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For the Second Time, Federal Court of Canada Judge Sends Mandatory Retirement Case Back to Canadian Human Rights Tribunal

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Cases Considered:

Air Canada Pilots Association v Kelly and Vilven, 2011 FC 120 ("*Vilven and Kelly #2"*)

Recently Justice Anne Mactavish of the Federal Court sent *Air Canada Pilots Association v Kelly and Vilven*, 2011 FC 120 ("*Vilven and Kelly #2"*), a mandatory retirement case, back to the Canadian Human Rights Tribunal for the second time. I have described the earlier cases here and here.

Previously, the Federal Court found that the Tribunal was in error when it ruled that section 15(1)(c) *Canadian Human Rights Act*, RSC 1985, c.H-6 (*CHRA*), which allows mandatory retirement, was not age-based discrimination. The Tribunal determined that section 15(1)(c) was age-based discrimination under the *Canadian Charter of Rights and Freedoms* (*Charter*), and that it could not be saved by *Charter* section 1. Second, the Tribunal held that even if section 15(1)(c) were saved by *Charter* section 1, Air Canada's mandatory retirement policy did not come within the exception in the *CHRA* that allows (age) discrimination where it is a *bona fide* occupational requirement (BFOR).

When the case arrived at the Federal Court for the second time, Justice Mactavish ruled that the Tribunal had acted unreasonably when it failed to acknowledge and analyze the evidence Air Canada had submitted to support its claim that an age limit of 60 for airline pilots is a BFOR.

The BFOR defence (or exception) exists in most human rights legislation across Canada. The Supreme Court of Canada has developed legal factors to be considered when determining whether an occupational requirement is indeed *bona fide* (see *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 SCR 3 *(Meiorin Grievance))*. These include:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) that 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. (*Meiorin Grievance* at para 54)

With respect to considering whether it is impossible to accommodate an employee without imposing undue hardship on an employer, factors considered by courts and tribunals include cost, safety, employee morale, interference with other employees' rights, and disruption of the collective agreement. However, *CHRA* section 15(2) states:

> (2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(*g*) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost. [emphasis added]

In 2007 (see *Vilven and Kelly v Air Canada and Air Canada Pilots Association*, 2007 CHRT 36), the Tribunal held that it was not limited by the factors listed in *CHRA* section 15(2) (health, safety, and cost) and could also consider other factors, such as employee morale and mobility (etc.). Justice Mactavish ruled that the Tribunal's interpretation of section 15(2) was unreasonable, given that the wording of the statute indicated Parliament's intention to limit the factors to be taken into account in an accommodation analysis under the *CHRA*. Justice Mactavish noted that the wording of section 15(2) indicated that strong inference could be made that these three specific matters are exhaustive. However, Justice Mactavish also noted that the breadth of the factors considered had no bearing in this case because the issue of BFOR and undue hardship related to cost-related operational matters (and cost is listed in section 15(2)) (*Vilven and Kelly #2* at para 404). Thus, the issue of the factors of undue hardship to be considered under section 15(2) is not yet settled.

Justice Mactavish returned the matter to the Tribunal because she held that the Tribunal had acted unreasonably by failing to acknowledge and analyze the evidence that Air Canada had submitted to support its claim that age 60 is a BFOR. In particular, she was concerned about the Tribunal's treatment of the evidence of flight operations expert Captain Steven Duke about the unworkability of scheduling pilots who are over 60 and under 65, and first officers who are over 60. Captain Duke had opined that additional pilots would have to be hired by Air Canada to ensure that all flights are properly staffed and that it would also have to continue paying over-60 pilots whose services could not be used (*Vilven and Kelly* #2 at paras 436 to 464).

Justice Mactavish did not comment on the merits of Captain Duke's evidence. Even after a detailed second look at the evidence, the Tribunal could still reach the same conclusion as it did in 2009. This is especially so since courts often defer to the expertise of specialized tribunals, such as the Canadian Human Rights Tribunal.

In the meantime, Vilven is now 67 and Kelly is 65, and this case does not seem to be close to being resolved.