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Mandatory Retirement of Air Canada Pilots

On February 3, 2011, Justice Anne Mactavish of the Federal Court of Canada released an important 127 page ruling in the latest round of the dispute between Air Canada (as well as ACPA, the Air Canada pilots' union) and two former pilots who were subject to the Air Canada mandatory retirement provision in their collective agreement, forcing them to retire at age 60.

In a previous round, the Canadian Human Rights Tribunal ("CHRT") ruled that these pilots, Robert Kelly and George Vilven, were to be reinstated and that they were to be compensated for lost income. This remedy came as a result of the CHRT ruling that s. 15(1)(c) of the *Canadian Human Rights Act* (the "*CHRA*") was inconsistent with the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

Section 15(1)(c) of the *CHRA* allows an employer to terminate an employee who has reached the "normal age of retirement" of persons working in similar positions. The CHRT had found, in this case, that the provision "perpetuat[ed] the group disadvantage and prejudice faced by older workers by promoting the stereotypical view that older workers are less capable, or less deserving of recognition or value as human beings or as members of Canadian society."

It is the judicial review of that CHRT decision that is the subject of this report.

The Federal Court had to determine two issues, namely:

- whether, in fact, s. 15(1)(c) of the *CHRA* is contrary to the *Charter*; and
- if it is, whether the retirement provisions in the Air Canada collective agreement could otherwise be enforceable under the legislation on the basis that they constitute a *bona fide* occupational requirement for the job.

It is impossible to summarize the decision in its entirety in the space available here, given its length and complexity. Accordingly, we will only touch on certain aspects of it, focusing on the second issue, as we believe that this is the area of most interest to our readers.

First, some background:

Mandatory retirement for pilots at Air Canada has been in place since 1957. In the early 1980s, it was incorporated into the collective agreement.

Shortly before the initial hearing before the CHRT in this saga, ACPA held a referendum on the mandatory retirement requirement. 75% of its members voted in favour of maintaining it.

Kelly and Vilven were senior pilots at Air Canada when they retired in 2003 and 2005, respectively. In addition to the complaints of these pilots, the Court noted that there were dozens of other complaints being held in abeyance by the CHRT pending the decision of the Court.

Finally, also by way of background, it is important to understand that prior to November 2006, ICAO rules did not permit a pilot over the age of 60 to act as pilot-in-command of a commercial aircraft operating internationally. Also at that time, it was ICAO's *recommendation* that persons over 60 should not act as first officers on international flights.

In November 2006, the ICAO standards were relaxed. They now permit a person to act as pilot-in-command until the age of 65, as long as one other member of the multi-pilot crew is under 60. There continues to be no mandatory restriction affecting first officers.

And now, back to the issues to be decided on the judicial review, the first being whether the s. 15(1)(c) of the *CHRA* is contrary to the *Charter*.

On this question, Justice Mactavish upheld the decision of the CHRT that the beneficial aspects of this legislative provision are "outweighed by its deleterious effects, when measured by the values underlying the *Charter*."

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In considering this issue, the Court examined the previous jurisprudence on the enforceability of mandatory retirement provisions — and held that this case was not "squarely on point" with the decision of the Supreme Court of Canada in *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 involving the mandatory retirement provisions that applied to professors at Ontario universities. In the circumstances of that case, the Supreme Court held that mandatory retirement did not violate the *Charter*.

Justice Mactavish distinguished *McKinney* on the bases that:

- there were significant differences at play in the wording of the legislation;
- there was a clear indication that the Supreme Court did not expect that *McKinney* would be the final word on mandatory retirement;
- there were marked differences in the evidentiary records in *McKinney* and the case at hand; and
- there had been important developments in public policy that have occurred since *McKinney* was decided.

As she did not feel bound by *McKinney*, Justice Mactavish undertook an analysis to determine whether the *prima facie* violation of the *Charter* was justified (this is commonly referred to as an *Oakes* test).

She decided that it was not. In working

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through the *Oakes* test, Justice Mactavish found, among other things, that the evidence before the Tribunal (much of it from expert witnesses) did not demonstrate that there is a reasonable basis for concluding that allowing mandatory retirement arrangements is necessary for the preservation of mutually-beneficial labour market structures (as was argued by Air Canada and ACPA).

Moreover, Justice Mactavish found that the harm inflicted by this provision of the *CHRA* was disproportionate to its beneficial effects as a result of its peculiar wording. Recall that the provision permits the enforcement of mandatory retirement so long as age of forced retirement is "the normal age of retirement for employees working in [similar] positions". Justice Mactavish agreed with the CHRT's finding "perhaps one of the most disturbing aspects of this provision was [that] … it allows employers to discriminate against their employees on the basis of age so long as that discrimination is pervasive in the industry."

Given that the mandatory retirement provisions in the collective agreement were not statutorily protected by s. 15(1)(c) of the *CHRA*, the Court was required to apply the three pronged test from *British Columbia (PSERC) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)* [1999] S.C.R. 3 to determine whether the mandatory retirement policy could be enforced by Air Canada on the basis that retirement of 60 year old pilots was a "*bona fide* occupational requirement". In order to uphold a *prima facie* discriminatory employment policy under *Meiorin*, the employer must demonstrate that:

- it adopted a standard for a purpose rationally connected to the performance of the job;
- it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- 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.

The underlying CHRT decision noted that the first two prongs were conceded by the pilots (more on that concession later) so that only the third *Meiorin* prong was addressed substantively by Justice Mactavish.

Air Canada's starting position in the debate, in keeping with the classic human rights analysis in Canada, was that it had a *prima facie* duty to accommodate older pilots — to the point of "undue hardship." In other words, Air Canada must employ pilots beyond the age of 60, unless it would suffer "undue hardship" by doing so.

Recall that even prior to November 2006, pilots over the age of 60 could act as first officers without violating the ICAO rules. The Tribunal found (and Justice Mactavish agreed) that the international rules did not prevent Air Canada from continuing to deploy its senior pilots as first officers. And, at the CHRT hearing, it appears that Air Canada did not offer evidence of undue hardship if it were to carry out this method of accommodation pre-November 2006.

The Court then considered whether the mandatory retirement policy was a "*bona fide* occupational requirement" after the change of the ICAO policy.

The vast majority of the evidence advanced by Air Canada addressed the "undue hardship" that would arise after the November 2006 ICAO rule change (which, for the most part, came from the scheduling difficulties arising from the need to ensure that over-60 pilots had access to under-60 first officers for each flight). This evidence came mainly from Capt. Steven Duke, described as Air Canada's "Six Sigma Black Belt for Flight Operations".

More specifically, Capt. Duke testified that, by having a defined retirement age, Air Canada is able to better predict its future requirements in that it could more accurately plan for succession of its pilots in advance, rather than waiting for them to announce their departure. He indicated that if mandatory retirement were abolished, an over-60 pilot could, without much notice, retire causing difficulties for Air Canada because it would take three months to schedule and train a new one.

Capt. Duke also offered evidence that, within five years, a very substantial portion of Air Canada's pilots would be over the age of 60. He explained, through a series of "experiments examining the scheduling consequences of having various percentages of A-340 Captains and First Officers being over the age of 60 in Vancouver and Toronto" under the current ICAO rules that eliminating the requirement to retire at age 60 would create an environment where some of Air Canada's more junior pilots would receive "materially lower quality monthly schedules, including being placed on reserve schedules rather than fixed flying scheduled".

He went on to testify that, to deal with this situation, Air Canada would have to hire additional pilots to ensure that all flights are properly staffed, all the while paying the over-60 pilots whose services could not always be used because of the ICAO policy.

In the end, the Tribunal found several deficiencies in Capt. Duke's "experiments" which lead the panel to conclude that his evidence was not sufficient to establish that the scrapping of the retirement policy would result in undue hardship to Air Canada.

However, in reviewing the CHRT's decision, Justice Mactavish noted that there were a number of problems with the Tribunal's treatment of Capt. Duke's evidence.

For example, the Tribunal noted that there was "no evidence" on certain aspects of Capt. Duke's "experiments" — when, it was clear the Tribunal had misapprehended his testimony in this regard.

In another instance, the Tribunal noted that Capt. Duke had not explained how he arrived at his conclusions, when the record clearly shows that he had explained that he had used Air Canada's normal scheduling software, identified certain pilots as restricted under the ICAO standards and then tried to generate hypothetical schedules in the same way that Air Canada generates real monthly schedules.

In another section of the CHRT's ruling, the panel found that there was "no evidence as to what is a materially lower quality schedule and why this is so". However, Capt. Duke had explained at the hearing that a "materially lower quality schedule was one where senior pilots were awarded the reserve duty that would typically be awarded to more junior pilots, as opposed to a fixed flying schedule." He also explained that seniority determines the quality of the schedule that a pilot can obtain (i.e. more senior pilots work fewer days per month).

Justice Mactavish noted that these failings didn't result in a problem with the weight given to Capt. Duke's evidence, but, rather, it was the fact that the CHRT had found that there was no evidence at all on these points. For that reason, she concluded that the Tribunal had not undertaken a reasonable analysis of the evidence.

She ordered that the same panel of the CHRT reconsider this evidence on the existing record to determine whether Air Canada had established that age was a *bona fide* occupational requirement for its airline pilots after November 2006. (Recall, that there was little evidence adduced of "undue hardship" for the period before the ICAO rule change — so that portion of the CHRT's ruling was upheld).

One final point. Earlier in this article, we noted that the CHRT ruled on the basis that the pilots had conceded that Air Canada had met the first two prongs of the *Meiorin* test. In fact, the record stated otherwise. There was ample evidence that the concession was not made.

As a result, Justice Mactavish ordered the CHRT to rule on all three aspects of the *Meiorin* test, when it makes a determination on the issue of whether Air Canada would suffer "undue hardship" from the disappearance of a mandatory retirement policy, post-November 2006.

Air Canada Pilots Association v. Kelly; *Air Canada v. Vilven*, 2011 FC 120

Amendments to the Canadian *Air Transportation Regulations*

The Canadian *Air Transportation Regulations,* (ATR) which came into effect in 1988, address the circumstances under which commercial air operators may be licensed in Canada. The ATR also deals with issues such as tariffs, general conditions of contract and provision of services to persons with disability. A large part of the ATR is devoted to addressing charter operations and these set out in great detail the rules which are said to apply to the traditional charter types. Changes in the industry have overtaken the ATR and for many years now Canadian air policy has recognized that it is not desirable to apply the old "charter fences" such as advance purchase, minimum fare and minimum stay. The Canadian Transportation Agency has long granted exemptions from the restrictive rules, but they remain on the books. A number of attempts have been made to reform the ATR over the last 20 years, but all of these have collapsed under the weight of accumulated and complicated provisions.

Somewhat over a year ago now, the Agency decided to adopt a new approach. Rather than attempt an overhaul of the entire ATR the task will be approached in stages. The Regulatory Projects group within the International Agreements and Tariffs Directorate has been tasked with the job of consulting with stakeholders and drafting proposed amendments. The first consultations took place in the spring of 2010 and on April 2, 2011, the proposed Phase One amendments were published in the Canada Gazette, Part I. Interested parties now have 30 days to submit comments, following which period it is anticipated the Agency will, subject to the approval of the Governor in Council, adopt the amendments.

The ATR consists of seven Parts and thirteen schedules. Phase One addresses Parts I and II which deal with such things as financial requirements, wet lease and code share arrangements and licensing of commercial air carriers. There are however two notable exceptions to the scope of Phase One review. Section 3 (which is in Part I) of the ATR identifies certain services which are exempt from regulation. The exemption rules begin with s. 56(2) of the *Canada Transportation* Act which exempts several enumerated operations as well as any "other prescribed air service". The additional prescribed services are those listed in s. 3 of the ATR and include such services as aerial advertising, firefighting and survey services. Whether other types of operations should be prescribed—air ambulance is a good illustration—is a controversial matter and the Regulatory Projects group has decided this issue should be deferred for future consideration. Likewise the rules respecting mandatory insurance, although found in Part I of the ATR, have not been considered in Phase One.

Although s. 7 of the ATR, which deals with mandatory insurance, has been excluded from Phase One, the proposed amendments do address the question of the insurance required to support an application for approval of a code share agreement. The new regulatory language largely reflects the current practice (which is based on directions from the Agency rather than formal regulation) but there are a few differences between the wording of the proposed regulatory text and the existing directions. The Agency has typically been very exacting in its scrutiny of documents submitted to prove the existence of adequate insurance and it is likely that close attention to the differences will be essential to obtaining timely approvals.

Another change which will affect code share approvals involves filing deadlines. At present the ATR requires an application for approval to be complete 45 days before the beginning of the proposed code share operation. This is often quite inconvenient and carriers regularly apply for exemptions to permit filing on shorter notice. The proposed text will reduce the time from 45 days to 30 days. The intention is to greatly reduce the number of exemption applications. At present it is often possible to process a code share application in less than 30 days and it will be interesting to see if the Agency will continue to accommodate requests for shorter filing periods.

In keeping with the objective of eliminating unnecessary filings, the current requirement that licencees file an annual declaration of continuing status with the Agency would be removed from the ATR.

A welcome change which certainly will eliminate the need for exemption applications concerns the names which may appear on an aircraft. The current ATR has a prima facie rule which restricts the carrier to displaying its own name (and authorized trade names) on its aircraft. Applications for exemptions to allow the name of, for example, a tour operator have become very common and are generally allowed. The need for these exemption applications would be disposed of by a blanket exemption: "Despite any other provision of these Regulations, a person does not contravene these Regulations by advertising on an aircraft." In an explanatory note to the regulatory text the Agency states that "the painting of an aircraft is a business decision" and it is clearly one the Agency does not intend to regulate in the future.

The circumstances in which normal course wet leasing will be allowed without Agency approval would be expanded by the amendments. As things now stand, it is allowable to conduct domestic operations on a wet lease basis and without Agency approval provided both the carrier selling the service and the operating carrier are Canadian and hold licences from the Agency. This restrictive rule long predates the current air services agreement between Canada and the United States, signed in 2007, which provides for an open skies regime between the two countries. In recognition of the more liberal regime, the liberty to operate a normal course wet lease without Agency approval will be extended to transborder services in cases where the seller (or operator) of the service is a citizen of the USA.

The detailed regulation of charter types is currently set out in Parts III and IV of the ATR and these parts are not the subject of Phase One revisions. However, the text which is now proposed does introduce two new simplifying terms which will eventually replace the ABC, ITC, CPC and entity charters. All passenger charters will eventually be passenger resaleable charters or passenger non-resaleable charters. While definitions of these simplified terms will be introduced, it will be necessary to maintain the definitions of the traditional charter types until the revision project reaches Parts III and IV.

Included in Part I of the ATR are rules which specify the financial requirements which must be met by parties applying for a licence to operate a domestic air service. These are quite onerous and compliance requires a good deal of work. There will be no change in the substance of the requirements but a redundancy will be eliminated. Currently a carrier which has already met the requirement for a service using large aircraft must nevertheless demonstrate compliance again if it introduces medium aircraft to its fleet. This latter requirement will be eliminated.

While the changes being proposed are relatively modest and, for the most part, represent current practice, they are very welcome. We believe the long history of failure to accomplish the renewal process in one massive amendment justifies the decision to divide the task into more manageable phases. It is to be hoped that Phase One is soon brought to a successful conclusion and that the process continues. It will be of particular interest to see if some of the more potentially controversial provisions, such as definition of which types of operations are excluded from the ATR rules altogether, are addressed in Phase Two.

Regulations Amending the Air Transportation Regulations and the Canadian Transportation Agency Designated Provisions Regulations

Canada Gazette, Part I, April 2, 2011

End of the Line *(Revocation of Transportation Security Clearance)*

In mid–March, Justice Barnes of the Federal Court of Canada released a decision describing the procedural steps required to remove a Transportation Security Clearance (TSC) from an airport employee.

The case arose in the context of Mr. Raymond Anthony Clue, a 28 year old baggage handler working at Pearson International Airport in Toronto. Mr. Clue was a naturalized Canadian citizen, born in Jamaica. He had been in Canada since 2002.

In 2003, the Minister of Transport issued a TSC to Mr. Clue. It was renewed in 2007.

In October 2009, Mr. Clue allegedly purchased a stolen Air Canada parking pass and, as a result, was charged with possession of stolen property. This lead to a suspension of Mr. Clue's TSC, subject to a review of the stolen parking pass incident, as well as another incident that occurred on June 6, 2009 when Mr. Clue was alleged to have placed a duffel bag containing a fully loaded, 16 round clip Smith & Wesson 9mm handgun (and two bags of hollow point ammunition) onboard an Air Transat aircraft bound for Jamaica.

In December 2009, the Crown withdrew the charge against Mr. Clue relating to the parking pass, but, nevertheless, the review of the suspended TSC proceeded.

In March 2010, the Director, Security Screening Programs of Transport Canada canceled the TSC, acting on the advice of the Transportation Security Clearance Advisory Board (the "Board"). The decision was made on the basis that Mr. Clue "may be prone or induced to commit an act that may unlawfully interfere with civil aviation."

Mr. Clue commenced a judicial review of this decision. At first instance, the Federal Court (on consent of the parties), remitted the matter to the Director for reconsideration.

Mr. Clue was invited to submit additional materials in support of his position, but, in the end, only filed the Affidavit sworn by him that was used to commence the judicial review. The result was the same: The Board recommended that his TSC be permanently revoked. The Board noted, in particular:

- the severity of the handgun incident;
- that Mr. Clue had stated that, even if he knew who was involved in the handgun incident, he would not divulge his identity to the police;
- that Mr. Clue did not explain or deny his involvement in the handgun incident; and
- that none of Mr. Clue's filed materials mitigated the Board's concerns.

Having failed to make his case for a second time before the Board, Mr. Clue sought a judicial review of the reconsideration—arguing that the decision was "perverse and capricious and therefore unreasonable in law."

The Court had two issues to decide: first, whether procedural fairness had been given to Mr. Clue, and, secondly, whether the evidence reasonably supported the Board's decision.

As to the issue of procedural fairness, the Court noted that the procedures designated by the TSC Clearance Program were followed—and that Mr. Clue was advised of the allegations and invited to respond. The Court also noted that neither Mr. Clue, nor his counsel sought further particulars of the allegations.

Finally, the Court noted that there was no obligation on the Director to identify the informant.

For these reasons, Justice Barnes found that the requirements of procedural fairness had been satisfied.

As to whether the evidence relied upon supported the decision, the Court noted that Mr. Clue had been largely uncooperative, belligerent and, possibly, obstructionist when confronted by airport authorities. Justice Barnes also referred to an Intelligence report filed with the Crown's materials where it was noted that, when confronted with the handgun allegations, Mr. Clue did not deny his involvement, appeared afraid to discuss the matter and attempted to shift the discussion to identifying who had implicated him in the matter. The Court noted that Mr. Clue was most concerned that he was "forced to express [his] displeasure at [his accusers], for impugning his good name without any [basis]."

Justice Barnes stated that "the security of Canadian airports rests in large measure on the vigilance of airport employees, including their willingness to report suspicious or criminal behaviour without equivocation or reservation."

Justice Barnes concluded that the Board's decision was supported by the evidence and noted that the standard of proof was not the criminal standard. The prosecutor need only demonstrate that there is a "reasonable belief, on the balance of probabilities, that a person may be prone or induced to commit and act (or to assist such an act) that may unlawfully interfere with civil aviation." *(underlining appears in original text)*

The application for judicial review was dismissed. Mr. Clue was order to pay $750 in costs.

Clue v. Attorney General of Canada, 2011 FC 323

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