Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

George Vilven

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

- and -

Air Canada Pilots Association
Fly Past 60 Coalition

Interested Parties

and Between:

Robert Neil Kelly

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Air Canada Pilots Association

Respondents

Decision

Member: J. Grant Sinclair
Date: November 8, 2010
Citation: 2010 CHRT 27

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I. Introduction

[1] On August 28, 2009, this Tribunal rendered its second decision finding that the respondents Air Canada and the Air Canada Pilots Association ("ACPA") had engaged in a discriminatory practice against the complainants George Vilven ("Vilven") and Robert Neil Kelly ("Kelly") contrary to the *Canadian Human Rights Act*. The Tribunal held a subsequent hearing to determine the complainants' remedy under s. 53 of the *CHRA*.

[2] The complainants ask for an order that:

i. Air Canada and ACPA cease applying the mandatory retirement provisions in the Air Canada pilots pension plan and in the collective agreement with respect to all pilots employed by Air Canada;

ii. they be reinstated as pilots with Air Canada and return to flying a regular assignment in accordance with their seniority as determined by the Tribunal;

iii. they receive compensation for lost wages from the date of their retirement to the date of their reinstatement;

iv. that upon reinstatement they continue to accrue pension and other benefits on the same terms and conditions as before their retirement;

v. each of them be awarded $20,000 as compensation for pain and suffering and $20,000 as compensation for the wilful and reckless conduct of the respondents;

vi. out of pocket expenses;

vii. interest on the compensation.

II. Cease and Desist Order

[3] The complainants ask for an order that the respondents cease applying s.5.1 of the Air Canada Pilots Pension Plan and the corresponding provisions in the collective agreement, thereby eliminating mandatory retirement for all Air Canada pilots.

[4] Section 5.1 provides that a member of the pension plan shall retire from the company no later than his normal retirement date. Normal retirement date is defined in s. 1.2(ii) as the first of the month immediately following the month the member attains the age of 60. The respondents agree to an order to cease applying s.5.1 of the pension plan but only with respect to these two complainants.

[5] In its second decision, this Tribunal, upon concluding that s. 15 (1)(c) contravened the *Charter,* refused to apply this provision to the facts of this case. This conclusion followed the well-established principle set out in a number of Supreme Court of Canada decisions starting with *Cuddy Chicks v. Ontario,* [1991] 2 S.C.R. 517, where the Court referring to the Ontario Labour Relations Board, said that a formal declaration of invalidity is not available to the Board, nor can it expect any curial deference with respect to its constitutional decisions.

[6] In the more recent SCC decision in *Nova Scotia (WCB) v. Martin*, [2003] 2 S.C.R. 504, the Court reiterated the principle that constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. Further, a determination by a tribunal that a provision of its enabling statute is invalid under the *Charter* is not binding on a future tribunal or other decision maker.

[7] The complainants agree with this statement of the law as does the Commission. However, they are asking that this Tribunal only exercise its remedial powers under s. 53(2)(a) of the *CHRA*. In particular, that the Tribunal order that the respondents cease the discriminatory practice of mandatory retirement and take measures in consultation with the Commission to prevent the same or similar practices from occurring in the future. Otherwise, to apply this remedial provision only to the complainants would not have the effect of preventing the discriminatory practice in the future.

[8] In support of its position, the Commission relies on the SCC decision in *CN v. Canada (CHRC),* [1987]1 S.C.R. 1114 *(Action Travail des Femmes).* In this case, the *ATF,* a public

interest pressure organization, filed a human rights complaint alleging that CN discriminated in its hiring and promotion practices by denying employment opportunities to women in certain unskilled blue-collar jobs.

[9] The Tribunal substantiated the complaint and ordered, in effect, an ‘employment equity program’ to address the systemic discrimination. CN appealed arguing that the Tribunal lacked the power to make this kind of remedial order under s.41(2)((a) of the *CHRA* (now 53(2)(a)).

[10] The SCC disagreed pointing out that this provision was designed to deal with the problem of systemic discrimination and the employment equity program was designed to break the continuing cycle of discrimination. More to the point, the Court noted that the goal was not to compensate past victims or provide new opportunities for specific individuals who have been unfairly refused specific jobs or promotions in the past.

A. Conclusion on Cease and Desist Order

[11] In my opinion, the Commission cannot rely on the *ATF* decision. The present case does involve a systemic complaint. *ATF* involved a complaint by a public interest group on behalf of a large number of alleged victims of a discriminatory practice. This is a case of two separate individual complainants with the same complaint. It is not a group complaint. What the complainants are asking is to have their remedy extend beyond their individual complaints.

[12] Further, and as this Tribunal pointed out in its previous decision, its finding that s. 15(1)(c) offends the *Charter* is not a legal precedent and is applicable only to the facts of this case. In these circumstances, s. 15(1)(c) remains operative and may be relied upon by other respondents as a defence to any other outstanding or future complaints regarding the mandatory policy in question. To grant the order requested would be to deprive them of the defence afforded by this section.

[13] Finally, if this Tribunal made this order, using its remedial jurisdiction under s. 53(2)(a), it would be expanding its powers to that of a s. 96 court. In my opinion, this remedial power must read with the limitations imposed by the Supreme Court in *Martin.*

[14] The more appropriate way of applying both *Martin* and s. 53(2)(a) in terms of remedy is for this Tribunal to rescind the termination of the complainants by an order to the respondents to cease applying s.5(1) of the pension plan vis a vis the complainants and redress the discriminatory practice by ordering their reinstatement.

III. Reinstatement

[15] Air Canada's stated position is that the complainants will be reinstated to employment on condition that the normal eligibility requirements are met. These are that they must have a valid pilot licence, a valid medical certificate showing that they are fit to fly a commercial aircraft under the applicable Transport Canada medical standards, and either a current instrument flight rating or the ability to renew their rating. Kelly meets these requirements. At the time of the hearing, Vilven did not have a current instrument flight rating, but has the ability to renew his rating.

[16] Once these requirements are met, Air Canada will reinstate the complainants and they will be eligible to attend the next available training course for the equipment that they are entitled to fly according to their seniority. Upon the successful completion of their training, they would not have to wait for the next equipment bid. They would be placed on the position list at the next monthly bid. The complainants said that they were satisfied with this.

[17] In terms of training they would need a full training course, ground school, a simulator course and a flight with a line captain. Air Canada estimated that the ground school would be approximately two weeks, the flight simulator course, two weeks and a regular flight with a line captain. To get a course date could take two to three months to at the most.

IV. Pension Remedy

[18] In respect of the pension remedy, the complainants ask that, upon reinstatement, they receive the wages and benefits of an active employee including continual accrual of pension benefits on the same terms and conditions as before their retirement. This is the position put forward by Air Canada in its evidence subject to "unwinding" the previous pension transactions.

[19] Unwinding involves the complainants repaying the monthly pension payments received from the start date of their compensation for lost wages to their reinstatement date and remitting the required pension contributions for that period.

[20] ACPA's initial view was that an order for continued accrual past age 60 would be contrary to the provisions of the pension plan and beyond the Tribunal's jurisdiction. However, having agreed to a cease order relating to s.5.1 of the pension plan in favour of the complainants, ACPA no longer maintains this objection.

V. Compensation for Lost Income and Position on the Seniority List

[21] The complainants claim that the compensation period should be the period from the date of their respective retirements to the date of their reinstatement to employment with Air Canada. They claim to be compensated for the income, including bonus and profit-sharing, that they would have earned had they continued in their employment, less any mitigation income and pension payments received in the compensation period.

A. Vilven

[22] For the purpose of determining his loss of income, Vilven used the compensation period from August 31, 2003 to April 30, 2010. His methodology was first, to determine his "proxy" seniority number, that is, the seniority number on the Air Canada Pilots Seniority List that he would have held for the years 2003 to 2010 if he had not been retired. The next step was to

determine his “proxy” pilot position assignment that he would have held for each of the years based on his proxy seniority number.

[23] Finally, the monthly income for each of these proxy pilot positions was calculated by reference to the collective agreement pay tables, assuming that the pilots in these positions would have flown schedules according to the following agreed upon by the parties to be reasonable assumptions:

(a) hourly pay rates as per the collective agreement for the proxy position in the respective compensation periods;

(b) 81 hours of flying per month, averaged at half-day, half-night rates of pay plus overseas premium pay for 71hours;

(c) monthly pay is multiplied by 12 to obtain an annualized salary for each period.

(i) Proxy Seniority Number

[24] When Vilven retired in August 2003, his seniority number was 1404. For the subsequent years 2004 to 2010, Vilven used pilot C.E. Hintz as his benchmark or proxy pilot. According to Vilven, Hintz was hired by Air Canada one year after Vilven so that if he had not been retired, he would have held Hintz’s seniority position for those years.

[25] To determine his proxy pilot position. Vilven initially positioned himself as a B747 FO YYZ. He had bid for this position sometime in 2001 but continued to fly as an A340 FO YVR until his retirement. However, from July 2003 to August 2003 he was paid at the rate of a B747 FO YYZ.

[26] The next step was to strike his proxy cohort for the years 2003 to 2010 which consisted of five pilots senior to him and 5 pilots junior to him who were based in Toronto. His reasoning was that but for Article 25.06.02 of the collective agreement, he would have been awarded that position in 2003.

[27] By reference to the Air Canada Pilot Position Assignment List for these years and on the basis of his proxy seniority, Vilven concluded that he would have bid and held the positions and seniority set out in Appendix I.

[28] Applying the pay rates referred to above, Vilven claims his total income would have been $1,086,093 from September 1, 2009 to April 30, 2010. (see Appendix I). This amount does not take into account his pension income received, required pension contributions or mitigation income during that period.

[29] The question at this point is whether Vilven is justified in using the B747 FO YYZ position as his starting point rather than his retiring position of A340 FO YVR. Under the Air Canada Pilots Pension Plan, a pilot's pension payout is based on the average of their best five years of earnings which is normally the sixty months prior to their retirement multiplied by their years of service.

[30] Vilven turned 60 in August 2003. At that time he had 22 years of pensionable service. To maximize his pensionable earnings, Vilven said that his practice was to always exercise his seniority rights to bid a position on a higher aircraft with a higher rate of pay.

[31] In 1998, Vilven held the position of an A320 FO in Winnipeg. He knew that in August 1998, he was entering his last five years as an Air Canada pilot. But he did not bid for a higher position to maximize his earnings until late 1999 or early 2000 when he exercised his seniority to transfer to Toronto as an A340 FO. When asked why he did not do so earlier, he explained that he made a mistake, he miscalculated.

[32] About six months later in 2000, Vilven transferred to Vancouver as an A340 FO. He did so knowing that there was no difference in the pay rate between Toronto and Vancouver for an A340 FO. He also recognized that his relative seniority in Vancouver was less than in Toronto so that he would not have the same opportunity to select the more desirable vacation and monthly schedules.

[33] Vilven explained why he chose to transfer to Vancouver in 2000 as an A340 FO rather than bid for a higher captain position elsewhere. During the Tribunal hearing in January 2007, when this Tribunal was considering the merits of his complaint, he testified that the reason he remained an A340 FO because he wanted to fly the big airplanes and that wasn't possible if he got promoted on the A320. He also testified that he was raised in Vancouver, his mother, his two sisters and his friends live there and it was only natural that he bid the Vancouver base.

[34] Vancouver is the most senior base in Air Canada and it was not possible for him to hold a captain's position there. He said that he could have held a captain's position in Winnipeg, Toronto or Montreal. But he wanted Vancouver as his base and he wanted to fly internationally. With his years of service it was not possible to do that as a captain.

[35] Vilven also testified that at times he decided not to exercise his seniority rights because he wanted to stay in a certain city. Vilven also told this Tribunal in the January 2007 hearing that if he was successful in his complaint, he would like to return as an Air Canada pilot in Vancouver.

[36] In the subsequent remedy hearing before the Tribunal, Vilven said that his previous testimony about why he transferred to Vancouver was not correct. Although his base was Vancouver, he lived in Calgary/Airdrie, about an hour-and-a-half away. Many Air Canada pilots do not live in the base that they fly from.

[37] He also said that there is another part to the story. He bid for Vancouver because there were more opportunities to do drafting and simulator work than in Toronto because many of the more senior Vancouver pilots were not willing to work on their days off. He was able to determine this by reviewing the open time and pilots passing flights. At the Toronto base, the flying was more structured and it appeared to him that more senior pilots in Toronto wanted to fly more.

[38] By doing so, he was able to maximize his earnings. For example, his pensionable earnings as an A340 FO YVR in 2000 were $179,000; in 2001, $175,000; in 2002, $176,000; and for eight months in 2003, $130,000. He could have held the position of an A320 captain, but in contrast an A320 captain earned approximately $165,000 in 2006 and there were no pay raises prior to that time.

[39] Vilven agreed that when he bid to transfer to Toronto as a B747 FO, he would lose the drafting and simulator work in Vancouver, except he said there might have been some possibilities in Toronto to do that extra work. But he then agreed that he transferred from Toronto to Vancouver in the same position of an A340 FO because he could make more in Vancouver.

[40] So why move back to Toronto? Vilven said that his reason for bidding the B747 FO YYZ position in 2001 was because there had previously been a pay decrease of approximately 15 percent for Air Canada pilots. The uplift on the B747 was 12 1/2- percent and by bidding the B747 he was able to mitigate to a large extent the 15% salary reduction.

[41] He agreed that $179,000 he earned as an A340 FO YVR in 2000 was about $30,000 more than his base A340 FO rate, which is considerably more than 12 1/2 percent. Vilven's response was that some of his colleagues who were B747 FOs in Toronto were making in excess of $200,000. There was a lot of opportunity in these years and they were drafting like crazy. When asked why then did he not bid earlier, his response was that he obviously miss-timed it.

[42] The evidence of Captain Duke from Air Canada is that pilots generally bid the position with the highest salary and regardless of the base in the remaining months prior to retirement, knowing that they will be frozen in their current position under Article 25.06 02 of the collective agreement.

[43] They do so with the knowledge that they will not have to occupy that position or transfer to another base which may involve moving, taking an aircraft training course and end up as a more junior pilot on the new equipment and suffer a junior schedule.

[44] So for Vilven it was the best of both worlds. He could retain his monthly bidding privileges of being senior in the A340 FO YVR position, continue his drafting and simulator work and be paid the higher rate of a B747 FO. That is the way the collective agreement is set up and many pilots take advantage of this.

(ii) Conclusion on Vilven Maximizing His Earnings

[45] In my opinion, Vilven has failed to demonstrate a pattern of maximizing his earnings. The facts are that he knew in 1998 that he was entering his final sixty months before retirement. Yet he did not transfer to Toronto until 2000 where he could have increased his pensionable earnings. The reason being that he miscalculated.

[46] He spent about six months in Toronto and then moved to Vancouver in the same position that he held in Toronto. It seems that he did earn well above his basic A340 FO salary there, but he did not bid for the B747 FO YYZ position until 2001 even though he knew that many of his colleagues were “drafting like crazy” and earning over $200,000 annually. In this case, his timing was off.

[47] Vilven’s evidence that he calculated his moves so as to maximize his earnings is not very convincing. He did not do so when the opportunity was there. Although he later disavowed it, his

earlier evidence supports the conclusion that his preferred base was Vancouver which was relatively close to his Calgary home and close to his family and friends who lived in Vancouver.

[48] I prefer the evidence of Capt. Duke that pilots in Vilven's situation bid for a position knowing that they will not be obliged to change their position. Vilven had the best of both worlds. He remained an A340 FO based in Vancouver, was paid at the B747 FO rate for a time and continued to supplement his income through drafting and simulator work.

[49] Thus, for the purpose of calculating Vilven's lost wages, the monthly rate should be that of an A340 FO YVR in effect during the compensation period as determined by the Tribunal.

B. Kelly, Calculation Loss of Income and Seniority

[50] For the purpose of determining his loss of income and seniority, Kelly considered the compensation period to run from May1, 2005 to April 30, 2010. He used the same methodology as Vilven, first, determining his "proxy" seniority number and then his "proxy" pilot position assignment for each of the years.

(i) Proxy Seniority

[51] Kelly retired as an A340 YYZ Captain on May 1, 2005. His seniority number on the Air Canada Pilots' System Seniority list was 79. However, because of the then ICAO rules, he could only fly internationally as a FO and not as a captain until after November 23, 2006. Kelly, at seniority number 79, would have been high on the seniority list and could have held the most senior A340 FO YYZ position.

[52] For the years 2006 to 2010, in terms of seniority as shown on the Pilots' System Seniority List, Kelly considered W.C. Ronan as his benchmark or proxy pilot. Tracking the seniority list for these years, Kelly's seniority number would have been one number below Ronan.

[53] Next, by reference to the Air Canada Pilot Position Assignment List for those years and on the basis of his proxy seniority number, Kelly concluded that he would have held the seniority and positions set out in Appendix II.

[54] Kelly provided two calculations for lost income. First, applying the pay rates set out in Appendix II for the proxy pilot assignment positions produces a total income of $1,040,128 from May 1, 2005 to April 30, 2010.

[55] The other calculation is found in a document Kelly submitted in evidence, “Statement of Annual Income, R.N. Kelly”. This shows his estimated loss of income from May 2005 to April 2010 to be $341,574.

[56] Kelly was challenged by ACPA with respect to his proxy pilot scenario which shows that from May 1, 2005 until December 1, 2006 he bid down from an A340 Captain to an A340 FO to satisfy the ICAO standards. After December 1, 2006, he bid up to a captain’s position.

[57] ACPA pointed out that this does not take into account Article 25.06.06 of the collective agreement which gives Air Canada the discretion to freeze a pilot from changing equipment and/or status for a period of 48 months.

[58] The evidence of Captain Duke was that the purpose of Article 25.06.06 is to prevent Air Canada from incurring training costs. It goes against the pattern of a pilot’s general career path, where you start at the bottom of the position hierarchy and move up as your seniority goes up. And along with that you are trained for moving up on to the higher equipment.

[59] He said the major factor that would be considered in exercising the discretion would be the training costs. He agreed that the training costs to move from the left seat to the right seat on a particular aircraft would be minimal, one or two hours in a simulator and perhaps a line check.

[60] There are three reasons to discount or ignore this factor. First, the proxy pilot assignment scenario reflects a hypothetical situation. Second, if the training costs are the major consideration and are so minimal, it is not reasonable to conclude that Air Canada would exercise its discretion against the bid particularly where Air Canada has engaged in a discriminatory practice. Third, Air Canada's expert Alexandra Leslie, in her compensation scenarios, also did not consider Article 25.06.06. So both are on the same footing.

C. Mitigation

(i) Vilven

[61] Vilven said that, in 2003, in anticipation of his retirement and to allow him to continue flying, he registered with Park Aviation, a hiring agency in Europe, and emailed a number of European airlines. He did not obtain any employment through these enquiries. He did not produce any of these emails or any employment applications.

[62] He also said that he called a number of airlines in Canada but it is not apparent in what years he did so. He compiled a list of airlines that he contacted every six months to kind of update his resume. The list did not have dates as to when he did so and he forgot to produce the list at the hearing.

[63] His evidence was that he would contact the airlines and talk to the chief pilot or their secretary. The airlines he said he contacted included Flair, Skyservice, Air Transat, Kelowna Flightcraft, Arctic Sunwest, Buffalo Airways, Hawk Air, Nolinor Aviation, Morning Star Aviation, Pacific Coastal and Air Saskatchewan. He did not contact Jazz Airline, Air Inuit, Canadian North, Porter Airline, Air Tindi, North Caribou Airline, Prince Edward Air, Provincial Airlines, Regional One Airlines, Trans Capitol Air, Transwest, Air Wasaya Airways, Central Mountain Air, Labrador Airline or Calm Air.

[64] Vilven felt that there was a bit of a major roadblock as far as getting jobs with these airlines. He told them that he was in the process of filing a human rights complaint and that it was his intention to go back to Air Canada if he could. He wanted them to know this because if they had to spend $15,000 or $20,000 to train him and he might quit shortly after did not seem to him morally or ethically correct.

[65] Vilven was not employed with any airline from September 2003 until January/February 2005 when he started flying with Flair Airlines. He stopped flying with Flair in May 2006. At that time he was flying approximately 15 days a month, was paid by the trip and earned about $5,000 a month. Since his retirement he had flown about 150 hours, all with Flair Airlines.

[66] The reason he left was because Flair had a military contract flying troops back and forth from Trenton to Edmonton and wanted a commitment from him to fly approximately 15 days a month. He would be based in Calgary but flying out of Toronto.

[67] Vilven said he could not make this commitment because the Tribunal hearing his complaint was scheduled to start in January 2007. He believed that it required a lot of preparation on his part and he would not have the time to prepare if he had to fly. He wanted to devote himself full time to advancing his human rights complaint and thought that this superseded his duty to mitigate his damages.

[68] Vilven agreed that both the Fly Pass 60 Coalition and the Commission, although not his counsel, represented his interests. He did not produce any records showing the amount of time that he spent preparing for the hearing, but estimated that, between the time he quit Flair and January 2007 when the hearing started, he would put in at least 20 to 30 hours/ week. In that time he said he read articles and verified certain evidence. His final written argument to the Tribunal amounted to two pages and it took him about four days to write these two pages.

(ii) Kelly

[69] When he retired in May 2005, his rating on the Airbus 330/340, B757 and B767 was valid until sometime in 2007. He has maintained his category one Aviation Medical and his pilot's licence

[70] Kelly started flying with Skyservice in November 2005 and did so until the end of April 2006. He was invited back to Skyservice and was employed there from November 2006 to March 2007, not as a full time employee but as a contract employee without benefits.

[71] His employment with Skyservice was as a contract flight crew member, initially flying as a first officer the first season and the second season as a captain. He was offered a winter assignment from November 2007 to April 2008 out of Calgary as a first officer. He advised Skyservice that he would accept a position as a first officer based in Toronto or a captain in Calgary, but was told that these positions were not available. For him, it did not make sense financially to operate out of Calgary as a first officer because the hotel costs, commuting and meals would have consumed his entire salary.

[72] Kelly applied to Jet Airways in November 2007 but was told that because his pilot proficiency check was over two years old, it would require a full course and they were unable to offer him a position at that time.

[73] From 2005, he consulted various web sites containing information about airlines world-wide for airline pilot positions. He submitted his CV with Park Aviation in 2005 showing his flight experience and aircraft ratings.

[74] Kelly produced documentation showing the search results and other efforts he made from 2005 to 2010 to obtain employment. He responded to several of these opportunities and also did

a job search for airlines within Canada operating the aircraft types for which he was current at the time. He was current when he started applying in 2005 but his currency expired.

[75] He also contacted Zoom Airlines in 2005 but they were not hiring. He contacted Harmony Airlines but they were in decline at the time and were not hiring pilots. He also did an Internet search for A330 postings for captains in Europe, Australia and Canada. There was a contract position through Park Aviation but they wanted pilots under the age of 50 and who had flown an A330 within the previous six months.

[76] Because he was no longer current after April 2007 he would have to take a full training course in order to fly commercially at a personal cost of around $40,000. This did not seem to him to be a good investment at this point.

[77] Kelly said he also made some preliminary inquiries with some of the freight carriers in Canada. However they weren't prepared to train him at their expense. He recalls contacting Kelowna Flightcraft and Cargo Jet during the period 2007 and 2008.

[78] His view was that the prospects of gaining alternative employment after Skyservice were fairly remote unless he invested in an endorsement on an aircraft in demand and pay for the retraining costs.

[79] He did indicate, however, that there were opportunities to fly overseas as a contract employee in 2006 and 2007. But he elected not to do summer operations because they operated in Europe and he didn't want to be away from his family for the entire year.

[80] Kelly's assessment of the job market was that in 2007 there was a shortage of pilots worldwide especially in India and China. But there was limited demand within Canada. His position was that were he to transfer to an airline based in India for example, it would involve about a six month training period to qualify. His experience was that the bureaucracy was not

favourable to contract expats taking flying jobs in India. He had done many trips to India and frankly it was not a place he would prefer to live. He chose Canada as a country to live and he prefers to live and work in Canada.

[81] His son-in-law flies for Air Georgia out of Toronto. But Kelly was not qualified on any aircraft that Air Georgia operates. He could have qualified on a turbo prop aircraft at his cost of about $30,000, but he was anticipating a return to Air Canada.

(iii) Conclusion on Mitigation

[82] The respondents argue that the complainants have a duty to mitigate their damages and cite the *Chopra* decision as support for this. In the case of Vilven, they say that he failed to do so limiting his job searches and declining to continue with Flair Airlines after May 2006 to devote himself to preparing his human rights complaint. Because of his failure to satisfy his obligation to mitigate, the respondents ask that the Tribunal should not award him any compensation for lost wages.

[83] As for Kelly, the respondents recognize that he made greater efforts to find employment but characterize his attempts as falling somewhat short of the mark. They list his unwillingness to work overseas in the summer months with Skyservice outside of Canada, or seek a pilot position overseas because he chose to live and work in Canada and the fact that he declined a third winter with Skyservice because he did not think it financially advantageous. The respondents request that the Tribunal discount any award of compensation to Kelly for lost wages by 50 per cent.

[84] *Chopra* does not impose a duty on the complainants to mitigate their damages. The decision of the Federal Court of Appeal reads otherwise. The Court agreed with the appellant Dr. Chopra, that there is no legal requirement under the *CHRA* that the doctrine of mitigation be invoked to limit to limit compensation for lost wages.

[85] The Tribunal, given its jurisdiction to award compensation for any or all of lost wages, has the discretion to apply the doctrine of mitigation but it is not bound to do so.

[86] I decline to exercise this discretion in favour of the respondents and impose the duty to mitigate on the complainants. The complainants are the victims of the discriminatory practice not the respondents. Clearly the complainants have suffered loss of income. Yet, as set out later in this decision, for reasons of the *Charter* and the principle of limited immunity, the amount of the award for lost wages has been substantially reduced from the amounts claimed.

[87] Now the respondents, in the case of Vilven, ask for even more, that the award for his lost wages be zero. And for Kelly, only 50 per cent. In these circumstances, there is no principled basis for the Tribunal to accede to the respondents' request.

VI. Pain and Suffering

A. Vilven

[88] Vilven claims $20,000 as compensation for pain and suffering, the maximum under s. 53(2)(e) of the *CHRA*. In terms of how his forced retirement affected him personally, he said flying has always been a significant part of his life. Most of his friends are pilots who continue to fly but he was not able to do so.

[89] Vilven said that the impact on his personal life is that he paid a terrible price for instituting and pursuing his complaint. His wife is extremely disappointed and saddened the way he's been treated. He has lost family friends. He was told that at the Winnipeg retirement dinner for Air Canada pilots on June 16, 2006, there was a mannequin portraying him in a very unflattering way. He said his wife would have been very upset if she had been there and so would he but he did not attend that dinner.

B. Kelly

[90] Kelly is claiming $20,000 for pain and suffering. He said that the impact of the termination of employment at Air Canada on his personal life has been very difficult. He has lost the comradeship of a lot of friends. He has lost the ability to visit regularly with his son who was resident in Hong Kong and which was a regular destination when he was flying.

[91] Kelly says that he's been employed continuously since the age of 16 and this is the first time in his life that he hasn't been employed. He finds it's very damaging to his dignity and sense of self worth, particularly the fact that he still has two younger children, one in university and one still in high school. He has to rely on his wife to earn the additional income required to maintain their lifestyle when he is perfectly fit and able to continue employment. He said relationships with friends have been strained.

C. Conclusion on Pain and Suffering

[92] With respect to Vilven and Kelly claims for pain and suffering, in my opinion these claims should not be allowed. They both ask for the maximum of $20,000 without explaining why they are entitled to the maximum. The Tribunal jurisprudence clearly indicates that the maximum award is reserved for the most egregious discriminatory practice. The facts presented by the complainants do not meet this standard.

[93] Rather the facts of this case militate against any award for pain and suffering. From the time Vilven and Kelly joined Air Canada they were well aware of the mandatory retirement age of 60. Yet they did nothing to challenge this as being discriminatory until after they were retired from Air Canada at age 60.

[94] On the contrary, they benefitted from this discriminatory practice by being able to move up more quickly in terms of seniority, higher paid positions, preferred monthly schedules and

vacation schedules. This was because the pilots ahead of and more senior to them were obliged to retire at age 60.

[95] As this Tribunal noted in its earlier decision on liability, the complainants may be unhappy about ending their rewarding pilots careers with Air Canada but that situation cannot be viewed in isolation. It must be seen in the context of a system that was designed to assign the responsibilities and benefits of being a pilot at Air Canada over different stages in their careers. All pilots at Air Canada understand that they will share these benefits and burdens equally at the appropriate stages in their careers.

VII. Wilful and Reckless Damages

[96] Vilven and Kelly also claim $20,000 against each respondent under 53(3) of the *CHRA*. They say that the respondents were fully aware that there were no negative consequences if the complainants continued with Air Canada. It would require only a small adjustment and the respondents could have accommodated this request within the ICAO standards.

[97] Yet the respondents refused to do so even after the Tribunal finding of a discriminatory practice. This demonstrates, argue the complainants, a wanton and reckless disregard for the rights of older pilots in favour of the interests of the younger pilots. As such, this calls for a substantial award of special compensation.

A. Conclusion on Wilful and Reckless Damages

[98] Section 53(3) of the *CHRA* allows for an award of special compensation where it is found that the person is engaging in the discriminatory practice wilfully or recklessly. In this case the discriminatory practice engaged by the respondents was applying the policy of mandatory retirement found in the pension plan and collective agreement, which presumably was agreed upon some time ago through the process of collective bargaining by Air Canada and ACPA representing the pilots.

[99] It was only by the Tribunal's August 2009 decision that the mandatory retirement policy was found to be discriminatory. Prior to that time the respondents were entitled to and did rely on the established legal authorities that such a policy did not offend the *Charter* or human rights legislation. It was reasonable for the respondents to apply this policy and in so doing they cannot be said to have acted wilfully or recklessly.

[100] The question that remains is whether the respondents have acted wilfully or recklessly by refusing to reinstate the complainants immediately after the policy was found to be discriminatory. In my view, the answer is no.

[101] Reinstatement is one of the remedies sought by the complainants. All parties agreed to bifurcate the hearing into liability and remedy. Reinstatement does not necessarily flow from a finding of liability. Further, even if reinstatement was ordered, there still remained the question of the complainant's position on the seniority list. This question is in dispute between the parties. For the respondents to await a Tribunal decision on remedy does not amount to wilful or reckless conduct.

VIII. Other Expenses

[102] Both Vilven and Kelly have claimed out-of-pocket expenses. These are detailed on Exhibit C-18. Items 1 to 6 are for hotel, meals and travel expenses incurred to attend the hearing both as witnesses and as observers.

A. Conclusion of Other Expenses

[103] The Tribunal has the discretion under s.53(2)(c) of the *CHRA* to award compensation for expenses incurred as a result of the discriminatory practice. In *Warman v. Winnicki*, [2006] C.H.R.D No.18,the Tribunal concluded that travel, accommodation and meal expenses are not the kind of expenses contemplated by this section because they are not directly related to

presenting a case to the Tribunal. They are one step removed. This was so even though the complainant in *Warman* appeared as a witness and provided evidence at the hearing.

[104] The Tribunal noted that counsel in *Warman* could not refer to any authority to support an award for these types of expenses. Nor did the complainants in this case provide any authority for their position that they should be reimbursed for expenses incurred to attend the hearing as witnesses or observers.

[105] Items 7, 8 and 9 relate to supplemental life insurance, retirement supplemental health plan and additional cost-health plan. Air Canada provided these benefits that ended upon retirement. There is no evidence whether the benefits were fully funded by Air Canada or whether there were employee contributions.

[106] The basis of the complainants' claim is that they now have to wholly fund these benefits. But to participate in these plans were at the option of the complainants. Further, they would have retired at some point in the near future and the expenses that they now claim have been slightly accelerated. In any case there is no substantiation of the amounts shown on Exhibit C-18. The same is true for Vilven's claim for Item 16, Air Canada pass charges.

[107] As for Items 10 to 15, bonus and profit sharing, these amounts are included in Air Canada's compensation calculations and are allowed, subject to adjustment to reflect the compensation period determined by this Tribunal. Accordingly, compensation for items 10 to 15 only is awarded.

IX. Air Canada/ACPA Calculation of Loss of Income and Seniority

[108] In determining loss of income and seniority, Air Canada put forward alternative scenarios. The first scenario is: *No Compensation Until August 28, 2009 (date of the Tribunal's second decision).*The second alternative scenario is: *Period of Compensation Limited to Two years.*

[109] Both scenarios contemplate that Vilven and Kelly would be reinstated to full service effective April 1, 2010. Once the reinstatement occurs, Vilven and Kelly would receive wages and benefits of an active employee which would include continued accrual of pension benefits on the same terms and conditions as before their retirement.

[110] Under the first Scenario, the compensation period would run from September 1, 2009 (being the first complete month following the second Tribunal decision) to April 1, 2010. No compensation would be paid for any period prior to September 1, 2009.

[111] Air Canada and ACPA take the position that, pursuant to the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Hyslop*, [2007] 1 S.C.R. 429, if certain criteria as set out in that decision are satisfied, no retroactive compensation should be granted. This is in contrast to Vilven and Kelly who claim that the compensation period should be from the date of their retirement to the date of their reinstatement.

A. Scenario One: No Compensation Until August 28, 2009

[112] To calculate their loss of income, the "proxy" seniority positions that Vilven and Kelly would have held on September 1, 2009 must first be determined. Air Canada took the position that, to be consistent, if no compensation should be awarded for the period prior to September 1, 2009, similarly, no seniority should be credited prior to that period.

(i) Vilven

[113] To determine Vilven's seniority as of that date, Air Canada reasoned this way. In the case of Vilven, as six years had elapsed between his retirement date and the Tribunal's decision, six years of seniority growth should be deducted from the elapsed time since his hire date ("carveout").

[114] Vilven was hired by Air Canada in May 1986. To reflect the carveout, Air Canada added six years to Vilven's date of hire in May 1986, giving him an "adjusted hire date" of May 1992. As no pilots were hired between 1989 and 1993, Vilven's seniority number at September 1, 2009 would be one lower than the last pilot hired in 1989. Air Canada determined this to be Captain Di Stazio whose seniority number in 2009 was 1221. Therefore Vilven's proxy seniority number would be 1222.

[115] At retirement, Vilven was an A340 FO YVR. At September 1, 2009, seniority number 1222 on the pilot position assignment list would allow a Vancouver based first officer to hold an A340 FO position.

[116] Applying the basic monthly salary rate for an A340 FO for seven months, plus an amount for bonuses and profit sharing and pension paid, Air Canada calculated Vilven's loss of income including bonus/profit sharing for the period September 1, 2009 to March 31, 2010 to be $88,984. Deducting $39,036 for pension reimbursement and $4,051 for required pension contributions, leaves a net loss of income or compensation payable of $45,897.

(ii) Kelly

[117] As to Kelly's seniority, four years and four months elapsed between his retirement date and September 1, 2009. As he was hired in September 1972, his carveout or "adjusted date of hire" would be January 1977. His proxy seniority number as of September 1, 2009 would be 176. As such, he could hold the position of B777 Captain with the highest salary rate. Using the same method as used for Vilven, Air Canada calculated his net loss of income or compensation for the period to be $62,711.

B. Scenario Two: Period of Compensation Limited to Two Years

[118] In this alternative Scenario, Vilven and Kelly would only be compensated for two years of lost income, namely, the two years immediately following their date of retirement.

[119] They would be reinstated effective April 1, 2010 and after reinstatement they would receive wages and benefits as an active employee and continue to accrue pension benefits on the same terms and conditions as before their retirement.

(i) Kelly

[120] In this Scenario, Air Canada calculated Kelly's compensation for loss of income for the period to be $42,376. This amount is based on lost wages and bonus/profit sharing of $384,891; less income from other sources, $65,825; less reimbursement of pension paid, $258,683; less employee required pension contributions, $18,007.

[121] This calculation was done on the basis of taking Kelly's seniority and determining the positions he could hold between May 1, 2005 and May 1, 2007. He was very high on the seniority list, but because of the ICAO standards he could only fly internationally as a B777 FO from May 2005 until November 2006 and as a B777 Captain until May 1, 2010.

[122] The salary he would have earned was based on 81 flying hours per month and the relevant salary rates for the B777 FO for 2005 and 2006. For 2007, it was based on the average of his peer group. In fact, however, there was little difference between the average monthly salary of the peer group of $19,792 in 2007 and the monthly salary of a B777 Captain of $19,434 in December 2006. The use of the peer group analysis was of little consequence for Kelly.

(ii) Vilven

[123] Under this Scenario, Air Canada used a *peer group analysis.* In contrast to Vilven who located himself as a B744 FO YYZ at retirement, the peer group for Vilven consisted of A340 YVR pilots, the same position Vilven had at retirement, five of whom were immediately above and five immediately below him relative to his position on the seniority list at his retirement date. The average pensionable earnings of the peer group of ten pilots were then tracked for the years September 2004 to September 2005.

[124] Air Canada considered the peer group analysis more appropriate than Vilven's pilot cohort because the group of 10 pilots remained unchanged throughout the analysis period. Any individual choices in terms of changing equipment, status or base would be automatically reflected as would earnings without having to make hypothetical decisions as to when an individual would exercise the various options that they have under the collective agreement. Whereas with the Vilven pilot cohort approach, there was a change in position every year.

[125] Air Canada's position is that the peer analysis requires less judgement because it starts with Vilven and his position at the time of his retirement and follows his peer group forward. It is based on actual decisions rather than on an hypothesis of what may or may not have happened. The peer group had similar seniority to Vilven, who also had the option of bidding into the Toronto base and becoming a first officer on a B767 and they did not do so.

[126] Air Canada calculated Vilven's loss of income for those two years to be $178,989, comprised of lost wages and bonus/profit sharing of $337,807; less mitigation income of $15,767; less pension reimbursement of $126,770; less employee pension contributions of $16,281.

[127] Air Canada seeks to support the two year compensation period on the basis of the expert evidence of Alexandra Leslie. In her opinion, if the pension plan had been amended to remove

the mandatory retirement age of 60, the average retirement age of two years would be at the outside bounds of what an anticipated increase would be.

[128] She pointed out that the vast majority of Air Canada pilots retire at 60. Should mandatory retirement be removed, her expectation would be that a large number would continue to retire at 60 simply because it has been a policy for so long. From an individual planning perspective, individuals tend to focus on that and it will take time for the de facto retirement age to move away from 60.

[129] It is interesting to note that there is much similarity between the Vilven cohort analysis and the Air Canada peer group analysis. Both use ten pilots, five above and five below Vilven by seniority. Both use the A340 position for the 2005 period. The difference is in the bottom line dollar amount for the two year period is attributable to the difference in the pay rate for a B747 FO and an A340 in 2003 and 2004.

C. Conclusion on Compensation for Lost Wages

[130] The complainants assert that the only limiting factors on their claim to be compensated for the period from retirement to reinstatement are that their claim must be causally connected to the discriminatory practice and their efforts at mitigation must be reasonable. (*Chopra v. Canada (Attorney General)*, [2007] F.C.J.1134.

[131] The respondents argue that there is another factor limiting the compensation and that is the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Hyslop*, 2007 SCC 10. On the basis of *Hyslop,* the Tribunal should not grant a retroactive remedy, i.e. it should not award any compensation for lost wages for the period prior to August 28, 2009.

[132] The complainants disagree that *Hyslop* should have this effect. That the Supreme Court decision in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 makes

it clear that, apart from the limiting factors set out above, the Tribunal has full remedial authority to make both prospective and retroactive awards.

[133] In *Martin,* there were two appellants. The appellant, Martin, suffered a workplace injury in February 1996, returned to work several times but ultimately had to stop work. The Workers' Compensation Board provided him with temporary disability and rehabilitation benefits. When these benefits were terminated in August 1996, he applied for a review of the decision but his claim was denied by the WCB.

[134] The other appellant, Laseur, also suffered a workplace injury, received temporary disability benefits, attempted to return to work but was unable to do so. She applied for a permanent partial disability award and vocational rehabilitation assistance. Both were denied.

[135] Both appealed these decisions to the WCB Appeals Tribunal, Martin arguing that s.10B and certain regulations under the *Workers' Compensation Act* infringed s. 15(1) of the *Charter.* The Appeals Tribunal found the legislation contravened the *Charter* and that Martin was entitled to temporary loss of earnings benefits and medical aid up to October 1996. The Nova Court of Appeal reversed this and the case found its way to the Supreme Court of Canada.

[136] The primary issue at the Supreme Court was whether the Appeals Tribunal had the jurisdiction to apply the *Charter.* The Court concluded that the Appeals Tribunal did have such jurisdiction and did correctly decide that the impugned legislation offended the *Charter.* In the result, the Supreme Court ordered that the decision of the Appeals Tribunal be restored and that Martin should receive the benefits that he claimed.

[137] As to Laseur, the Appeals Tribunal refused to grant her the benefits that she had claimed because she had not challenged the validity of the applicable legislation. The Supreme Court in this situation sent the matter back to the Appeals Tribunal to decide the *Charter* issue if she raised it and her entitlement to the benefits claimed in accordance with the Court's decision.

[138] In *Martin,* the Supreme Court decided three questions. First, that the Appeals Tribunal had the jurisdiction to decide *Charter* issues relating to the provisions of its enabling statute; second, that the provisions in question were contrary to s.15(1) of the *Charter* and were not saved by s.1*;* and third, the constitutional remedies available to the Appeals Tribunal were limited to disregarding the impugned provisions and ruling on the applicant's claim as if the provisions were not in force. It did not deal with the question of when a retroactive remedy should or should not be awarded.

[139] Whether it was because the Appeals Tribunal did not apply these provisions or because the Supreme Court decided that they were of no force and effect, the result for Martin was the same. He was awarded the retroactive benefits he sought because there was no longer any legal basis to deny them.

[140] The Vilven and Kelly situation is different. What this Tribunal decided on the *Charter* issue was that s.15(1)(c) of the *CHRA* was not available as a defense for the respondents. But this finding did not trigger any remedies. It did not operate in the same way as the decision in *Martin.* It did not confer on the complainants any remedy. That remained to be determined.

[141] The facts in *Hyslop* are as follows. To be entitled to a survivor's pension under the *Canada Pension Plan,* the survivor had to be married to the contributor or be a common-law partner of the opposite sex in a conjugal relationship at the time of the contributor's death.

[142] If so qualified, the survivor could apply for a survivor's pension which would be payable for each month after the death of the contributor. If the application was not received within 12 months of the contributor's death, the arrears that could be claimed were limited to the 12 months preceding the receipt of the application.

[143] In 2000, following the Supreme Court's decision in *M v. H*, [1999] 2 S.C.R.3, the federal government amended the *CPP* to extend survivor benefits to same-sex partners by changing the definition of "common-law partner" so that there was no reference to the gender of the partner.

[144] In addition to this amendment, ss. 44(1.1), 72(1) and 72(2) were added to the *CPP*. Under s. 44(1.1), a same-sex survivor would not be eligible for survivor's pension unless they became survivors after January 1, 1998. Section 72(2) precluded payments to survivors for any month before July 2000 irrespective of when the same-sex partner became eligible.

[145] The effect of this provision was to preclude any retroactive survivor benefits to same-sex survivors including the opportunity to seek up to 12 months of pension arrears which was available to opposite-sex survivors under s.72(1). Section 72(2) came to an end as of June 2001, because after that date, same-sex and opposite-sex partners were treated the same under s. 72(1).

[146] *Hyslop* was a class action and the position of the class was that same-sex survivors whose contributing partner died any time after April 17, 1985, should be entitled to retroactive benefits to the month following the death of their same-sex partner.

[147] The Supreme Court found that s. 44(1.1) and s.72(2) infringed the *Charter* and then considered the question of the appropriate remedy. As a starting point, the Court noted that where the offending provision is declared unconstitutional, the result under s. 52(1) of the *Charter,* is the nullification of the law from the outset. In such case, the courts generally grant retroactive remedies.

[148] However, where the law changes through judicial intervention, it may be appropriate for a court to limit the retroactive effect of its judgement, that is, apply the principle of limited immunity. Under this principle, "it is a general rule of public law that, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm

suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional." (*Makin and Guimond v. Quebec*, [1996] 3 S.C.R.347, para. 78).

[149] To justify a prospective remedy only, the Supreme Court required that the threshold requirement of a "substantial change in the law" must be satisfied. Once this is met, other factors such as reasonable reliance, good faith, fairness to litigants and respecting parliament's role must be considered.

[150] For the Supreme Court in *Hyslop,* the substantial change in the law came in the Court's earlier decision in *M v. H,* which the Court considered to be a marked departure from the pre-existing jurisprudence on same sex equality rights. Prior to *M v. H*, the Court had held that the Constitution did not require equal benefits for same-sex couples.

[151] As to the other factors, the Court concluded that the denial of benefits to same-sex partners under the former *CPP* was reasonable given the previous state of the s. 15(1) equality jurisprudence. The government did not act in bad faith in failing to extend same-sex survivor benefits pre *M v. H.* And imposing liability for payment of arrears that could reach as far back as 1985, in the absence of bad faith, unreasonable reliance or wrongful conduct, would undermine the balance between the protection of constitutional rights and the need for effective government.

[152] In my opinion, the Tribunal's August 28, 2009 decision represents a clear departure from the existing state of the law. Prior to the Tribunal's decision s. 15(1)(c) was available as a defence for employers to a claim under the *CHRA* that a mandatory retirement policy was discriminatory.

[153] The Supreme Court of Canada, from *McKinney* and going forward, has consistently concluded that legislative provisions permitting mandatory retirement were justifiable limitations under s.1 of the *Charter*. (see *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison*

v. University of British Columbia, [1990] 3 S.C.R.451; *Dickason v. University of Alberta [*1992] 2 S.C.R 1103*; Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R.483).

[154] Apart from the recent decision of the Manitoba Court of Queen's Bench in *CKY-TV v C.EP. Local 816*, 252, which was subsequent to the Tribunal's decision in *Vilven and Kelly*, the Federal Court and arbitrators have accepted this provision as constituting a valid defense.

[155] In terms of the other considerations, reasonable reliance, good faith and fairness to the litigants, as the Supreme Court noted in *Hyslop* that, "an approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate interests of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on the one hand and the need to allow constitutional jurisprudence to evolve over time on the other".

[156] Given the then state of the law, the respondents acted in good faith and reasonably in applying the mandatory retirement policy to the complainants. As to considerations of fairness to the litigants, in my view, a fair balance is struck, on the one hand, by not imposing on the respondents the burden of damages for a policy that was legal at the time, and, on the other hand, by awarding damages to the complainants from the time the policy was declared to be illegal.

[157] I conclude that *Hyslop* should apply in this case and that the complainants should not be awarded any compensation for lost wages prior to August 28, 2009. This being the case, it is not necessary to decide the respondents' alternative position that the compensation period should be limited to two years from the date of the complainants' retirement.

D. Conclusion on Seniority

[158] It is well established in human rights jurisprudence that the purpose of awarding a remedy is to make whole the victim of the discrimination in the appropriate circumstances. This suggests that Vilven and Kelly should be credited with the seniority that they would have accrued had they not been retired, unless there is some reason for discounting their seniority.

[159] According to their calculations as detailed earlier in this decision, Vilven's seniority number on reinstatement in 2010 would be 751 and Kelly's seniority would be 5. The respondents, relying on the "carveout", concluded that the complainants should return with seniority number 1222 for Vilven and 176 for Kelly.

[160] In coming to this conclusion, the respondents use this logic. First they say that in the pilot world, the collective agreement is structured on seniority and this drives compensation. As pilots progress in seniority they have the ability to bid on the higher equipment which pays the higher salary.

[161] Thus the respondents argue, if seniority is equated with compensation, then *Hyslop* should apply. To allow the complainants to accrue seniority prior to August 28, 2009 would be contrary to the principle that the respondents are entitled to rely on the law as it was prior to the Tribunal's decision.

[162] But as the evidence shows, seniority also determines benefits other than just compensation. For example pilot position (equipment, status and base), monthly schedules, vacation schedules, working conditions, layoffs are all tied to seniority.

[163] Seniority gives pilots lifestyle choices. Some may forego compensation for a preferred base or a better monthly or vacation schedule. *Hyslop* did not consider the question of seniority

and retroactive remedies. If seniority cannot be tied exclusively to compensation, then *Hyslop* should not apply.

[164] Further, in limiting retroactive relief, *Hyslop* requires that fairness to the litigants be considered. In my opinion, the balance in terms of fairness, favors the complainants. The complainants are two in number. There is no evidence that their reinstatement at the seniority numbers they claim would have any negative effect on Air Canada's operations. As for ACPA, awarding this seniority to Vilven and Kelly does not result in them jumping ahead. They merely maintain their seniority position as if not retired. Some ACPA members may be displeased, but as this Tribunal noted in its earlier decision, it would only delay the younger pilots' seniority progression.

[165] For these reasons, I have concluded that Vilven and Kelly should be reinstated with seniority number 751 for Vilven and seniority number 5 for Kelly.

E. Previous Financial Advantage Due to Mandatory Retirement

[166] The respondents ask that any compensation awarded to Vilven or Kelly be discounted to reflect the fact that their careers progressed and were accelerated in an employment environment where mandatory retirement applied. Previous and current Air Canada pilots such as Vilven and Kelly have benefited from being hired earlier and promoted faster due to the existence of the mandatory retirement age.

[167] They argue that Vilven and Kelly have the freedom to work as long as they are qualified without enduring any offsetting delay. So the question is, should the fact that Vilven and Kelly have not suffered any offsetting delay in career progression be a factor in determining their compensation. In other words, should they get the benefits without paying the price.

[168] Air Canada asked its expert witness Ms. Leslie to quantify this previous financial advantage. She acknowledged that such an exercise would be hypothetical because it depends in large part on the average age of the pilots in the absence of mandatory retirement which is unknown.

[169] Ms. Leslie hypothesized that if the average age increased by two years, current pilots would have benefited by a two year acceleration throughout their careers. The only facts that she could offer on this question was that the average age of retirement in the Air Canada pilots plan is 59.2, and that the vast majority of their pilots retire on their normal retirement date. What is not known is if mandatory retirement was removed, how many pilots would still retire at age 60 and how many of them would retire at what age in the future.

[170] Ms. Leslie concluded that, assuming the average age to retirement was delayed for two years and given Kelly's final average pensionable earnings of $224,000, a decent approximation of the financial advantage that he obtained through the existence of mandatory retirement would be in the order of $450,000. For Vilven with his final average earnings of $167,000 and assuming two years, Ms. Leslie said that would amount to about $334,000.

[171] Ms. Leslie acknowledged that this was only a rough approximation and her attempt to quantify the advantage has weaknesses. Further, she also agreed that she was not suggesting that the complainants' compensation be reduced by those amounts, but only that the compensation should be discounted. Air Canada left it to the Tribunal to calculate the discount.

F. Conclusion on Previous Financial Advantage

[172] There are problems with this claim. Even assuming that there has been a financial advantage, the basis for quantifying the amount is very weak. It is impressionistic rather than factual. Further, if the discount is to be less than 100 per cent, what should it be. In the absence of any formula from the respondents, it is not for the Tribunal to guess.

[173] Finally, in my view, the respondents are more than overreaching by asking for this discount. By seeking to apply *Hyslop*, the respondents have in effect reduced the complainants' compensation by approximately six years and four years respectively, considerably more than the two years suggested by Ms. Leslie. Their request for a further reduction is rejected.

X. Order

[174] The Tribunal orders as follows:

1) The respondents are to cease applying to the complainants, s.5.1 of the Air Canada Pilots Pension Plan and the corresponding provisions of the collective agreement Plan;

2) The complainants are to be reinstated to employment as pilots with Air Canada as of the date of this decision on condition that they have a valid pilot licence, a valid medical certificate showing that they are fit to fly a commercial aircraft under the applicable Transport Canada medical standards and a current instrument flight rating;

3) Upon reinstatement, the complainants shall be enrolled in the next available training course for the equipment that they are entitled to fly according to their seniority. Upon the successful completion of their training, they shall be scheduled for flying at the next opportunity for monthly bidding and placed on the pilot position list.

4) Upon reinstatement, Vilven is to hold seniority number 751 and Kelly, seniority number 5 on the pilots' seniority list.

5) Upon reinstatement, the complainants are to receive the wages and benefits of an active employee including continual accrual of pension benefits on the same terms and conditions as before their retirement.

6) The complainants are to be compensated by the respondents for lost income for the period from September 1, 2009 to the date of their reinstatement as active employees. The compensation is to be calculated on the basis of the monthly salary for the position of 81 hours of flying per month, averaged at half-day, half-night rates of pay, plus overseas premium pay for 71 hours. The compensation shall include any profit sharing/bonus paid in that period. Vilven shall be compensated at the salary rate of an A340 FO and Kelly at the salary rate of a B777 Captain until April 30, 2010 and thereafter at the salary rate of a B777 FO.

7) The compensation for lost wages shall be net of the amounts of the pension paid to the complainants from September 1, 2009 to the date of their reinstatement.

8) The respondents are to pay interest on the net amount of the compensation from September 1, 2009 until the compensation is paid. The amount of the interest shall be calculated on the basis set out by Ms. Leslie in her expert report (Exhibit AC-13, as am. by AC-13A) and as agreed with by the complainants.

9) Air Canada is to pay fifty per cent and ACPA is to pay fifty per cent of the net compensation and profit sharing/bonus and the interest payable.

Signed by

J. Grant Sinclair
Tribunal Member

OTTAWA, Ontario
November 8, 2010

Appendix I

George Vilven, Proxy Position Assignment an Proxy Income, 2003-2010

Pay Rate Effective:	Period	Proxy Seniority #	Proxy Position Assignment, Per Exhibit C-9	Revised Proxy Position Assignment	Number of Months	Monthly Pay Rate, Per Table 3	Period Income	Year	Annual Income
2003-06-01	2003-09-01 to 2003-12-31	1406	YYZ B744 F/O		4	$13,387	$53,548	2003	$53,548
	2004-01-01 to 2004-12-31	1533	YYZ B744 F/O		12	$13,387	$160,644	2004	$160,644
	2005-01-01 to 2005-12-31	1323	YYZ A320 CA	YYZ A340 F/O	12	$11,964	$143,568	2005	$143,568
	2006-01-01 to 2006-06-30	1188	YYZ A320 CA	YYZ A340 F/O	6	$11,964	$71,784	2006	$146,521
2006-07-01	2006-07-01 to 2006-11-30	188	YYZ A320 CA	YYZ A340 F/O	5	$12,207	$61,035		
	2006-12-01 to 2006-12-31	1188	YYZ A320 CA		1	$13,702	$13,702		
	2007-01-01 to 2007-06-30	1093	YYZ A320 CA		6	$13,702	$82,212	2007	$180,104
2007-07-01	2007-07-01 to 2007-07-31	1093	YYZ A320 CA		1	$13,942	$13,942		
	2007-08-01 to 2007-12-31	1093	YYZ B767 CA		5	$16,790	$83,950		
	2008-01-01 to 2008-06-30	972	YYZ B767 CA		6	$16,790	$100,740	2008	$188,268
2008-07-01	2008-07-01 to 2008-08-31	972	YYZ B767 CA		2	$17,084	$34,168		
	2008-09-01 to2008-12-30	972	YYZ B777 F/O		4	$13,340	$53,360		
	2009-01-01 to 2009-12-31	868	YYZ B777 F/O		12	$13,340	$160,080	2009	$160,080
	2010-01-01 to 2010-04-30	751	YYZ B777 F/O		4	$13,340	$53,360	2010	$53,360
							$1,086,093		$1,086,093

Appendix II

Neil Kelly, Proxy Position Assignment an Proxy Income, 2005-2010								
Pay Rate Effective:	**Period**	**Proxy Seniority #**	**Proxy Position Assignment, Per Exhibit C-13**	**Number of Months**	**Monthly Pay Rate, Per Table 3**	**Period Income**	**Year**	**Annual Income**
2003-06-01	2005-05-01 to 2005-12-31	79	YYZ A340 F/O	8	$11,964	$95,712	2005	$95,712
	2006-01-01 to 2006-06-30	52	YYZ A340 F/O	6	$11,964	$71,784	2006	$151,146
2006-07-01	2006-07-01 to 2006-11-30	52	YYZ A340 F/O	5	$12,207	$61,035		
	2006-12-01 to 2006-12-31	52	YYZ A340 CA	1	$18,327	$18,327		
	2007-01-01 to 2007-03-31	39	YYZ A340 CA	3	$18,327	$54,981	2007	$231,936
	2007-04-01 to 2007-06-30	39	YYZ B777 CA	3	$19,435	$58,305		
2007-07-01	2007-07-01 to 2007-12-31	39	YYZ B777 CA	6	$19,775	$118,650		
	2008-01-01 to 2008-06-30	20	YYZ B777 CA	6	$19,775	$118,650	2008	$239,382
2008-07-01	2008-07-01 to2008-12-31	20	YYZ B777 CA	6	$20,122	$120,732		
	2009-01-01 to 2009-12-31	11	YYZ B777 CA	12	$20,122	$241,464	2009	$241,464
	2010-01-01 to 2010-04-30	5	YYZ B777 CA	4	$20,122	$80,488	2010	$80,488
						$1,040,128		$1,040,128

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1176/5806, T1177/5906 & T1079/6005

Style of Cause: Robert Neil Kelly v. Air Canada and Air Canada Pilots Association and George Vilven v. Air Canada

Decision of the Tribunal Dated: November 8, 2010

Date and Place of Hearing: February 1, 2, 4, 5, 2010
March 3, 4, 22 to 24, 2010
April 28 to 29, 2010

Ottawa, Ontario

Appearances:

Raymond D. Hall and David Baker, for the Complainants

Daniel Poulin, for the Canadian Human Rights Commission

Maryse Tremblay and Fred Headon, for the Respondent, Air Canada

Bruce Laughton, Q.C., for the Respondent, Air Canada Pilots Association