2017 CarswellNat 3472
Canada Arbitration

ACPA and Air Canada (Personal Travel Privileges), Re

2017 CarswellNat 3472

AIR CANADA PILOTS ASSOCIATION (the "Association") and AIR CANADA (the "Company")

Robert D. Howe Member

Heard: July 26, 2016; July 27, 2016; July 28, 2016; December 19, 2016; December 20, 2016; March 16, 2017
Judgment: July 25, 2017
Docket: None given.

Counsel: Steve Waller, Alison McEwen, for Association
Irene Chrisanthopoulos, for Employer

Subject: Constitutional; Public; Employment; Labour; Human Rights

Related Abridgment Classifications

Human rights

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Labour and employment law

I Labour law
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Headnote

Human rights --- What constitutes discrimination — Sex — Employment — Pregnancy, maternity and parental leave — Benefits

Human rights --- What constitutes discrimination — Disability — Physical disability — Employment — Benefits

Human rights --- What constitutes discrimination — Adverse effect discrimination

Human rights --- Statutory exemptions — Bona fide requirement — Occupational requirement

Labour and employment law --- Labour law — Collective agreement — Employee benefits — Miscellaneous

Labour and employment law --- Labour law — Collective agreement — Management rights — Work rules — Absenteeism and attendance

Labour and employment law --- Labour law — Collective agreement — Discrimination

***Robert D. Howe Member*:**

1 This award pertains to a grievance filed by the Air Canada Pilots Association (also referred to in this award as "ACPA" and the "Association") on October 29, 2014, through which the Association challenges a change made by Air Canada (also referred to in this award as the "Employer" and the "Company") to its Travel Privileges Policy (the "Policy"). The impugned change applies to pilots and other Air Canada employees who have been on most but not all kinds of leaves of absence for over 365 days. (For ease of exposition, that change will be referred to in this award as the "365 day rule"). It is the Association's position that the 365 day rule adversely impacts women, parents, and the disabled, who are protected groups under the *Canadian Human Rights Act* (the "*CHRA*"), and that its adverse effect on them constitutes discrimination under that Act. It is also ACPA's position that the 365 day rule is unreasonable. (The grievance also challenged new procedures which employees on sickness or injury leave were required to follow before they could book travel under the Policy, but that aspect of the grievance was resolved by the parties on the final day of hearing and will consequently not be addressed in this award.)

2 During the six days devoted to the hearing of this matter, seven persons were called as witnesses. In addition to their testimony, 39 exhibits were entered into evidence. In making the findings and reaching the conclusions set forth is this award, I have duly considered all of that oral and documentary evidence, as well as the oral and written submissions

presented by counsel, including the numerous cases and other authorities referred to in those submissions. Since evidence adduced in support of the adverse impact alleged by the Association included medical and other personal information, the employees to whom it pertains will be referred to in this award through the use of initials rather than names for purposes of privacy.

3 Upon completion of six months of continuous employment (including permanent, temporary, full-time, and part-time employment), an employee becomes eligible for travel privileges under the Policy. Persons eligible to travel under the Policy include not only employees of Air Canada, but also persons employed by certain other companies with which Air Canada has a commercial relationship (including Fasco, Jazz, and Air Georgian). Those other companies also provide travel privileges to employees of Air Canada through reciprocal arrangements. Employees' eligible family members (including their spouses/common law partners, dependent children, and parents) also have travel privileges under the Policy, as do retired employees (and some of their survivors, as well as some persons who have become former employees by means other than retirement), provided that they meet one of three criteria: twenty-five years of continuous (or qualifying) service, factor 80 (age + continuous or qualifying service = 80), or age 65 (60 for pilots) with a minimum of ten years of continuous service. Laid off employees retain travel privileges for 365 days from their lay-off date, provided that they have accumulated at least six months of service. The service required to satisfy any of those duration of service requirements need not be active service. However, the scope of travel privileges available to an employee under the Policy depends on the employee's active or inactive status, as well as the employee's position.

4 Travel privileges granted by the Policy permit eligible persons to access seats for personal travel on a space available (i.e., standby) basis at a substantially reduced cost (paying only a service charge to Air Canada, and charges imposed by other entities, such as taxes and airport improvement charges). Since paying customers always have priority over persons travelling under privileges granted by the Policy, the availability of seats for travel privileges is affected by the passenger load factor, which is a measure of passenger capacity utilization derived by expressing revenue passenger miles as a percentage of available seat miles. That factor rose by over ten percent between 2001 and 2015, resulting in fewer seats being available for travel privileges. Available seats are allotted on the basis of a complex priority system, based upon a number of factors including the position held by the employee and the employee's length of service with the Company. Employees of Air Canada's regional carriers have lower boarding priority than employees of Air Canada (with the exception of some "grandfathered" Jazz employees).

5 Employees on leave continue to accrue years of service for travel privilege purposes. Employees on leave who are eligible to travel compete directly with active employees for available seats, and will board before active employees if they have a better boarding priority, or if they have the same boarding priority as the active employees but longer service.

6 The ACPA-Air Canada collective agreement (the "Agreement") provides entitlement to travel passes in a variety of circumstances, including travel passes for ACPA representatives travelling to conduct business with Air Canada (Article 10.09.09), travel passes for deadheading pilots (Article 23.01.04), and travel passes for pilots travelling for training (Article 23.02.01). However, the Policy does not form part of Agreement, and has never been negotiated with ACPA or any of the other unions which hold bargaining rights for employees of Air Canada. The Company has always retained the discretion to change the Policy unilaterally at any time, and has exercised that discretion many times over the years.

7 The scope of travel privileges available to employees on leave of absence has been changed a number of times, but has always differed from those available to active employees. The scope of travel privileges has also varied depending on the type of leave on which the employee is absent. For example, under the 1991 version of the Policy, employees on voluntary leaves of absence (such as personal leaves and educational leaves) could only use their travel privileges up to December 31st of the year in which the leave commenced. Moreover, unlike active employees, they could only use their travel privileges on Air Canada flights, as they were not permitted to use them on Air Canada regional airlines, code-sharing carriers, or any other airlines. The latter limitation also applied to employees on worker's compensation and group disability, but did not apply to employees on union leave or maternity/child care leave. By 1997, the Policy had been revised to permit employees on disability leave to travel not only on Air Canada, but also on Canadian Airlines and Air Canada's Regional carriers. That version of the Policy also indicated that employees on Inability to Meet Medical

Standards ("IMMS") leave, could not use their personal travel benefits after December 31st of the year in which the leave commenced.

8 Laid-off employees also have different travel privileges than active employees, and the scope of their travel privileges has also changed over the years due to Policy revisions. Prior to October of 1992, they were granted ten authorization vouchers that could be exchanged for ten personal trip pass tickets (for use by them, their spouses and their dependent children under twenty-one years of age), but the travel had to be completed by December 31st of the year of lay-off. However, as of October of 1992 the Policy was changed to provide that laid off employees would have travel privileges for 180 days from the date of lay-off. Under the Policy in force in September of 2001, laid off employees (and their spouses and dependent children) could use travel privileges to take an unlimited number of trips, but the outbound travel had to be completed by December 31, 2001, and the inbound travel had to be completed by January 31, 2002. In the version in force as of September of 2003, they (and their spouses, dependent children, parents and partners) were permitted to travel for the first 365 days from the date of lay-off. Travel was only permitted on Air Canada and Air Canada Regional airlines; travel on Star Alliance carriers, code-sharing carriers, and all other airlines was not permitted.

9 Prior to the changes that gave rise to the grievance, the Policy required employees absent on medical leave to make a written request to their immediate manager to obtain approval to travel prior to using their travel privileges. However, compliance with that requirement was based on an honour system, and not all employees complied with it. Moreover, approval was supposed to be granted only when there was a medical reason to travel (such as a requirement for medical treatments), bereavement, or other compassionate or extenuating circumstances. Although managers in some divisions only granted approval in those limited circumstances, managers in other divisions, including the flight operations division in which pilots are employed, generally granted approval to any travel requests made. Thus, pilots were able to make largely unrestricted use of travel benefits while on leave due to illness or injury, while employees in some other divisions were seldom able to obtain permission to travel while on such leave.

10 Prior to the changes that gave rise to the grievance, employees on personal/educational leave retained travel privileges for 365 days from the commencement of the leave. However, employees on IMMS leave retained their travel privileges until December 31st of the year in which the leave commenced. Employees on all other types of leave (including maternity, paternity, child care, compassionate, and union leave) retained travel privileges throughout the duration of their leaves.

11 In 2012, the Company's Business Transformation ("BT") Department (which is now called its Strategic Initiatives Department) was mandated to review workers' compensation, absenteeism, and the group disability income plan ("GDIP"). Anshul Pahuja, the department's Senior Manager, testified that the Department's role is to enhance revenue generation, reduce costs, and assess business processes for the purpose of recommending how they can be made more efficient. In performing the review, the BT group considered some cost reduction initiatives and some foundational improvements that are not related to cost reduction initiatives. The group sought to improve the "WCB and GDIP process" by considering an overview of WCB and GDIP costs and recommending initiatives to reduce those costs. Those recommendations included: "Improve RTW process using stay at work philosophy and stronger case management", and "Participate in occupational service program to facilitate return to work process". The group also made recommendations to streamline the return to work process, and estimated the annual cost savings which would be achieved if those recommendations were implemented.

12 Although the Company's policy regarding travel privileges while on leave was not one of the items initially included in the review, input received by the BT group during the review process indicated that the existing policy was not being applied consistently, giving rise to frustration. As noted above, managers in some departments were being more generous than those in other departments in granting approval for travel while on medical leave, and although some employees were seeking approval, others were travelling without obtaining approval. As a result of that input, the BT group decided to add travel privileges while on leave as an area to be explored for foundational improvement. Research conducted by the TP group confirmed that input.

13 The foundational improvement that the BT group sought to achieve regarding travel privileges while on leave was to have the Company's existing Policy applied consistently across all of the Company's divisions. In December of 2012, it facilitated a rephrasing of the Policy, established an employee travel report for all branches, and reinforced the necessity of manager approval prior to travel while on medical leave. To assist with the enforcement of the Policy, a "pop-up window" was added to the Company's travel portal asking employees to acknowledge that they had completed the required procedure and had received confirmation from Occupational Health Services that they were fit for air travel. Those measures resulted in a significant improvement in compliance with the Policy. However, there continued to be some inconsistency in the application of the Policy, and there remained a concern that not all leaves were being treated in the same manner.

14 Further review of the Policy was conducted in 2013-14 by a committee that initially consisted of Sophie Georgakakos, who at that time was the Company's Customer Service Manager -Employee Reliability, and Kate Friedman, the Company's Director of Disability Management. Leslie-Ann Vezina, who is the Company's Manager of Travel and Recognition, was subsequently added to the committee, because she was the person who would be implementing the changes to the Policy. Ms. Friedman and Ms. Vezina were both called by the Company as witnesses in these proceedings, as were Dr. Jim Chung, Air Canada's Chief Medical Officer, and Harlan Clarke, who was the Company's Director of Labour Relations at the time the grievance was filed.

15 Since that further review indicated that the existing requirements were still not being applied consistently across the various branches of the Company, the Policy was changed to eliminate those inconsistencies, streamline the process, and take the onus of enforcing the Policy away from managers. Under the initial changes to the Policy announced in November of 2013, all employees on Company-approved leaves of absence (and their eligible family members) were to be permitted to use their travel privileges during the first 365 days of their leave with no requirement for managerial approval and no limitation on the purpose of the travel. However, on the 366th day of their leave, all of those travel privileges were to be placed on hold and were not be reinstated until the employee had returned to work and completed 26 weeks of continuous service. If an employee on leave of absence returned to work after being absent on leave for less than 365 days but then went off on leave again before completing 26 weeks of continuous service, the count of days absent on leave was to resume where it had left off and the travel privileges were to be placed on hold when the employee accumulated a total of 365 days absent on leave.

16 Permitting employees to use their travel privileges during the first 365 days of their leave with no requirement for managerial approval and no limitation on the purpose of the travel was a suggestion made by Ms. Georgakakos. After gathering and reviewing data concerning the duration of leaves, Ms. Friedman concluded that the suggestion was logical based on the fact that most leaves are completed in less than 365 days. During the course of her testimony, she also provided the following explanation of why the committee felt there was a need for a cut-off date:

> Air Canada has always provided gratuitous travel for employees and has always treated employees on leave differently than active employees. For example, employees on IMMS leave lost their travel privileges at the end of the year. Employees on disability leave had to get managerial approval. So when the Company has always treated employees differently because of their contribution, it was logical to end travel privileges at day 366.

Ms. Friedman testified that employees on leave are treated differently from active employees "because active employees are contributing differently than people on leave; they're at work every day contributing to the active operation, so the travel privileges given to them are different for that reason".

17 It was Mr. Clarke's evidence that another reason why the Company decided to change the Policy was that the old Policy treated employees differently depending on what kind of leave they were on, or what kind of inactive status they held. He testified that the International Association of Machinists and Aerospace Workers ("IAMAW"), which represents some of the Company's employees, filed a grievance in 2013 alleging that the old Policy was discriminatory. In November of 2013 that grievance came before Arbitrator Teplitsky, who for almost a decade had been the chief

arbitrator under an expedited arbitration process agreed to by the IAMAW and the Company. Mr. Clarke testified that Mr. Teplitsky "was not shy to telegraph what he was thinking regarding a particular case sometimes before a hearing or even mid-hearing". He also gave the following evidence regarding Mr. Teplitky's comments about that grievance: "With this particular grievance, he made it clear to the Company that at first glance, without getting into a deeper analysis, the old Policy may be considered discriminatory under human rights [legislation], and that he would remain seised of the matter". In describing the consideration that the Employer gave to that information, Mr. Clarke stated: "Obviously there is a concern if the Policy which has been in place for a number of years could be seen as discriminatory".

18 Mr. Clarke's involvement with the Policy changes commenced in November of 2013, when he and his colleagues gave unions including ACPA a "heads up" regarding the proposed changes. The feedback which he received included concerns that the changes might be unpopular, and that the requirement of working 26 weeks before regaining travel privileges could adversely affect employees who use those privileges to commute between their Air Canada base and the place where they reside.

19 In November of 2013, the Company disseminated a "Frequently Asked Questions" document regarding "Travel while on a Company-Approved Leave of Absence", which included the following question and answer:

> **Why will my travel profile be deactivated if I am on leave for more than 365 days?**
>
> In order for a policy to be applied consistently across an organization, it needs to include specific parameters that are easily followed. Otherwise, it is open to personal interpretation, which is where inconsistencies arise. There are many reasons why an employee may need to take leave, but many return within the first 365 days, which is why the one-year timeframe was considered a reasonable amount of time before travel privileges were deactivated. However, as an employer, we have a responsibility toward all of our employees and must consider how a policy regarding travel privileges for those who are inactive potentially affects those who are active. At some point, it becomes difficult to justify allowing employees who are not working to continue to receive all of the same privileges are those who are.

20 In explaining why this was a consideration, Ms. Vezina testified that while the Company wants to be fair to all of its employees, it has a responsibility to acknowledge and reward its employees who are contributing on a day-to-day basis. She further testified that deactivating the personal travel privileges of employees on leave (and their eligible family members) serves this purpose by limiting the number of times that active employees will have to compete with employees on leave for available seats.

21 During July of 2014, Ms. Vezina conducted a "bench marking" exercise by contacting her counterparts at various other airlines to determine what travel privileges they provided to employees on leave of absence. Through those contacts, she determined that the majority of U.S. carriers were very restrictive, basically not permitting any travel while on leave, with the exception of maternity leaves and military leaves. However, she also determined that some of the Company's Canadian and European competitors allowed for unlimited travel while on leave. As a result of that benchmarking exercise, Ms. Vezina concluded that what was being proposed was "reasonable within those benchmarks", as it was "middle of the road - not completely restrictive like the U.S. airlines but not completely open like some of the Canadian and European airlines".

22 Mr. Clarke provided the following explanation of why Air Canada treats active employees differently from inactive employees for purposes of travel privileges: "An active employee contributes to the success of the Company - the bottom line - whereas employees on inactive status are not necessarily contributing to the same level".

23 Air Canada has an attendance policy which includes an expectation that employees will "be at their assigned work post at the start of their shift every workday", and the obligation that "[w]hen sickness prevents an employee from working, the employee shall take the necessary measures to foster his or her recovery and enable him or her to make a safe and timely return to work". There is also some evidence that another purpose of the 365 day rule was to curb abuse of sick leave. In responding to an email sent by an Air Canada pilot on a GDIP leave of absence who was about to

undergo lung cancer surgery and who was writing to management to express his concerns about the new policy, Arielle Meloul-Weschler, who was the Company's Vice President of Human Resources, wrote, in part, as follows, after repeating the above-quoted explanation of why employees' travel profiles were going to be deactivated if they were on leave for more than 365 days:

> Returning to work from an extended leave can be a difficult process requiring adjustment for the employees and their department. We have always operated based on trust and supported those returning from a leave through this process to the best of our ability. Unfortunately, over the years an increasing number of employees have taken advantage of the system, enjoying privileges while not active for extended periods of time. Our attempts to manage this on a case by case basis were inconsistent and not entirely successful as the policy did not address this issue. As a result, the 26-week rule was added for clarity and also to discourage individuals from returning to work for a very short period of time for the sole purpose of resetting their travel profile and associated privileges for another year.

24 An email exchange between D.S., a disabled pilot based in the Vancouver area who had been on sick leave for over three years, and Ben Smith, who is Air Canada's President, Passenger Airlines, commenced in November of 2014 and continued into the summer of 2015. After undergoing his third surgery, D.S. wrote to Mr. Smith on November 24, 2014, to express a number of concerns, including the impending suspension of travel privileges, which would preclude affordable visits with his elderly sick parents who lived in Toronto. Mr. Smith was sympathetic to his situation and undertook to raise it with Human Resources.

25 The aforementioned changes to the Travel Privileges Policy were announced in November of 2013. Since only time away on leave after December 1, 2013 was to count toward the 365 days, the employee privileges of employees on leave as of that date were to remain intact until December of 2014, when they were to be suspended if the employees were still on leave at that time. However, in November of 2014, Air Canada agreed to defer that suspension of travel until February 2, 2015, in order to give the unions an opportunity to determine if they could agree upon revisions to be presented to the Company for consideration. Although D.S. was grateful for that reprieve, he remained of the view that the 365 day rule was unfair because it applied to everyone on leave, rather than targetting abusers. In June of 2015 he sent Mr. Smith a newspaper column entitled "Got a problem employee? Don't whitewash", along with an email indicating that the article was "something along the lines of what [he] was trying to impart regarding staff travel". Mr. Smith's response was:

> Unfortunately, it wasn't just one employee it was several hundred and our way of doing business does not allow for easy termination.

26 As indicated above, after the initial revisions to the Policy were announced in November of 2013, the Company received feedback about them from employees and their unions. As a result of the aforementioned concern about the requirement to complete 26 weeks of continuous service before regaining travel privileges after returning to work, the Company further revised the Policy to provide for travel privileges to be immediately reinstated when an employee returned to work from leave of absence, but to also provide that if the employee went off work on another leave of absence within the first 26 weeks after returning to work, the employee's travel privileges would be immediately placed on hold until the employee returned to work again. In order to ensure that an employee at or near the end of the 365 day period did not return to work simply to "reset the clock" and then go off on leave again with a fresh 365 day. period, the calculation of the 365 days was made cumulative from the beginning of the initial leave and continuing from the point at which it had left off if an employee returned to work from the initial leave and then went back on leave without working 26 continuous weeks.

27 In response to a prevalent concern that travel privileges were to be entirely cut off on the 366th day of leave, the Policy was further changed to provide for an annual allotment of three passes (issued on a pro-rated basis dependent on when in the calendar year the 366th day fell), with that annual allotment of three passes being refreshed every January. (Unused passes could not be carried over to the next year.) Three annual passes were also to be allotted to eligible family members (because family members' travel privileges are an extension of the employee's travel privileges). Bereavement passes were also to be available upon individual request and proof of circumstances warranting the travel. As indicated

above, once an employee returned to active status from a leave that lasted 365 days or longer, full travel privileges would be reinstated without any waiting period. However, if the employee went off work on any form of Company-approved leave within 26 weeks thereafter, travel privileges would be immediately removed and replaced with the pro-rated annual allotment of three passes (taking into account any prior usage of those passes within the calendar year).

28 Air Canada subsequently further deferred the implementation of the revised Policy until April 1, 2015, to ensure that the necessary changes had been made in the Company's computer system.

29 The 365 day rule applies to all employees on Company-approved leaves with the exception of three groups that have been exempted from its application. Employees on leaves negotiated to mitigate head-count surpluses (such as the Special Leave of Absence Program agreed to by the Company and the Association, the provisions of which are incorporated into Letter of Understanding No. 68 that forms part of the Agreement) are exempted from those changes as an incentive to encourage employees to volunteer for and remain on such leaves. In explaining the rationale for that exemption, Mr. Clarke testified that reducing the active workforce in this manner rather than through lay-offs is beneficial for employee morale and avoids the delays and disruption caused by lay-offs.

30 Employees on leave for union business purposes are also exempted from the 365 day rule. Mr. Clarke testified that the Vice-President of Labour Relations decided upon that exemption because of the Company's ongoing relationship with the unions. However, that exemption has no impact on ACPA representatives. They retain their travel privileges because they are not on a leave of absence; they are on a release and continue to be paid by Air Canada (with partial reimbursement by the Association). However, the exemption does have an impact on other unions such as the IAMAW, because some of their officers are on leave of absence from Air Canada.

31 The third group exempted from the Policy changes are employees on leave who are able to return to work but who cannot be provided with any work or training by the Company. In a "Frequently Asked Questions" section of an Air Canada "News & Policies" publication, the Employer offered the following explanation for that third exception:

> **If I cannot return to work for reasons unrelated to a leave (for example, the company cannot schedule me for work or training right away), will the time off still count toward the 365 days of travel privileges?**
>
> No. This travel policy applies to leaves of absence only. As soon as you are able to return to work, even if the company is not able to absorb you for initial training or otherwise, the clock would stop ticking and you would no longer be considered on leave for the purposes of calculating the 365 days.

32 ACPA called two pilots as witnesses to describe the impact of the 365 day rule on them and their families: L.P. and D.M. L.P. became an Air Canada pilot in 1996, after working in a variety of aviation positions for other employers. Some of her previous employers also provided travel privileges for active employees and for employees on leave. She used those travel privileges for various purposes including visiting her family, pursuing additional training, and pursuing other employment opportunities. In the two and a half years before she secured a pilot position with Air Canada, she worked at Air Nova, which was an Air Canada connector airline. She enjoyed personal travel privileges at Air Nova after a six-month waiting period, and continued to enjoy those privileges without any additional waiting period after commencing employment with Air Canada. Toronto was the initial base for her employment with Air Canada, but since she did not want to live there she used her travel privileges to commute between Toronto and Winnipeg. After moving to Victoria, she used her travel privileges to commute to Winnipeg, which had become her Air Canada base. She also used her travel privileges for recreational purposes and for family visits, including extended visits with her father to assist with his rehabilitation after he suffered a stroke. She ultimately moved to Winnipeg from where she and members of her family continued to use travel privileges for a variety of purposes, including visits with her brother in Florida and her sister in Victoria, arrangements for her children to visit their cousins, annual trips to Europe to visit with extended family, and other vacations.

33 L.P. had to take sickness/disability leaves several times during the course of her employment with Air Canada, as a result of becoming medically unfit to fly aircraft. The first time this occurred was when she suffered a miscarriage while on a layover in Denver. During that leave of absence, she was told that she could not fly while pregnant because she was high risk. Consequently, when she became pregnant again, she went off on leave and did not return to work until after giving birth to her first son following an uneventful pregnancy. She subsequently suffered several late term miscarriages with haemorrhaging that resulted in her haemoglobin level becoming extremely low, necessitating a blood transfusion and iron intensive therapy to bolster it. During a resulting leave of absence, she used her travel privileges to become a patient of a fertility specialist in Toronto, who diagnosed the cause of her miscarriages and prescribed two daily injections for her to self-administer. She used her travel privileges to see that specialist once a month during her ensuing pregnancy, which resulted in the birth of her second son. Although she was eager to return to work after that successful delivery, she was unable to get her haemoglobin up to the level normally required. Eventually she managed to obtain a restricted licence at a lower level, with the restriction being that she had to fly with another pilot.

34 Six years later, L.P. had to take disability leave again after she tore the meniscus and a tendon in her left knee, resulting in locked knee. She subsequently developed a life threatening infection after undergoing surgery in which a tendon from a cadaver infected with a rare disease was used as a replacement tendon. This led to six months of intensive antibiotic treatment using a PIC line catheter that fed a lead from her arm directly into her heart, followed by massive doses of oral antibiotics for another eight months. She also underwent several surgeries related to the hole that the infection left in the tibial canal of her left knee. While away on leave, she worked diligently at the rehabilitation necessary to return to work. She used her travel privileges to fly to Toronto for a week-long noncompulsory thirty-hour simulator training session, during which she stayed at a hotel at her own expense. Once she was confident that her knee could handle everything required to perform the duties of an aircraft captain, she returned to work in November of 2014, after being away on leave for close to a year. She was then able to remain at work for six months before suffering another tear under her knee cap while stepping down to the aircraft stairs during an overseas flight. Three weeks later, her knee totally dislocated while she was getting out of a shuttle bus with her luggage. When she saw a surgeon the next day, he told her that she had suffered another tear, that this was likely going to continue to occur, and that he did not think that her knee would ever become stable enough for her to return to work as a pilot. She was devastated by that information because she defined herself as a pilot and loved being an aircraft captain, which she described as a fantastic job that gave her a significant amount of joy. She contacted her manager, who was very supportive and arranged for her to receive counselling and pilot-to-pilot therapy. She also turned to her family, her sister in Victoria, and her brother in Florida for support.

35 When L.P. wanted to use her travel privileges while on leave due to illness or injury, she phoned her Manager of Line Operations and told him: "I just went on disability and I'm going to Toronto. According to the procedure, I have to let you know about that." His response was "Okay and don't worry about calling again". When she phoned other line operation managers for that purpose on other occasions, they all responded in that same way to her calls. None of them ever asked her the specific reason why she wanted to travel, and it was never suggested to her that employees on leave due to illness or injury were only permitted to travel for limited purposes. She did not contact Air Canada's Occupational Health Services to obtain permission to travel because she had never been advised that she was required to do anything beyond contacting management to advise of her travel plans.

36 L.P. was notified of the forthcoming changes to the travel policy through the following letter that she received in November of 2013, while undergoing the aforementioned antibiotic treatment:

> As an Air Canada employee who is currently on a leave of absence, please take note of the following changes to the travel policy as they relate to you. Starting December 1, 2013, all employees on a company-approved leave and their eligible family members will retain their travel privileges throughout the first year of their leave. On the 366th day, if applicable, the travel profile will be deactivated and a hold will be put on all privileges for anyone listed therein. These will be reinstated once the employee has returned to work and completed 26 weeks of continuous service.

> In order to ensure consistency and legal compliance in the enforcement of this policy across Air Canada, it will apply to all company-approved leaves. For safety reasons, employees who are on a leave due to illness or injury and who wish to travel during the first year of their leave will be required to provide medical evidence of their ability to do so safely each time they wish to do so.
>
> [The balance of that letter describes the process for obtaining travel clearance, explains that although L.P. was currently on leave only her time on leave as of December 1, 2013 would count toward the 365 days during which she would retain travel privileges, and indicates that time away from work would be cumulative from leave to leave unless she returned to work for at least 26 continuous weeks.]

37 L.P.'s testimony regarding her reaction to that letter was:

> I felt like I got kicked in the stomach when I got this. I was so sick. I thought that I was being accused of making it up. I was so shocked at the letter. I would make a point of dragging myself to the airport on crutches with the PIC line to visit my manager so people would see how sick I was. It was hard to move. The pain was substantial. I had to change the bag on the PIC line every hour and a half so it was hard to leave home.

38 Although L.P. remained on disability leave and continued to receive sixty percent of her pre-disability income of approximately $190,000 per year, she could not accept that her career as a pilot was over and remained determined to attempt to return to work. She tried more aggressive physiotherapy and went to Victoria in June of 2016 for five weeks of laser therapy. Since the application of the 365 day rule in May of 2016 had limited her and her family's travel privileges to two passes for the duration of that year, she did not see her husband or children during that five week period because she wanted to save those passes for use with her family. Although the clinic wanted to do eight more treatments, L.P. left early because she could not bear to be away from her children any longer. It was also her evidence that although most surgeons are unwilling to consider performing an additional complex surgery because of her previous infection, there is a German surgeon who is willing to consider it in conjunction with a surgeon in Victoria. However, she testified that she will probably be unable to pursue this possibility because she would have to pay for a ticket to go to each consultation, and because if she had surgery she would be away from her family for at least six weeks during which she would be unable to travel. She also stated: "If I had passes at least my husband could bring my kids to visit me".

39 D.M. is a Toronto-based relief pilot who generally works on long flights to Asia, South America, and the south Pacific. Since she is married to an Air Canada pilot who has more seniority than she does, she generally uses his travel privileges rather than hers because his greater seniority gives him and his family members higher boarding priority. After her father suffered a brain bleed causing stroke-like symptoms, she used travel privileges to travel back and forth to Kingston to provide care for him because her mother was initially too distraught to do so. Since her parents were eligible to fly using her travel privileges but were not eligible to fly under her husband's travel privileges, they have used hers for various purposes, including travelling to Toronto, travelling to Costa Rica for dental work, travelling south to access a South American cruise, and travelling to Florida, where they usually spend some months during the winter and where her father participated in a speech therapy program after suffering his brain bleed.

40 D.M. became pregnant in 2013. At about the thirtieth week of pregnancy, Transport Canada generally takes away the medical certification on which a pilot's licence is predicated, and does not restore it until at least six weeks after she gives birth, pursuant to section 404.06 of the *Canadian Aviation Regulations*, SOR/96-433, which provides in part as follows:

> 404.06(1) Subject to subsection (3), no holder of a permit, licence or rating shall exercise the privileges of the permit, licence or rating if
>
> . . .
>
> (c) the holder has entered the thirtieth week of pregnancy....

(d) the holder has given birth in the preceding six weeks.

However, many female employees leave work prior to their thirtieth week of pregnancy for medical reasons. About two months into her pregnancy, D.M. began to experience morning sickness and fatigue. At the suggestion of her physician who was of the view that she was not fit to fly an airplane, she went on GDIP leave on August 6, 2013, which was about two months into her pregnancy. Although D.M.'s due date was in late April, her son was born on April 11, 2014. D.M. planned to transition from GDIP leave to the normal one-year maternity leave.

41 At the beginning of December of 2013, D.M. was notified of the forthcoming changes to the Policy through a letter containing the same information as the above-quoted one received by L.P. Since it looked like a form letter, D.M. thought that it had been sent to her by mistake as it did not make sense to her that the 365 day rule would be applicable to female pilots on maternity leave. In an attempt to clarify her situation, she subsequently phoned the Company and spoke with Catherine Giannini, a crew planning official, who told her that this was not going to affect her and that she need not worry about it. However, since the letter had been addressed to her, L.P. remained disturbed by the letter and consequently arranged to send Ms. Giannini a copy of it, along with an email in which she expressed the following concern:

> If they are including the GDIP leave before the baby was born I will only be able to take maternity/parental [leave] until December 1st or lose my passes and have to work 6 months again before they are reinstated. If that's the case no female pilot would be able to take their full maternity without being penalized.

42 D.M. also sent a copy of that email to Air Canada's Toronto Manager of Line Operations, Captain Kurtis Scheirer, on August 24, 2014. After receiving a response from Captain Scheirer advising that the 365 day rule would apply if she was on a combination of GDIP, maternity leave, and parental leave for more than 365 days, she sent him the following email:

> Thank you for your reply. I understand this policy means I will only be able to take 7 1/2 of my legally alloyed 12 months of maternity or the company will take my travel privileges away.
>
> I find this policy quite discriminatory especially as no female pilot who chooses to have a baby will be able to take their full maternity without having their passes revoked.
>
> I'm hoping the company will make an exception for female pilots in these cases.

43 Captain Scheirer's response to that email included the following observations:

> ... No one has stated that you will only be able to take 7 1/2 of your legally allotted 12 months of maternity leave. The legal entitlement to your maternity leave will remain intact.
>
> This policy has been vetted by our legal department and is applied uniformly to all of our employee groups for a fixed period of time independent of the type of leave.
>
> I do not believe that any exceptions will be made.

44 Those observations generated this reply from D.M. on August 26, 2014:

> I know this policy was written as a blanket policy for all employees and I'm sure they didn't consider the special nature of the female pilot when it concerns maternity. In the Q&A section it asked if those on maternity would be affected, and it stated they would not since maternity benefits are only one year in length. Female pilots have the unique situation where our license is revoked in the third trimester (or earlier with complications) before maternity benefits begin. In this case, being a female pilot at Air Canada means that if you choose to have a baby, you have no option but to lose your travel passes if you take your full maternity.

I know the Government stipulates that:

"An employer cannot penalize an employee *in any way* because the employee is or will be eligible to take a pregnancy or parental leave, or for taking or planning to take a pregnancy or parental leave."

I understand the lawyers vetted this policy but may not have considered the unique female pilot situation when it comes to maternity

Perhaps we could request that the policy be changed when a LOA status changes from GDIP to parental leave (wherein the one year clock starts again).

45 Captain Scheirer responded:

This policy is not targeted at any specific group, I believe they did take maternity leave into account, and it is unlikely that the policy will change. Pass travel is a privilege, not a benefit, and as such the loss of a privilege with respect to the present policy of leaves is not considered as punitive. Your thoughts have been forwarded to our Labour department.

46 The application of the 365 day rule to D.M.'s maternity leave would have diminished her parents' ability to travel using her travel privileges. She was breast-feeding her baby and did not want to return to work early, but also did not want to have her parents' ability travel restricted. After much discussion, she and her husband ultimately decided that she would return to work early, and that her husband would take the remaining parental leave so that the 365 day rule would not apply.

47 In November of 2014, implementation of the changes initially proposed by Air Canada was deferred for two months until February 2, 2015, in order to consider feedback from employees and their unions. Implementation of a revised policy was subsequently further deferred until April 1, 2015, to allow time for the finalization of changes based on that feedback. Thus, by the time that D.M. returned to work on February 11, 2015, she and her husband were aware that the implementation of the revised policy had been deferred until the end of that month. However, it had been necessary for them to make their plans prior to being notified of that deferral.

Summary of Submissions made by Association Counsel during their Argument-in-Chief

48 Human rights legislation prohibits not only direct discrimination but also adverse effect discrimination. When a rule or policy adopted by an employer is on its face neutral but has a discriminatory effect on a prohibited ground, this constitutes adverse effect discrimination that violates human rights legislation. That type of analysis has been approved by the Supreme Court of Canada and adopted by human rights tribunals. Intent to have a discriminatory effect is not a requirement.

49 In order to determine whether adverse effect discrimination has occurred, it is necessary to consider an appropriate comparator group. In some cases the comparator group will be active employees, but in other cases it may be employees who are not working. In determining the appropriate comparator group, the first step is to determine the purpose of the benefit plan. Comparing the benefits allocated to employees pursuant to different purposes is not helpful in determining whether discrimination has occurred. In making that determination, consideration can be given not only to members of the bargaining unit but also to persons outside of the bargaining unit. To determine whether there is an active service requirement for a benefit, it is important to look at the underlying purpose of the benefit in question. If the underlying purpose for the benefit is ambiguous, the best way to resolve the ambiguity is on the basis of past practice.

50 Once a prima facie case of discrimination has been established, the burden shifts to the employer to justify it by establishing that the standard or requirement in issue is a bona fide occupational requirement ("BFOR"). A requirement of active service can be a component of a BFOR. There is no illegality in making an entitlement contingent on active work. This can have the effect that employees who cannot work for whatever reason may be adversely affected. The key

is that everyone is treated the same way regardless of the reason for the absence from work. If there is this type of equal treatment, there is no violation of human rights legislation.

51 The Company has for many years conferred on a broad range of persons, including some who are not even employees of Air Canada, an unrestricted number of passes for personal travel. The best evidence of the purpose of that benefit is the Employer's past practice. Entitlement to that benefit has never been based on active service. Although there is a six month waiting period before an employee obtains this benefit, the past practice indicates that this is merely a requirement of six months of employee status, not a requirement of six months of active service. Retirees provide another example of that benefit not being tied to active employment status; they gain entitlement to unlimited personal travel passes through a combination of service and age, with no requirement for any particular active service. Another example is provided by employees on leave who are ready to return to work but who are unable to do so because Air Canada has no work to give them. Although such employees have not returned to active service, they nevertheless receive a fully restored personal travel benefit. Employees on union leave and employees on surplus leave also retain that benefit without any requirement of active service.

52 Even if one disregards the past practice and just focuses on the post-change regime, the existence of those latter three groups raises the question of why the Employer is accommodating those groups that are not protected by human rights legislation, but is not accommodating women, parents, and the disabled, who are protected groups under the *Canadian Human Rights Act*. Extending that accommodation to those protected groups would not impose undue hardship on the Employer. The unrestricted travel passes benefit costs the Employer nothing; the travelling employee has to pick up any costs imposed by third parties plus an administrative fee for whatever the Employer's costs are for making the booking. All of the passes are based upon contingent space available, so Air Canada is never deprived of revenue because of someone using these passes. The adverse impact of the 365 day rule on those protected groups is two-fold: employees who have planned their lives around the availability of those passes are denied that benefit, and are made to feel that they are malingerers who are no longer members of the team.

53 The genesis of the policy change was a business transformation exercise intended to reduce the cost of absences by cutting down on the length of absences. By making it less pleasant to be on leave, the 365 day rule would inevitably put pressure on employees to come back from leave sooner or to go off on leave later. The mathematical approach adopted by the Employer in developing the 365 day rule was based upon the majority of leaves ending within that period. It gave no consideration to the true impact on the minority of employees who through no fault of their own are on leaves exceeding 365 days. Disabled pilots and female pilots who become pregnant are more likely than other Air Canada employees to be part of that minority because of the expanded periods of time during which the *Aeronautics Act* and its regulations preclude them from flying an aircraft due to safety considerations.

54 There are some categories of persons who are not employees of Air Canada but who nevertheless continue to enjoy personal travel privileges without any reduction by the 365 day rule, including retired Air Canada employees and employees of other companies such as Fasco, Jazz, and Air Georgian. If it is necessary to ACPA's case to include them in the comparator group, this can be done because Air Canada treats them as employees for the personal travel pass purposes. However, it is unnecessary to go that far because Air Canada has exempted from the 365 day rule employees on leave who are ready to return to work but who are unable to do so because there is no work available for them, employees on union leave, and employees on surplus leave. Those people provide Air Canada with no service but still get unrestricted access to the personal travel benefit. This indicates that the benefit is clearly not earned by active service.

55 There is no evidence that the purpose of the 365 day rule is to reward active service. The evidence indicates that it is intended to control the abusing of leaves and to somehow assuage the morale problem of active employees who do not like having to compete with employees on leave. However, Air Canada has a separate "attendance policy" designed to minimize absences from work, and there is no evidence that pilots are abusing leaves of absence.

56 The 365 day rule can be struck down not only on the basis of the law of adverse effect discrimination under human rights principles, but also on the basis of the *KVP* principle, which places a reasonableness limitation on the exercise of

a management right to unilaterally adopt rules or policies. Unreasonableness is determined by balancing the employer's legitimate interest in adopting the rule or policy, and the adverse effect the rule or policy has on employees' legitimate interests. The 365 day rule not only discriminates against groups protected by human rights principles but is also simply unreasonable.

57 The authorities upon which ACPA relies include *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Granovsky v. Canada (Minister of Employment & Immigration)*, [2000] 1 S.C.R. 703; *Chapdelaine v. Air Canada* (1987), 87 C.L.L.C. 17,037 (C.H.R.T.); *Chapdelaine v. Air Canada* (1991), 91 C.L.L.C. 17,031 (C.H.R.R.T.); *Sangha v. Mackenzie Valley Land & Water Board*, 2006 CHRT 9; *Sangha v. Mackenzie Valley Land & Water Board*, 2007 C.L.L.C. 230-031 (Fed. Ct.); *Re Algonquin College and O.P.S.E.U.* (2003), 115 L.A.C. (4th) 297 (Knopf); *Re CULE and PSAC (Urrutia)* (2015), 256 L.A.C. (4th) 377 (Lynk); *Gibbs v. Battlefords & District Co-operative Ltd.*, [1996] 3 S.C.R. 566; *Re Kingdom Hotels Ltd. and U.F.C.W.* (2011), 205 L.A.C. (4th) 408 (Marcotte); *Re Complex Services Inc. and O.P.S.E.U.* (2006), 152 L.A.C. (4th) 315 (MacDowell); *Air Canada and CAW-Canada (Whitlow Grievance)*, [1994] C.L.A.D. No. 737 (Frumkin); *British Columbia (Public Service Employee Relations Commissioner) v. BCDSEU*, [1999] 3 S.C.R. 3; *Culic v. Canada Post Corporation*, 2006 CHRT 6; *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital* (1999), 42 O.R. (3d) 692 (C.A.); *Re Porcupine and District Children's Aid Society and Canadian Union of Public Employees, Local 2196* (1996), 56 L.A.C. (4th) 116 (Brown); *Cameco Corporation and United Steelworkers of America, Local 13173*, 2007 CanLII 37669 (Surdykowski); *Re Burnaby (City) and CUPE, Local 23 (Vocation Pro-Rating)*, [2016] B.C.W.L.D. 976 (Hall); *Ghost v. Domglas Inc.* (1992), 17 C.H.H.R. D/216; *Starzynski v. Canada Safeway Ltd.* (2003) 231 D.L.R. (4th) 285 (Alberta C.A.); *KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2357* (1965), 16 L.A.C. 73 (Robinson); *CEP, Local 30 v. Irving*, [2012] 2 S.C.R. 458; Brown and Beatty, *Canadian Labour Arbitration*, Canada Law Book (online ed.), at paragraphs 4:2310, 4:2322, and 8:3900; *Re Canadian Bank Note Co. and G.C.I.U., Local 41-M*, 1999 CarswellOnt 7060 (Brown); *Re Labatt Breweries Ontario and SEIU, Local 2 (voluntary severance program)*, 2014 CarswellOnt 11888 (MacDowell); and *Metropolitan General Hospital v. O.N.A.* (1996), 58 L.A.C. (4th) 72 (Kennedy). ACPA also relies on sections 204 to 206 of the *Canada Labour Code*, R.S.C., 1985, c. L-2, and section 404.06 of the *Canadian Aviation Regulations*, SOR/96-433.

58 In addition to noting provisions of the Agreement (including those referred to above) which provide for travel passes in various circumstances, counsel for the Association also referred to the following provisions of the Agreement during the course of argument:

> **ARTICLE 10 - ADMINISTRATION AND COMPANY/ASSOCIATION INTERACTION**
>
> . . .
>
> ***10.12 Human Rights***
>
> 10.12.01 The Company and ACPA agree to cooperate as necessary to fulfill their respective obligations under the Canadian Human Rights Act.
>
> . . .
>
> **ARTICLE 16 - GROUP DISABILITY INCOME PLAN - PILOTS**
>
> . . .
>
> ***16.03 Disabilities Covered by the Plan***
>
> 16.03.01 The following levels of disability conditions are covered by the plan:
>
> 16.03.01.01 "Disabled" - A pilot will be considered disabled if Air Canada Occupational Health Services or Transport Canada determine that, for medical reasons, he is unfit to fly.

59 As part of their submissions, counsel for ACPA also filed a written guide to the evidence and a document containing key quotes from the authorities on which ACPA is relying. Although the contents of those documents have not been detailed in this award, they have been duly considered in the preparation of this award.

Summary of Submissions Made on Behalf of the Employer

60 Travel privileges are a gratuitous reward granted by Air Canada to employees and eligible retirees to reward them for their contribution to the Company. Those privileges are not a benefit nor a contractual right. They do not form part of the Agreement and have never been negotiated with ACPA or any other union. Air Canada can change them at any time at its sole discretion, and has done so many times over the years.

61 The scope of the travel privileges provided by the Policy depends on an employee's active or inactive status. Although retirees are no longer actively working for the Company, they previously gave service and thereby worked to earn their travel privileges, which are only provided to retirees who have met the required criteria. Throughout the years, employees on various leaves of absence have had a different scope of travel privileges than active employees, who have always been rewarded by Air Canada with the highest level of travel privileges. The scope of the travel privileges has also varied depending on the type of leave. Employees are also rewarded with different boarding priorities depending on the level of their position.

62 Prior to the changes that gave rise to the grievance, not all employees on leave of absence were receiving the same travel privileges. The changes improved the Policy. They simplified the process and streamlined travel privileges for employees on leave of absence. They provided for all employees on leave of absence to receive the same travel privileges, regardless of the reason for their absence. They also improved travel privileges by no longer requiring employees on sick/injury leave to demonstrate that the travel was required for one of the previously permitted reasons. They made it easier to administer by removing discretion from managers, and ensured consistency, fairness, and objectivity.

63 The purpose of the 365 day rule is to give something more to active employees, but the changed Policy was also an improvement for employees protected by the *CHRA*. The comparator group for purposes of determining whether discrimination has occurred should be all Air Canada employees who are on leave of absence. Persons who are not employees of Air Canada, such as employees of other companies with which Air Canada has a commercial relationship, cannot form part of the comparator group. If they are considered, it should be noted that they have lower boarding priority than employees of Air Canada, and that when they are on a leave of absence area they also subject to the 365 day rule.

64 Although the scope of travel privileges for Air Canada employees on leave of absence has changed over the years, it has always been different from that available to active employees. Those differences have been established by Air Canada so that active employees are receiving something more for their active service. The policy regarding travel privileges for inactive employees potentially affects those who are active, and at some point it becomes difficult to justify allowing employees who are not working to continue receiving travel privileges similar to those who are. Since most employees return to work within one year from the commencement of their leave of absence, the 365 day rule is reasonable and results in active employees having less competition with employees on leave of absence for standby seats available for personal travel under the Policy. The purpose of the rule is to give active employees a better chance of getting on the airplane. The fact that the Company is being generous to employees on leave of absence for the first 365 days of their leaves does not change the important fact that Air Canada can treat those employees differently from active employees. No accommodation is possible for those employees as there is nothing that Air Canada can do to make it possible for them to return to active employment.

65 The 365 day rule does not discriminate against employees who are away from work on leave due to a characteristic protected by the *CHRA*. Many of the types of leaves that are subject to the 365 day rule, such as personal leaves, educational leaves, military leaves and jury leaves, are not related to prohibited grounds of discrimination. Air Canada

does not make any differentiation among employees on the basis of a prohibited ground under the *CHRA*. Justification has been provided for the exemption of three groups of employees from the application of the 365 day rule. The exemption of employees on a leave of absence to mitigate headcount surpluses is necessary to entice employees to apply for such leave. The willingness of some employees to take voluntary leaves precludes Air Canada from having to make involuntary layoffs and is therefore in the interest of all employees. Employees who accept a voluntary leave of absence are rendering a service or contribution to the Company. The Special Leave of Absence Program incorporated into Letter of Understanding No. 68 which forms part of the Agreement goes to the justification of why leaves of absence of this type are treated differently.

66 Employees on leave for ACPA business purposes remain active employees released from flight duty for the duration of their term in accordance with Section 10.09 of the Agreement, so that they may attend to ACPA business and related Company/ACPA meetings. Pursuant to that provision, they are paid by Air Canada, which is partially reimbursed by ACPA. Since they remain active employees, they cannot appropriately be included in the comparator group. Employees on leave who are able to return to work but who cannot be provided with any work or training by the Company are also justifiably exempted from the application of the 365 day rule because they are ready to come back to work and it is the Company's "fault" that it does not have a job for them to do. With the exception of those three justifiable exemptions, the 365 day rule applies to all of the Company's employees on leave of absence, not just to those who are away due to a characteristic protected by the *CHRA*.

67 The grievance cannot succeed on the basis of an unreasonableless argument. The *KVP* principle applies to a rule or policy that is adopted with a view to the imposition of disciplinary measures. It does not apply to changes which Air Canada makes to its travel privileges policy because that policy is not in the Agreement, and because those changes were not adopted with a view to the imposition of disciplinary measures. The right to make changes to the Policy falls within the discretionary management rights of the Company and is not arbitrable. Alternatively, if such exercise of management rights is arbitrable, the changes Air Canada made to the Policy are reasonable.

68 There is no evidence which supports the Association's allegation that the 365 day rule was adopted by the Company to pressure employees to return to work from leaves of absence.

69 The authorities upon which Air Canada relies include: *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital*, *supra*; *Re Burnaby (City) and CUPE, Local 23 (Vocation Pro-Rating)*, *supra*; *Canada (Canadian Human Rights Commission) v. Canadian National Railway (re Cramm)*, [2000] F.C.J. No. 881; *O'Connor v. Air Canada*, Section 40/41 Decision dated November 28, 2014 (CHRC); *Shamess v. Air Canada*, Section 40/41 Decision dated July 2, 2015 (CHRC); *Okanagan College v. Okanagan College Faculty Assn. (Maternity/Parental Leave Grievance)*, [2012] B.C.C.A.A. No. 137 (Hall); *Toronto (City) v. Canadian Union of Public Employees, Local 79 (Manini Grievance)*, [2016] O.L.A.A. No 166 (Goodfellow); *K. v. L. (District)*, [2013] B.C.H.R.T.D. No. 233; *Assn. of Justice Counsel v. Treasury Board*, [2012] C.P.S.L.R.B. No. 30; *Re Ontario (Ministry of Finance) and O.P.S.E.U. (Cherwonogrodzky)*, (2004) 127 L.A.C. (4th) 150 (ON GSB); *O.P.S.E.U. (Pozderka) and The Crown in Right of Ontario (Ministry of Transportation)*, 2016 CanLII 18727 (ON GSB); *Air Canada Pilots Association and Air Canada*, 2012 CIRB 644; *Renfrew County and District Health Unit v. Ontario Public Employees Union, Local 487 (Haslam Grievance)*, [2005] O.L.A.A. No. 764 (Chodos); and Brown and Beatty, *Canadian Labour Arbitration*, *supra*, at paragraph 4:2324.

Summary of Reply Submissions made by Association Counsel

70 A full human rights analysis is still required even if the case involves the reduction of a benefit rather than the elimination of a benefit. Although the Employer offered many reasons for introducing the 365 day rule, it is clear from the caselaw that what must be looked at is the reason for giving the benefit in the first place. Even if the purposes for making the impugned changes to the Policy were relevant, the ones given by Air Canada are not relevant for human rights purposes. Justification for exempting some kinds of leaves of absence from the changes must also fall in line with human rights legislation. One justification for differential treatment that the caselaw has allowed is differentiation based on active service. Although Air Canada asserted that the benefit rewards active service, actions speak louder than words

and in this case there are a number of groups not providing active service who continue to get the benefit. The cases relied upon by the Company involve benefits which are rewards for active service. These are very different facts from the instant case in which the travel benefit is not truly tied to active service. Since this is not an active service benefit, the required accommodation would not be the Company doing something to make it possible for them to return to active employment; it would be the Company making the 365 day rule inapplicable to them, as has been done for other groups not providing active service.

71 The *KVP* principle can be applied regardless of whether the 365 day rule has any potential disciplinary consequences.

72 In support of its case, the Association relies on what actually happened, not on what was set out in Air Canada's written policies. Prior to the implementation of the 365 day rule, pilots on leave of absence routinely obtained permission from management to use their travel privileges, and were not restricted to the limited purposes set out in the previous policy. The 365 day rule was not an improvement for them.

73 An off-hand comment made by Arbitrator Teplitsky clearly has no weight, nor can much weight be given to the Section 40/41 Reports regarding the two complaints filed with the Canadian Human Rights Commission, as those complaints were dismissed at the Commission stage without being referred to the Tribunal and without a hearing. They are also distinguishable because their analysis is based on the policy having been applicable to all employees absent from the workplace for a period longer than a year, regardless of the reasons.

74 The exemption of employees on leave for union business purposes is not limited to ACPA Representatives released from flight duty pursuant to Article 10.09 of the Agreement. That exemption applies to all Air Canada employees on leave for union business, including employees outside of the ACPA bargaining unit who are represented by other unions.

75 The same is true of leaves of absence for mitigation of headcount surpluses.

Decision

76 As indicated above, ACPA contends that the 365 day rule adversely impacts protected groups under the *CHRA*, and that its adverse effect on them constitutes discrimination under that Act, which provides in part as follows:

> **Prohibited grounds of discrimination**
>
> **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, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> **Idem**
>
> **(2)** Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.
>
> . . .
>
> **Employment**
>
> **7** It is a discriminatory practice, directly or indirectly,
>
> . . .
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

77 The concept of adverse effect discrimination was described as follows in *Ontario (Human Rights Commissioon) v. Simpsons-Sears Ltd. supra*, in the judgment of the Supreme Court of Canada delivered by McIntyre J.:

> 18. ... [Adverse effect discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the [Ontario Human Rights] Code I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

78 In *British Columbia (Public Service Employee Relations Commissioner) v. BCDSEU*, *supra* (the "*Meiorin* case), the Supreme Court of Canada held that the conventional approach of distinguishing between direct and indirect (or adverse effect) discrimination in the process of determining whether an impugned standard is a bona fide occupational requirement ("BFOR") should be replaced by a unified approach, which was described as follows in paragraph 54 of the judgment:

> Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that 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) that 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.

79 Both parties in the instant case rely upon the Ontario Court of Appeal's ruling in *Orillia Soldiers Memorial Hospital*, *supra*, and various subsequent cases which have applied the principles set forth in that ruling. Although that ruling predates *Meiorin*, it nevertheless remains of assistance in cases involving employee benefits or privileges. Arbitrator Lynk's award in *Re CULE and PSAC (Urrutia)*, *supra*, includes the following thoughtful passages regarding that matter and regarding the principles set forth in the pertinent judicial and arbitral jurisprudence:

> 37 The Ontario Court of Appeal ruling in *Orillia Soldiers Memorial Hospital* was issued before *Meiorin*, but it retains some precedential value for human rights cases involving workplace benefits and compensation. *Orillia Soldiers Memorial Hospital* dealt with, among other things, the issue of whether the employer's negotiated right under the collective agreement to discontinue the payment of premiums for benefit insurance plans (for example, items [such] as dental care and a semi-private hospital bed) of those nursing employees who were off work due to a disability amounted to discrimination. Specifically, the governing collective agreement provided that the employer was to pay all or part (depending on the specific benefit item) of the premiums for a nurse's benefit insurance coverage. Under the collective agreement, if a nurse went on an unpaid leave of absence (including a disability leave), the employer would continue to make the agreed-upon benefit premium insurance contributions for the first 30 days of the leave; after that date, however, the nurse on leave would then assume all of the premium insurance payments, until she or

he returned to work. The union in this case argued that this difference in treatment between active employees and nurses on an unpaid leave of absence because of a disability was in breach of the *Human Rights Code*.

38 In ruling against the union on this issue, the Ontario Court of Appeal in *Orillia Soldiers Memorial Hospital* stated that requiring the active performance of work in exchange for compensation is a reasonable and *bona fide* requirement under human rights analysis. Since the purpose of these compensation items - wages and benefits - was to provide a monetary payment in exchange for the performance of work, the pre-requisite condition that the nurse-employee had to maintain an active work status [in] order to receive this compensation was not a breach of the employer's human rights obligations....

39 The Court of Appeal distinguished this requirement for an active work status from the negotiated provisions dealing with benefits tied to employment status, such as the accumulation of seniority credits. Seniority is not directly related to compensation, and its purpose is not to provide an additional form of compensation in exchange for work. Rather, seniority rights are based simply on the status of being an employee, and their purpose is to provide preferential employment claims to such items as promotions and protection from layoffs that are enhanced as employment service increases. Thus, an employee who is away from work because of a human rights protected ground (such as a disability, or a maternity and/or parental leave) is entitled to continue to accumulate seniority during the leave as part of her or his employment status, with nothing more required.

40 Thus, from *Orillia Soldiers Memorial Hospital*, contemporary human rights analysis requires that a legal decision-maker is to determine the *purpose* of the employment entitlement or collective agreement provision when assessing whether a human rights claim of discrimination in the allocation of these entitlements or rights has validity.

. . .

43 ... In its ruling, the Court of Appeal relied upon an appropriate comparator group analysis as an important tool to determine whether discrimination exists in any particular case. Comparator group analysis requires the legal decision-maker to find a group similar in characteristics to the individual or group that has initiated the human rights complaint. (In the employment sphere, the appropriate comparator group would be another group in the workplace with some shared characteristics and context.) Once having found the appropriate comparator group, the decision-maker would then assess whether the complainant has been treated in a similar or distinct fashion from the comparator group.

44 At the time when *Orillia Soldiers Memorial Hospital* was released, comparator group analysis was part and parcel of the prevailing human rights test. However, since the 1999 ruling by the Ontario Court of Appeal, the Supreme Court of Canada has moved away from a strong reliance on appropriate (or "mirror") comparator group analysis when conducting equality and human rights analysis....

51 The caselaw I have reviewed provides a set of applicable principles to apply when dealing with the question of whether the denial of benefits, or the reduced level of a benefit, to an employee who has claimed protection on a human rights ground is, in the context, discriminatory. These principles include the following:

i. The three step *Meiorin* test is the usual analytical starting point.

ii. When assessing whether a particular form of compensation, whether wages or benefits, is consistent with human rights obligations, the *purpose* of the compensation item must be determined.

iii. If the purpose of the compensation item is to provide an equitable exchange for an active work status, then tying the availability of the compensation item to maintaining that status is consistent with human rights. Employer payments for benefit insurance programs would be an example of this.

iv. If, however, the purpose of the compensation item is linked to an employee's general employment status, then the availability of the compensation item is to be extended to any employee, whether on active work status or not, as long as he or she maintains the employment status. Seniority accumulation is an example of this.

v. On its face, discrimination would exist if the employer provided different levels of compensation for work because of disability or another human rights protected ground. Likewise, it would constitute discrimination if the employer provided different levels of compensation for not working because of disability or another human rights protected ground.

vi. If the purpose of the compensation was the same, but the compensation differed as to the type of disability or other protected human rights ground, or differed for a reason that was not tied to the purpose where a human rights ground was involved, then discrimination may well exist.

vii. Caution must be employed in the used of comparator group analysis. Experience has shown that the analysis can be applied in a mechanical and rigid fashion that belies the objective of human rights. The real question to ask in a human rights case is whether the law, rule or collective agreement provision disadvantages the employee, or perpetuates a stigmatized view of him or her.

80 Reference may also usefully be made to the following passages from Arbitrator Goodfellow's award in *Toronto (City) v. Canadian Union of Public Employees, Local 79 (Manini Grievance)*, *supra*:

50 The analytical framework is provided by *Orillia Soldiers Memorial Hospital*, *supra*. ...

52 According to the Court, the first question to be addressed is what is the purpose of the benefit. Is the benefit tied to the status of being an employee or is it meant as a form of compensation for work performed....

53 In other words, the first step in the discrimination analysis is to determine the nature, intent or purpose of the benefit: is it one that is logically and properly tied to the performance of work or simply to the status of being an employee. If it is the former, a requirement of work will not be found to discriminate against those who are unable to work for statutorily protected reasons provided all employees who are unable to work for any reason are treated the same....

54 Important for present purposes, however, the Court did not determine that simply because something is not a *monetary* benefit, or is not directly tied to *monetary* benefits" ... means that a work requirement is discriminatory. The question is whether the benefit is "work-related" or- "employee status-related". That is the essence of the distinction between "compensatory" and "non-compensatory" benefits.

81 Although the standby travel opportunities in issue in these proceedings are privileges rather than benefits, section 7(b) of the *CHRA* is very broad in scope. It provides that "[i]t is a discriminatory practice, directly or indirectly, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination". Thus, the same human rights principles apply to employment privileges as apply to employment benefits; an employer is no more entitled under that provision to discriminate against protected employees in respect employment privileges than it is to discriminate against them in respect of employment benefits. Consequently, although the fact that the travel privileges in issue are not enshrined in the parties' collective agreement enables Air Canada to modify them, such modifications must nevertheless comply with the requirements of the *CHRA*.

82 As indicated above, the first step in the discrimination analysis is to determine the nature, intent or purpose of the travel privileges provided by Air Canada through the Policy. Is that purpose one that is logically and properly tied to the performance of work, as contended by Air Canada, or is it simply tied to the status of being an employee, as contended by ACPA? It is clear from the totality of the evidence that the purpose of the travel privileges is to reward employees for the contribution that they make to the Company's operations. Active employees have generally received

a higher level of travel benefits than inactive employees, such as those away from work on leave of absence or on lay-off. Although the scope of travel privileges available to inactive employees has been modified a number times over the years, it has generally differed from those available to active employees by being more limited in terms of the scope of travel opportunities available and/or the time frame in which those travel opportunities can be utilized.

83 The fact that some travel privileges have typically remained available to employees for some time after their status changed from active to inactive reflects an intention that their reward for previous active service should continue in at least a reduced manner for a period of time thereafter. However, the Company seeks to find an appropriate balance between the interests of its inactive employees and the interests of its active employees, as indicated by the evidence given by Ms. Vezina, who testified that while the Company wants to be fair to all of its employees, it has a responsibility to acknowledge and reward its employees who are contributing on a day-to-day basis. Reducing the personal travel privileges of employees on leave (and their eligible family members) serves that purpose by reducing the number of times that active employees will have to compete with employees on leave for available seats. Consequently, although those travel privileges have a dual nature in that they have historically remained available to inactive employees in various reduced forms for varying lengths of time, it is clear from the totality of the evidence that they are primarily "work-related" rather than "employee status-related".

84 The travel privileges extended to qualified retirees and certain other persons who have left the employ of the Company reflect a similar intention to reward them for their previous contributions to the Company. Air Canada also extends travel privileges to persons employed by certain other companies, such as Fasco, Jazz, and Air Georgian, pursuant to commercial relationships with those companies. Those arrangements are mutually beneficial, since the other companies also provide travel privileges to employees of Air Canada through those reciprocal commercial arrangements. However, they have no bearing on the matters in issue in these proceedings.

85 Although comparator group analysis has limitations, it can nevertheless be a useful tool in determining whether discrimination exists in some circumstances. In the instant case, the group of employees with characteristics and context most similar to the employees whom the Union alleges have been discriminated against is not a group consisting of all Company employees but rather a group consisting of all Company employees absent from work on leave of absence. Accordingly, that is the appropriate comparator group in the circumstances of this case.

86 One of the cases on which the Company relies in support of its contention that the impugned change to the Policy is not discriminatory is *O'Connor v. Air. Canada*, *supra*, which is a Section 40/41 Report regarding a complaint filed with the Canadian Human Rights Commission by a flight attendant on disability leave who alleged that the initial version of the 365 day rule discriminated against her and other employees who are on a leave of absence longer than one year. As indicated above, the initial version of that rule provided that although all employees on Company-approved leaves of absence (and their eligible family members) would be permitted to use their travel privileges during the first 365 days of their leave with no requirement for managerial approval and no limitation on the purpose of the travel, on the 366th day of their leave all of those travel privileges would be placed on hold and would not be reinstated until the employee had returned to work and completed 26 weeks of continuous service. The Report recommended that the Commission not deal with the complaint for the following reasons:

> 24. Although the complainant's circumstances are unfortunate, it does not appear that she has reasonable grounds for believing that the respondent's actions, in restricting eligibility for travel privileges to active employees and those on an approved leave of absence of up to one year, are discriminatory under section 7 and 10 of the *Act*.
>
> 25. The respondent's policy on travel entitlements is based upon the status of an employee. The policy differentiates between employees who are actively employed and those who are absent from the workplace, whatever the reason, for more than one year. The policy appears to apply equally to all employees who are on an approved leave of absence. Hence, it does not appear that the respondent treated the complainant adversely by revoking her travel privileges because she has been on disability leave for more than one year.

Conclusion

26. It is plain and obvious that this complaint cannot succeed. The complainant has not set out a basis for a reasonable belief that the respondent treated her in an adverse differential manner on the ground of her disability. The complainant has not provided any information to demonstrate that a reasonable person in her circumstances would believe that the respondent treated her adversely by revoking her travel privileges, pursuant to its policy that applies equally to all employees who are absent from the workplace for a period of longer than one year, regardless of the reasons. Therefore the complainant's allegations are not linked to a prohibited ground. For these reasons, the complainant's allegations are frivolous within the meaning of section 41(1)(d) of the Act and the Commission should refuse to deal with it.

The Company also relies upon the subsequent Section 40/41 Report in *Shamess v. Air Canada*, *supra*, in which the Commission applied similar reasoning in making the same recommendation regarding a similar complaint filed by a pilot who had been on disability leave for five years.

87 As a result of those recommendations, both of those files were closed at the Commission stage. Since those dispositions of the files occurred without the complaints being referred to the Tribunal and without a hearing, they are of limited precedential value. Moreover, as contended by Union counsel, they are distinguishable from the instant case because they are both based on the impugned policy being applicable "equally to all employees who are absent from the workplace for a period of longer than one year, regardless of the reasons".

88 As indicated in *Orillia Soldiers Memorial Hospital*, *supra*, and subsequent decisions which have applied its rationale, such as *Toronto (City) v. Canadian Union of Public Employees, Local 79 (Manini Grievance)*, *supra*, no discrimination will generally be found in cases involving work-related benefits or privileges if all employees in the comparator group are treated the same. However, in the instant case, although the impugned modified version of the 365 day rule applies to most of the employees who are on leave of absence from Air Canada, it does not apply to all of them as the Company has created three exemptions: employees on leaves negotiated to mitigate head-count surpluses, employees on leave for union business purposes, and employees on leave who are able to return to work but who cannot be provided with any work or training by the Company. Although the second exemption does not apply to ACPA representatives since they retain their travel privileges because are on a release rather than a leave of absence and continue to be paid by Air Canada, it does apply to some other Company employees, such as the IAMAW officers who are on leave of absence from Air Canada.

89 The first exemption was created by Air Canada as an incentive to encourage employees to volunteer for and remain on leaves that mitigate head-count surpluses, thereby avoiding the delays, disruption, and harm to employee morale caused by lay-offs. The second exemption was created because of the Company's ongoing relationship with the unions that have officers or other officials who benefit from it. The third exemption reflects the Company's view that the "clock would stop ticking" for purposes of the 365 day rule as soon as an employee is able to return to work, even if the Company is not able to reabsorb that employee into its active workforce for initial training or otherwise. Although those may be valid business justifications for creating those three exemptions, they do not constitute valid human rights justifications for failing to similarly exempt members of protected groups such as female pilots absent due to pregnancy or child birth, and disabled pilots adversely affected by the rule.

90 As noted above, section 404.06 of the *Canadian Aviation Regulations*, SOR/96-433, provides in part as follows:

404.06(1) Subject to subsection (3), no holder of a permit, licence or rating shall exercise the privileges of the permit, licence or rating if

. . .

(c) the holder has entered the thirtieth week of pregnancy....

(d) the holder has given birth in the preceding six weeks.

91 The manner in which Air Canada's female pilots could have been adversely affected by the original 365 day rule was succinctly described as follows by D.M. in the above-quoted email dated August 26, 2014, that she sent to Captain Kurtis Scheirer:

> In the Q&A section it asked if those on maternity would be affected, and it stated they would not since maternity benefits are only one year in length. Female pilots have the unique situation where our license is revoked in the third trimester (or earlier with complications) before maternity benefits begin. In this case, being a female pilot at Air Canada means that if you choose to have a baby, you have no option but to lose your travel passes if you take your full maternity.

The adverse effect that female pilots will experience as a result of revised 365 day rule is that if they have a baby, their travel passes will be reduced to an annual allotment of three passes (issued on a pro-rated basis dependent on when in the calendar year their 366th day of absence falls) if they take their full maternity leave. That reduction is discriminatory because it deprives them of the full travel privileges that the aforementioned three exemptions in the comparison group continue to enjoy.

92 L.P.'s situation provides another example of circumstances in which a female pilot may discriminatorily suffer an adverse effect under the 365 day rule. Since she was high risk for miscarriages, she was medically unfit to fly aircraft whenever she was pregnant. If she succeeded in having a baby and wished to take a full maternity leave thereafter, her travel passes would similarly be reduced to an annual allotment of three passes, unlike the three exemptions in the comparison group.

93 Adverse effects of that type constitute discrimination on the ground of sex, by virtue of s. 3(2) of the *CHRA*, which provides that "[w]here the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex".

94 As indicated earlier in this award, prior to the changes that gave rise to the grievance, the Policy required employees absent on medical leave to make a written request to their immediate manager to obtain approval to travel prior to using their travel privileges, and such approval was supposed to be granted only when there was a medical reason to travel (such as a requirement for medical treatments), bereavement, or other compassionate or extenuating circumstances. However, although managers in some other divisions only granted approval in those limited circumstances, managers in the flight operations division generally approved all such requests. Consequently, although the elimination of the requirement for managerial approval which accompanied the introduction of the 365 day rule was an improvement for employees in some other divisions, it was not an improvement for pilots, who had traditionally been able to make largely unrestricted use of travel benefits while on leave due to illness or injury. Accordingly, L.P.'s situation also provides an example of circumstances which could result in any disabled pilot, whether male or female, being discriminatorily adversely affected by the 365 day rule. An extended disability leave of the type that she had to take as a result of her knee injury and the ensuing post-surgical complications could result in a pilot suffering the aforementioned reduction in travel passes through circumstances entirely beyond the pilot's control, as a result of the pilot's disability. The understandably strict medical requirements regarding fitness to fly increase the likelihood of a pilot being absent on medical leave for more than 365 days and therefore being disadvantaged by suffering the consequences of that rule through circumstances beyond their control. That constitutes discrimination because in such circumstances it deprives those disabled pilots of the full travel privileges that the aforementioned three exemptions in the comparison group continue to enjoy.

95 Extending that exemption to include pilots on maternity leave and disabled pilots on medical leave would not impose undue hardship on the Employer, as the provision of travel privileges does not put the Employer to any expense or deprive it of any revenue, nor is there any evidence that it would unduly affect the travel privileges of active employees. Paying customers always have priority over persons travelling under privileges granted by the Policy, which only permits

employees to access seats for personal travel on a standby basis. Moreover, the travelling employee pays a service charge to Air Canada and also pays all of the charges imposed by other entities, such as taxes and airport improvement charges.

96 One of the concerns that the Company sought to address through the 365 day rule was the possibility suggested by Arbitrator Teplitsky that the Policy might be considered discriminatory under human rights legislation. Although that was a laudable goal, it was unfortunately not totally achieved as the rule disproportionately disadvantages pilots on maternity leave and disabled pilots on medical leave. There is also some evidence which suggests that some members of management viewed the rule as a means of curbing abuse of leaves of absence. Although that does not appear to have been part of the BT group's rationale for formulating the rule, to the extent that it may have been a consideration taken into account at a higher level of the Company it would be a misguided consideration in that the rule would have an adverse effect not only on abusers but also on employees, such as disabled employees, who remain on leave of absence for over a year through no fault of their own, and on female pilots who choose to avail themselves of the full maternity and related leaves to which they are legally entitled.

97 Although most Air Canada employees on leave of absence return to active employment in less than 365 days, a minority of employees remain away on leave for over 365 days. It is clear from the totality of the evidence that disabled pilots and female pilots who become pregnant are more likely than other Air Canada employees to be part of that minority because of the expanded periods of time during which the *Aeronautics Act* and its regulations preclude them from flying an aircraft due to safety considerations.

98 For the foregoing reasons, I have concluded that the 365 day rule is violative of section 7 of *CHRA* in relation to female pilots who are absent on maternity and related leaves for more than 365 days, and in relation to disabled pilots who are absent on medical leaves for more than 365 days, in that it indirectly differentiates adversely in relation to them in the course of their employment on the prohibited grounds of sex and disability respectively. In view of that conclusion, it is unnecessary to determine whether the grievance could also succeed on the basis of the *KVP* principle, as contended by the Association but disputed by Employer.

99 In accordance with the procedure stipulated at the hearing, I will afford the parties an opportunity to confer regarding the measures to be taken in light of the findings made in this award, remaining seised to deal with remedial issues, with the benefit of further submissions (and evidence, if appropriate), in the event that the parties are unable to resolve those matters.

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