Protection and Prosecution: Falling at Work

Peter Bowal

Introduction

Just before Christmas 2009, Mr. Murgappa Naiker died instantly after falling 18.5 feet from an open bucket while de-icing an airplane at the Calgary airport. He was not wearing his safety harness. He had 17 years experience as a de-icing ramp agent and had completed updated safety training two months earlier.

His employer, Servisair, was charged with failing to ensure the health and safety of the employee, and failure to ensure use of personal protective equipment. The employer sought to defend by showing it had exercised due diligence to prevent this workplace fatality. This article describes this typical regulatory prosecution against an employer (R. v. Servisair Inc., 2012 ABPC 63 (March 09, 2012)).

Facts

Servisair is a global provider of aviation ground services. It provides ramp services, passenger services, load control, de-icing and aircraft cleaning.

At 6 a.m. on December 21, 2009, Mr. Naiker was working as part of two Servisair de-icing teams from modular de-icer trucks in an open area on the tarmac. Soon after starting to de-ice the

airplane, Mr. Naiker fell from the bucket, which is surrounded by guard rails 43 inches high, and died from blunt head injury. He was 52 years old, 5 feet 9 inches tall and weighed 157 lbs. No alcohol or drugs were detected in his body. The bucket door was in an open, inward position. No one witnessed Mr. Naiker's fall.

Servisair had safety policies and procedures in place for de-icing operations. De-icing bucket operators are required to use safety equipment. When in an open bucket, the restraint must be worn and securely attached to the de-icing truck boom.

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In de-icing training, Servisair emphasized proper use of harnesses and lanyards and the mandate that these fall restraint devices be used at all times while in the open bucket. The company also required drivers of de-icing trucks to ensure the de-icer in the bucket wore the fall protection equipment. Mr. Naiker had not been wearing his harness and lanyard, which were readily available, contrary to Servisair's safety procedures and his training. All four employees (two bucket operators and two truck operators) were in violation of company policy and training on the use of fall protection equipment.

The Charges

As airports are governed by federal legislation, in this case the Canada Labour Code, Servisair was charged with the general section 124: "Every employer shall ensure that the health and safety at work of every person employed by the employer is protected." and also section 125(1)(w) which requires employers to ensure that workers are familiar with and uses all prescribed safety equipment. If the contravention of this duty causes the death or serious injury to an employee, the employer is guilty and may be sentenced to a fine up to $1,000,000 and/or imprisonment for up to two years.

Section 148(4) states that the employer charged may successfully defend by proving it "exercised due care and diligence to avoid the contravention." The *Code* also lists various detailed legal duties of employees to use safety equipment and observe health and safety precautions.

Actus Reus of the Offence

The Crown must prove a wrongful, illegal act (*actus reus*) beyond a reasonable doubt before the burden shifts to Servisair to show on a balance of probabilities that it took reasonably steps (due diligence) to prevent the incident from occurring. Some previous judicial decisions have held that a workplace death automatically leads to the conclusion that the employer failed to ensure the health and safety of the employee. Proof of the accident is essentially proof of the breach of this law.

The Crown had proven the *actus reus* in this case by showing beyond a reasonable doubt that Mr. Naiker was employed by Servisair and working when he fell to his death.

The Due Diligence Defence

It was now up to Servisair to show how it exercised reasonable care in the circumstances to avoid the accident. To answer this question, the Provincial Court judge went through all the evidence of Servisair in great detail.

Overall, the judge concluded from the "overwhelming evidence" that Servisair "implemented a thorough and complete set of policies and training to ensure safe procedures [were] in place for employees required to de-ice aircraft" in a highly regulated industry on an ongoing basis. Servisair complied not only with its own safety standards, but those of Transport Canada and other agencies within the airline industry, as well as national and international safety procedures, including de-icing operations.

However, given that Mr. Naiker was dead because he had not followed safety procedures, and the other three co-workers with him that morning were also safety non-compliant, the critical employer due diligence issue became whether Servisair reasonably monitored, supervised and enforced its own safety practices and procedures.

Servisair had established a Central De-Icing Facility in Toronto to develop de-icing safety procedures. There was extensive ongoing training of de-icing employees in place. Mr. Naiker was trained as a de-icer, and completed training prior to each winter season which emphasized the need to wear fall protection equipment when de-icing aircraft from the open bucket. He had completed this recurrent training two months before his death.

However, given that Mr. Naiker was dead because he had not followed safety procedures, and the other three co-workers with him that morning were also safety non-compliant, the critical employer due diligence issue became whether Servisair reasonably monitored, supervised and enforced its own safety practices and procedures. The other de-icer was not properly trained and qualified. Servisair did not systematically go out and observe de-icing operations. There was a smaller supervisory staff on duty in the 5:00 a.m. to 7:00 a.m. period – which is the time this fatality occurred – to monitor and a large territory to cover, especially for unscheduled planes de-iced farther away from the gates.

The evidence showed that Mr. Naiker and his colleagues had not used harnesses in the past and nothing was said or done about this. Only a few weeks before, Mr. Naiker had been observed *by an airline captain* without the safety harness, and reported. He was then verbally warned to use it, which he did on his next airplane. Policy called for this warning to be placed on his file, which was not done.

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On the morning in question, the two de-icers were rushing to complete an unscheduled airplane. Mr. Naiker enlisted his untrained and unprepared colleague at the last minute because he felt he would do a favour for the employer. Since it was only one

plane, he decided not to wear his safety equipment. Other de-icers testified that they did not always wear their harnesses.

Therefore, did Servisair reasonably enforce its own safety policies? The Court said "yes."

The judge said (surprisingly): "the company was completely unaware that anyone had ever failed to wear fall protection equipment" and that no safety discipline records existed "because this issue had never been raised as a safety issue." The judge continued "this company was unaware that any employee would violate the requirement to wear fall protection equipment, especially since the danger to the employee himself was so apparent and significant."

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This seems to be a curious conclusion given that all four workers that tragic morning were not in compliance with safety policies, the evidence was that the deceased worker occasionally did not harness up for the first de-icing, that the pair of de-icers deliberately did not report each other, and the one time that any supervisor admitted to having observed Mr. Naiker working without a harness, he only verbally warned him and did not take any further disciplinary action. Mr. Naiker's de-icing partner, who would know best what usually happened, said he knew that morning that Mr. Naiker was not harnessed and he did not harness either. Surely the fact that all four workers violated their safety obligations that morning is compelling evidence about Servisair's enforcement of its safety procedures.

Conclusion

The judge said Servisair: "has satisfied the Court on a balance of probabilities that it took all reasonable steps to ensure the safety and health of its employee, Mr. Murgappa Naiker, and to ensure he wore his fall protection equipment. Perfection is not the expectation of the Court with regard to the test of due diligence …"

Servisair was found not guilty of both charges and the Crown did not appeal the acquittal.

Lessons Learned

Both employers and employees need to do their respective parts in workplace safety. Employers cannot guarantee that injury and death will not occur at work, since they also depend on employees to comply with safety policies. When safety standards change, it may take a redoubled effort to bring experienced employees around to consciously committing to them.

Enforcement of workplace safety obligations for employees is achieved by prosecution and by employer workplace discipline,

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which must be serious, consistent and documented for internal safety violations. Proof of the employer's *actus reus* of the offence is straightforward where a fatality occurs at work. At trial, it will then be up to the accused employer to show that it acted reasonably in the circumstances to prevent the fatality.

Employers must keep records, conduct their own investigations and be prepared to come to court to show in detail what they have done to prevent the incident. They must show that they have an effective system of safety policies and training and that the safety program is closely monitored and enforced by management. Mere declarations and platitudes on the importance of safety will not be enough – effective and ongoing action must be demonstrated.

These Servisair de-icers were very experienced, had long worked together and got along well. They took things for granted and cut corners. This case referred, inaccurately, to "one off" safety violations. The case is another example how serious injury or death can happen in mere seconds, especially where the workers are performing repetitive actions, feel rushed in a task, take safety for granted, and where no one – fellow workers, corporate management or regulators – are holding them accountable daily.

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