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Mandatory Retirement Issue for Air Canada Pilots Has Taken Flight Again

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Cases Considered:

Air Canada Pilots Association v Kelly, 2011 FC 120 ("*Kelly*")

In 2009, the Canadian Human Rights Tribunal ("Tribunal") ruled in favour of Robert (Neil) Kelly and George Vilven, two Air Canada Pilots who had challenged their mandatory retirement at age 60. See my post on "Pilot from Airdrie is Successful in Mandatory Retirement Case." The Tribunal in that case — *Vilven v Air Canada and Air Canada Pilots Association; Kelly v Air Canada and Air Canada Pilots Association*, 2009 CHRT 24 (*Vilven and Kelly*) — ruled that the mandatory retirement provisions in the airline's collective agreement with the Air Canada Pilot's Association ("ACPA") (as protected under s. 15(1)(c) of the *Canadian Human Rights Act* ("CHRA")) violated the *Canadian Charter of Rights and Freedoms* ("*Charter*") and could not be saved by s. 1 of the *Charter*. In 2011, the Federal Court agreed with the Tribunal's decision on the *Charter* issue (see *Kelly*, paras. 50 to 351).
In a decision on the remedy (2010 CHRT 27), the Tribunal ordered Air Canada to reinstate Kelly and Vilven and to compensate them for lost income.

In the *Vilven and Kelly* case, the Tribunal held that Air Canada failed to demonstrate that age is a *bona fide* occupational requirement for pilots. This year in the *Kelly* decision, Justice Anne Mactavish of the Federal Court ruled that the Tribunal erred with respect to this issue as it related to the period after November 2006. Thus, Air Canada's application for judicial review was granted in part, and the issue of *bona fide* occupational requirement was remitted to the Tribunal.

Justice Mactavish applied a reasonableness standard of review to the issue of the *bona fide* occupational requirement defence. She considered the "justification, transparency and intelligibility of the decision-making process, and whether the decision [fell] within the range of possible acceptable outcomes which are defensible in light of the facts and law" (see para. 49).

Section 15(1)(a) of the CHRA provides that a practice is not discriminatory if "any refusal, exclusion, expulsion, suspension, limitation, specification or reference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement" (para. 353). The Federal Court noted that the test for a *bona fide* occupational requirement is that set out by the Supreme Court of Canada in *Meiorin (British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees Union (BCGSEU)*, [1999] 3 SCR 3). The respondent employer must prove on a balance of probabilities the following elements:

> 1) The employer adopted the standard for a purpose rationally connected to the performance of the job;

> (2) The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
>
> (3) The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer (*Kelly*, para. 355)

The Federal Court decision focused on the third element of the *Meiorin* test: the ability to accommodate individual employees without imposing undue hardship on the employer. Air Canada argued before the Tribunal that it could not accommodate pilots over the age of 60 without experiencing undue hardship in light of the standards set out by the International Civil Aviation Organization (ICAO) under the "Chicago Convention" with respect to international flights. The ACPA had argued before the Tribunal that the abolition of the mandatory retirement provision would cause undue hardship to its members, as it would limit the number of positions available to pilots under age 60 and would dilute their seniority. This could also interfere with the ability of younger pilots to plan their retirements and could have a negative effect on pilot morale (paras. 359-361).

In November 2006, the ICAO standards were amended so that Pilots-in-Command under age 65 could fly internationally, so long as one of the pilots in the crew was under 60. The IACO also recommended, but did not require, that First Officers stop flying after reaching age 65 (para. 363). The Tribunal found that Air Canada and ACPA had not established a *bona fide* occupational requirement for their discriminatory conduct during the period up to November 2006.

As for the time period after November 2006, Air Canada's evidence of undue hardship came mostly from Captain Steven Duke, who opined that having pilots over the age of 60 would have an impact on Air Canada's operations, particularly its scheduling, in light of its international obligations (paras. 367 to 370). The Tribunal concluded that Captain Duke's evidence was not sufficient to establish undue hardship to Air Canada.

With respect to the ACPA's argument that the delay in career progression and salary increases for younger pilots would interfere with the rights of these employees, the Tribunal did not accept that this would affect younger ACPA members and held that there were ways to address the scheduling problems that might arise by implementing the new standards. It is interesting to note that ACPA did not challenge the Tribunal's findings with respect to the *bona fide* occupational requirement in its application for judicial review (para. 376).

In addressing Air Canada's arguments, Justice Mactavish noted that the vast majority of Air Canada flights have an international aspect to them. Thus, the consequences for failing to comply with the ICAO standards that apply to international flights could be severe, "as contracting States may ground aircraft and deny entry into their airspace to any aircraft flown by pilots who do not meet ICAO standards" (para. 380).

While s. 15(2) of the CHRA stated that in order to establish the existence of a *bona fide* occupational requirement or justification, the respondent must establish that the accommodation

of the needs of a class of individual affected "would impose undue hardship on the person who would have to accommodate those needs considering health, safety and cost", the Tribunal determined that it could look to matters other than health, safety and cost in determining undue hardship. The Federal Court held that the Tribunal's interpretation of s 15(2) was unreasonable (para. 391). Because Parliament had specifically listed three factors to be considered (health, safety and cost), other factors, such as effect on employee morale, could not be considered (paras. 392 to 403).

While she spent a great deal of space interpreting s. 15(2) of the CHRA, the decision of Justice Mactavish did not turn on this interpretation. The determinative issue was actually the Tribunal's treatment of the cost of Air Canada's accommodation of over-60 pilots after November 2006. As Air Canada argued that the Tribunal erred in its dealing with this issue, Kelly and Vilven argued that the Tribunal erred in its assessment of the *bona fide* occupational requirement issue, but nevertheless arrived at the right result (paras. 429 to 430).

The Tribunal found that there was "no evidence as to what is a materially lower quality schedule" as had been asserted by Captain Duke, yet the Federal Court found that significant portions of Captain Duke's evidence were overlooked (para. 456). In addition, while the Tribunal found that the evidence was lacking as to the potential cost incurred by Air Canada if it had to hire additional pilots while it continued to pay reserve pilots whose services could not be utilized, the Federal Court found that Air Canada had actually provided detailed evidence on the cost of additional pilots (paras. 458 to 459).

Vilven and Kelly argued that all of the logistical and scheduling problems identified by Captain Duke would be eliminated if Air Canada required that all over-60 pilots worked as First Officers (para. 462). Justice Mactavish noted that the Tribunal had not offered this as a reason for rejecting Air Canada's *bona fide* occupational requirement defence.

Since it is not the role of a reviewing court to substitute its decision for that of the Tribunal, the Federal Court held as unreasonable the Tribunal's analysis of the ability of Air Canada to accommodate pilots over the age of 60 after November 2006 (para. 464).

In addition, it came to light that while the Human Rights Commission had conceded that the first two elements of the *Meoirin* test were made out, Vilven and Kelly had not so conceded. As a result, the Federal Court remitted the question of whether being 60 was a *bona fide* occupational requirement for Air Canada pilots after November 2006, to be examined in light of all three elements of the *Meiorin* test.

Finally, the Federal Court dismissed a last-minute application by Vilven and Kelly to have CHRA s. 15(1)(c) declared to be invalid and of no force or effect under the *Constitution Act*, 1982, s. 52(1). It is interesting to note that Bill C-481 was re-introduced in Parliament on March 3, 2010. This would have the effect of repealing CHRA s.15(1)(c), amending s. 15(1)(b) and repealing mandatory retirement provisions under the *Canada Labour Code*.

Even if these sections are repealed (or amended), CHRA s. 15(1)(a) will still be in force. It is likely that Vilven and Kelly will provide fulsome arguments on all three elements of the *Meiorin* test when the Tribunal revisits the issue of whether age can be a *bona fide* occupational requirement in the context of Air Canada pilots.