

Canadian Human Rights Tribunal rules against mandatory retirement

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In 2009 the Canadian Human Rights Tribunal (the “Tribunal”) released its most recent decision in *Vilven v. Air Canada*. The Tribunal ruled that mandatory retirement can not be justified as a reasonable limit on the equality rights guaranteed by the *Canadian Charter of Rights and Freedoms* (the “Charter”). The Tribunal also held that eliminating the employer's mandatory retirement policy would not impose undue hardship on the employer and therefore mandatory retirement was not a *bona fide* occupational requirement (“BFOR”).

This was the Tribunal's second decision about mandatory retirement at Air Canada. In its first decision, the Tribunal dismissed the human rights complaints brought by two former Air Canada pilots who were forced to retire at age 60. In that decision, the Tribunal found that 60 was the normal age for retirement for positions similar to those of the pilots. Therefore terminating their employment was not a discriminatory practice under s. 15(1)(c) of the *Canadian Human Rights Act* (the “CHRA”).

Section 15(1)(c) of the CHRA states:

15. (1) It is not a discriminatory practice if
 - (c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;

The complainant pilots applied to the Federal Court for judicial review of the Tribunal's first decision. In April 2009, the Federal Court disagreed with the Tribunal. The Court ruled that s. 15(1)(c) of the CHRA violates the equality rights in s. 15(1) of the Charter because it denies the equal protection and equal benefit of the law to workers over the normal age of retirement for similar positions.

The Federal Court remitted the complaints back to the Tribunal to determine—in the Tribunal's second decision last August—whether s. 15(1)(c) of the CHRA could be demonstrably justified as a reasonable limit in a free and democratic society within the meaning of s. 1 of the Charter.

THE OAKES TEST AND REASONABLE LIMITS ON CHARTER RIGHTS

The test for whether a Charter right violation is a reasonable limit within s. 1 of the Charter was articulated by the Supreme Court of Canada in the seminal decision of *R. v. Oakes* (1986). The *Oakes* test is a two-step approach which considers, first, whether the objective of the challenged law relates to a “pressing and substantial” societal concern; and second, whether the means used to attain that objective are “proportional”. Proportionality means that the law must be rationally connected to the objective, and should only “minimally impair” the right.

NOT PRESSING AND SUBSTANTIAL

In its August 2009 decision, the Tribunal began by noting that the purpose of s. 15(1)(c) of the CHRA is to allow employers and employees to negotiate mandatory retirement arrangements, particularly through the collective bargaining process. The Tribunal then addressed the question of whether the goal of permitting mandatory retirement to be negotiated in the workplace was of pressing and substantial importance.

The Tribunal noted that the workforce in Canada is aging and many individuals need, and want, to work past the mandatory age of retirement. The Tribunal also examined the experiences of the provinces that have abolished mandatory retirement. The Tribunal found that the negative aspects previously said to be associated with eliminating mandatory retirement were largely rebutted by the actual experiences in the provinces which abolished mandatory retirement. For example, deferred compensation schemes, which pay workers more in later years and provide deferred benefits, such as pensions which increase with tenure, remained intact, even after many provinces abolished mandatory retirement. The Tribunal concluded that the goal of allowing mandatory retirement to be negotiated was not sufficiently pressing and substantial to warrant the infringement of equality rights.

NOT PROPORTIONAL, NO MINIMAL IMPAIRMENT

In applying the proportionality analysis of the *Oakes* test, the Tribunal found that the objectives of the CHRA were not logically furthered by the means the government chose to adopt. The wording of s. 15(1)(c) of the CHRA did not actually require negotiation of mandatory retirement. Instead it simply required that retirement occur at the “normal age”. The effect therefore of s. 15(1)(c) was that mandatory retirement could be imposed upon workers without negotiation, subject to the sole requirement that the retirement age correspond to the industry norm.

In assessing whether mandatory retirement “minimally impaired” the complainants' equality rights, the Tribunal found that there were less intrusive options available. For example, a more carefully crafted s. 15(1)(c), which limited mandatory retirement to situations where it was essential to maintaining a negotiated package of rights and benefits, could potentially pass the *Oakes* test.

The Tribunal held that the normal age of retirement criterion contained in s. 15(1)(c) was not rationally connected to the goal of furthering negotiation of mandatory retirement and did not minimally impair the right of older workers to equal protection under the law. Older workers were found to be deprived of legal redress for the harm they suffered when they were forced to retire at the “normal age of retirement”. The negative effects of the infringement of the right—that of depriving individuals of the protection of the CHRA—outweighed any positive benefits of the challenged provision.

NO UNDUE HARDSHIP, MANDATORY RETIREMENT NOT A “BFOR”

The Tribunal then considered whether Air Canada's mandatory retirement policy could be considered a *bona fide* occupational requirement permitted by s. 15(1)(a) of the CHRA. In order to avail itself of the BFOR defence, Air Canada was required to meet the three requirements set out by the Supreme Court of Canada's decision in *Meiorin* (1999) 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 a 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, an employer must demonstrate that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.

It was accepted that the first two components of the *Meoirin* test were satisfied. The only dispute was over whether Air Canada could demonstrate that the complainants could not be accommodated without undue hardship. The Tribunal examined the evidence and found that Air Canada could not meet this requirement. The Tribunal found that, with some cooperation, changes to Air Canada's rules could be made that would accommodate pilots working past age 60.

Although the Tribunal found that the human rights complaints had been substantiated, it refrained from providing a remedy until further information was provided by the parties. The nature of the remedies sought, including reinstatement, restoration of seniority, and damages for lost income and benefits, would involve a considerable readjustment to the current workplace regime. The Tribunal said it was unable to dispose of those requests based solely on the information submitted at the hearing.

In Our View

The decision in *Vilven v. Air Canada* will apply to collective agreements across federally regulated industries. These include banking, telecommunications, marine and rail transport, the postal service and the armed forces. Mandatory retirement provisions in collective agreements in such industries will not be upheld, unless it can be established that mandatory retirement is a BFOR. In this respect, the Tribunal's decision will bring federally regulated industries in line with most of the provinces. Both the employer and the Pilots Association have applied for judicial review of the decision. We will keep readers informed of future developments.

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