

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE**

GEORGE VILVEN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AIR CANADA

Respondent

- and -

**AIR CANADA PILOTS ASSOCIATION
FLY PAST 60 COALITION**

Interested Parties

AND BETWEEN:

ROBERT NEIL KELLY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

**AIR CANADA
AIR CANADA PILOTS ASSOCIATION**

Respondents

DECISION

PANEL: J. Grant Sinclair 2007 CHRT 36
Karen A. Jensen 2007/08/17
Kathleen Cahill

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I. INTRODUCTION

[1] George Vilven and Robert Neil Kelly were pilots with Air Canada. Mr. Vilven was employed by Air Canada from May 26, 1986 to September 1, 2003, when his employment with Air Canada was terminated. Mr. Vilven turned 60 on August 30, 2003. Mr. Kelly joined Air Canada on September 11, 1972 and his employment with Air Canada ended on May 1, 2005. He attained 60 on April 30, 2005.

[2] Mr. Vilven and Mr. Kelly were required to retire from Air Canada at age 60 in accordance with the mandatory retirement age provisions of the Air Canada Pilots Pension Plan which is incorporated into the collective agreement between Air Canada and the Air Canada Pilots Association (ACPA), the union that represents Air Canada pilots.

[3] The relevant section of the Pension Plan provides that every pilot's employment with Air Canada shall be terminated no later than the first day of the calendar month following which the pilot reaches 60.

[4] Both Mr. Vilven and Mr. Kelly want to continue flying as pilots with Air Canada. Both filed complaints with the Canadian Human Rights Commission (CHRC); Mr. Vilven on August 5, 2004 and Mr. Kelly on March 5, 2006. In their complaints, they alleged that Air Canada discriminated against them on the basis of age, contrary to sections 7 and 10 of the *Canadian Human Rights Act (CHRA)* by requiring them to retire at age 60. Mr. Kelly also filed a complaint against ACPA, alleging a contravention of ss. 9 & 10 of the *CHRA*.

[5] The Tribunal granted interested party status to ACPA in relation to Mr. Vilven's complaint. It also granted interested party status to the Fly Past 60 Coalition (Coalition) which is a group of pilots or former pilots of Air Canada who are united in their goal of eliminating the mandatory retirement age at Air Canada. At the request of the parties, the Tribunal joined the three complaints and all were dealt with at the one hearing.

[6] The Coalition filed a Notice of Constitutional Question in which it challenged the constitutionality of s.15(1)(c) of the *CHRA* alleging that it contravened s.15(1) of the *Canadian Charter of Human Rights and Freedoms (Charter)* and was not justified under s. 1 of the *Charter*.

II. DECISION

[7] For the reasons that follow, the Tribunal has concluded that the complaint of Mr. Vilven against Air Canada and the complaints of Mr. Kelly against Air Canada and ACPA have not been substantiated and are therefore dismissed. The Tribunal finds that age 60 is the normal age of retirement, within s. 15(1)(c) of the *CHRA*, for persons working in positions similar to the positions of the complainants. As such the mandatory retirement policy of Air Canada does not constitute a discriminatory practice under the *CHRA*. The Tribunal also finds that s. 15(1)(c) of the *CHRA* does not contravene s. 15(1) of the *Charter*.

III. FACTS

A. Mr. Vilven

[8] Mr. Vilven was hired as a Pilot in Training by Air Canada on May 26, 1986. He was qualified as a Second Officer on a B-727 aircraft on September 11, 1987. Under the collective agreement, pilots use their seniority rights for professional advancement, which includes the aircraft that they will fly, the status that they will hold (Captain, First Officers or Relief Pilots) and the base from which they will fly.

[9] Mr. Vilven used the seniority that he accrued during his tenure at Air Canada to move from being a First Officer on a B-727 aircraft, to eventually becoming a First Officer on an A340 based in Vancouver, effective August 1, 2000. Mr. Vilven chose not to become a pilot in command of an aircraft, but instead to use his seniority to remain a pilot on an A340 and to obtain a base in Vancouver where he could be near his family.

[10] Mr. Vilven's last flight with Air Canada took place on August 24, 2003, just short of his 60th birthday, en route from Seoul to Vancouver, piloting an A340.

[11] Under the terms of the Pension Plan in effect on September 1, 2003, Mr. Vilven was credited with 17.3334 years of allowable service with Air Canada. He was also credited with 5.5833 years pre-employment military service, for a total of 22.9167 allowable years of service for purposes of calculating his pension. Under the pension option he selected,

Mr. Vilven now receives a pension payment of \$6,094.04 per month until the age of 65 and of \$5,534.33 after age 65 until his death.

[12] Since the termination of his employment with Air Canada, Mr. Vilven has continued to pursue his flying career. He flew with Flair Airlines from April 2005, until May 2006. He holds a valid airline transport pilot's licence with the highest category and standing of instrument rating. It is valid to December 1, 2007. Mr. Vilven ceased flying for Flair Airlines in order to prepare for the hearing in this matter.

B. Mr. Kelly

[13] Mr. Kelly was hired by Air Canada on September 11, 1972, as a DC-8 Second Officer. He flew a number of aircraft in various positions until he was promoted to Captain on January 16, 1992. Mr. Kelly used his seniority within Air Canada to advance from being pilot in command on a B-727 to being pilot in command on an A340.

[14] Mr. Kelly's last flight with Air Canada took place just short of his 60th birthday, on April 30, 2005, en route from Hong Kong to Toronto piloting an A340-500.

[15] Under the terms of the Pension Plan in effect on May 1, 2005, Mr. Kelly was credited with 32.6667 years of allowable service with Air Canada for purposes of calculating his pension. Under the pension option he selected, Mr. Kelly now receives a pension payment of \$10,233.96 per month until the age of 65 and of \$9,477.56 after age 65 until his death.

[16] Following his termination from Air Canada, Mr. Kelly has continued to pursue an active aviation career, and has continuously held a valid air transport pilot's licence with Category 1 Medical Certification.

[17] In 2005, he flew as a contract First Officer on a B757/767 aircraft with Skyservice Airlines to Europe and the Caribbean. He continues to fly as a contract Captain with Skyservice on B757 equipment on international flights.

[18] Mr. Kelly's most recent Category 1 Medical (No Waivers) was obtained on October 11, 2006. His most recent Licence and Instrument Rating Renewal was obtained on November 16, 2006 at an Air Canada B767 simulator in Toronto.

C. Pilot Careers at Air Canada

[19] Air Canada is a major international and interline carrier, flying domestic flights in Canada to several continents and regularly operating flights to 33 foreign states (including the United States).

[20] Air Canada offers the highest paying pilots jobs in Canada, with the best benefits and large amounts of interesting and lucrative long haul international flying. Its fleet has the largest, technologically-advanced aircraft in Canada, which pilots strive to fly. Flying for Air Canada is seen by many pilots as the best job for a commercial airline pilot in Canada. The number of pilot jobs at Air Canada has remained relatively stable between 2,500 and 3,000 for a number of years. The number of applicants for pilot jobs at Air Canada far exceeds the number of positions available.

[21] Pilots at Air Canada have been represented by ACPA since November 1995. Prior to that time, they were represented by the Canadian Air Line Pilots Association from 1945. Most of the terms and conditions of pilots' employment at Air Canada are set by the collective agreement between ACPA and Air Canada.

D. The Pension Plan

[22] Air Canada pilots are covered by a very generous pension plan. It has two parts: the first is the *Registered Retirement Pension Plan* governed by the *Income Tax Act* and the

federal *Pension Benefits Standards Act*; the second is the *Supplemental Pension Plan*. It provides pensions higher than the maximum permitted by the *Income Tax Act*. These supplemental pensions are funded by payments from Air Canada's general revenues. The pension plan benefits are part of the compensation package negotiated on behalf of Air Canada pilots by ACPA.

E. Seniority

[23] Seniority is very important to Air Canada pilots. Many important elements of a pilot's career are "bid" upon and awarded based on seniority. Thus, seniority dictates the pilot's status (i.e. Captain, First Officer or Relief Pilot), income, the base from which the pilot flies, the choice of schedules between pilots in the same positions, priority for vacations and protection against layoff. The career progression of a pilot and the salary that he or she earns is very much tied to seniority.

F. The Regulation of the Airline Industry

[24] Canada has no maximum licensing age for airline pilots. To be licensed in Canada, pilots must successfully pass a medical examination approved by Transport Canada. Pilots under the age of 40 must undergo a medical examination once a year. Pilots over the age of 40 must undergo a medical examination twice a year.

[25] Air Canada is subject to the standards and recommended practices developed by the International Civil Aviation Organization (ICAO) because Canada is a signatory (i.e. a Contracting State) to the Chicago Convention on International Civil Aviation (Chicago Convention). ICAO is a United Nations organization charged with fostering civil aviation safety and the development of world-wide standards for licensing pilots.

[26] ICAO has developed and adopted both standards and recommended practices for the maximum age of pilots flying commercial aircraft internationally. Age 60 was the maximum age for a pilot in command under the ICAO standards in effect at the time of Mr. Kelly's retirement. The ICAO standards in effect at the time of Mr. Vilven's retirement recommended, but did not require, that pilots acting as co-pilots on international flights not fly past their 60th birthday.

[27] A contracting state is free to adopt a maximum age for pilots that is lower than the ICAO standard. However, such lower maximum age will only apply to pilots licensed by the contracting state. It will not apply to foreign pilots from ICAO members who need only comply with the ICAO maximum age to fly into the contracting state.

[28] In March of 2006, ICAO passed an amendment to its maximum age standard for pilots. This new ICAO standard, which became effective on November 23, 2006, establishes 65 as the maximum age for pilots. It also establishes a standard that if one member of a multi-pilot flight crew is over 60, the other must be under 60. ICAO also recommends that First Officers cease international commercial flying at age 65.

IV. THE ISSUES

- A) where does the burden of proof lie under s. 15(1)(c) of the *CHRA*? To establish a *prima facie* case of discrimination, do the complainants have to show that they have not reached the normal age of retirement within s. 15(1)(c) of the *CHRA*? Or is the burden on the respondents to show that age 60 is the normal age of retirement for s. 15(1)(c) purposes?
- B) if the onus is not on the complainants to establish the normal age of retirement, have they otherwise established a *prima facie* case of discrimination based on age?
- C) if so, have the respondents demonstrated that age 60 is the normal age of retirement for pilots working in similar positions to the position of the complainants so that s.15(1)(c) applies?

D) if s. 15(1)(c) of the *CHRA* does apply, does s. 15(1)(c) of the *CHRA* contravene s. 15(1) of the *Charter*. If so, is s. 15(1)(c) justified under s. 1 of the *Charter*?

E) if s. 15(1)(c) contravenes the *Charter*, is the mandatory retirement age of 60 a *bona fide* occupational requirement (BFOR) under ss. 15(1)(a) and 15(2) of the *CHRA*?

[29] In addressing these issues, the Tribunal has considered the evidence as it was at September 1, 2003, the date when Mr. Vilven's employment was terminated. And for Mr. Kelly, May 1, 2005, the date when he was terminated. The reason for this is that the respondents should be accountable only for decisions made on the basis of the facts that existed when the alleged discriminatory acts occurred.

A. Who has the onus?

[30] In *Ontario Human Rights Commission et al v. The Borough of Etobicoke*, [1982] 1 S.C.R. 202, the Supreme Court of Canada stated that the onus is on the complainant to establish a *prima facie* case of discrimination. Subsequently, in *Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd.* [1985] 2 S.C.R. 536, the Court clarified that a *prima facie* case is one that covers the allegations made and which, if believed, is complete and sufficient for a decision in favour of the complainant, in the absence of a reasonable answer from the respondent. Once a *prima facie* case is established, the burden shifts to the respondent to provide a reasonable explanation.

[31] In *Stevenson v. Air Canada* [1984] 2 F.C. 691, which involved a challenge to s. 14(c) [now s. 15(1)(c)] under the *Canadian Bill of Rights*, the Federal Court of Appeal stated that s. 14(c) circumscribed or limited the protection provided under the *CHRA*. Only those who have not reached the normal age of retirement can complain about the termination of their employment on the basis of age.

[32] Nowhere in *Stevenson* does the Court discuss the burden of proof with respect to establishing a *prima facie* case of discrimination. Indeed, the terms *prima facie* and burden of proof are not used at all in the decision. This is understandable because the complaint had been dismissed by the Commission so that the Court was not called upon to review the burden of proof as it related to the *prima facie* case.

[33] Moreover, *Stevenson* pre-dates the Supreme Court's 1985 decision in *O'Malley*. In *O'Malley*, the Court found fault with the Ontario Board of Inquiry for requiring the Commission and the complainant to establish that the employer had not acted reasonably in all the circumstances of the case. That burden, it was said, must fall squarely on the shoulders of the employer since it is the employer who will be in possession of the necessary information to show undue hardship and the employee will rarely be in a position to show its absence. The Court stated that the assignment of the burden of proof to the appropriate party is an essential element of the process.

[34] The importance of following the *prima facie* test set out in *Etobicoke* and *O'Malley*, and respecting the shifting burdens of proof has been underscored in recent Federal Court of Appeal decisions (*Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, para. 18; *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154, para. 26).

[35] Indeed, Mr. Vilven testified during the hearing that he experienced considerable difficulty in attempting to obtain information about the ages of retirement and the mandatory retirement policies in other airlines in Canada and around the world. He stated that when he called and explained the reasons for his request, there was often resistance on the part of officials from other airlines to providing him with the information he requested. Air Canada, on the other hand, with some effort, was able to obtain a

considerable amount of data regarding the retirement policies and ages of airlines in Canada and around the world.

[36] It could be argued, as did the respondents, that a textual analysis of s. 15 of the *CHRA* comparing ss. 15(1)(a) and 15 (1)(c) of the *CHRA*, would support the conclusion that the burden should be on the complainants. Where the employer is to bear the burden in s. 15, it is expressly stated.

[37] Section 15(1)(c) is ambiguous as to the assignment of the burden. The Supreme Court of Canada has held that ambiguities in the *CHRA* must be interpreted by the Tribunal in a manner that furthers, rather than frustrates, the *Act's* objectives. (*Bell Canada v. C.T.E.A.*, [2003] 1 S.C.R. 884, para. 26; *C.H.R.C. v Canadian Airlines International Ltd.*, [2006] 1 S.C.R. 3). The chief objective of the *CHRA* is the promotion of equal opportunity unhindered by discriminatory practices (s. 2). It is a scheme for identifying and remedying discrimination.

[38] In light of the disadvantage that complainants generally have accessing informational and financial resources, assigning complainants the onus of demonstrating that they were not retired in accordance with the normal age for similar positions would frustrate the goal of identifying the presence of discrimination - or for that matter, its absence. It is certainly not the construction of the *CHRA* that best ensures the attainment of its objects. (*C.N.R. v C.H.R.C.* [1987] 1 S.C.R. 1114 at p.1134.)

[39] The goal of determining whether discrimination occurred is best ensured by assigning respondent-employers the onus of demonstrating that the complainants were retired in accordance with the normal age for similar positions.

B. Have the complainants and the Commission established a *Prima Facie* case of discrimination under ss. 7, 9 and 10 of the *CHRA*?

[40] Section 7 of the *Act* stipulates that it is a discriminatory practice to refuse to continue to employ an individual on the basis of a prohibited ground of discrimination. Age is one of the prohibited grounds of discrimination mentioned in s. 3 of the *Act*.

[41] As stated in the Joint Statement of Facts, the sole reason for the complainants' termination was the application of the mandatory retirement age provisions. At Air Canada, when a Captain or a First Officer reaches the age of 60, his/her employment is terminated; the pilot must then retire. The termination of the complainants' employment with Air Canada on the basis of the mandatory retirement policy is sufficient evidence to conclude that the complainants have established a *prima facie* case of discrimination under s. 7 of the *Act*.

[42] Section 9 of the *CHRA* provides that it is a discriminatory practice for an employee organization, on a prohibited ground, to act in a way that would deprive an individual of an employment opportunity, or limit employment opportunities, or otherwise adversely affect the status of the individual. ACPA agreed to the inclusion of the mandatory retirement provisions in the Air Canada Pension Plan, which is incorporated by reference into the collective agreement. Mandatory retirement adversely affected Mr. Kelly's employment status. Therefore, a *prima facie* case of discrimination has been established with respect to Mr. Kelly's s. 9 complaint against ACPA.

[43] Under s. 10(b) of the *Act*, it is a discriminatory practice for an employer or an employee organization to enter into an agreement affecting any matter relating to employment that deprives an individual of any employment opportunity on a prohibited ground. ACPA and Air Canada entered into an agreement with respect to mandatory

retirement which affected the employment of Mr. Kelly and Mr. Vilven. Accordingly, a *prima facie* case has also been established with respect to the s. 10 complaints.

C. Have the respondents demonstrated that age 60 is the normal age of retirement within s. 15(1)(c) of the CHRA?

[44] The term "normal age of retirement" in s. 15(1)(c) is identified in relation to the term "employees working in positions similar to the position of the individual" who filed the complaint. This raises the following two questions:

- i) What is the proper comparator group to identify the positions that are similar to that occupied by the complainants?
- ii) What is the normal age of retirement?

(i) The Proper Comparator Group

[45] Air Canada argued that the proper comparator group under s. 15(1)(c) is pilots flying internationally for carriers such as Air Canada, or "legacy carriers". Air Canada would define legacy carriers as long-established, major international carriers that rely heavily on international flight in their business models. Legacy carriers are often the "flag carrier" for the country in which they are based.

[46] Air Canada maintained that it is the only legacy carrier in Canada. All of the other Canadian carriers operate substantially fewer aircraft than Air Canada and the nature of their operations would not qualify them as legacy carriers. Therefore, Air Canada argued that the comparison has to be made to pilot positions in the other major international carriers around the world.

[47] ACPA took a somewhat different tack, namely, that the selection of the appropriate comparator group should be one that shares similar terms and conditions of employment with those of Air Canada pilots. ACPA also argued that the comparison must be limited to other Canadian air carriers since s. 2 of the CHRA limits its application to matters coming within the legislative authority of Parliament.

[48] The Commission argued that neither of the comparator groups suggested by the respondents is appropriate. It was impossible to define what the normal age of retirement is because of the wide range of ages at which pilots retire both in Canada and internationally.

[49] The Fly Past 60 Coalition argued that there was no basis in the statute for interpreting similar positions to mean positions that have similar work conditions, or positions within legacy carriers. The Coalition argued that a similar position to that of the complainants is the position of an airline pilot, be it a pilot in command (Captain), or a co-pilot (First Officer), with airlines that fly similar (but not necessarily identical) aircraft to those of Air Canada.

[50] The Tribunal rejects ACPA's argument that the comparison should be limited to individuals occupying positions with airlines within the Canadian federal jurisdiction. Section 15(1)(c) does not purport to regulate individuals or air carriers beyond its legislative scope. It simply invites a comparison to those in similar positions.

[51] Further, there are good reasons not to limit the comparison to positions within Canada. As the Tribunal noted in *Campbell v. Air Canada* (1981), 2 C.H.R.R. D/602 (C.H.R.T.), the danger of a comparison of positions within Canada alone is that it would

result in Air Canada setting the industrial norm for the "normal age of retirement". This would mean that Air Canada could effectively determine the application of s. 15(1)(c).

[52] The Tribunal agrees with the Coalition that there should be no differentiation between Captains and First Officers. There was substantial agreement among the witnesses who discussed the two positions that, although the Captain, as pilot in command, has ultimate responsibility for the safety of the aircraft, the positions are otherwise very similar.

[53] In the Tribunal's view, the best approach to determining the appropriate comparator group is to characterize the essential feature of the position. The complainants' evidence established that the essential feature of their position was that they flew on regularly scheduled international flights on wide-bodied aircraft, to many international destinations, with a major international airline. A major international airline is an airline that is often the dominant carrier in the country, employing a significant number of pilots and where regularly scheduled international flights make up a significant portion of its operations.

[54] It was clear from the complainants' evidence that the prestige and status that came with working for a major international airline, whether that is called a "legacy airline" or a "flag carrier" or any other name, was an essential feature of the position.

[55] From this, the Tribunal has concluded that the appropriate comparator group i.e. "employees working in positions similar to the position" of the complainants', is pilots who fly with regularly scheduled, international flights with a major international airlines.

(ii) What is the "normal" age of retirement?

[56] There are two approaches that the Tribunal can look to in order to answer this question: the "normative" approach and the "empirical" approach. The normative approach is suggested by the French version of s. 15(1)(c) which makes reference to "**the application of a rule in force for this type of job**". It reads: «Ne constituent pas des actes discriminatoires le fait de mettre fin à l'emploi d'une personne **en appliquant la règle de l'âge de la retraite en vigueur pour ce genre d'emploi** ».

[57] This normative approach asks one to search for the existence of a rule governing the maximum age of retirement in the airline industry. In the Tribunal's opinion, the ICAO maximum age provision qualifies as such a rule or standard because it governs the same community of international carriers that the Tribunal has chosen as comparators to determine "positions similar" to the complainants' position.

[58] In September of 2003 and May of 2005, the ICAO standard for pilots in command required retirement at age 60. ICAO recommended, but did not require the retirement of First Officers at age 60.

[59] The empirical approach leads to a consideration of the statistical evidence presented at the hearing relating to the retirement ages for both commercial airline pilots in Canada and foreign commercial pilots.

[60] Air Canada is the only major international carrier in Canada where pilots fly on regularly scheduled international flights. Although Jazz is the second largest carrier in Canada, it operates flights solely within Canada and the United States. It is a regional carrier, not a major international carrier.

[61] None of the other 6 Canadian airlines could be considered to be major international carriers. Skyservice, Air Transat, Harmony, Canjet and Zoom are charter airlines and WestJet is a low-cost carrier that does only limited international flights. Combined, these

airlines employ only 885 pilots as compared to almost 3,000 pilots employed by Air Canada.

[62] Having concluded that the appropriate comparator group is major international airlines, these Canadian carriers fall outside of that group and therefore, cannot be used for the purpose of determining what the normal age of retirement is for positions similar to that of the complainants.

[63] The parties produced as part of their Joint Statement of Facts, a Schedule that included 22 foreign international carriers that have regularly scheduled international flights. However, complete data was not available for 12 of these airlines.

[64] The total number of pilot positions in the major international airlines for which there was complete data was 25,308 in 2003. In 2003, when Mr. Vilven retired, **80%** of those positions required mandatory retirement at age 60 or younger.

[65] The parties agreed that the total number of pilots employed by these airlines has not changed substantially over the years. Therefore, we can assume that there were also roughly 25,308 pilots employed by the major international airlines outside of Canada (for which there was complete data) in 2005, when Mr. Kelly retired.

[66] Between 2003 and the end of 2006, only two of the major international airlines requiring mandatory retirement at age 60 or younger, increased their age of mandatory retirement to 63 and 65. These changes occurred in November 2006 following the changes in the ICAO standards in that same month.

[67] There was no evidence to indicate that prior to 2006, there were any changes to the mandatory retirement policies of any of the other major international airlines that had mandatory retirement policies of age 60 or younger.

[68] It is reasonable to conclude that in 2005, when Mr. Kelly retired, retirement at age 60 or younger was required in **80%** of the major international airlines for which data was available.

[69] This data reveal that age 60 was the mandatory retirement age for the majority of positions that were similar to that of the complainants at the time of their retirements in 2003 and 2005. This was the normal age of retirement for the purposes of s. 15(1)(c) of the *CHRA*. The result is that Air Canada's mandatory retirement age policy is not a discriminatory practice under the *CHRA*.

D. Does s. 15(1)(c) of the *CHRA* Contravene the *Charter*?

[70] In its Notice of Constitutional Question, the Coalition raised the constitutionality of s. 15(1)(c) of the *CHRA*, arguing that s. 15(1)(c) contravened s. 15 of the *Charter* and is not justified under s. 1 of the *Charter*. If this is so, the Coalition argued, then the Tribunal should refuse to apply s. 15(1)(c), which would deprive the respondents of this defense to the complainants' *prima facie* case. The respondents did not dispute the jurisdiction of the Tribunal to deal with the constitutionality of s. 15(1)(c). It should be pointed out that the Tribunal's decision on this question is limited to the facts of this case.

(i) Previous Challenges to Human Rights Legislation that Permits Mandatory Retirement.

[71] The present case constitutes the first time that a *Charter* challenge to s. 15(1)(c) of the *CHRA* has reached the Tribunal stage. There are, however, two decisions of the Supreme Court of Canada that examined the constitutionality of similar provisions in provincial human rights legislation. Those are *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, and *Harrison v. University of British Columbia* [1990] 3 S.C.R. 451.

[72] *McKinney* examined the constitutionality of s. 9(a) of the *Ontario Human Rights Code*. It was released at the same time as *Harrison*, which dealt with the constitutionality of s. 8(1) of the *British Columbia Human Rights Act*. Both provisions permitted mandatory retirement. In *Harrison*, a majority of the Supreme Court declared that, for the reasons provided in *McKinney*, the constitutionality of s. 8(1), which limited age protection to those between the ages of 45 and 65, was unimpeachable.

[73] In *McKinney*, the appellants who were university professors at the University of Guelph, were forced to retire at age 65 pursuant to the University's mandatory retirement policy. In their appeal, the appellants posed two separate constitutional questions to the Supreme Court of Canada:

- (1) did the University's mandatory retirement policy violate the *Charter*; and,
- (2) did s. 9(a) of the Ontario *Human Rights Code* violate the *Charter* by sheltering the mandatory retirement policy?

[74] As to the university's mandatory retirement policy, the majority of the Court found that the *Charter* does not apply to universities because a university is not part of government. But, assuming the *Charter* did apply, the policy contravened s. 15(1) of the *Charter*. However, it was justified under s. 1 of the *Charter*.

[75] The Court then turned its attention to the second constitutional question that was posed to it: did s. 9(a) of the Ontario *Human Rights Code* violate the *Charter*? It is this second analysis involving the constitutionality of s. 9(a) of the *Code* that is relevant to the case before the Tribunal.

[76] Section 9(a) of the *Code* limited the protection of the *Code* to those between the ages of 18 to 65. The majority held that this provision violated the right to equality under the *Charter* since it permitted the forced retirement of employees at age 65, but was constitutionally valid under s. 1 of the *Charter*.

[77] Although very differently worded, s. 9(a) of the Ontario *Code* (which has since been repealed) and s. 15(1)(c) of the *CHRA* are comparable: both are permissive, both exempt mandatory retirement policies from conduct that would otherwise be considered to constitute *prima facie* discrimination.

(ii) Does Section 15(1)(c) of the CHRA Contravene s. 15(1) of the Charter?

[78] In *McKinney*, the majority found that s. 9(a) of the Ontario *Code* violated s. 15 of the *Charter* because it deprived the claimants of a benefit under the *Code* on the basis of their age, a ground specifically enumerated in the *Charter*. Although that concluded his analysis of s. 15, Justice La Forest noted that, for a variety of reasons, age distinctions are not viewed in the same light as distinctions based on other prohibited grounds such as race or gender.

[79] He stated that, while we must guard against laws having an unnecessary deleterious impact on the aged based on inaccurate assumptions about the effects of age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits. (*McKinney* at p. 297).

[80] At the time that *McKinney* was decided, however, such considerations regarding the nature and scope of the rights under s. 15 were dealt with under s. 1 of the *Charter*. Since *McKinney* was decided in 1990, the law regarding the analysis of discrimination claims under s. 15 of the *Charter* has evolved. This evolution can be seen in two subsequent decisions in which the Supreme Court set out the governing standard for s. 15(1) of the

Charter: Law v. Canada [1999] 1 S.C.R. 497 and Gosselin v. Quebec (Attorney General) [2002] 4 S.C.R. 429.

[81] Considerations regarding the nature and scope of s. 15 have been addressed within the analysis of that section by focusing on the purpose of that provision. The purpose of s. 15 is to assure that human dignity is not harmed by arbitrary distinctions created by the law or government action.

[82] In *Law*, the Court stated that the overriding concern with protecting and promoting human dignity infuses all elements of the discrimination analysis. Human dignity is harmed when individuals are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society (*Law, supra*, at para 53).

[83] *Law* involved an application by Nancy Law, a surviving spouse, for survivor benefits under the Canada Pension Plan. Under the eligibility criteria, able-bodied surviving spouses without dependent children and who were under 35 at the death of their spouse, were not eligible for survivor benefits. Ms. Law was 30 at the relevant time. She challenged the age criterion, claiming that it violated s. 15 of the *Charter*.

[84] The Court acknowledged that, like other surviving spouses of all ages, Ms. Law might be vulnerable, economically and otherwise, immediately following the death of a spouse. However, the Court stated that the purpose of the impugned CPP provisions was not to remedy the immediate financial need experienced by widows and widowers, but rather to enable older widows and widowers to meet their basic needs during the longer term.

[85] The Court held that younger widows were in a better position than widows who were over the age of 45 to find work and become financially secure again. The Court stated that although the law imposed a disadvantage on younger spouses, it was unlikely to be a substantive disadvantage, viewed in the long term. When the dual perspectives of long-term security and the greater opportunity of youth were considered, the Court stated the differential treatment did not reflect or promote the notion that younger widows were less capable or less deserving of concern, respect and consideration.

[86] In *Gosselin*, the appellant challenged a provision of the Quebec Social Assistance scheme that provided that the base amount of social assistance payable to people under 30 was about 30 per cent less than the base amount payable to those 30 or older. Under the program, those under 30 could increase the base amount by participating in certain educational or work experience programs. Ms. Gosselin challenged the validity of the program under s.15 of the *Charter* claiming age discrimination.

[87] The Court held that Ms. Gosselin had not established that the government treated her as less worthy than older welfare recipients, simply because it conditioned increased payment on her participation in programs designed to integrate her into the workforce and to promote her long-term self-sufficiency.

[88] The Court stated that unlike race, religion, or gender, age is not strongly associated with discrimination and arbitrary denial of privilege. Age-based distinctions do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization in the same way that other enumerated grounds might. Indeed, such distinctions are entirely reasonable and non-discriminatory provided they do not treat people as less worthy of respect or concern or contribute to negative stereotypes relating to age.

[89] The question then is whether, as a result of the age-based distinction in s. 15(1)(c) of the *CHRA*, the complainants' dignity was affronted or they experienced negative stereotyping relating to their age.

[90] For the reasons that follow, the Tribunal finds that, although the provision deprives the complainants of the opportunity to challenge the mandatory retirement policy in their workplace, the loss of this opportunity does not violate their dignity or fail to recognize them as full and equal members of society.

[91] In arriving at this conclusion, the Tribunal has applied a purposive and contextual approach to the discrimination analysis, as suggested in *Law*. This approach focuses on three broad inquiries:

- (i) does the impugned law draw a distinction between the claimant and others on the basis of personal characteristics;
- (ii) is the claimant subject to differential treatment on an enumerated or analogous ground; and
- (iii) does the differential treatment impose a burden which reflects or reinforces a negative disadvantage or stereotype; or has a negative effect on the individual's dignity or self-worth. (*Law*, p. 548-9). It is the third question that is central to this aspect of the Tribunal's inquiry.

Does the distinction created by s. 15(1)(c) contribute to or reinforce stereotyping or pre-existing disadvantage experienced by the complainants?

[92] One of the most compelling factor favouring a conclusion that differential treatment imposed by legislation is discriminatory is pre-existing disadvantage or vulnerability to stereotyping (*Law*, at para. 63). While it is clear that airline pilots, as pilots, do not constitute a group which suffers from negative stereotyping or pre-existing disadvantage, the more appropriate focus of the analysis here is whether the complainants, as members of the group of older workers whose employment has been forcibly terminated, are subject to pre-existing disadvantage or negative stereotyping.

[93] The disadvantages suffered by older workers have been noted in the case law. For example, in *McKinney*, La Forest J. stated that barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills (at p. 299). Moreover, while social security and private pension schemes may afford some financial redress, many older people have need of additional income, a situation that is becoming apparent as people live longer (at p. 300).

[94] In her dissenting reasons in *McKinney*, Wilson J. noted that there is a stereotype that older people are unproductive, inefficient, and lacking in competence. (at p. 413)

[95] There was no indication that the complainants experienced these age-related disadvantages or negative stereotyping. On the contrary, the evidence was that as senior pilots, the complainants were fully up-to-date in the latest technology and skills required to fly some of the most sophisticated aircraft in a major international airline.

[96] Very soon after their retirement from Air Canada, both were able to get work as pilots with other airlines that did not have mandatory retirement policies. Mr. Kelly testified that when he was returning his Security Pass to Air Canada following his last flight, he ran into a former colleague who offered him employment with Skyservice Airlines. He readily accepted the offer.

[97] The acceptance of employment with Skyservice meant that Mr. Kelly was able to supplement the \$124,000 income that he was receiving from his Air Canada pension with what he earned as a pilot with Skyservice. At \$72,000 per annum, Mr. Vilven's retirement income was less at retirement than Mr. Kelly's because Mr. Vilven started work at Air Canada later. However, Mr. Vilven was able to supplement his pension income with the earnings he received working as a pilot with Flair Airlines.

Does s. 15(1)(c), in purpose or effect, have a negative impact on the complainants' dignity?

[98] The purpose of s. 15(1)(c) is to strike a balance between the need for protection against age discrimination and the desirability of those in the workplace to bargain for and organize their own terms of employment (*Campbell v. Air Canada* (1981), 2 C.H.R.R. D/602 (C.H.R.R.T.) at para. 5483). The provision does not mandate mandatory retirement; it is permissive and allows parties like Air Canada and ACPA to negotiate contracts that include a mandatory retirement provision.

[99] Mandatory retirement policies are usually in place where the employees have considerable bargaining power, most commonly through trade union representation. Indeed the overwhelming majority of mandatory retirement policies are found in unionized workplaces. Labour economists Jonathan Kesselman and Lorne Carmichael, testifying on behalf of the Commission and Air Canada respectively, agreed that jobs in unionized workplaces are considered to be the "good jobs", that is, jobs that pay well, have a high degree of security, operate with a strong seniority system and have good pension plans.

[100] In the present case, ACPA and Air Canada agreed to retirement at age 60 in exchange for the rich compensation package, including a pension plan that put Air Canada pilots in an elite group of pensioners. Mr. Harlan Clarke, Manager Labour Relations Flight Operations at Air Canada, identified an important characteristic of a mandatory retirement policy, namely, that employees, including Air Canada pilots, are not faced with the indignity of retiring because they have been found to be incapable of performing the requirements of their position or because of failing health. Rather, retirement at age 60 for pilots is the fully understood and anticipated conclusion of a prestigious and financially rewarding career.

[101] The complainants testified that they were fully aware, when they began their employment with Air Canada, that they would be required to retire at age 60. They testified that becoming a pilot with Air Canada was every pilot's goal; the pay was excellent, the work was interesting and there was significant prestige associated with the position. However, they also knew that this would not last indefinitely and that all pilots at Air Canada were required to retire at age 60.

[102] Nevertheless, when they reached age 60 and had to retire from Air Canada, the complainants experienced a blow to their self-esteem. Both complainants testified that they missed the prestige and exciting work they had as Air Canada pilots. Mr. Kelly testified that he missed the friendships that he had at Air Canada.

[103] There is no doubt that the termination of employment has a profound impact on the self-worth and dignity of an individual (Reference Re *Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368). As difficult as that situation might be for the complainants, an assessment of the impact of the termination of their employment on the complainants' dignity must be viewed in the broader context of their careers.

[104] The case law dealing with allegations of age discrimination under the *Charter* reflects the view that one should be careful about assessing the impact of age distinctions on human dignity based solely on isolated moments in time (*Law*, para. 102; *Gosselin*, at para 32, *McKinney*, at p. 297).

[105] Professor Carmichael testified that age distinctions are viewed differently by most people than distinctions based on grounds such as gender and race. Unlike gender and race, we all become older with the passage of time. For that reason, young workers generally do not resent the fact that an older employee working beside them is paid more than them as long as they believe that they will be treated the same when they reach a similar stage in their career. Age-based distinctions are seen as fair and do not offend human dignity because we can all expect to reap the benefits and bear the burden of the distinctions at some point in our lives.

[106] According to Professor Carmichael, the complainants, throughout their careers at Air Canada, reaped the benefit of the mandatory retirement rule that their union had negotiated on their behalf. As a result of the departure of 60-year old pilots from Air Canada, the complainants were able to progress through their careers at a more rapid pace.

[107] In addition, the pilots' status, income, the base from which they flew, the choice of schedules and the pension plan benefits they received, among other things, were negotiated on the basis of the mandatory retirement provision. Having reaped the benefit of mandatory retirement, it should not be perceived as unfair to require the complainants to ultimately bear the burden of that policy.

[108] The complainants may be unhappy about ending their rewarding careers as pilots with Air Canada. But that situation cannot be viewed in isolation. It must be seen in the context of a system that was designed to assign the responsibilities and benefits of being an Air Canada pilot over different stages in the pilots' careers. All pilots in Air Canada understand that they will share these benefits and burdens equally at the appropriate stages in their careers.

[109] The denial of the right to challenge the final stage of that system - retirement at age 60 - as a result of s. 15(1)(c) does not communicate the message that the complainants are not valued as members of society, nor does it necessarily marginalize them. It simply reflects the view that it is not unfair to require the complainants to assume their final responsibility as Air Canada pilots. This message cannot reasonably be viewed as an affront to their dignity.

[110] For these reasons, the Tribunal has concluded that the complainants' right to equality under s. 15 of the *Charter* has not been violated by s. 15(1)(c) of the *CHRA*. Having come to this conclusion, it is not necessary for the Tribunal to consider s. 1 of the *Charter*, or whether Air Canada's mandatory retirement policy is a *bona fide* occupational requirement under ss. 15(1)(a) and 15(2) of the *Act*.

[111] The complaints of Mr. Vilven and Mr. Kelly are dismissed.

"Signed by"

J. Grant Sinclair, Chairperson

"Signed by"

Karen A. Jensen, Member

"Signed by"

Kathleen Cahill, Member

OTTAWA, Ontario

August

17,

2007

PARTIES OF RECORD

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APPEARANCES:	
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