

# **UP IN THE AIR: *VILVEN V. AIR CANADA* AND THE FUTURE OF MANDATORY RETIREMENT**

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## INTRODUCTION

On February 3, 2011, the Federal Court of Canada issued the latest decision in *Vilven v. Air Canada*, the prolonged legal battle of two Air Canada Pilots who are challenging their forced retirement at the age of 60. In that decision, Justice Mactavish returned the complaint to the Tribunal for a second time to determine whether Air Canada can justify mandatory retirement as a *bona fide* occupational requirement. This matter is not yet close to a final resolution, but nonetheless raises significant issues about the future of mandatory retirement.

## THE DECISIONS

When George Vilven and Robert Neil Kelly were retired by Air Canada shortly before their 60th birthdays in accordance with the mandatory retirement provisions of the collective agreement between Air Canada and the Air Canada Pilots Association (“ACPA”), the two pilots filed complaints with the Canadian Human Rights Commission, alleging discrimination on the basis of age.

In August 2007, the Canadian Human Rights Tribunal held that the mandatory retirement of pilots at the age of 60 did not discriminate on the basis of age within the meaning of the *Canadian Human Rights Act* (the “CHRA”). The Tribunal based its ruling on section 15(1)(c) of the CHRA, which provides that:

15(1) It is not a discriminatory practice if

...

(c) 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 Tribunal accepted Air Canada’s evidence that age 60 was the normal age of retirement for “employees working in similar positions,” namely pilots working for other major international carriers. The Tribunal therefore dismissed the complaint.

Vilven and Kelly applied for judicial review of the Tribunal’s decision, and on April 9, 2009, the Federal Court of Canada granted their application. Justice Angela Mactavish concluded that section 15(1)(c) of

the CHRA violated section 15(1) of the *Charter of Rights and Freedoms* (the “*Charter*”), which provides that:

Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Justice Mactavish set aside the Tribunal’s decision and remitted the matter to the Tribunal for further determination as to whether the limitation in section 15(1)(c) of the *CHRA* could be justified under the saving provision of the *Charter*, which allows limits on *Charter* rights if they can demonstrably be justified as reasonable.

The Tribunal issued a second decision on August 28, 2009. It found, upon reconsideration, that section 15(1)(c) of the *CHRA* could not be saved as a reasonable limit on Vilven and Kelly’s equality rights under the *Charter*. Accordingly, Air Canada could not justify its mandatory retirement policy on the basis of the “normal age of retirement for employees working in positions similar to the position” of Vilven and Kelly. The Tribunal also found that the mandatory retirement policy could not be justified as a *bona fide* occupational requirement for Air Canada pilots specifically.

In making its argument that mandatory retirement at the age of 60 was a *bona fide* occupational requirement, Air Canada relied heavily on the standards established by the International Civil Aviation Organization (“ICAO”) established in November 2006, which only permit pilots over the age of 65 to fly internationally if another pilot on the multi-pilot crew is under the age of 60. Given the ICAO rule, Air Canada argued that existing pilots under 60 would experience a material decrease in the quality of their flight schedules, and that it would be required to hire new pilots to ensure that its flights were properly staffed while continuing to pay over-60 pilots who could not be scheduled. In Air Canada’s view, this amounted to undue hardship. In dismissing the *bona fide* occupational requirement argument, the Tribunal found that the quality of Air Canada’s evidence in this respect was “lacking.”

Following additional submissions on the various remedies sought by the complainants, which included reinstatement, restoration of seniority and service, damages for lost income, and lost pension and other benefits, the Tribunal issued a supplementary decision dated November 8, 2010 in which it ordered Air Canada to reinstate Vilven and Kelly with full retroactive seniority and compensation up until the date of reinstatement.

This time Air Canada applied to the Federal Court of Canada for judicial review of the Tribunal's decision. Mactavish J. found no fault with the Tribunal's determination on the section 1 *Charter* issue. She found, however, that Tribunal had erred in finding that Air Canada had not established that mandatory retirement at age 60 is a *bona fide* occupational requirement for its pilots. She noted that the Tribunal had unreasonably overlooked the evidence tendered by Air Canada with respect to the scheduling difficulties that it would experience in complying with ICAO requirements. She also found that the Tribunal had overlooked the significant increase in compensation costs, given that the average pilot's compensation was approximately \$177,000.00 per year.

Noting that the Tribunal had not provided any explanation as to why it had found Air Canada's evidence to be "lacking," Mactavish J. ruled that the Tribunal's *bona fide* occupational requirement analysis was unreasonable and sent the matter back to the Tribunal for re-determination on the evidence in the existing record.

Although she found the Tribunal's failure to consider Air Canada's evidence to be unreasonable, Mactavish J. did not make any pronouncement on the merits of the evidence itself. It is still possible that the Tribunal will, on further consideration, find that Air Canada's evidence with respect to the ICAO requirements does not establish a *bona fide* occupational requirement. Accordingly, it remains to be determined whether Air Canada will be able to justify its mandatory retirement policy.

### **SO WHAT DOES THIS MEAN FOR EMPLOYERS?**

The outcome of the *Vilven* case could have serious implications in the Federal sector, and employers are watching this saga with interest. One area of concern is the significant retroactive compensation and seniority awarded by the Tribunal. Not only does this raise the spectre of costly awards in similar complaints, but it also raises serious practical questions about the reintegration of employees who have been terminated under mandatory retirement policies. *Vilven* and *Kelly* are now 67 and 65, respectively, and have been out of the workforce for a number of years. Their reinstatement would require Air Canada to provide significant retraining, and would also negatively affect the more junior pilots in the bargaining unit in terms of their access to preferred flying schedules and compensation.

*Vilven* also raises the spectre of the end of mandatory retirement in the Federal sector. Most provincial employers have now weathered the

abolishment of mandatory retirement. Federal employers can anticipate similar challenges.

In addition to concerns about increased costs for health and pension benefits, employers may also have concerns about the increased cost of the duty to accommodate older workers. While it should not be assumed that older workers will require accommodation, the practical reality is that an aging workforce is more likely to require accommodation for vision loss, hearing loss, declining mobility and cognitive decline.

Employers will have to carefully consider the extent to which they must go to accommodate employees up to the point of undue hardship. Vilven clearly highlights the difficulties that employers will face in attempting to establish an age-related *bona fide* occupational requirement.

Many employers have historically considered mandatory retirement to be a cost-effective way of discharging older employees who are non-productive. If this option is no longer available, it will no longer be sufficient for employers to “wait it out.” A performance-based termination can be rendered more complicated and costly by an allegation of age discrimination, and employers will be required to develop strategies to effectively manage the performance of older employees.

Employers will also have to consider whether their existing hiring practices are discriminatory and consider what strategies they might employ to make their workplaces “senior friendly.” The abolishment of mandatory retirement also requires a reconsideration of the proper balance between succession planning and retaining and attracting older workers to their workplace in order to maintain a workplace with the necessary experience and skills.

While the final outcome of this case is certainly “up in the air,” employers in the Federal sector will have to address the challenges of managing an older workforce. Early recognition of that reality and the implementation of sound human resource practices and policies to deal with these issues will help employers avoid problems in the workplace and associated legal proceedings.