Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 37
Date: August 28, 2019
File Nos.: T2117/3315 & T2118/3415

Between:

Roy Bentley

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada and Air Canada Pilots Association

Respondents

Decision

Member: Alex G. Pannu

I. Complaint

[1] Roy Bentley is the Complainant in this case. He is a pilot employed by the Respondent Air Canada and his union, the Air Canada Pilots Association, is the other Respondent. Mr. Bentley alleges that a provision (L75.07) in the collective agreement between the Respondents, which allows termination of long-term disability benefits for pilots who become eligible for an unreduced pension, discriminates against him on the basis of age, a prohibited ground under Section 3 of the *Canadian Human Rights Act,* RSC 1985, c H-6 (the *Act* or the *CHRA*).

[2] The complaint was filed under sections 7(b) and 10(a) of the CHRA. The Act deems it a discriminatory practice to directly or indirectly differentiate adversely in relation to an employee in the course of employment on a prohibited ground of discrimination. It is also a discriminatory practice to establish or pursue a policy or practice that deprives employment opportunities on a prohibited ground of discrimination. On both counts, age is the alleged prohibited ground of discrimination.

[3] The Complainant alleges that subsections 3(b) and 5(b) of the *Canadian Human Rights Benefit Regulations SOR 80/68,* which create exemptions for age-based differentiation in the context of pension and long-term disability insurance plans, violate Section 15(1) of the *Canadian Charter of Rights and Freedoms*, which guarantees equal protection and equal benefit of the law without discrimination, and are therefore unconstitutional. Further, he alleges that the impugned sections are not saved by section 1 of the Charter.

[4] Section 3 of the *Regulations* says "The following provisions of a benefit plan do not constitute the basis for a complaint under Part III of the Act that an employer is engaging or has engaged in a discriminatory practice:

> (b) in the case of any disability income insurance plan, provisions that result in an employee being excluded from participation in the plan because the employee has attained the age at which a member of the plan would not be eligible to receive benefits under the plan or has attained that age less the length of the waiting period following the commencement of a disability that must pass before benefits may become payable thereunder, if that age is

> not less than 65 or the normal pensionable age under the pension plan of which the employee is a member, whichever occurs first;…"[1]

[5] Section 5 of the *Regulations* says "The following provisions of an insurance plan do not constitute the basis for a complaint under Part III of the Act that an employer is engaging or has engaged in a discriminatory practice:

> b) in the case of any disability income insurance plan, provisions that result in differentiation being made between employees because the benefits payable under the plan to an employee cease when the employee has attained the age of not less than 65, or the normal pensionable age under the pension plan of which the employee is a member, whichever occurs first;…"[2]

[6] The *Regulations* define normal pensionable age under a pension plan as "…the earliest date specified in the plan on which an employee can retire from his employment and receive all the benefits provided by the plan to which he would otherwise be entitled under the terms of the plan, without adjustment by reason of early retirement, whether such date is the day on which the employee has attained a given age or on which the employee has completed a given period of employment…"

[7] Under the collective agreement between the Respondents, the normal pensionable age is 65 or 60 if the employee has 25 years of service with Air Canada.

[8] Initially, both Respondents said that the provisions in question fall under an exemption provided by the *Regulations*, were not discriminatory and constitutionally valid. In the alternative, the Respondents said that the regulations constituted a reasonable justification under Section 1 of the Charter.

[9] However, the Respondent ACPA changed its position after the decision of the Ontario Human Rights Tribunal in *Talos v. Grand Erie District School Board.*[3] In written submissions to the Tribunal after the hearing, the ACPA said in light of the *Talos* decision, their new position was that "…those provisions are contrary to s. 15 of the Charter, and consequently, L75.07 of LOU 75 is discriminatory based on age…" The Respondent Air

[1] Canadian Human Rights Benefit Regulations SOR 80/68
[2] Canadian Human Rights Benefit Regulations SOR 80/68
[3] 2018 HRTO 680

Canada's position was that the conclusion and findings in *Talos* did not apply to the present case.

[10] The Complainant and both Respondents were represented by counsel at the four-day hearing held in Vancouver, British Columbia. The Canadian Human Rights Commission ("Commission") has a mandate to seek public interest remedies designed to address discriminatory practices and prevent similar future practices. It participated at the initial stages of the matter but not at the hearing. The parties called several witnesses to testify and provide evidence.

Background - CHRT Airline age discrimination cases

[11] The CHRT has heard a number of age discrimination cases filed by Air Canada pilots with respect to mandatory retirement in the preceding years. Prior to December 2012, Air Canada pilots were forced to retire at age 60 due to the mandatory retirement provisions in both their collective agreement and in their pension plan.

[12] Two pilots filed complaints with the Commission in 2004 and 2006 against Air Canada and the ACPA alleging age discrimination because of their mandatory retirement and both cases were heard together by the Tribunal in 2007 (known as the Vilven/Kelly line of cases).[4] At the Tribunal hearing in that case, Air Canada and the ACPA relied on a statutory exemption to the prohibition against age-based discrimination in the employment context, which at the time was found at paragraph 15(1)(c) of the CHRA. The provision stated as follows:

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

[13] The Tribunal dismissed the Pilots' constitutional challenge to s. 15(1)(c): deciding that that 60 was the normal retirement age for persons working in similar positions, so that the Pilots' mandatory retirement was not a discriminatory practice within the meaning of

[4] *Air Canada Pilots Association v. Kelly*, 2012 FCA 209 (CanLII)

the CHRA. The Tribunal also found that paragraph 15(1)(c) did not violate the guarantee of equal treatment found at s. 15 of the *Charter*. As a result, the Tribunal did not have to decide if paragraph 15(1)(c) could be saved under s. 1 of the Charter.

[14] Both cases were appealed to the Federal Court which found that, in one case, paragraph 15(1)(c) violated s. 15 of the Charter and returned the matter to the Tribunal for a decision as to whether the provision could be justified under s. 1 of the Charter. In the other decision, the Tribunal decided that paragraph 15(1)(c) was not saved by s. 1 of the Charter. Finally on further appeal, in July 2012, the Federal Court of Appeal ruled that decision of the Federal Court should be set aside and the matter returned to the Tribunal with the direction that the complaints of Kelly and Vilven should be dismissed on the ground that paragraph 15(1)(c) of the CHRA was constitutionally valid, and that 60 was the normal retirement age for persons working in positions similar to theirs.

[15] A second group of complaints (Thwaites/Adamson) involved former Air Canada pilots who were forced to retire at age 60 due to the mandatory retirement rule in the collective agreement between Air Canada and the ACPA.[5] They brought complaints against both organizations, alleging that the mandatory retirement rule constituted a discriminatory practice under the Act. The Tribunal found that the mandatory retirement rule constituted *prima facie* discrimination. It rejected the Respondents' bona fide occupational requirement defences under paragraph 15(1)(a) of the Act. However, it accepted Air Canada's defence under paragraph 15(1)(c), concluding that age 60 was the normal age of retirement for pilots in Canada. As a result, the complaints were dismissed.

[16] This group of cases also were appealed and overturned by the Federal Court. Ultimately in June 2015, the Federal Court of Appeal overturned the decision of the Federal Court and upheld the Tribunal's decision on 60 being the normal age of retirement.

[17] Parliament repealed section 15(1)(c) of the Act in December 2012 and mandatory retirement at age 60 is no longer in the collective agreement between Air Canada and the ACPA. However, the mandatory age of retirement of Air Canada pilots is 65 because the

[5] *Adamson v. Canada (Canadian Human Rights Commission)* [2016] 2 FCR 75, 2015 FCA 153 (CanLII)

United States will not allow pilots aged 65 or older to fly into their airspace. That has an enormous impact on Air Canada's operations, so they chose to adhere to that reality and the collective agreement today with their pilots requires retirement at 65 years of age.

II. Issues

[18] The issues for the Tribunal to consider are:

A. Do sections 3(b) and 5(b) of the *Canadian Human Rights Benefit Regulations SOR 80/68* violate the equality rights provisions of section 15(1) of the *Canadian Charter of Rights and Freedoms?*

B. If those sections of the Regulations are unconstitutional, can they be justified in a free and democratic society by section 1 of the Charter?

III. Law

(1) The Supreme Court of Canada addressed the issue of a challenge to section 15(1) of the Charter in the context of an age discrimination claim in *Withler v. Canada (Attorney General)*[6]. The court laid out the two-part test, first described in *Law v. Canada (Minister of Employment and Immigration)*[7], for assessing claims pursuant to s. 15(1): (1) Does the law create a distinction that is based on an enumerated or analogous ground and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The court stated that the claimant must establish that he or she has been denied a benefit that others are granted by reason of a personal characteristic that falls within the enumerated or analogous grounds of section 15(1). If the claimant can establish such a distinction, the court can proceed to the second step and analyze whether, having regard to all relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group or by stereotyping it.

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[6] *Withler v. Canada (Attorney General)* 2011 SCC 12, [2011] S.C.R. 396
[7] *R v. Kapp* 2008 SCC 41, [2008] 2 S.C.R. 483

[19] In W*ithler* at paragraph 30*,* the Supreme Court reiterated the two-part test for assessing a s. 15(1) claim.[8] The Court examined the first step and said in paragraph 33 that as per *Andrews,* section 15(1) protected only against distinctions made on the basis of the enumerated grounds or grounds analogous to them.[9]

[20] The second part of the test requires demonstrating that the law has a discriminatory impact in terms of prejudicing or stereotyping as described in *Andrews*[10]. The Court said that substantive inequality or discrimination can be established by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group based on personal characteristics.[11]

[21] The Court went on to say that the second way to establish substantive inequality is to show that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant group.[12] The Court stressed that the analysis is "contextual not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation."[13]

[22] The importance of the contextual analysis is evident later in *Withler* when the Court said "Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interest it attempts to balance will colour the discrimination analysis".[14]

[23] Talking about pensions benefits programs such as the case in *Withler*, the Court said that "Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered."

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[8] *Withler*, p. 410
[9] *Andres v. LSBC* [1989] 1 S.C.R. 143
[10] *Withler* para 34.
[11] Ibid para 35.
[12] Ibid para 36
[13] Ibid para 37.
[14] Ibid para 38.

[24] The most recent case to consider a similar question is *Talos v. Grand Erie District School Board*[15], a decision of the Ontario Human Rights Tribunal, which was decided in May 2018, after the hearing.

[25] In *Talos*, the complainant was a secondary school teacher who alleged that an exception in the *Ontario Human Rights Code* that grants employers the discretion to terminate benefits for workers over age 65 infringed his equality rights and was unconstitutional. His extended health, dental and life insurance benefits and those of his ill spouse were terminated when he reached age 65 although he continued to work on a full-time basis.[16]

[26] Adjudicator Grant in *Talos* ruled in favour of Mr. Talos' claim that he experienced disadvantage on the basis of age and that his s. 15(1) *Charter* right was infringed as a result of the impact of s. 25(2.1) of the Code, and held that the respondent had not discharged its onus to justify this infringement under s.1 of the Charter.[17]

[27] In the event the Complainant can establish that the provisions of the Regulations in question do violate section 15(1) of the Charter, the Respondents may rely on section 1 of the Charter to argue that they are justified in a free and democratic society.

[28] The Respondents would then have the onus to meet the test set out by the Supreme Court of Canada in *R. v. Oakes*.[18] First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The objective must be related to societal concerns which are pressing and substantial in a free and democratic society. Second, the means used must be shown to be reasonable and justified using a three part proportionality test: (1) the measures used must be fair and rationally connected to the objective; (2) the means used should impair the right in question as little as possible; and (3) there must be proportionality between the limiting measure and the objective.

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[15] *Talos v. Grand Erie District School Board* 2018 HRTO 680
[16] Ibid. para 1.
[17] Ibid. para 14.
[18] *R v. Oakes* [1986] 1 R.C.S.

IV. Evidence

Complainant's witnesses

Roy Bentley

[29] Roy Bentley was a pilot with Air Canada. He is now retired having attained the highest possible position as a pilot at Air Canada, being the captain of a Boeing 777. On May 30, 2014 Bentley turned 60 years old and had accrued at least 25 years of service with Air Canada. Under the terms of the collective agreement with Air Canada, having reached the age of 60 and having accrued the minimum 25 years of service, Bentley was entitled to retire with an unreduced pension.

[30] According to Mr. Bentley's testimony, he filed his complaint when he read the provisions of the collective agreement between the ACPA and Air Canada, specifically L75.07, and realized that after turning 60 years old and with at least 25 years of service with Air Canada he became eligible for an unreduced pension and thus, if he were to become disabled while working after that point, he would no longer be entitled to any disability benefits.

[31] L75.07 is a section of Letter of Understanding No. 75 ("LOU 75") between Air Canada and Air Canada Pilot's Association titled "Elimination of Mandatory Retirement".[19] The preamble reads "In order to comply with Canadian human rights laws and with ICAO Standards, the Collective Agreement is amended to accommodate Pilots working past age 60 after December 15, 2012 as follows…"

[32] L75.07.01 amends the previous section in the collective agreement where termination of disability insurance benefits occurred on the last day of the month on which the pilot entered their 60th birthday. The date of termination of benefits was amended to "…the date on which he is entitled to receive the benefits provided by the pension plan without adjustment by reason of early retirement…"

[19] Exhibit A-12

[33] Under cross-examination, Mr. Bentley admitted that he personally had not made a claim and been denied disability benefits because of his age. He said he had not been negatively impacted financially by the rule in L75.07 although he said he felt emotionally impacted.

[34] Mr. Bentley testified that he believes the age at which long-term disability benefits should cease is 65 which, as noted earlier, is the current mandatory pilot retirement age at Air Canada because pilots that age or older are prohibited from flying into US airspace.

Robert Lyon

[35] Mr. Bentley's next witness was a senior pilot in Air Canada, like himself a captain of a Boeing 777. Mr. Robert Lyon turned 60 in January 2013. On May 1, 2013 he became eligible to retire with an unreduced pension by virtue of his age and years of service with Air Canada.

[36] Mr. Lyon testified that in July 2013, while at home, he suffered cardiac arrest and had to be rushed to hospital by ambulance. He had suffered blockages of arteries leading to his heart which required the insertion of two stents. After his heart attack, Mr. Lyon opted to remain employed because his doctor advised him that he would be able to return to work in about six months.

[37] At this time, Mr. Lyon had an accrued 18 sick days and 16 vacation days which were credited by Air Canada and paid to him. After that, Air Canada placed Mr. Lyon on an unpaid leave of absence.

[38] At this point, Mr. Lyon found out that his disability benefits, life insurance, dental benefits and medical insurance had been terminated. He contacted Air Canada and had his life insurance reinstated by paying the premiums himself. He testified that when he turned 60, no one had advised him that his other benefits would be terminated in addition to his disability benefits.

[39] About six months after his heart attack, Mr. Lyon received medical clearance and returned to work.

[40] Under cross examination, Mr. Lyon stated that he thought disability benefits should terminate at 65 years of age, the age of mandatory retirement for Air Canada pilots.

Sandra Anderson

[41] The Complainant's last witness was Sandra Anderson, a pilot who retired from Air Canada after achieving the rank of First Officer on a Boeing 777. She turned 60 on August 22, 2016.

[42] Ms. Anderson underwent major surgery in December 2016. Due to ongoing post-surgical pain, she was not able to return to work, although she hoped to get back to flying for Air Canada eventually.

[43] From December 2016 to June 2017, she received income from her accrued sick and vacation days. When these credits ran out, Ms. Anderson was faced with a choice of going on an unpaid personal leave until she could return to work or retiring on an unreduced pension.

[44] Without certainty from her doctors as to when she might be able to return to work, Ms. Anderson chose to retire effective July 1, 2017. She testified that had she been able to return to work, she would have done so. She said that that chose retirement because she no longer had her disability benefits and needed the income from her pension. She testified that although her pension would seem generous to most people, it was only about 45% of her pre-disability earnings.

[45] During Ms. Anderson's testimony, the Complainant introduced into evidence an email from Brad Ridge, President of the Air Canada Pilots' Association in response to a request from her to ACPA to file a grievance on her behalf over the termination of her disability benefits.[20]

[46] The e-mail reads: "ACPA had carefully considered this issue. We have come to the conclusion that the grievance you wish to file cannot succeed both because the offending provisions are part of the ACPA-Air Canada collective agreement as opposed to

[20] Complainant Exhibit C-3

representing a breach of one its provisions. And the provisions do not represent a breach of applicable human rights legislation. Therefore, the Association will not file a grievance."

[47] The e-mail went on to say "As I'm sure you're aware, the provisions in question were not collectively bargained in the usual sense. They were included as part of the company's proposal in the final offer selection arbitration process that resulted in our previous collective agreement. The Association's clear preference would be that all pilots remain eligible for GDIP regardless of age and/or pension status. However, the Association recently attempted to achieve this in bargaining and was unsuccessful. The company was unwilling to bend on this issue and bargained hard to ensure that the applicable provisions would continue in the collective agreement".

Respondent's witnesses

Harlan Clarke

[48] The Respondent Air Canada called Harlan Clarke as a witness. He is the Director of Human Resources for North America for Air Canada. Previously he worked in labour relations for Air Canada. He testified about working conditions for pilots, the collective agreement process resulting in LOU 75 and the changes made because of the elimination of mandatory retirement.

[49] Mr. Clarke described difficult negotiations that resulted in two complete collective agreements being submitted to an arbitrator to choose. That arbitrator's decision became the collective agreement between Air Canada and the ACPA for the 2011-2016 period. It's unclear whether the question of providing disability benefits to pilots past age 60 was directly addressed in the arbitrator's decision.

[50] In cross-examination, the Complainant attempted to get an estimate from Mr. Clarke on the cost of providing disability insurance for pilots up to age 65 based on the fact that Air Canada claimed in its 2012 Annual Report that it had achieved cost savings of over $100 million because mandatory retirement at age 60 had ended. However, Mr. Clarke was unable to provide an estimate, claiming lack of knowledge. The

Respondent Air Canada said it was not an issue raised by the Complainant prior to the hearing and that the Complainant should have introduced evidence from its own expert witness.

Christine Sinclair

[51] Christine Sinclair was called by the Respondent Air Canada as a witness. She is the manager of pensions for Air Canada. She testified that under the pension plan pilots are entitled to a non-reduced pension at age 60 with 25 years of qualifying service, or at age 65 if they don't have the 25 years of qualifying service.

[52] She said the earliest date on which an employee can retire from his employment and receive all the benefits provided by the plan without adjustment by reason of early retirement is on normal pensionable age.

[53] Responding to a direct question, Ms. Sinclair said it was not mathematically possible under the Air Canada pension plan to have a pensionable age that is less than the normal pensionable age in the Regulation. She agreed that it was a perfect correspondence in the definition of pensionable age in the Regulations and in the Air Canada pension plan.

Peter Gorham

a) Peter Gorham was called by the Respondent Air Canada as an expert witness. He is a consulting actuary who has testified as an expert on actuarial questions involving pension and benefits in a number of court cases including *Talos*. The Complainant did not challenge his qualifications as an expert witness. Mr. Gorham wrote a report and provided an opinion to Air Canada on whether and why in the context of a workplace disability income program it may be appropriate from an actuarial perspective to a) restrict coverage in a disability program to an employee after the employee attains a specified age; and b)

restrict benefits payable to disabled employees on a disability income program after the employee attains a specified age.[21]

[54] As an overview comment on his report, Gorham said "…in my opinion, I conclude that it's appropriate from an actuarial and insurance perspective to replace loss of income benefits with retirement benefits at some point between ages 61 and 65. That's the range that I conclude is the reasonable age. And reference to pensionable age is a reasonable proxy to recognize these situations."

[55] With specific reference to disability plans, Gorham said in terms of disability insurance, the purpose of long-term disability plans like GDIP is to provide income protection. "Benefits should only be provided during the period where a pilot is unable to work due to the disability and during which they would have worked in the absence of the disability. The termination of compensation is necessary at some point and needs to be designed into the plan terms in order for this to work as an insurance plan."

[56] In response to a question of estimating the costs of providing disability benefits past age 60, Gorham said "… the cost at age 65 for long-term disability, if there was no limiting age, I've estimated could be more than 18 times the cost of an average-aged employee."

[57] In paragraph 190 of his Report, Gorham wrote "In my opinion, the cessation of loss of income benefits between the ages of 61 and 65 is based on sound actuarial principles. The use of other ages would also be appropriate provided the difference from ages 61 to 65 is reasonably minor"[22]

[58] His conclusion in paragraph 191 was that "…stopping disability income benefits at a time determined by reference to pensionable age is a reasonable basis and an appropriate method of recognizing different retirement situations among employers and, as I said before, consistent with sound actuarial and insurance practices."[23]

V. Issues and Analysis

[21] Respondent Exhibit R-12
[22] Ibid para 190
[23] Ibid para 191

Do sections 3(b) and 5(b) of the *Canadian Human Rights Benefit Regulations* violate the equality rights provisions of section 15(1) of the *Canadian Charter of Rights and Freedoms?*

[59] As the Supreme Court directed in *Withler*, it is important to analyse the regulations on a contextual basis. What was the purpose behind the law that should be considered when deciding whether there was discrimination? What interests did the legislators attempt to balance?

[60] Under the first step of the analysis required by *Withler*, it's clear that age is an enumerated ground of discrimination. Therefore, although the eligibility for an unreduced pension is both attaining the age of 60 and accumulating at least 25 years of service, age is a factor in the provision in the collective agreement to terminate disability benefits once pension eligibility is obtained. A distinction based on an enumerated or analogous ground is established.

[61] Section 3(b) of the *Regulations* provides an exemption to excluding the Complainant from the Air Canada Pilots disability benefits plan if he has reached age 65 or normal pensionable age. As noted earlier, the normal pensionable age for Air Canada pilots is 65 or earlier if they have reached age 60 and have 25 years of experience.

[62] The analysis then turns to the second part of the two-step test laid out *Withler* in which we examine ask whether the *Regulations'* exemption to allow for terminating the Complainant's disability benefits violated his s. 15(1)'s protection of substantive equality. The question is the same as the one the Supreme Court asked in *Withler* – "…having regard to the relevant context does the impugned law perpetuate disadvantage or prejudice or stereotype the claimant group?"[24]

[63] In *Withler* the issue was whether it was discriminatory to reduce supplementary death benefits to members of government pension plans once they had reached certain ages. The Supreme Court affirmed the trial judge's textual analysis which held that one could not isolate the supplementary death benefits from the other benefits offered by

[24] *Withler*, para. 70

government. Not considering the entire benefits plan would result in an unrealistic analysis.[25]

[64] In W*ithler*, the trial judge noted that the supplementary death benefit was not intended to be a long-term stream of income for older surviving spouses. That long-term security was instead provided by the survivor's pension. In this case the disability benefits provided under the collective agreement were also not intended to be an income replacement once plan members reached pensionable age. At that point, lost income would be provided by an unreduced pension.

[65] The Supreme Court also affirmed the trial judge's analysis in *Withler* of the purpose of the legislation saying "When the supplementary death benefit is considered in the context of the other pensions and benefits to which the surviving spouses are entitled, therefore it is clear that its purpose corresponds (albeit imperfectly) to the claimants' needs…"[26]

[66] The trial judge in *Withler* noted that the Reduction Provisions operated within the context of a much larger benefit program. She concluded that they did not treat the plaintiffs unfairly, taking into account all of the circumstances of the legislative framework of the impugned law.[27]

[67] In this case, I find from the evidence that the disability benefits were designed to provide a measure of income loss to plan members should they become disabled and unable to work. However, if the member were eligible for an unreduced pension, then although their disability benefits were no longer available to them, if they became disabled, they could choose to use their sick days and vacation and possibly unpaid leave before returning to work. That was the option chosen by Robert Lyon. Their other choice was to retire and collect their unreduced pension. That was the option chosen by Sandra Anderson.

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[25] Ibid. para. 74
[26] Ibid. para. 77
[27] Ibid. para. 78

[68] It was not perfect correspondence between the benefit plan in the collective agreement and the actual circumstances of Mr. Lyon and Ms. Anderson but that is not required by the jurisprudence. The Supreme Court said in *Withler* that what needed to be considered were the allocation of resources and the goal of the legislation.[28]

[69] The Complainant challenged the constitutional validity of s. 3(b) and 5(b) of the *Regulations.* In closing argument, the Complainant suggested that the *Regulations* might be obsolete, noting that they came into force prior to the *Charter of Rights* in 1982, the coming into force of the Charter's section 15 provisions in 1995 and the elimination of mandatory retirement in 2012.

[70] The Respondent Air Canada argued that when the *Regulations* were enacted in the early 1980s, mandatory retirement was not widespread in Canada, at least in the federal sphere. Indeed, they made the point that the *Regulations* were necessary because it was not widespread, there were employees working past age 65. Their contention being that the *Regulations* would not have been necessary had universal mandatory retirement been in effect.

[71] The Respondent Air Canada also pointed out that that these regulations were based on the recommendations of the Canadian Human Rights Commission following extensive consultation with employers, employer organizations, underwriters of benefit plans, benefit consulting firms, other human rights administrators, and other interested organizations in 1979.

[72] The *Regulations* allow benefit plans to terminate disability benefits at a defined point, which essentially corresponds to the date at which employees can access full retirement benefits under the applicable pension plan, or 65, which is the age at which government pension programs also became available; CPP, OAS, in Quebec QPP.

[73] That introduces the concept of pensionable age, which is 65 in most of the provinces. The Respondent Air Canada's expert witness Mr. Gorham testified that it was appropriate, from an insurance and actuarial perspective, to replace loss of income

[28] Ibid. para 77

benefits, such GDIP, with retirement benefits, such as a pension, at some point between the ages of 61 to 65. It is a necessary feature in the design of disability income plans.

[74] Mr. Gorham also opined that cessation of disability benefits at a lower age could be appropriate where the employment situation differs from the average for Canada, such as in the case at hand, where the plan provides for an unreduced pension prior to age 65 in some circumstances.

[75] In paragraph 75 of his report, Mr. Gorham estimated that providing disability benefits for employees at 65 could cost 18 times more than providing benefits for employees between 40 and 45.[29] Although this case does not deal with employees older than 65, the evidence supports the notion that disability benefit plans are less sustainable for older workers.

[76] At paragraph 68 of his report Mr. Gorham also stated:

> Even if retirement was not a reason to limit the age at which disability benefits are payable, the cost charged by the insurer would result in a limit. If disability benefits continued for life, the cost of the insurance would be so high that employers would likely refuse to provide the benefit at all, or demand something cheaper, which would result in benefits ceasing at some specified age. In a collective bargaining situation, unions might not want disability insurance since the cost would be so high the trade-off with other benefits and wages would not be acceptable." [30]

[77] None of the parties disputed the fact that sections 3(b) and 5(b) of the Regulations explicitly provide an exemption to L75.07. The Complainant did not provide sufficient evidence at the hearing that would persuade me to find that the *Regulations* were not constitutional valid.

[78] The Complainant relied on the recent case of *Talos* to support its challenge to the constitutionality of the *Regulations*. The *Talos* decision did not follow similar and well-established cases like *Chatham-Kent* and sought to distinguish *Withler.*

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[29] Respondent Exhibit R-12
[30] Ibid. para 68

[79] Section 25(2.1) of the Ontario Code, in conjunction with the *Employment Standards Act* (S.O. 2000, c. 41*)* and its Regulations, specifically carved out 65 and older workers from protections with respect to different treatment in benefits plans, pension and other workplace plans, in a bid to maintain flexibility for the workplace parties to make arrangements that would respect the financial viability of those plans.[31] The adjudicator found that a benefit differential that is only explained by the age of the employee would be *prima facie* age discrimination under the Code. Therefore, she held that a legislative provision that prevents a worker age 65 and older from being able to challenge any reduction or elimination of access to workplace benefits as age discrimination is a *prima facie* violation of s. 15(1) of the Charter.[32]

[80] The adjudicator distinguished *Chatham-Kent (Municipality) v. O.N.A. (O'Brien) (Re)*[33] which upheld the constitutionality of s. 25(2.1) of the Code and the relevant provisions of the ESA and its Regulations. She also distinguished *Withler* and rejected the arguments advanced by the respondent Board that Mr. Talos suffered no disadvantage because of the "generous" nature of his pension, that "he [Talos] can lead an economically viable life during his senior years" because he benefited from being the member of a union, and that his transition to government funded programs at age 65 adequately substituted for benefits that he previously enjoyed as part of his remuneration package.[34]

[81] I am not bound by Member Grant's decision in *Talos* and distinguish *Talos* in its application to the matter in hand on a number of grounds.

[82] Unlike in the current case, *Talos* deals with the termination of health, dental and life insurance benefits rather than disability benefits. Member Grant makes it clear a number of times in her decision that her analysis excludes long-term disability insurance including paragraph 284 where she said, "For greater clarity, this decision does not address long term disability insurance, pension plans and superannuation funds."[35]

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[31] Ibid. para 15.
[32] Ibid. para 16.
[33] 104 C.L.A.S. 267 (October 31, 2010), 202 L.A.C.(4th)
[34] *Talos* para 16.
[35] Ibid. para 284

[83] This distinction is particularly relevant because Member Grant distinguished *Withler* on the basis that in *Talos*, the termination of benefits at age 65 was not set-off by any other compensatory arrangement. Whereas in *Withler*, the Supreme Court did not find a violation of section 15(1), Grant wrote at paragraph 222 “In contrast, in the instant case, there is no alternative “suite” of benefits offered to employees age 65 and older that can be considered to be “sufficiently equivalent” to the benefits offered to employees age 64 and younger.”[36]

[84] In the next paragraph she said:

> In *Withler*, the Court viewed the trade-offs within the suite of benefits to be appropriately balanced, and thus found no disadvantage to group members as a whole because of the age-based reduction in certain benefits. Those facts are distinguishable from the instant case where age-differentiated benefits in an employer plan are not ameliorated or set-off by any other employer provided benefit.[37]

[85] In the case here, the parties negotiated a collective agreement that included providing a group disability plan for income loss in the event of disability. But the agreement was designed to transition to replacing disability benefits with retirement benefits upon employees becoming eligible for an unreduced pension. Not only is retirement with an unreduced pension a tangible benefit, this type of scheme is explicitly permitted by the federal government in the pension benefit regulations.

[86] In *Chatham-Kent*, the actuarial evidence tendered showed that the cost of disability benefits increased steeply when workers entered their 60s. In *Talos*, Member Grant found that there was no correspondingly steep increase in the cost of providing health and dental benefits that would justify a protection necessary to maintain the financial viability of those plans.

[87] However, in this case the actuarial evidence produced by expert witness Gorham, which was not contradicted in the hearing, suggested that the cost for long term disability benefits at age 65 would be more than 18 times the cost for an average-aged employee

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[36] Ibid. para 222
[37] Ibid. para 223

(at age 40 to 45).[38] It supports the notion that financial viability of the disability plan was a consideration in setting an age for termination of the Air Canada disability benefits plan.

[88] I would accept *Withler* as continuing to be the law while distinguishing *Talos.* Since I do not find the *Regulations* to have violated section 15(1), there is no need for a section 1 *Oakes* analysis.

VI. Decision

[89] I dismiss the complaint on the basis that sections 3(b) and 5(b) of the *Canadian Human Rights Benefit Regulations SOR 80/68* provide a constitutionally valid exemption for the termination of disability benefits for those Air Canada pilots who have reached pensionable age.

[90] The *Regulations* were based on the recommendations of the Canadian Human Rights Commission following extensive consultation with employers, employer organizations, underwriters of benefit plans, benefit consulting firms, other human rights administrators, and other interested organizations in 1979. To the knowledge of the Tribunal, they had not previously faced a constitutional challenge.

[91] The words of the statute are clear and unequivocal. Sections 3(b) and 5(b) of the *Regulations* provide exemptions for benefit plans that discriminate against plan members by denying them access to certain benefits if they have attained the normal pensionable age of the plan.

[92] The definition of normal pension age under a pension plan under section 2 of the *Regulations* “means the earliest date specified in the plan on which an employee can retire from his employment and receive all the benefits provided by the plan to which he would otherwise be entitled under the terms of the plan, without adjustment by reason of early retirement, whether such date is the day on which the employee has attained a given age or on which the employee has completed a given period of employment…”.

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[38] Respondent Exhibit R-12

[93] The provisions of L75.07 are exempted from a complaint of discrimination because the employee has reached the normal pensionable age as defined by the *Regulations*. In this case, pensionable age means the employee is eligible for an unreduced pension when they reach the age of 60 and have at least 25 years of service with the employer. Pensionable age is also defined under the terms of the collective agreement between Air Canada and ACPA and corresponds to the definition in the *Regulations*.

[94] All parties accept that the collective agreement and L75.07 in particular are insulated from a claim based on discrimination by the *Regulations*. Indeed, that is why the Complainant chose to challenge the *Regulations* as being in contravention of the equality rights section 15(1) of the Charter.

[95] The Complainant and the Respondent ACPA submit that the *Talos* case provides support to find the Regulations constitutionally invalid. I believe that based on the facts of this case, *Talos* should be distinguished. The key finding by Member Grant in *Talos* is that benefits at issue (group health, dental and life insurance) are not ameliorated or set-off by any other employer provided benefit when employees reach age 65. She said “In *Withler*, the Court viewed the trade-offs within the suite of benefits to be appropriately balanced, and thus found no disadvantage to group members as a whole because of the age-based reduction in certain benefits. Those facts are distinguishable from the instant case where age-differentiated benefits in an employer plan are not ameliorated or set-off by any other employer provided benefit.”[39]

[96] However, in this case, the termination of disability benefits upon reaching pensionable age – 60 years old and at least 25 years of service with Air Canada – is generously set off with retirement benefits, a full unreduced pension.

[97] *Talos* should also be distinguished from this case because it involves group health, dental and life insurance benefits. It excludes disability benefits and Member Grant made than exclusion explicitly clear several times in her decision.

[98] The opinion of the expert witness supports the conclusion that in collective bargaining, Air Canada and the ACPA considered it reasonable and acceptable to

[39] Ibid. para 223

terminate disability benefits once pilots reached pensionable age. The Air Canada disability benefits plan establishes a normal pensionable age that corresponds to the definition in the *Regulations.*

[99] The *Regulations* were designed to allow this process to occur and to afford such plans a degree of insulation from claims for discrimination. The *Regulations* should be afforded a degree of deference from administrative tribunals.[40]

[100] I do not find that sections 3(b) and 5(b) of the *Canadian Human Rights Benefit Regulations SOR 80/68* are unconstitutional.

[101] Having determined that the *Regulations* are constitutionally valid, I do not need to consider whether they are saved by section 1 of the Charter*.*

[102] Based on all the reasons above, I dismiss the complaint.

Signed by

Alex G. Pannu
Tribunal Member

Ottawa, Ontario
August 28, 2019

[40] *McKinney v. University or Guelph* [1990] 3 R.C.S. para 104-105

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2117/3315 & T2118/3415

Style of Cause: Roy Bentley v. Air Canada and Air Canada Pilots Association

Decision of the Tribunal Dated: August 28, 2019

Date and Place of Hearing: January 29 to February 1, 2018

Vancouver, BC

Appearances:

Raymond Hall, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Maryse Tremblay, for the Respondent, Air Canada

Bruce Laughton, for the Respondent, Air Canada Pilots Association