

AIR CANADA IS ORDERED TO REINSTATE TWO PILOTS FORCED TO RETIRE

Vilven v. Air Canada, 2010 CHRT 27

On November 8, 2010, the Canadian Human Rights Tribunal issued a decision ordering Air Canada to reinstate two of its pilots, George Vilven and Robert Neil Kelly (the “complainants”), who were required to retire upon reaching age 60. The two pilots (now 67 and 65) had been forced to retire in accordance with the mandatory retirement provisions of the collective agreement in force between their union, the Air Canada Pilots Association (“ACPA”) and Air Canada (the “respondents”).

Prior Decisions

The November 8, 2010 decision followed a series of earlier rulings involving a complaint by Air Canada pilots of discrimination against Air Canada and the ACPA. The complaints have challenged the exceptions with respect to age under the *Canadian Human Rights Act* (“CHRA”).

In 2007, the Tribunal had upheld the mandatory retirement provision for pilots, as 60 was found to be the normal age of retirement for such positions, and dismissed the complaints. The Tribunal had found that although the policy mandating retirement at age 60 adversely affected the complainants, the Tribunal applied the exception contained in 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 pilots' application for judicial review was allowed by the Federal Court of Canada on April 9, 2009. The main issues for the Federal Court were whether 60 was a normal age of retirement for people in the position of airline pilots and whether section 15(1)(c) of the *CHRA* was a violation of the equality guarantee under section 15(1) of the *Charter of Rights and Freedoms* (“*Charter*”), which provides that,

Every individual is equal before and under the law and has the right to the 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.

The Federal Court disagreed with the Tribunal and determined that while 60 is the normal age of retirement for pilots, section 15(1)(c) of the *CHRA* violates section 15 of the *Charter*. The Court set aside and remitted the decision back to the Tribunal for further determination on whether the limitation posed by section 15(1)(c) of the *CHRA* was justified as a reasonable limit on the right to equality under section 1 of the *Charter*.

The Tribunal's August 28, 2009 Decision on Discrimination

Following its further analysis, the Tribunal found that the infringing section 15(1)(c) of the *CHRA* was not a reasonable limit on the rights of the Air Canada pilots to equality under the *Charter*. The Tribunal also found that the mandatory retirement provision was not a *bona fide* occupational requirement within sections 15(1)(a) and 15(2) of the *CHRA*.

The Tribunal did not, at that time, rule on the numerous remedies sought by the complainants, which included, reinstatement, restoration of seniority and service, damages for lost income, as well as lost pension and other benefits. Rather, the Tribunal requested additional evidence and submissions with respect to these remedies to be presented at a further hearing.

The Tribunal's November 8, 2010 Decision on Remedies

On November 8, 2010, the Tribunal ruled that the appropriate remedy in the circumstances of Mr. Vilven and Mr. Kelly was to order Air Canada to reinstate them with seniority and compensation. The complainants were to be reinstated once they demonstrated that they met the normal eligibility requirements. These requirements included having a valid pilot's licence, a valid medical certificate showing they are fit to fly a commercial aircraft and an appropriate instrument flight rating. Further, once the complainants completed the next available training course for the particular equipment they were entitled to fly based on their seniority, they would return to flying.

The Tribunal also awarded compensation from September 1, 2009 until the complainants' date of reinstatement. The Tribunal refused to order compensation to be retroactive to the date of the complainants' retirement. According to the Tribunal, its August 28, 2009 decision was a "clear departure from the existing state of the law", prior to which, "section 15(1)(c) of the *CHRA* was available as a defence for employers to a claim that a mandatory retirement policy was discriminatory." Given the state of the law prior to August 28, 2009, the Tribunal found that the respondents acted in "good faith and reasonably" in applying the mandatory retirement policy. The Tribunal determined that limiting compensation to the complainants from September 1, 2009 to the date of reinstatement would strike a balance between the litigants. On the one hand, the respondents would not have the burden of damages for a policy that was legal at the time. On the other hand, the complainants would be compensated from the time the mandatory retirement policy was declared illegal.

The Tribunal rejected the complainants' claim of \$20,000 each for pain and suffering as the facts did not meet the standard for egregious discriminatory practice. Rather, the Tribunal found that the complainants were aware of the mandatory retirement age of 60 when they commenced employment with Air Canada. The complainants did not challenge this, however, until after they were forced to retire at age 60. The Tribunal also found that the complainants actually benefited from mandatory retirement at Air Canada because they were able to advance in seniority more quickly as the pilots ahead of them who were more senior were obliged to retire at age 60.

The Tribunal further rejected the complainants' claim for damages on the basis that Air Canada and the ACPA acted "wilfully and recklessly". The Tribunal found that until its August 2009 decision, the respondents were entitled to and did rely on the established legal authorities which

had held that such a mandatory retirement policy did not offend the *Charter* or human rights legislation.

The Tribunal also refused to issue an order requiring the respondents to cease applying the mandatory retirement provisions of the pension plan and in the collective agreement, thereby eliminating mandatory retirement for all Air Canada pilots. The Tribunal held that the present case did not involve a complaint of systemic discrimination. Rather, it was case of “two separate individual complainants with the same complaint” and the Tribunal would not award a remedy that would “extend beyond...individual complaints.”

The Tribunal reaffirmed its earlier ruling that its finding that section 15(1)(c) of the *CHRA* offends the *Charter* is not a legal precedent and is applicable only to the facts of this case. The Tribunal held that section 15(1)(c) of the *CHRA* remained “operative and may be relied upon by other respondents as a defence to any other outstanding or future complaints regarding the mandatory policy in question.”

Commentary

Despite the Tribunal’s ruling that its decision does not constitute a precedent, administrative tribunals may rely on the reasoning in this case when deciding the outcome of future challenges to exceptions to mandatory retirement in human rights legislation.

The Tribunal’s November 8, 2010 decision may not, however, be the last the word in this matter. On September 29, 2009, the ACPA filed an application for judicial review of the Tribunal’s August 28, 2009 decision. The judicial review application was to be heard by the Federal Court on November 22, 2010. The Tribunal’s November 8, 2010 decision is also under review. Air Canada filed its judicial review application on December 7, 2010. The two complainants filed theirs on December 8, 2010. Further developments will be posted as they become available.

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