Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

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

MEMBER: Wallace G. Craig

2011 CHRT 10
2011/07/08

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I. INTRODUCTION

[1] This is the third decision by the Canadian Human Rights Tribunal (the Tribunal) arising out of an inquiry into complaints under the *Canadian Human Rights Act* (*CHRA*) by pilots George Vilven and Robert Kelly that they had been subjected to a discriminatory practice resulting from mandatory retirement at age 60, in accordance with provisions in a collective agreement between Air Canada Pilots' Association (ACPA) and Air Canada.

[2] At the date of his retirement on September 1, 2003, at age 60, Mr. Vilven was a First Officer when flying an Airbus 340. Mr. Kelly retired on April 30, 2005, the day on which he turned age 60. At the time of his retirement, Mr. Kelly was a Captain and Pilot-in-command when flying an Airbus 340.

[3] The first decision of the Tribunal was rendered in August 2007, and dismissed the human rights complaints. On judicial review, the first decision was quashed in part, and the matter was remitted to the Tribunal for re-determination of a Charter issue and, if necessary, whether mandatory retirement provisions constituted a *bona fide* occupational requirement within the meaning of s. 15(1)(a) of the *CHRA*.

[4] The second decision of the Tribunal was rendered on August 28, 2009 (2009 CHRT 24). A judicial review of this decision by the Federal Court resulted in a Judgment by Justice Mactavish, dated February 3, 2011, ordering, among other things, that:

> 3. Air Canada's application for judicial review is granted, in part, as it relates to the Tribunal's finding that Air Canada had not demonstrated that age was a *bona fide* occupational requirement for its pilots.
>
> 4. The question of whether age was a *bona fide* occupational requirement for Air Canada pilots after November of 2006 is remitted to the same panel of the Tribunal, if available, for re-determination in accordance with these reasons, on the basis of the existing record.

[5] As the same panel of the Tribunal was not available to proceed with the re-determination as ordered, I have been asked to re-determine the question of whether age was a *bona fide* occupational requirement for Air Canada pilots after November 2006, in accordance with the reasons for judgement of Justice Mactavish, and on the basis of the existing record. In the course of my re-determination, I have read and considered Justice Mactavish's reasons for judgement and I have examined and considered, in its entirety, the evidence of Captain Steven Christopher Duke (Captain Duke), a witness called by Air Canada on the issue of accommodation.

[6] With respect to the evidence of Captain Duke, Justice Mactavish commented in paragraph 429 of her Reasons that:

> As was noted earlier, Air Canada says that the Tribunal misunderstood and mischaracterized the evidence put forward by Captain Duke in support of its undue hardship argument. Air Canada also contends that the Tribunal ignored important portions of Captain Duke's evidence as to the operational and scheduling difficulties that would result if Air Canada were required to accommodate pilots over the age of 60. …;

And in paragraph 384:

> I also agree with Air Canada that having regard to the systemic nature of Messrs. Vilven and Kelly's human rights complaints and the fact that the potential invalidation of the mandatory retirement provisions in the Air Canada Pension Plan and the Air Canada/ACPA collective agreement would affect other Air Canada pilots, it was also appropriate for the Tribunal to examine the issue of undue hardship on a going-forward basis, taking into account the subsequent changes to the ICAO standards…

II. THE APPLICABLE LAW

CANADIAN HUMAN RIGHTS ACT PROVISIONS

> 3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

> 10. It is a discriminatory practice for an employer, employee organization or employer organization
>
> (a) to establish or pursue a policy or practice,
>
> or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.
>
> 15. (1) It is not a discriminatory practice if
>
> (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;
>
> (2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[7] In her reasons for judgment, Justice Mactavish summarizes the legal principles governing *bona fide* occupational requirements (at paras. 353-358):

> The test to be applied for determining whether an employer has established a *bona fide* occupational requirement is that articulated by the Supreme Court of Canada in *Meiorin* [*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, (1999) 3 S.C.R. 3]
>
> That is an employer must establish on a balance of probabilities that:
>
> (1) The employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) The employer 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
>
> (3) 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 first and second steps of the *Meiorin* test require an assessment of the legitimacy of the standard's general purpose, and the employer's intent in adopting it. This is to ensure that, when viewed both objectively and subjectively, the standard does not have a discriminatory foundation.
>
> The third element of the *Meiorin* test involves the determination of whether the standard is required to accomplish a legitimate purpose, and whether the employer can accommodate the complainant without suffering undue hardship: *McGill University Health Centre v.*

> *Syndicate des employe-e-s de l'Hopital general de Montreal, 2000 (SCFP-FTQ)* 2007 SCC 4, 1 S.C.R 161, at para.14.
> As the Supreme Court of Canada observed in *Hydro-Quebec v Syndicat des employe-e- s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000* (SCFP –FTQ), 2007 SCC 43, [2008] 2 S.C.R. 561, the use of the word "impossible" in connection with the third element of the *Meiorin* test had led to a certain amount of confusion. The Court clarified that what is required is "not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances": at para.12.
> As to the scope of the duty to accommodate, the Supreme Court stated that "The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work": *Hydro Quebec*, at para. 16."

[8] Further, Justice Mactavish determined that subsection 15(2) of the CHRA should be interpreted as limiting the factors to be taken into account in an accommodation analysis to health, safety and cost. However she qualified her determination with the following observation:

> That is not to say that matters such as employee morale and mobility, interference with other employees' rights, and disruption of a collective agreement could never be relevant in a claim under the *CHRA*. My interpretation of the legislation simply means that in order to be taken into account in an accommodation analysis, these matters must be of a sufficient gravity as to have a demonstrable impact on the operations of an employer in a way that relates to health, safety or cost.

III. THE EVIDENCE

[9] Of significance in my re-determination is the November 23, 2006 change to the rules of the International Civil Aviation Organization (ICAO), a UN organization charged with fostering civil aviation safety – Canada is a signatory – a change which makes it mandatory that Captains/ Pilots-in-Command between the ages of 60 and 65 may continue to fly internationally, but only if one of the other pilots in a multi-pilot crew is under 60.

[10] The ICAO standards apply only to international flights. The vast majority of Air Canada flights have an international aspect, 86% are either to an international destination or pass through foreign (primarily American) airspace, en route to a Canadian destination. Between 20 and 25%

of the remaining 14% of Air Canada flights have an American airport as an alternate airport where planes are to land if, for example, weather precludes landing at the regularly-scheduled Canadian airport.

[11] Captain Duke testified on behalf of Air Canada regarding its likely inability to accommodate pilots over age 60 if the ICAO "one pilot over 60/one pilot under 60" requirement (over/under rule) becomes applicable to scheduling the company's pilots.

[12] In the time period relevant to this matter Captain Duke was employed by Air Canada in a managerial position with Flight Operations. Among his qualifications, Captain Duke is recognized as a Six Sigma Black Belt in management processes. He testified that Six Sigma is a business improvement process which originated in the late 1980s at the Motorola and General Electric corporations which has been adopted by Air Canada. The description of Captain Duke as a "Black Belt" is in recognition of his expertise in this process.

[13] Captain Duke began his testimony by outlining several detrimental consequences, including an unavoidable and inevitable increase in pilots and the cost of flight operations, that would burden Air Canada if mandatory retirement of pilots on their reaching age 60 was eliminated: a) inability to accommodate captains over age 65 on international and domestic flights; b) a very limited capacity to accommodate captains or first officers who are over age 60; c) loss of the capability of accurately predicting hiring and training needs in advance and the effect that will have on Air Canada.

[14] Captain Duke testified that Air Canada's pilots, approximately 3200 in December 2006, are grouped according to the aircraft they fly:

1) largest aircraft, mostly on international routes, Airbus-345-500, A-340-300 and A-330 (generally referred to as A-340s);

2) Boeing 767, 777 on some international routes;

3) A-320's and A-319's;

4) Embraer 190 and 175.

[15] Captain Duke explained that the A-340 series and the Boeing 767 require three pilots in the cockpit, one being a relief pilot.

> So our 3200 pilots break down into 16…non-interchangeable groups, which are then geographically divided into 42 unique positions. 'Position' is a collective agreement term that is defined as a unique combination of equipment, status and base. For example: the Boeing triple-7 captain in Toronto would be one position; Montreal, the captain, there are only 35 of them. If we go further down the list, the other extreme of the most populous position would be the A-320 Toronto captains with 363 of them. So at any given time these groups are non-interchangeable. We can't move pilots back and forth – they are stuck with their assignments.
>
> They can move a little bit between base, for example if we have a Montreal A-320 captain and they are flying out of Toronto, we can move them to Toronto to do that flying, but we cannot have any A-320 captain fly a 767 or an A-320 first officer act as an A-320 captain.

[16] In his evidence Captain Duke explained the choices available to a pilot with a hypothetical seniority number of 1100: He or she could choose to be a middle of the pack A-320 captain flying middle-of-the-pack schedules or get more money as a very junior 767 captain and suffer the schedule of a junior captain. Captain Duke pointed out that with increasing seniority it is the pilot, alone, who chooses whether to become a very senior A-320 captain or a junior 767 captain.

[17] Captain Duke described a typical career path for Air Canada pilots: starting off either as a relief pilot or a narrow-body aircraft first officer, then moving to a wide-body first officer position, a return to a narrow-body aircraft as a captain, and a final move back to a wide-body captaincy, having spent five to seven years in each block, to end their careers at age 60. Captain Duke noted that within each block pilots can switch between positions.

[18] Captain Duke testified about the correlation between the Marketing and Flight Operations departments of Air Canada:

> We are a marketing driven company and our Marketing Department produces a lengthy list of the flights that they want Flight Operations to conduct in the coming months. We have people called Pairing Analysts and there is one assigned per fleet type. So there is one for the 340, one for the 767. What they do is, they take this monstrous list of flights they wish us to conduct and they break that down into smaller usable chunks that consist of a series of flights that will combine to cover a one-day period or anywhere up to a four-day period.

[19] Captain Duke then described a typical pairing in the Toronto A-320 group: Flight 700 leaving Toronto at 6:30am, arriving New York just before 8am. Forty minutes later it becomes Flight 705, New York to Toronto, arriving at 10:10am. The pilots then have two hours and 40 minutes before their next flight departs Toronto as Flight 177 for Edmonton, arriving at 3 pm Mountain time. After spending the night in Edmonton the pilots depart the next day at 7am and fly to Toronto:

> That is a typical and an actual two-day pairing for the Toronto 320 pilots to fly. The thing to note about this pairing is it is a mix of international and domestic flying.

[20] Captain Duke explained that the pairing analyst's goal is to link flights that have a reasonable period of time between them, the above-mentioned two hours and 40 minutes being at the upper end of waiting time for pilots, and noted that there are other guarantees in the collective agreement that move the company to make the pilot's time more productive when they are working.

[21] Duke then described the process carried out by Flight Operations after the Marketing Department stipulates its flight requirements. Once the General Manager of Crew Resources receives the Marketing Department list of flights "she will spend anywhere from two weeks to a month fine-tuning the number of positions that she needs to cover." After that, the Crew Manning Steering Committee (CMSC), a joint company-union committee, approves the plan as presented or as amended, triggering a two-week period for pilots to update their Standing Preferential Bid in

light of the opportunities presented to them in the schedule of planned flights, and to engage in bidding for positions. Based on Captain Duke's evidence, I infer that seniority is absolutely essential in enabling pilots to take the initiative in controlling their careers with Air Canada.

[22] Captain Duke described the working relationship between Flight Operations and the Marketing Department from the perspective of the CMSC, which conducts its review twice each year in accordance with the collective agreement:

> The thing to notice is we put out a training plan that works 12 months ahead and then six months later we do this again … we are working toward this plan but never get there. We get halfway there and we start again. It is a very dynamic environment (in which) our Marketing Department tries to be very sensitive to what the consumers are accepting for our product and so they are changing their plans constantly. That is one side of the equation; on the other side is Flight Operations which takes a long time to respond to the changes. …Our way of meeting their need (is) by amending our position list every six months … allow(ing) us the security … of knowing what we are doing for the next six months before the CMSC review starts again. It is a compromise between the two different branches of the company.

[23] Captain Duke gave extensive evidence concerning anticipated scheduling difficulties and costs that Air Canada would likely experience if mandatory retirement at age 60 was ended. He testified that Air Canada would have to employ more pilots to ensure absolute compliance with the over/under rule on all international and partially international flights.

[24] Duke testified that he had conducted computer experiments on the premise that Air Canada no longer had the certainties of mandatory retirement of pilots at age 60. In one of the experiments, Captain Duke tried to schedule flights for pilots over age 60 who would be subject to the over/under rule, and concluded that as the number of pilots over age 60 increases, scheduling becomes unworkable.

> Chair: "Because …?"
> Duke: "Because our software cannot solve the problem: there are not enough unrestricted pilots to fly with the other unrestricted pilots."

[25] Duke then presented a graph which he identified as Air Canada's Vancouver A-340 captains, ranking them in order of seniority, which showed that 85% of the Vancouver captains were age 55 or older. He reasoned that if mandatory retirement at age 60 was abolished, then in the ensuing five years 85% of these captains would be in a potentially restricted age range, i.e. beyond 60 but not yet 65, and thus subject to the over/under rule restricting them from international flights unless the pilot flying with them was under 60.

[26] Captain Duke described a similar problem facing Vancouver-based A-340 first officers:

> … For example the pilot that the far left dot represents who is 57 years old, if he stays …five years to age 62 …(he) will be restricted from flying with the other captains….
>
> When the monthly schedule bid happens they can pretty much pick and choose whatever they want. They are…senior, they get first choice at things. Well, now not necessarily, because we run our captain schedule first and if all the flying you want has other potentially restricted pilots in it, you can't fly with those people. So your seniority rights are being impacted by being potentially restricted from flying with the captains on the flying that you are looking for.

[27] Air Canada's Toronto-based A-340 pilots were similarly analyzed, 78% of them being age 55 or older. In five years they also would be in the potentially restricted range. Captain Duke found that similar demographics applied to Vancouver and Toronto based pilots flying the Boeing 767.

[28] Captain Duke continued his analysis, assuming that 10% of the captains and first officers were restricted by the over/under rule. It is significant that the resulting simulated schedule disregarded the seniority of many first officers and assigned them to reserve-pilot status. He testified that as relief pilots they would not be able to relieve an ill first officer assigned to fly with a captain aged over 60.

> When we deal with a small base such as the Vancouver A-340 the number is shockingly small. With 20% of the captains restricted and 11% of the first officers restricted …We can't generate a schedule.

Member Jensen: “Unless you hire an additional pilot.”

Duke: “That is our obvious response to that … to somehow introduce more pilots who are not restricted ... Of course our current system is based on seniority, so this would go back … to the CMSC review. …Lets say you open up two more spots …the CMSC review is run … if those two new pilots are 62 years old, you haven’t helped yourself at all, because we don’t have the right as it were to restrict pilots based on age from obtaining these positions … We can’t guarantee through any method in our collective agreement that we would have less than 11% first officers restricted.”

…

Tremblay: “What does that do to pilot morale if you ignore the seniority list in order to overcome or minimize … some of these problems?

Duke: “Seniority is one of ACPA’s most dearly held concepts and we have repeatedly had this mentioned to us at the negotiating table. Depending on how much we restricted it, it would be anywhere from negative to very negative. If suggestions such as (to) directly hire people to a position that is as senior as the Vancouver A-340 first officer, it could bring the airline to a halt. We could have wildcats the likes we haven’t seen before. …we wouldn’t even try to bring something like that forward.”

…

Tremblay: “Has Air Canada experienced wildcats or issues of that kind because of pilot morale issues related to seniority before?

Duke: “During the merger, that didn’t go smoothly as far as the pilots were concerned because we had a disagreement between the Canadian pilots and the Air Canada pilots as to how the two seniority lists should be merged. We had various versions of sickouts associated with various Labour Board rulings with that …we had a taste of the effect of playing with seniority and how it affect the pilots’ morale.”

[29] Captain Duke testified that mandatory retirement of pilots at age 60 gives Air Canada stability and predictability with respect to hiring and training needs, and that there is an operational risk associated with changing retirement from age 60:

> We plan on pilots retiring at age 60 and we have CMSC reviews based on that; and we train (pilots) based on that … So if we push retirement from age 60 to a higher limit or no limit we are going to be potentially stuck with unexpected retirements because nothing in the collective agreement causes our pilots to give us notice of when they are going to retire. It will detrimentally affect Air Canada’s operation and result in increased costs.

[30] When asked by Member Jensen whether Air Canada could impose a retirement-notice requirement on its pilots Captain Duke responded that Air Canada has no power to unilaterally impose anything on pilots, that it would have to be negotiated with ACPA, and "that it would take a lot of bargaining capital on the company's behalf, starting from scratch, to negotiate something like that."

[31] Member Jensen also wanted clarification on Captain Duke's evidence concerning the need to have predictability in retirement:

> Jensen: "Just so I'm clear, when you say it is one of our biggest issues, what you mean there is (that) the predictability of retirement is one of the biggest problems with not having a mandatory retirement date; is that right?"

[32] Duke agreed, and using the Vancouver A-340 group as an example said that Air Canada has:

> … six people worth of work in Vancouver that allow us to absorb external shocks to our operation. Once we pass that number – all our assumptions working out on sickness, on the amount of people in training, on the number of supervisors we have, all the assumptions we have in staffing – six is the magic number that we can use to absorb external shock such as early retirements. Any more than that and we are cancelling flights. So to directly answer your question, the issue is planning the number of staff we need; and at the senior positions we are currently the beneficiaries of a regular retirement pattern in our planning, we know when they are going to retire and they do retire pretty much on schedule. If we were to lose that through the Tribunal ordering a change to mandatory retirement and us not being able to successfully address that with ACPA, we would have to buy some insurance somehow by having extra pilots in these positions.

[33] Captain Duke testified that given the restrictiveness of ICAO's over/under rule, and absent age-60 mandatory retirement, Air Canada's Flight Operations would experience significant increases in pilot costs and complications in scheduling.

[34] In dealing with the prospect of scheduling domestic flights for pilots over age 65, Captain Duke testified that it was not feasible, in that 86% of these flights customarily fly over parts of the United States:

> So if we have to reroute domestic flights that otherwise would over fly the U.S. to keep them solely within Canadian airspace, …that is going to …increase the time en route, which increases the costs and additionally makes the next flight of the day late, which we are deadly against.
>
> In extreme cases, (for example) Vancouver to Toronto, with an A-320 which is near the top of the range, if we have to put more fuel on board we may have to take passengers off because the plane may be at its maximum weight limit.

[35] Captain Duke gave precise information concerning extra fuel costs, citing 62 Toronto to Halifax flights, each one costing an additional $1,695 equating to $5.5 million per year.

[36] Concerning one experiment he conducted, a worst case scenario, to determine the consequence of accommodating pilots over age 65 by using them exclusively on domestic flights, Captain Duke testified that "… it has the same problems that we saw on the Toronto/Halifax issue … you end up with 1,700 hours of additional pairings needed to fly the exact same schedule." He explained that when the pairing analysts have to split the flying schedule into two groups to accommodate ICAO restricted captains, it negates optimization, which is the minimization of inherent costs by generating effective pairings. Captain Duke testified that having two groups of pilots to cover the same schedule, one group restricted by the over/under rule, creates a situation that requires employment of 42 more pilots, and that these additional pilots would themselves need reserve coverage factored at 34%, bringing the increase in reserve coverage to 56 pilots, each costing $11,500 per month, equating to $7.7million per year.

IV. RE-DETERMINATION

[37] The parameters of this re-determination were stated by Justice Mactavish In paragraphs 469, 470 and 471 of her reasons for judgement:

> 469 I have already found that the Tribunal's finding with respect to the *bona fide* occupational requirement issue as it related to the period before November of 2006 was reasonable. Consequently, any error on the part of the Tribunal with respect to the first two elements of the *Meiorin* test is immaterial as it relates to that time frame.
>
> 470 However, I have found that there were a number of errors in the Tribunal's *bon fide* occupational requirement analysis as it related to the post-November 2006 period, rendering this aspect of the Tribunal's decision unreasonable.
>
> 471 As a result, the question of whether being under 60 was a *bona fide* occupational requirement for Air Canada pilots after November of 2006 will be remitted to the same panel of the Tribunal, with the direction that the issue must be examined in light of all three elements of the Meiorin test.

[38] Accordingly, this re-determination is limited to the period after November 2006.

[39] There is nothing in the record of the previous proceedings to suggest that the Tribunal, or the reviewing Judge, found that Captain Duke lacked credibility. Based on my review of his evidence, I am satisfied that he was a credible witness. Further, I find that his evidence is convincing and cogent.

[40] Captain Duke's testimony has established, on a balance of probabilities, that elimination of mandatory retirement of pilots at age 60, either through a final determination of this case or through revision of the collective bargaining agreement, will carry with it a heavy burden to achieve full compliance with ICAO's over/under rules.

[41] It is more likely than not that the scheduling of pilots over age 60 will become markedly less efficient and more costly as compared with the certainty that the company has experienced with mandatory retirement requirements which have been in place since 1957. I accept

Captain Duke's succinct assessment of the over/under rule: "It is the conditionality of the restriction that causes the problems."

[42] Captain Duke's description of the workings of Air Canada Flight Operations reveals a practical and efficient balancing between the Marketing Department flight requirements and Flight Operation's ability to assign pilots to them. He testified that the elimination of the mandatory retirement provision in the collective agreement, in combination with the restrictions of the over/under rule, will require the employment of more pilots at greater cost to ensure that all flights will be piloted in compliance with ICAO's over/under rule.

[43] Based on Captain Duke's testimony it is inconceivable that Air Canada and ACPA would, together, willingly embrace the inflexibility and cost of matching "one pilot over age 60 with one pilot under age 60" on the flight decks of Air Canada aircraft.

[44] I am mindful of the case of *F.H. v McDougall*, 2008 SCC 53, and the clarification by the Supreme Court of Canada that with respect to the standard of proof in civil cases: nothing more, nothing less than a balance of probabilities.

[45] Although Air Canada's mandatory retirement of pilots at age 60 is *prima facie* discriminatory, it is not a discriminatory practice if Air Canada establishes, on a balance of probabilities, that the limitation is based on a bona fide occupational requirement. The test to be applied is that articulated by the Supreme Court of Canada in the *Meiorin* case, a three step process.

[46] Steps one and two require an assessment of the legitimacy of the (work) standard's general purpose and the employer's intention in adopting it. The assessment must be both objective and subjective to ensure that the standard does not have a discriminatory foundation.

[47] It is clear from Duke's evidence that for decades Air Canada has engaged in a legitimate and meaningful bargaining process with the pilot's union that has resulted in an enduring collective agreement which enshrines seniority and provides for mandatory retirement at age 60 with a reasonable pension. In the result, Air Canada has been able to effectively balance the introduction of new pilots to replace a predictable number of retiring pilots. Assessing this situation both subjectively and objectively, I conclude on a balance of probabilities that the work standard does not have a discriminatory foundation.

[48] The third step in *Meiorin* requires a determination whether the standard was established to accomplish a legitimate purpose. Again, persuaded by Captains Duke's evidence, I conclude on a balance of probabilities that the work standard of mandatory retirement in the collective bargaining agreement between Air Canada and ACPA was intended to accomplish the legitimate purpose of melding the company's needs with the collective rights and needs of its pilots.

[49] The third step also requires Air Canada to prove that it would suffer undue hardship in accommodating the complainants. Given the restrictions of the ICAO over/under rule, I am satisfied that the accommodation of the needs in the period after November 2006, by abolishing mandatory retirement, would result in negative consequences to Air Canada: significantly increased operational costs, inefficiency in the scheduling of pilots, and, to a lesser extent, negative ramifications for the pilot's pension plan, and the collective bargaining agreement, particularly in maintaining an effective rule of seniority. I conclude on a balance of probabilities that Air Canada would suffer undue hardship in accommodating the complainant's needs.

V. RULING

[50] With respect to the question whether being under age 60 was a bona fide occupational requirement for Air Canada pilots after November 2006, I am satisfied on a balance of probabilities that:

(1) Mandatory retirement of pilots at age 60 is based solely on a *bona fide* occupational requirement, therefore it is not a discriminatory practice, and

(2) Accommodating the needs of the complainants after November 2006 would impose undue hardship on Air Canada, considering health, safety and cost.

VI. DECISION

[51] The complainants George Vilven and Robert Kelly have not substantiated their allegation of a decimator practice on the part of Air Canada during the period after November 2006. Accordingly their complaints are dismissed.

Signed by

Wallace G. Craig

OTTAWA, Ontario
July 8, 2011

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILES:	T1176/5806, T1177/5906 & T1079/6005
STYLE OF CAUSE:	Robert Neil Kelly v. Air Canada and Air Canada Pilots Association and Geroge Viven v. Air Canada
DECISION OF THE TRIBUNAL DATED:	July 8, 2011

APPEARANCES:

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Daniel Poulin	For the Canadian Human Rights Commission
Maryse Tremblay	For the Respondent
Bruce Laughton, Q.C.	For the Air Canada Pilots Association