

## **Air New Zealand Ltd v. McAlister [2008] NZCA 264**

### **1) Reference Details**

Jurisdiction: New Zealand, Court of Appeal

Date of Decision: 30 July 2008

Case Status: Returned to Employment Court for reconsideration

### **2) Facts**

Mr McAlister was a senior pilot with Air New Zealand and flew regularly as Pilot in Command (PIC) on Boeing 747s for Air New Zealand; he was also designated as a flight instructor. In January 2003 he was informed by Air New Zealand that after his 60<sup>th</sup> birthday in September 2004 he would no longer be able to fly as PIC on the majority of Air New Zealand routes due to the application in other states, notably the USA, of Standard 2.1.10.1 of the International Civil Aviation Authority (ICAO). This Standard, which New Zealand and Australia had not adopted, restricted the role of PIC on international air services to under 60s. In accordance with Air New Zealand's policies, in order to maintain qualification as a flight instructor on these aircraft the pilots had to log a certain number of hours as PIC. Due to the small number of routes that they operated which would not be affected by this restriction, they considered that Mr McAlister would be unable to fulfil this requirement and would therefore either have to retire, or accept a role as a First Officer and without the designation as flight instructor, at a lower rate of pay.

Mr McAlister sought to contest this decision as contrary to the Employment Relations Act s104 (1)(b) as submitting an employee to a detriment to which other employees are not subjected to in a discriminatory manner on one of the prohibited grounds set out in s105, namely age. The Employment Court Judge found in his favour using the comparator of equally qualified and skilled pilots who were under 60. Air New Zealand sought an appeal.

### **3) Law**

- Employment Relations Act s 103(1)(c), s 104 (1) and s 105
- Human Rights Act 1993 s 22 (1) and s 30

### **4) Legal Arguments**

#### *Appellant*

Air New Zealand submitted that the Employment Court had erred in law in concluding that Mr McAlister's demotion was a result, directly or indirectly, of discrimination on the basis of his age. They argued that the ICAO requirement, as applied by the US Federal Aviation Authority, was the sole reason for Mr McAlister's demotion.

As for operational reasons, they were unable to offer him enough hours on routes he was authorised to fly as PIC in order for him to maintain his flight instructor classification. In accordance with the rules applying on the majority of routes that they fly, pilots could only operate as a PIC if they were under 60, as such age was a 'genuine occupational qualification' and is in any case exempt from the rules prohibiting discrimination under s30 Human Rights Act 1993.

## *Defendant*

Mr McAlister maintained his position that age was the determinative factor in his demotion, and as such he suffered from a detrimental change in the conditions of his employment as a result of a prohibited ground of demotion in contravention of s 103(1)(c), s104(1) and s105 of the Employment Relations Act. Mr McAlister relied on the Employment Court ruling that there was an established causal link between the detriments he suffered and the prohibited ground of discrimination. He asserted that although there may have been more than one reason for his demotion, the test should be whether the prohibited ground is the substantial operative factor. He also maintained that the test to be applied should be that of a comparison with someone of the same qualifications and level of skill and position but without the characteristic which gave rise to discrimination – namely age. He also relied on the Employment Court’s ruling that the matter of rostering difficulties, in order to ensure that Mr McAlister has sufficient hours of flight as a PIC to maintain his flight instructor position, was a question of operational difficulty, but did not render age an occupational qualification exempt under s30 of the Human Rights Act.

## **5) Decision**

The Court of Appeal’s decision turned on the matter of appropriate comparator group. The Court first of all stated that a comparison is not always a necessary part of determining that discrimination has taken place. The need for such an approach is dependent upon the wording of the relevant legislation. Section 22(1) (a) and (d) of the Human Rights Act prohibiting discrimination in employment, as constructed, does not require a comparator group. The Court determined that the test for discrimination under this provision is a matter of whether the decision was causally based on the prohibited ground. In such cases the discriminatory treatment then becomes excusable under s30 as a ‘genuine occupational qualification’. The Court of Appeal distinguished this from the construction of s22 (1) (b) and (c) which do refer to a comparator group, but not to the exception for occupational qualification. This, the Court determined, is due to the fact that the claimed qualification is incorporated into the comparison. Therefore under s104(1)(a) and (b) of the Employment Relations Act, the comparator group referred to meant employees with the same qualifications, experience and skills employed in the same circumstances, namely - senior B747 pilots with a flight instructor position. However, the Employment Court based its ruling on the understanding that these comparator pilots should be both technically and legally able to fly through or to the US. Whereas the Court of Appeal decided that the correct comparator group is one which is the same in *all* the circumstances save the prohibited ground, therefore a pilot of the same qualifications, skills and experience but who is unable for some reason, other than the prohibited ground (such as an invalid visa), unable to fly in or to the US. The Court ruled that “[B]y ignoring a crucial operational difference, the comparison would not be a meaningful one.”[para.90]

The Court of Appeal having identified the correct comparator group allowed the appeal and returned the case to the Employment Court for a new ruling.