported for its various destinations via timely travel advisories and briefings.

[19] Ms. Elias argued that terrorism in Israel is omnipresent, random and high, and consequently the possibility of terrorism is not hypothetical. As a result, she held that Air Canada had a duty under the *Code* to develop and establish in consultation with employees emergency or contingency plans to protect the health and safety of employees during layovers; to ensure that the information was communicated to employees; and to ensure the safe evacuation of crews during a crisis. She reiterated that the sole basis for the refusals to work on September 14 and October 14, 2001 was Air Canada's refusal to advise crew members of their emergency or contingency plans for ensuring the health and safety of crew in layover in Israel

[20] She argued that health and safety officers Garron and Grinblat misapplied the definition of danger because both officers held that, for a finding of danger, there must be a reasonable probability that crew members who refused to work would be subjected to terrorist activity and that the risk of future terrorist activity could reasonably be expected to cause injury or illness to a crew member. She held that for a finding of danger, it is only necessary for an officer to establish that it was reasonable to expect the hazard posed by terrorism could

cause injury or illness to a person exposed thereto before the hazard could be corrected. She added that hazards related to terrorism are not normal to employees who must layover at Air Canada destinations.

[21] She complained that the decisions rendered by health and safety officers Garron and Grinblat that a danger did not exist for employees who refused to work should be reversed because the officers accepted and relied upon facts provided to them by Air Canada without testing their veracity relative to:

- the degree of terrorist threat in Israel;
- security during transportation between the Ben Gurion airport and the Daniel Hotel in Herzliya;
- overall crew security at the Daniel Hotel in Herzliya;
- the security measures in place in Israel and their adequacy to ensure the health and safety of crew in layover status; and,
- the contingency plan that Air Canada said was in place to evacuate crews from Israel if necessary.

[22] Ms. Elias held that the Air Canada officials do not have the necessary expertise for properly assessing the risk of terrorism in Israel and that Air Canada travel advisors simply gleaned general information from government travel advisories. She held that the government and Air Canada travel advisories do not deal with the subject of crew layovers, do not address emergency or contingency plans for evacuating employees and are quickly outdated. She added that the absence of crew complaints is not proof that security in Israel is adequate or appropriate.

[23] She further argued that health and safety officer Grinblat relied on findings of Garron even though the refusal to work by Mr. Matos was more than a month after the first refusal and weeks after the latest travel advisory update.

[24] Ms. Henderson held that terrorism is beyond the control of the employer; that the *Code* does not deal with terrorism; and that terrorism does not constitute a danger under the *Code*. She referred me to the Welbourne and Canadian Pacific Railway Company, [2001] C.L.C.R.S.O. No. 9 and underscored that the concept of reasonable expectation relative to the definition of the danger in the *Code* excludes hypothetical or speculative situations. She also cited David Pratt, (1988) 73di 218, the Canadian Labour Relations Board wherein the Board held that the former definition of danger under the *Code* did not contemplate the risk of a terrorist attack.

[25] She added that the situation in Israel at the time of the refusals to work was under control and that there was no evidence that terrorism had increased following the September 11, 2001, attacks in USA. She argued that any risk to crew members during their layovers is normal to their work

[26] Ms. Henderson emphasized that the applicants had not proffered evidence that the security assertions by Air Canada officials vis-à-vis overall security in Israel and, specifically, security at the Daniel Hotel in Herzliya were false. She further argued that the existence or absence of an emergency or contingency plan was irrelevant to whether or not a flight crew might be subjected to a terrorist attack.

[27] With regard to the investigation conducted by health and safety officer Grinblat, she held that the information used by health and safety officer Grinblat was still relevant for her assessment and there was no proof that it was outdated.

[28] Finally, Ms. Henderson argued that health and safety officers Garron and Grinblat had not failed to exercise their jurisdiction under the *Code* because they did not find any contraventions.

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[29] The issue in this case is whether the potential of being exposed to terrorism during a layover in Israel constituted a danger for the Air Canada flight crew employees who respectively refused to work on two occasion being September 14, 2001 and October 14, 2001.

[30] To decide the matter it is necessary to interpret the definition of danger in the *Code* relative to the facts related to the refusals to work by Air Canada flight crews scheduled to fly to Israel and layover at the Daniel Hotel located in Herzliya. The definition of danger is as follows in subsection 122.(1):

> "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;

[31] It is clear that the definition refers both to existing and potential hazards and conditions and to current and future activities. In the *Welbourne and Canadian Pacific Railway Company Decision, Decision No. 01-008, dated March 22, 2001*, Appeals Officer Serge Cadieux wrote that danger under the *Code* can be prospective to the extent that the hazard, condition or activity that constitutes the danger is capable of coming into being or action. However, he qualified in the same sentence (see last sentence in paragraph [18] below) that, for a danger, it must be reasonable to expect that the prospective hazard, condition or activity will cause injury or illness to a person exposed thereto before the hazard or condition can be corrected or the activity modified. Paragraph 18 of the decision reads:

> [18] **Under the current definition of danger, the hazard, condition or activity need no longer only exist at the time of the health and safety officer's investigation but can also be potential or future**. The New Shorter Oxford Dictionary, 1993 Edition, defines "*potential*" to mean "possible as opposed to actual; capable of coming into being or action; latent." Black's Law Dictionary, Seventh Edition, defines "*potential*" to mean "capable of coming into being; possible." The expression "*future activity*" is indicative that the activity is not actually taking place [while the health and safety officer is present] but it is something to be done by a person in the future. Therefore, under the *Code*, the danger can also be prospective to the extent that the hazard, condition or activity is capable of coming into being or action and is reasonably expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected or the activity altered.

[32] Ms. Elias argued in the contrary that, for a finding of danger under the *Code*, there is no need to reasonably expect that the potential hazard or condition or future activity will actually come into being or take place. Instead, the officer need only decide if it is reasonable to expect that an existing or potential hazard or condition or present or future activity could reasonably be expected to cause injury or illness before the hazard or condition could be corrected or activity altered.

[33] However, the difficulty that I have with her interpretation is that, if there is no reasonable expectation that a potential hazard or condition or future activity will actually come into being or take place, then the danger is more hypothetical than prospective in nature. Historically, the courts and tribunals, including this office have held that danger cannot be hypothetical. In my opinion, the September, 2000 amendments to the *Code* did not alter this interpretation. However, one of the principal changes effected when the definition of danger was amended in September of 2000 is that the hazard, condition or activity reasonably expected to cause injury or illness to a person exposed thereto before it can be corrected or altered no longer needs to exist or be taking place at the time of the health and safety officer's investigation.

[34] Moreover, it is my opinion that, if there are insufficient facts in a refusal to work to establish a reasonable expectation that a potential hazard or condition or future activity will actually come into being or take place and a person will be exposed thereto, then it is impossible for a health and safety officer to execute his or her legislative duty under subsections 129.(1), (4), (6) and (7), and subsection 145.(2). In the *Correctional Service of Canada – Drumheller Institution and Larry DeWolfe case, Decision No. 02-005, dated May 9, 2002,* I referred to the Welbourne and Canadian Pacific Railway Case and wrote the following in paragraphs 39 to 41 inclusively.

> [39] While I agree with my colleague's findings in this case, I believe there is a need to elaborate on his findings to address arguments made by Mr. Fader in this case. Specifically, Mr. Fader argued that, for a danger under the *Code*, the circumstances related to a potential danger must exist at the time of the investigation by the health and safety officer.

[40] According to subsection 129.(1) of the *Code*, when a health and safety officer is notified that an employee is continuing to refuse to work, the health and safety officer is required to investigate or cause another officer to investigate the refusal to work without delay. On completion of the investigation, the investigating officer is required, pursuant to subsection 129.(4), to decide whether or not a danger under the *Code* exists. If the officer decides that a danger exists, then the officer is required by subsection 129.(6) to issue a direction pursuant to subsection 145.(2) requiring the employer to, amongst other things, take measures to correct the hazard or condition or alter the activity, or to protect any person from the danger. The officer is also required to issue a direction to the employee(s) in question to cease the work in question until the employer complies with the officer's direction under 145(2)(*a*). If the officer decides that a danger does not exist, then according to subsection 129.(7), the employee is not entitled under section 128 to continue to refuse to work. The officer is clearly deciding whether or not a danger under the *Code* exists at the time of his or her investigation and, relative to subsection 145.(2.1), whether or not the employee(s) may work in a place or do the work in question. Subsections 129.(1), (4), (6) (7) and 145.(2) and 145.(2.1) read:

> 129.(1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), **the health and safety officer shall without delay investigate or cause another health and safety officer to investigate the matter** in the presence of the employer, the employee and one other person who is
> (*a*) an employee member of the work place committee;
> (*b*) the health and safety representative; or
> (*c*) if a person mentioned in paragraph (*a*) or (*b*) is not available, another employee from the work place who is designated by the employee.
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> **129.(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.**
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> 129.(6) **If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity** until the directions are complied with or until they are varied or rescinded under this Part.

145.(2) **If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place, or the performance of an activity constitutes a danger to an employee while at work,**
(*a*) the officer **shall notify the employer of the danger** and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to
(i) correct the hazard or condition or alter the activity that constitutes the danger, or
(ii) protect any person from the danger; and
(*b*) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine or thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

145.(2.1) If a health and safety officer considers that the use or operation of a machine or thing by an employee, a condition in a place or the performance of an activity by an employee constitutes a danger to the employee or to another employee, **the officer shall**, in addition to the directions issued under paragraph (2)(*a*), **issue a direction in writing to the employee to discontinue the use, operation or activity or cease to work in that place until the employer has complied with the directions issued** under that paragraph.

129.(7) If a health and safety officer decides **that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee**, or a person designated by the employee for the purpose, may appeal the decision in writing to an appeals officer within ten days after receiving notice of the decision.
[Underlined for emphasis.]

[41] For deciding if a danger exists, the health and safety officer must consider all aspects of the definition of danger and, on completion of his or her investigation, decide if the facts in the case support a finding of danger under the *Code*. This determination must be done on a factual basis and the facts must be persuasive since the right to refuse and danger provisions under the *Code* are considered to be exceptional measures. For a health and safety officer to find that a danger under the *Code* exists at the time of his or her investigation in respect of a potential hazard or condition, as in this case, the facts in the case must be persuasive that:

- a hazard or condition will come into being;

- an employee will be exposed to the hazard or condition when it comes into being;
- there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and
- the injury or illness will occur immediately upon exposure to the hazard or condition.

[35] Appeals officer Serge Cadieux subsequently wrote the following in the *Parks Canada Agency and Doug Martin and Public Service Alliance of Canada case, Decision No. 02-009, dated, May 23, 2002*.

> [143] A difference between the "old" definition of danger and the current one lies in the fact that the current definition includes a reference to a potential hazard or condition and a future activity so that the hazard, condition or activity no longer need to be present at the time of the health and safety officer's investigation. Hence, the health and safety officer can look beyond the immediate circumstances in existence at the time of his investigation to decide on the existence of "danger" as defined in the *Code*. There is however limitations to the concept of "danger" as defined in the *Code*.
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> [144] The *Code* allows for a future activity to be taken into consideration in order to declare that "danger" as defined in the *Code* exists. However, this is not an open-ended expression. In order to declare that danger existed at the time of his investigation, the health and safety officer must form the opinion, **on the basis of the facts gathered during his investigation**, that:
>
> - the future activity in question will take place[1];
> - an employee will be exposed to the activity when it occurs; and
> - there is a reasonable expectation that:
>
> the activity will cause injury or illness to the employee exposed thereto; and,
>
> the injury or illness will occur immediately upon exposure to the activity.
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> **Note:** The latency aspect of the injury or illness will not be addressed in this decision since this was not raised as an issue in the instant case. However, I would refer the reader to paragraph #21 of the *Welbourne* decision for clarification.

[1] This first condition is redundant in cases where the health and safety officer has established that the activity is taking place at the time of his investigation.

> [145] Given that the health and safety officer must investigate a situation in a factual manner and having regard to the four objective criteria listed above, hypothetical and speculative situations will continue to be excluded from the definition of danger. After all, both hypothetical and speculative situations have no firm factual basis, a direct contradiction with the concept of "danger" as defined in the *Code*. It is important to note at this point that although "danger" as defined in the *Code* may be found not to exist, a contravention may still exist.

[36] In both instances of refusals to work in this case, the Air Canada flight crew employees refused to work prior to departing Toronto for Tel Aviv, Israel. Therefore, the hazard they feared of being exposed to a terrorist act in Israel did not relate to an existing hazard, condition or current activity. Since the condition or activity feared by the refusing employees did not exist at the time of the refusals to work, and since I am not persuaded by Ms. Elias's interpretation that, for a finding of danger, it is unnecessary that the facts in the case establish a reasonable expectation that a potential hazard or condition or future activity will occur and that an employee will be exposed thereto, this is the first issue that I must address in respect of both refusals to work.

[37] Ms. Elias argued that the history of terrorism in Israel and the terrorist attacks on the United States of America on September 11, 2001 made the potential risk of being exposed to and injured by acts of terrorism of sufficient certainty for the Air Canada flight crew employees who refused to work that it constituted a danger for them. But, I would make the following analogy in respect of her logic in this regard. In Canada, it seems that a week rarely goes by without a news item on the radio or television, or in the press, concerning a motor vehicle accident attended by injury or death. One might reasonably conclude from this that, if you accept to drive in a motor vehicle on our highways, you expose yourself to a risk of being involved in an automobile accident and of being injured or killed therein. However, I doubt that anyone would reasonably conclude that the simple act of driving in a motor vehicle on a Canadian highway constitutes a danger under the *Code* for the driver or passengers. However, if, for example, the vehicle in which a person was riding or was about to ride had been fabricated with a component subsequently determined by professionals to be defective and to catastrophically fail causing a loss of control of the vehicle at the approximate reading indicated on the odometer of the vehicle, then the situation would have to be reassessed. That reassessment would have to consider the reliability of the evidence concerning the attendant risk amplifiers.

[38] No conclusion is drawn in the above hypothetical example regarding the existence or not of danger. It is offered only to illustrate that, for a finding of danger, the evidence in respect of a hazard, condition of activity must be sufficient to elevate the risk of occurrence and of injury or illness to a person exposed thereto from a speculative possibility to a reasonable expectation. In respect of both instances of refusals to work in this case, the evidence did not confirm the existence of attendant risk factors or risk amplifiers sufficient to establish that it was reasonable to expect that the Air Canada employees who refused to work would be exposed to an act of terrorism in Israel that could reasonably be expected to cause injury or illness to the employees had they carried out their assigned tasks.

[39] With regard to Ms. Elias assertions that Air Canada's response in respect of the risk was deficient, the evidence established that Air Canada has a Corporate Security and Risk Management Department headed by Senior Director Mr. Yves Duguay, and that the Department continually monitored the situation in Tel Aviv. They accomplished this via government travel advisors, and through regular contact with government and security officials in Israel and other countries. The security department issued regular travel advisors of its own based on intelligence information gathered and briefed crews before they departed to Israel. Ms. Elias held that Air Canada did not have sufficient expertise in terrorism to adequately assess risk. However I was not persuaded by this. In my opinion, the expertise at Air Canada was sufficient to receive, interpret and react to intelligence information at their disposal.

[40] Ms. Elias held that the Air Canada advisories and briefing did not specify an emergency plan to evacuate crew members from Israel and were too vague to be of assistance to Air Canada employees who could be exposed to terrorism in Israel. She further held that the Air Canada travel advisors and briefings were obsolete practically as soon as they were issued. However, according to Mr. Duguay, Air Canada did not have a standing evacuation plan for evacuating crews from Israel in the event of a terrorist act or a general escalation of terrorism because it was safer for employees to remain at their hotel than to attempt an over-land evacuation. It is regrettable that this was not communicated to employees who were seeking answers. With regard to the topical status of Air Canada travel advisories, I can appreciate the stress experienced by Air Canada employees in the circumstances. However, there was no contradictory evidence to show that the Air Canada advisories and briefings were unreliable or that information from any other source was able to forecast when and where the next terrorist action could reasonably be expected to occur, or more importantly, not to occur.

[41] In terms of Ms. Elias' contention that the Daniel Hotel in Herzliya was not more secure that the Sheraton Hotel in Tel Aviv, I was satisfied by Mr. Duguay's testimony that the change was justified and that there was a need to act quickly before employees were consulted. Ms. Elias is correct that the *Code* requires the employer to consult with employees on health and safety matters. However, exceptional situations may arise where the employer must unilaterally act quickly to protect the health and safety of employees. That is exactly what Mr. Duguay did, and, based on his testimony, I was persuaded that the security measures he described are in fact in place at the Daniel Hotel.

[42] With regard to Ms. Elias' concern that health and safety officers Garron, McCabe and Grinblat erred because they failed to test the veracity of the information that Air Canada provided to them during their investigation of the refusals to work, I am of the view that it is unnecessary for officers to question every fact provided to them by a party during an investigation unless the evidence is inconsistent with or contradicted by other evidence. The time and expense to verify every statement or document proffered by a party could be prohibitive and unproductive. With regard to officer Ginblat's use of evidence collected by officers Garron and McCabe, there was no evidence that the information was outdated and irrelevant.

[43] There was insufficient evidence to persuade me that there was a reasonable expectation that the potential hazard or condition related to terrorism in Israel would manifest itself in respect of the employees who refused to work. I find that the danger was hypothetical and not one covered under the *Code*. In my opinion, the investigations and findings of health and safety officers McCabe, Garron and Grinblat were reasonable and correct and I confirm their decisions in both cases.

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Douglas Malanka
Appeals Officer

Summary of Appeals Officer Decision

Decision No.: 03-002

Applicant: R. Abood, J. Chan, C. Ouelette, D. Rai and B. Singh

Respondent: Air Canada

Key Words: danger, flight crew, employees, terrorism, Israel, Herzliya, Tel Aviv, security, assessment, layover, travel advisories, briefings

Provisions: C.L.C: 122.(1),128, 129
Regulations

Summary:

On September 14, 2001, the 5 member flight attendant crew assigned to Air Canada Flight 886 (Lester B. Pearson International Airport, Toronto, Canada to Tel Aviv, Israel) refused to work. The employees complained that Tel Aviv was not a safe destination because of ongoing terrorist action present in Israel, and because of the September 11, 2002 terrorist attacks on the World Trade Center, New York and the Pentagon. They feared that they could be exposed to terrorism and injured during their layover in Israel during transport by ground transportation from the airport to the Daniel Hotel in Herzliya and back, and while staying at the Daniel Hotel.

On October 14, 2001, Air Canada crew member Charles Matos was assigned to Air Canada Flight 886 (Lester B. Pearson International Airport, Toronto, Canada to Tel Aviv, Israel). Mr. Matos refused to work because he feared the turmoil in Israel and the lack of security guards at the Daniel Hotel. He added that there is an animosity directed towards Americans, and since he looks and sounds American, he would be targeted. Mr. Matos further complained that there was no contingency plan in place to evacuate crews from Israel should an incident occur.

Following his review, the appeals officer confirmed the decisions of the health and safety officers that a danger did not exist for the employees who refused to work. In the opinion of the appeals officer, the facts in the refusals to work did not establish a reasonable expectation that a hazard or condition related to terrorism in Israel would manifest itself such that it constituted a danger under the *Code*.