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Pilot from Airdrie is Successful in Mandatory Retirement Case

By Linda McKay-Panos

Cases Considered:

Vilven v Air Canada and Air Canada Pilots Association; *Kelly v Air Canada and Air Canada Pilots Association*, 2009 CHRT 24; Remedy: 2010 CHRT 27

Recently, an Air Canada pilot from Airdrie, George Vilven, together with pilot Neil Kelly, succeeded in challenging Air Canada's mandatory retirement policy. Mandatory retirement in human rights law has seen some interesting developments over the years. There are currently no laws in Canada that force a person to retire. In addition, the federal and most provincial governments prohibit age discrimination in their human rights legislation. Nevertheless, mandatory retirement does exist in Canada, and whether you are forced to retire and when, depends on where you live.

Alberta human rights law prohibits age discrimination, but allows mandatory retirement in reasonable and justifiable circumstances or if it is in a *bona fide* retirement or pension plan, or is a *bona fide* occupational requirement (see the *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5).

Federally, civil servants who work for the government cannot be forced to retire. However, under current federal human rights legislation, mandatory retirement may be allowed at "the normal age of retirement for employees working in positions similar to the position of that individual" for non-civil servants who work for an employer in a federally regulated industry (s.15(1)(c) *Canadian Human Rights Act*, RSC 1985, c.H-6 (*"CHRA"*)). Mr. Vilven's situation was governed by federal law, as airlines are a federally regulated industry. Vilven and Kelly are two of 60 pilots who complained to the Federal Human Rights Commission about mandatory retirement.

Mandatory retirement for Air Canada at age 60 has been a company policy and part of their pension plan since 1957. Since the early 1980s, provisions mandating retirement at age 60 have been part of the collective agreement between Air Canada and the Air Canada Pilots Association ("ACPA") (*Vilven v Air Canada; Kelly v Air Canada*, 2009 FC 367 at para. 11).

Vilven had been a pilot for Air Canada for a number of years. He turned 60 in 2003, and in accordance with the mandatory retirement provisions of the collective agreement, Vilven was required to retire on September 1, 2003 (*Vilven v Air Canada; Kelly v Air Canada*, 2009 FC 367 at para. 15). There was no suggestion of job performance related issues or medical fitness issues. The sole reason for Vilven's employment termination was the mandatory retirement provision in the collective agreement.

In August 2004, Mr. Vilven filed a complaint against Air Canada with the Canadian Human Rights Commission, alleging discrimination on the basis of age, contrary to ss. 7, 9 and 10 of the *CHRA*. Likewise, Mr. Kelly filed a complaint against both Air Canada and ACPA in March 2006. A group of current and former Air Canada pilots wanting to eliminate mandatory retirement ("Fly Past 60 Coalition") was granted interested party status in the case. This group filed a Notice of Constitutional Question, challenging the constitutionality of s. 15(1)(c) of the *CHRA* on the basis that it violated the *Canadian Charter of Rights and Freedoms* s.15(1). The *CHRA* s. 15(1)(c) provides that it is not a discriminatory practice if an individual's employment is terminated because "that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual".

The Canadian Human Rights Tribunal ("Tribunal") dismissed Vilven's and Kelly's complaints and also found that *CHRA* s. 15(1)(c) did not contravene *Charter* s. 15(1). The Tribunal accepted evidence that 60 was the "normal age of retirement" for persons working in positions similar to Vilven and Kelly. While the Tribunal determined that the complainants had made out a *prima facie* claim that they had been discriminated against under *CHRA* sections 7, 9 and 10, they also held that Air Canada had established that 60 was the normal age of retirement, and thus the policy did not amount to a discriminatory practice under the *CHRA*.

Vilven and Kelly applied to the Federal Court for judicial review of the Tribunal's decision. Madam Justice Anne Mactavish of the Federal Court first found as reasonable the Tribunal's conclusion that the normal age of retirement for persons in positions similar to those occupied by Vilven and Kelly was 60. Thus, the fact that they were required to retire at 60 in accordance with the collective agreement was not a discriminatory practice under s. 15(1)(c) of the *CHRA*.

Next, the Federal Court examined whether s. 15(1)(c) violated *Charter* s. 15(1). The Federal Court noted that it was necessary to examine this issue in light of the tests articulated in the cases of *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 and *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, taking into account the comments of the Supreme Court of Canada in *R v Kapp*, 2008 SCC 41 (*Vilven v Air Canada; Kelly v Air Canada*, 2009 FC 367, para. 248). The Federal Court concluded that *CHRA* s. 15(1)(c) violates *Charter* s. 15(1) because it denies older workers the equal protection of the law, and has the effect of perpetuating the group disadvantage and prejudice faced by older workers in Canada. In addition, the provision perpetuates the view that older workers are less capable, or less deserving of recognition or value as human beings or members of Canadian society.

Since the Tribunal had determined that that s. 15(1)(c) of the *CHRA* did <u>not</u> offend *Charter* s. 15(1), it had not addressed the question of whether the section could nevertheless be justified under *Charter* s. 1. Thus, the Federal Court set aside the Tribunal decision and remitted it back for reconsideration. If the Tribunal eventually determined that s. 15(1)(c) was not saved by *Charter* s. 1, the Tribunal was instructed to decide whether the mandatory retirement provision was nevertheless a *bona fide* occupational requirement under *CHRA* sections 15(1)(a) and 15(2).

In reconsidering the issues, the Tribunal first dealt with whether *CHRA* s. 15(1)(c) could be saved by *Charter* s. 1. The Tribunal relied on the test set out in *R v Oakes*, [1986] 1 SCR 103 to determine whether the impugned provision is a "reasonable limit prescribed by law as can be justified in a free and democratic society."

The Tribunal reviewed a number of decisions in which mandatory retirement provisions were saved by s. 1 (see for example, *McKinney v. University of Guelph*, [1990] 3 SCR 229

"*McKinney*"). The Tribunal also noted some more recent decisions, however, in which the courts have indicated that the social and economic context in which the *McKinney* decision was rendered had changed sufficiently to leave the Supreme Court of Canada's decision in that case with respect to *Charter* s. 1 inapplicable to today's circumstances (see, for example *Association of Justices of the Peace of Ontario v Ontario (Attorney General)* (2008), 92 O.R. 16 (C.A.)). Of particular relevance was the fact that several provincial legislatures had abolished mandatory retirement. Noting that mandatory retirement is no longer as prevalent in Canada as it was at the time *McKinney* was decided, that expert evidence in the case at bar questioned many of the concerns raised by the Court in *McKinney*, and that the loss of work can have a detrimental impact on an individual's sense of self-worth and well-being, the Tribunal held that "it can no longer be said that the goal of leaving mandatory retirement to be negotiated in the workplace is sufficiently pressing and substantial to warrant the infringement of equality rights" (2009 CHRT 24, para. 50). Further, the "normal age of retirement" criterion is not rationally connected to the goal of negotiated mandatory retirement. In addition, the alternative of applying the defence of the *bona fide* occupational requirement would be less intrusive. The tribunal noted that in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), the Supreme Court had underlined the importance of assessing the capabilities of each individual up to the point of undue hardship, rather than submitting to the concerns about individual accommodation in the collective bargaining process. Finally, the Tribunal concluded that the negative effects of the infringement (depriving individuals of the protection of the *CHRA*) outweighed the positive benefits associated with s. 15(1)(c). Thus, s. 15(1)(c) was not a reasonable limit on the complainants' equality rights under *Charter* s. 15(1). In sum, the offending provision of the *CHRA* could not be saved by *Charter* s. 1.

Next, the Tribunal dealt with whether the mandatory retirement provision in the collective agreement was a *bona fide* occupational requirement ("BFOR") within section 15(1)(a) and 15(2) of the *CHRA*. Tribunals and courts apply the three-step *Meiorin* test in order to determine whether an employment practice is a BFOR:

1. The mandatory retirement provision must be adopted for a purpose that is rationally connected to the performance of the job.

2. The mandatory retirement provision must be adopted in the honest and good faith belief that it is necessary to the fulfillment of a legitimate work-related purpose.

3. The mandatory retirement provision must be reasonably necessary to the accomplishment of the legitimate work related purpose. 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 or the union. (Recent cases have indicated that there must be proof that accommodation will necessarily produce undue hardship; see: *Hydro-Québec v Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, 2008 SCC 43. In addition, they have indicated that health, safety and cost are not the only factors to be considered in deciding whether undue hardship has been reached.)

In this case, at issue was the third *Meiorin* factor. Air Canada and ACPA argued that reinstating the two pilots would cause undue hardship. First, there were age limitations on flying internationally and also, ACPA argued that removal of mandatory retirement would limit the number of positions available to pilots under age 60. Also, the removal of the age 60 provision would require ACPA and Air Canada to renegotiate their collective agreement. The Tribunal

noted (2009 CHRT 24 at para. 133) that removal of the mandatory retirement provision would likely result in a delay but not a denial of progression in the careers of younger pilots. Also, the international age requirements could be met if the two pilots flew as first officers rather than captains. Finally, the Tribunal noted that the respondents had not provided sufficient evidence that the renegotiation of the collective agreement would constitute undue hardship. Thus, the Tribunal concluded that the respondents had not established that mandatory retirement was a BFOR under the *CHRA*.

In a separate decision on remedy (2010 CHRT 27) the Tribunal ordered the following remedies (at para. 174):

1. Air Canada is to cease applying s. 5.1 of the Air Canada Pilots Pension Plan and the corresponding provisions of the collective agreement plan to Vilven and Kelly;
2. Kelly and Vilven are to be reinstated to employment as pilots with Air Canada on the condition that they have a valid pilot licence, a valid medical certificate showing that they are fit to fly a commercial aircraft, and a current instrument flight rating;
3. Upon reinstatement, Kelly and Vilven to be enrolled in the next available training course for the equipment that they are entitled to fly according to their seniority. Once they successfully complete their training, they shall be scheduled to fly at the next opportunity for monthly bidding and placed on the pilot position list;
4. Vilven to hold seniority number 751 and Kelly, seniority number 5 on the pilots' seniority list;
5. Once reinstated, Vilven and Kelly to receive the wages and benefits of an active employee including continual accrual of pension benefits on the same terms and conditions as before their retirement;
6. Kelly and Vilven to be compensated for lost income since September 1, 2009. The compensation will include any profit sharing/bonus paid in that period.
7. The compensation for lost wages to be net of the amounts of pension paid to Kelly and Vilven since September 1, 2009.
8. Respondents to pay interest on the compensation (since September 1, 2009).
9. Air Canada and ACPA each to pay 50 percent of the compensation and profit sharing/ bonus and interest payable.

It appears then, that s. 15(1)(c) of the *CHRA* is unconstitutional, as it was found by the Federal Court to violate *Charter* s. 15(1), and then found by the Canadian Human Rights Tribunal to be unjustified under *Charter* s. 1. Nevertheless, mandatory retirement provisions may be found not to be discriminatory if they are *bona fide* occupational requirements. It will usually be up to respondent employers to demonstrate that they cannot accommodate the individual to the point of undue hardship. This will have to be done on an individual assessment basis rather than by relying on a blanket policy or one that provides for the "normal age of retirement" for a particular profession.