

DECISION RENDERED ON OCTOBER 28, 1981  
T.D. 10/81

THE CANADIAN HUMAN RIGHTS ACT

BETWEEN:

Douglas Campbell

Complainant,

- and -

Air Canada

Respondent.

Before: F.D. Jones, Q.C., appointed a Human Rights Tribunal pursuant to Section 39 of the Act.

Appearances: R.G. Juriansz, representing Canadian Human Rights Commission and Douglas Campbell.

R. Patrick Saul, representing Air Canada.

Heard in Vancouver, Canada, on August 12, 1981.

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THE CANADIAN HUMAN RIGHTS ACT  
HUMAN RIGHTS TRIBUNAL

BEFORE:

Frank D. Jones

BETWEEN:

DOUGLAS CAMPBELL

Complainant

- and -

AIR CANADA

Respondent

The parties before the Tribunal presented an Agreed

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Statement of Facts which contained the following:

"AGREED STATEMENT OF FACTS

1. The Complainant was born in England on the 30th day of December, 1918.
2. The Complainant commenced employment with the Respondent on the 17th day of November 1947 and was continuously employed with the Respondent until his retirement at age 60 which took effect on the 1st day of January, 1979.
3. During the first twelve years of his employment with the Respondent, the Complainant was a flight attendant. The following twelve years he was employed in an administrative position at the Respondent's headquarters. During the final seven years of his employment with the Respondent, the Complainant was a flight attendant again.

4. By internal correspondence dated the 18th day of September, 1978, the Complainant was informed by E.M. Zakala, Personnel Administration and Scheduling Manager of the Respondent as follows:

'In accordance with company policy, the mandatory retirement date for Cabin Personnel is the first day of the month following the month in which the employee reaches age sixty.

'Your retirement date will, therefore, be December 31, 1978.'

5. On the 23rd day of May, 1979, the Complainant filed a complaint under section 32 of the Canadian Human Rights Act, S.C. 1976-77, c. 33 with the Canadian Human Rights Commission alleging that the Respondent had engaged in a discriminatory practice based on age when it retired him at the age of 60. The particulars of his complaint are:

'In accordance with company policy, I was retired at age 60. I feel that this policy is completely arbitrary, and has no demonstrable relationship to the duties associated with the flight attendant position.'

6. Upon being retired by the Respondent, the Complainant worked for Mohawk Oil Co. Ltd. of Burnaby, B.C. where he had been employed on a part-time basis while working for the Respondent.

7. The Complainant died on the 15th day of October, 1980.

8. The number of flight attendants employed with major airlines and the applicable mandatory retirement ages as of December 31, 1978 are as follows:

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(a) Canadian carriers  
Retirement Number of  
Age Flt/Attdts  
Air Canada 60 3131  
C.P. Air 60 1200  
Eastern Provincial Airways 65 120  
(no attendants over 40)  
Great Lakes Airlines 65 21  
(Air Ontario since April 1981)  
(no attendants over 40)  
Nordair 65 220  
Pacific Western Airlines 65 650  
Quebecair 65 120  
(oldest attendant age 36)  
Wardair 60 650

(b) American carriers  
Alaska Airlines 62 not readily  
Aloha Airlines 60 available for

American Airlines 65 remaining  
Braniff Airlines 55 carriers  
Continental Airlines 60  
Delta Airlines 65

[American carriers, continued]

Eastern Airlines 62  
Frontier Airlines 60  
Hawaiian Airlines 60  
Hughes Airwest 60  
National Airlines 65  
Northwest Airlines 65  
Ozark Airlines 65  
Pan American Airlines 60  
Republic Airlines 65  
Trans World Airlines 60  
United Airlines 60  
U.S. Air 65  
Western Airlines 65

(c) European Carriers

Air France 50  
British Airways 55  
Lufthansa 55 3520

9. For the year 1978 the Complainant earned wages in the gross amount of \$20,098.40 working on a full-time basis for the Respondent.

10. In 1978 the Complainant earned a gross amount of \$6,831.34 working part-time for Mohawk Oil Co. Ltd.

In 1979 the Complainant earned a gross amount of \$10,559.57

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from Mohawk Oil Co. Ltd.

From January to October of 1980 the Complainant earned a gross amount of \$9,730.16 from Mohawk Oil Co. Ltd.

11. At the date of his retirement the Complainant was participating in the Respondent's life insurance plans by virtue of which his life was insured in the following amounts:

(a) Compulsory Group Life Insurance  
(Great-West Life) non-contributory

amount: (1) death during active service or  
within 31 days following  
retirement \$25,000

(2) death following 31st day following  
retirement 25% of active value,  
i.e. \$ 6,250

beneficiary: wife

privileges: right upon retirement to convert to personal life insurance of same value with Great West Life without evidence of insurability, rates prevailing at retirement date.

(b) Supplementay Group Life Insurance (Empire Life Insurance Company) contributory amount: (1) death during active service \$33,000 (2) death during retirement nil

beneficiary: unknown

privileges: right upon retirement to convert to personal life insurance of same value value with Empire Life Insurance without evidence of insurability at rates prevailing at retirement date.

Upon the Complainant's death in 1980, his estate received the following life insurance benefits:

(a) Mohawk Oil Co. Ltd. Insurance Plan  
- \$33,000.00

(b) Air Canada Retired Employees Benefit Plan (Great-West Life) - Group Policy No. 4745GL  
- \$6,250.00

12. Pursuant to the provisions of the Respondent's pension plan the Complainant received \$920.00 a month in pension benefits from January of 1979 until October of 1980.

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13. We agree that the facts stated herein are true. The Canadian Human Rights Act, section 7, reads as follows:

"7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee

on a prohibited ground of discrimination."

Section 3 of The Canadian Human Rights Act reads as follows:

"3. For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap, are prohibited grounds of discrimination."

Section 14 of The Canadian Human Rights Act reads as follows:

"14. 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; ..."

It was common ground between the parties that there are two facets to the exception enumerated in section 14 quoted above. The first of these facets is "normal age of retirement" and the second of these facets is "employees working in positions similar to the position of that individual".

It was conceded by Counsel for The Canadian Human Rights Commission that Air Canada had complied with the first facet requirement. That is, Air Canada had retired Mr. Campbell at the "normal age of retirement". On page 51 and page 52 of the transcript, the following is noted:

" MR. JURIANZ: That is correct. Mr. Campbell was retired at a normal age of retirement but there are two phrases we have to deal with, 'normal age of retirement' and 'working in positions similar'. My argument is not that if you retire somebody at the normal age of retirement you are within the exception. You have two -

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MR. CHAIRMAN: You have two facets to it.

MR. JURIANZ: Right.

MR. CHAIRMAN: But are you now

MR. JURIANZ: I will address the second facet. I will proceed to the second facet

MR. CHAIRMAN: Okay. I would like to though -

MR. JURIANZ: I concede that Air Canada is within the first facet.

MR. CHAIRMAN: Fine. That is just what I was going to ask.

And also at page 56, the following is found:

" MR. CHAIRMAN: I follow that and coming back to the two points which must be fulfilled under The Canadian

Human Rights Act, why hasn't Air Canada fulfilled point one or if in fact have they in your submission?

MR. JURIAN SZ: They have, they have.

MR. CHAIRMAN: They have?

MR. JURIAN SZ: They have.

MR. CHAIRMAN: So as far as the two part requirement in your submission, part one has in fact been fulfilled by Air Canada?

MR. JURIAN SZ: They have retired Mr. Campbell at a normal age of retirement.

MR. CHAIRMAN: Thank you. That is what was confusing me."

However, it was urged upon me by Counsel for The Human Rights Commission that it would be useful if a broader view was taken as to interpreting these words which might be of some assistance in circumstances where these words were at issue.

As I understand the argument of the Commission, it is to the effect that the words "normal age of retirement" are used as words of art with a special meaning. It was urged upon me that the insurance industry recognizes these words to a special meaning insofar as their industry is concerned to the effect that "normal age of retirement" means retirement with a

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full pension.

With respect, I do not view these words as words of art and do not feel that the insurance industry useage of these words can be adopted in The Canadian Human Rights Act without specific provision to so adopt. The normal canon of statutory interpretation is that words are to be given their clear and normal meaning, unless there is something to indicate that the words are being used in a special sense. In my opinion there is nothing in The Canadian Human Rights Act to indicate these words are being used in any special sense and therefore would reject the argument that they are words of art with a particular or special meaning.

Turning to the second facet of the exception "employees working in positions similar to the position of that individual". The question arose as to what employees and what positions should be looked to in order to ascertain if a particular practice comes within the exception of section 14. It was urged by Counsel for The Human Rights Commission that when looking at similar positions, one should look at the widest field; on the other hand it was urged by Counsel for Air Canada that the comparable should be confined to Air Canada itself because of the use of the word "employees" which, in his submission, meant employees of, in this instance, Air Canada.

I reject the argument that one is confined in seeking comparables to looking solely within the company itself. This

would lead to an absurd situation where, for instance, Air Canada might retire all of its employees at age 30 and if this construction were accepted, this would be the normal age within the company.

I also reject the proposition that one should look world-wide for one's comparables. In my opinion, there is a social context which is inherent in the wording of the statute. That is, the statute is attempting to provide a measure by which an exception to what would otherwise be a discriminatory practice, might be measured. This is a Canadian statute and, in my opinion, the measure should be a Canadian measure to be applied in this instance.

Having arrived at this conclusion, the information given on page 3 with respect to retirement age of Canadian carriers, one is faced with the usual statistical problem of how does one interpret these statistics. If one takes the number of carriers, it would seem that the normal age of retirement for employees working in positions similar to the position of the Complainant, would be age 65 in that 3 carriers have a retirement age of 60 and 5 carriers have a retirement age of 65. However, if one is to take the number of flight attendants in the industry in Canada, by far the majority retire at age 60, i.e., 4981 out of 6112 or 81.49%.

In considering what statistical basis should be adopted, the wording of The Canadian Human Rights Act in section 14 (c) stipulates "positions". Therefore, it should be the number of

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positions which govern the norm; in this case that would lead to the normal age of retirement being age 60.

This conclusion is strengthened if one considers that it would be unreasonable that a very small airline such as Great Lakes Airlines should be weighted on an equal footing in determining an industry norm as a very large airline such as Air Canada or C.P.A.

The main danger in deciding to take the number of flight attendants as the statistical base, is that one dominant corporation might set the industrial norm, although in the present circumstances, this is tempered with the fact that the retirement age is a negotiated item between the Union and the Company.

When The Canadian Bill of Rights was being considered at the committee stage, Mr. Basford stated:

" 'Some members of parliament and I am thinking particularly of the member of Fundy Royal, Mr. Fairweather, Mr. Green would have expressed concern over the provision in paragraph 14(c) that it is not a discriminatory practice to terminate an individual's employment because he or she has reached the normal retirement age for persons working in similar positions. I am not sure I actually understand the concern

expressed. I would invite the honourable members to clarify it for me. I would also invite the comments of the members of the committee as to what alternative exists as to the type of provision set out in paragraph 14(c). Any comments in doing so I would like to point out that the determination of retirement age in the Federal public sector is a matter of legislation or regulatory policy. In the private sector this is a matter which has traditionally been left to be determined between employer and employee. Such determinations which I take some members feel should be made by the Human Rights Commission involve many complex social and economic factors. It seems to me the question of whether this type of intervention by the commission in the labour market would be desirable.' "

Also, Mr. Strayer in his remarks to the Committee stated as follows:

" 'What clause 14(c) means is that as long as the individual is obliged to retire at the same age as everyone else in his kind of employment then it would not be treated as a discriminatory act to ask him to retire. The problem is in knowing what to do to go beyond that. As the minister says in this statement, public service employment which is one of the largest areas of employment covered by the bill is already governed by law

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as far as the retirement age is concerned. As for the rest I believe that retirement is often a matter of collective bargaining. It is also a matter of personal negotiation and as far as we could determine the next best arrangement would be to somehow enable the commission to review what was a reasonable retirement age in that particular employment. I think that is the real -' "

"And then Mr. Fairweather says:

'I must say I think that is right. Perhaps the critics here are trying to move into the Human Rights field, an area which should be discussed in public service superannuation or other labour legislation. I guess it is important to raise it now as we go through the bill.' "

#### JUDGMENT

For the above reasons, it is my judgment that the mandatory retirement age of 60 that Air Canada applies to its flight attendants comes within the exception enumerated in section 14(c) of The Canadian Human Rights Act, and therefore such is not a discriminatory practice.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of October, 1981.



F.D. Jones, Q.C.