IN THE EMPLOYMENT COURT
AUCKLAND

AC 65/06
ARC 37/05

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	DAVID MCALISTER Plaintiff
AND	AIR NEW ZEALAND LTD Defendant

Hearing: 20, 21, 22 and 23 February 2006
(Heard at Auckland)

Appearances: Rodney Harrison QC, Counsel for the Plaintiff
Kevin Thompson, Counsel for the Defendant

Judgment: 24 November 2006

JUDGMENT OF JUDGE C M SHAW

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[1] This case is about whether Air New Zealand's policy preventing a person who has reached the age of 60 from holding a position of pilot in charge on certain aircraft is discriminatory and therefore unlawful.

[2] David McAlister, a pilot with Air New Zealand for many years, attained the rank of captain of Boeing 747-400 fleet (B747) as pilot-in-command (PIC). He was also a standards captain undertaking flight instructor duties.

[3] In September 2004, having reached the age of 60, he was removed by Air New Zealand from his position of flight instructor, ceased to hold the rank of captain, and under protest was made first officer on B747 aircraft. Air New Zealand's reason for this was that (document 83 of plaintiff's bundle):

> *No pilot who has attained age 60 can hold the position of pilot-in-command on the 747 and 767 aircraft while the predominant operation of these aircraft is to or through territories and alternates that have adopted the ICAO and FAA regulations in relation to the age of pilots-in-command.*

[4] Mr McAlister protested this decision but after Air New Zealand declined to alter its position Mr McAlister brought a personal grievance alleging that:

(a) Air New Zealand has discriminated against him by reason of his age.

(b) Air New Zealand has acted unjustifiably to his disadvantage.

[5] Air New Zealand denies these allegations. The proceedings were removed to the Court from the Employment Relations Authority by special leave.

The issues

[6] The issues which arise from the first cause of action are:

1. How should Mr McAlister's employment be characterised? He says he is a B747 flight instructor holding the rank of captain. Air New Zealand alleges that he was employed as a pilot who, from time to time, held qualifications which enabled him to be appointed as a standards pilot.
2. Has Air New Zealand discriminated against or treated Mr McAlister in an unjustifiable manner either under s104(1)(b) or (a) of the Employment Relations Act 2000 by subjecting him to detriment by demotion or refusing to offer him conditions of employment on the grounds of his age and, if so –
3. Can Air New Zealand establish any of the exceptions or affirmative defences provided in the Human Rights Act 1993 and incorporated in the Employment Relations Act 2000?

[7] The issues for the second cause of action are:

4. Has Mr McAlister's employment been affected to his disadvantage by the actions of Air New Zealand and, if so –
5. Were those actions justifiable?

[8] The hearing was limited to issues of liability. By agreement if questions of reinstatement and/or pecuniary losses arise, these will be dealt with by the Court in a separate hearing.

Introduction

[9] Flight instructors in the B747 fleet hold the most senior of the standards positions. The Air New Zealand appointment process requires that an applicant for a standards role of flight instructor be a current company captain on that aircraft type and be able to perform at all times the role of PIC of the aircraft if required. As

at September 2004, the destinations of Air New Zealand's B747s were the United States (Los Angeles and San Francisco); London (via the United States); Japan; Brisbane; Melbourne; and occasionally Cairns.

[10] Civil aviation in New Zealand is regulated by the Civil Aviation Authority of New Zealand. New Zealand is also a contracting state to the International Civil Aviation Organisation (ICAO) whose standards and recommended practices must be enacted into contracting states domestic aviation laws unless a state files a "difference". ICAO standard 2.1.10.1 imposes an age restriction on pilots acting as a PIC:

> *A Contracting State, having issued pilot licences, shall not permit the holders thereof to act as pilot-in-command of an aircraft engaged in scheduled international air services or non-scheduled international air transport operations for remuneration or hire if the licence holders have attained their 60th birthday.*

[11] This is followed by an ICAO recommendation which states:

> ***Recommendation: -*** *A Contracting State, having issued pilot licences, should not permit the holders thereof to act as co-pilot of an aircraft engaged in scheduled international air services or non-scheduled international air transport operations for remuneration or hire if the licence holders have attained their 60th birthday.*

[12] New Zealand has elected not to adopt that standard and has filed a difference to it. This stance is shared with other countries including Australia, Fiji, Japan, Germany, and the United Kingdom. Among those countries which have adopted clause 2.1.10.1 and into which or through whose territorial airspace Air New Zealand operates are the United States, Singapore, Hong Kong, Tahiti, and New Caledonia.

[13] The US Federation Aviation Administration (FAA) operation specification specifically prohibits Air New Zealand from using a PIC in US territorial airspace if that person has attained the age of 60.[1]

[14] As a consequence of the ICAO and the FAA standards and specifications, a pilot over the age of 60 acting as a PIC cannot fly into or over US territorial airspace.

[15] Japan has an age limit of 63 for PICs which does not prevent over 60 pilots from landing in Japan but it is Air New Zealand's case that its flights to Japan are affected by the ICAO and FAA rules because Air New Zealand's services to Japan directly fly over US territorial airspace including Guam. Flights over Noumea and the Federated States of Micronesia are also problematic.

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[1] Since the first hearings of this case ICAO has recommended that the upper age limits for flight crew members will be reviewed and proposes that the age limit for PIC will increase to 65 with effect from 23 November 2006. This change is only relevant insofar as reinstatement is concerned.

[16] Air New Zealand is also concerned that even if there could be a way to route the aircraft around those territories Guam is designated as an alternate aerodrome in the event of a diversion which prevents a pilot affected by the PIC restrictions from flying to Japan.

Employment agreement

[17] Mr McAlister is on an individual employment agreement based on the Federation of Air New Zealand Pilots Collective Employment Agreement 2002. Its relevant sections are:

> ***SECTION 2 AREA AND INCIDENCE OF DUTY***
>
> *The Company shall employ its pilots and the pilot shall serve the Company in the capacity of pilot whether in New Zealand or any other part of the world where the Company may from time to time be operating, or to or from which the Company's aircraft may require to be flown, and shall perform such other duties in the air and on the ground relating to his employment as a pilot as the company may reasonably require.*

[18] Section 3.2.1 provides that the earliest age for retirement under normal terms and conditions shall be 50 years.

[19] Section 3.3.3 requires a pilot employed by the company to ensure the validity of his licences, passports, medical certificates and visas necessary to the performance of his duties.

[20] Section 8 includes a description of long haul operations, sets limits of flight and duty times and specifies pilots' entitlements to rests etc. These are limitations on Air New Zealand's ability to roster other than in accordance with the limitations allow for special scheduling agreements where the limitations may be exceeded or reduced for good and sufficient reasons.

[21] Section 11 deals with rostering. B747 and B767 pilots are rostered using a Seniority Biased Rostering System (SBS).

[22] Section 11.5.5 describes how rosters for standards pilots are constructed:

> *11.5.5.1* *At the roster construction stage, Standards pilots will be allocated training duties in a way that meets the requirements of the Standards Branch.*
>
> *11.5.5.2* *Standards pilots will not have their seniority bid rights enhanced as a result of their appointment to a Standards position.*

[23] Section 12.3 concerns appointment of standards pilots by way of the standing bid system. The suitability and selection of pilots for standards positions is at the absolute discretion of the company and they are chosen from pilots on the seniority list. If the company intends to return a standards pilot to the position of

pilot, 3 months notice must be given (section 12.3.7). Pilots holding standards positions receive additional salary.

Company policy

[24] The relevant policy in force at the time was the "Company policy for pilots attaining age 60". One of its stated purposes was to advise pilots approaching age 60 of the employment consequences of turning 60 so that they could take appropriate steps to secure ongoing employment with the company.

[25] The background to the policy refers to ICAO regulations and FAA rules and their effects on the territories/airspace in which B747 and B767 aircraft operate. The impact of these is that:

> *… the destinations and alternates to which the pilots-in-command who have reached age 60 can operate, particularly in the 747 and 767 fleets are very limited and represent only a very small fraction of the destinations and alternates to which the Company operates.*

[26] The age 60 policy is stated as follows:

> *No pilot who has attained age 60 can hold the position of pilot-in-command on the 747 and 767 aircraft while the predominant operation of these aircraft is to or through territories and alternates that have adopted the ICAO and FAA Regulations in relation to the age of pilots-in-command.*

Background employment

[27] Since the 1970s Mr McAlister has been employed as a pilot first with NAC and then with Air New Zealand. In 1998 he was trained as a B747 flight instructor. The letter advising him of his selection said that he was to undergo the Standards Qualification for appointment to the position of B747 Flight Instructor. In 2000, he was appointed chief pilot responsible to the manager, flight operations international, for a 2-year period. This was a management position. In 2001 he returned to a line flying position of a B747 flight instructor.

[28] It is not in issue that Mr McAlister is a loyal employee of the company who, over his 35 years of employment, has provided it with good service particularly in his management role. He is very familiar with the management of the airline's operations and what can reasonably be achieved by the company in the management of its rosters and duties.

[29] In January 2003, Air New Zealand wrote to Mr McAlister noting that he would soon be reaching the age of 60 years and advising him of the impact the ICAO and FAA age 60 rules would have on his ongoing flying career with the company.

[30] The letter said that, because the majority of territories or airspaces to which the B747 operates to or through have adopted the ICAO regulations or were covered by the FAA regulations, the destinations and alternates to which he could fly as a PIC on a B747 once he reached the age of 60 was very limited and represented only a small fraction of the destinations to which the company operates.

[31] Mr McAlister was invited to bid for a position which was not affected by the restrictions. If he did not bid for or be appointed to one of these positions he was advised that his employment with the company would conclude at the anniversary of his 60th birthday. He was advised to give these options some serious thought during the coming months.

[32] Mr McAlister advised Air New Zealand that he did not intend to retire when he turned 60 on 16 September 2004 and asked for a meeting. In spite of reminders, no such meeting was arranged. On 18 February 2004, Mr McAlister wrote to the general manager of Air New Zealand operations, Captain David Morgan, stating his position on the options offered to him upon his turning 60. He did not accept that the requirement to place a standing bid for what he regarded as a demotion in rank or equipment category was lawful because it breached age discrimination laws. He reiterated that he did not wish to retire or to register a standing bid. He asked again for an attempt to achieve a solution to his employment relationship problem.

[33] Some months later, Air New Zealand wrote to the FAA seeking a formal view on the age 60 issue as it affected the B747 flight instructors. The FAA legal advice was that the flight 60 rule meant that an instructor could not act as a PIC engaged in scheduled international air services or non-scheduled international air transport operations if that instructor had reached the age of 60. As a result of that advice, Air New Zealand took the stance that an instructor who had reached the age of 60 would not be able to hold the necessary licence and rating to act as a PIC.

[34] Mr McAlister's counsel took detailed issue with Air New Zealand about the way in which the question had been formulated to the FAA. However, it maintained its position that he would be unable to fly as a PIC on most of its long haul operations and therefore it was not able to employ him as a flight instructor.

[35] In the course of subsequent correspondence, Captain Gerry Dunn, the international fleet manager, set out Air New Zealand's position to Mr McAlister. On 9 July 2004 he explained:

- Mr McAlister was employed as a pilot whose ongoing standards position on the B747 fleet required currency as PIC.

- Because of ICAO/FAA age 60 restrictions and because of the nature of the B747 operations, once a pilot has turned 60 he can no longer operate as a PIC on Air New Zealand's B747s.

- Although Mr McAlister's situation required an individual focus to decide if holding flight instructor privileges meant he could still continue as a B747 captain, in light of the regulatory provisions and the company's processes he would not be able to remain current as PIC.

[36] On 27 August Captain Dunn reiterated the company's decision and set out its reasons. In summary these are:

1. The limitations created by his reaching age 60 were such as to require the Company to define a new role specific to his circumstances.

2. Any accommodation of these limitations for Mr McAlister would impact on fellow Line Captains, particularly check Captains and Flight Instructors.

3. His unencumbered flying would be limited to the Tasman and this is not reflective of the Company's operations as a whole. This may also require interference with the bidding rights of other pilots and pre-assignments for fellow standards pilots.

4. He would not be able to train or check any pilot as pilot-in-command, except on a limited number of routes.

5. The company would not have the flexibility of being able to roster tours of duties where he could be used as pilot-in-command for certain sectors or pilot-in-command in the event of sickness of the pilot-in-command or in a disrupt situation. He would also not, in all circumstances, be able to designate himself as pilot-in-command when considered necessary in the interests of safety.

[37] This remained Air New Zealand's position at September 2004 when Mr McAlister turned 60.

[38] Mr McAlister resigned from the Federation of Air New Zealand Pilots on 17 September 2004, took annual leave and upon his return was required to undergo a

training course for transition to the role of B747 first officer. He complied under protest and without prejudice to his personal grievance and has been flying in this role since.

[39] In 2005 the unions representing the majority of pilots employed by the company reached a position which acknowledges that they and Air New Zealand find the PIC restrictions imposed by ICAO/foreign countries unsatisfactory. Pilots can now stipulate a position they wish to be appointed to upon reaching age 60 and the company is required to appoint the pilot to that position even if it has to create such a position.

[40] It is accepted by Air New Zealand that since Mr McAlister turned 60 there has been no change in his ability to perform any of his duties as long as he had the appropriate approvals from Air New Zealand. It is also accepted that he could theoretically maintain his qualification but maintains that this is not practically possible given the restrictions imposed by foreign legislation.

[41] It takes the stance that age does not determine a pilot's ability or productivity and that the airline does not rely on age per se as the reason why he cannot remain PIC on the B747s. But for the foreign requirements, Air New Zealand says Mr McAlister would have continued in that position.

Training of pilots

[42] Air New Zealand's international operations comprise a number of fleets of long haul aircraft. Each fleet has its own management pilots and training regime. Each appoints line pilots and a number of pilots to be standards pilots. They act as flight instructors, check captains, training captains, check first officers, and training first officers. Pilots in these standards roles must have certain specified qualifications and competencies.

[43] The New Zealand Civil Aviation rules, along with Air New Zealand's aviation training organisation manuals, prescribe the initial and ongoing training requirements for pilots employed by the company. They must hold an airline transport pilot licence and ratings for specific aircraft types. Once they have attained certain levels of operating experience, the pilot is able to upgrade from second officer to first officer or first officer to captain or change aircraft type. At each stage they must undergo specified training, operating experience, and checks. The training is given by a qualified flight instructor or a check captain who must act as PIC during the training.

[44] Of the 175 pilots in the B747 fleet, about 11 percent are standards pilots including six flight instructors. There are also flight simulator instructors who hold full time ground positions training and checking pilots in the flight simulator who are on a separate employment agreement however there is some overlap between flight simulator instructors and flight instructors as flight instructors do a percentage of flight simulator training.

[45] Each pilot must keep their qualifications current by ongoing training and satisfactory completion of route checks, supervised landings and take offs etc, under the supervision of a flight instructor. Captains are checked by flight instructors who act as second captains (CAP2) but the checking of first officers must be done by flight instructors who act as PICs.

[46] A CAP2 position arises when a pilot holding the rank of captain flies as part of the crew but is not nominated as pilot in charge. CAP2 pilots can train and perform checks on current captains flying long haul without assuming the position of PIC.

[47] Each of the standards roles have a number of defined purposes and responsibilities. For example, a training first officer conducts second officer line training excluding the final checks. A training captain conducts route training excluding final route checks. A check captain is responsible for final acceptance of pilots for line operations having established the standard of competency shown by those pilots.

[48] As well as check captain responsibilities, a flight instructor assesses the level of competency of the other standards flight and line pilots by conducting route checks of first officers, final route checks on captains who have moved from one type of aircraft to another, and final route checks on pilots undergoing command training.

[49] To assume a command on a B747, a pilot must train over a number of sectors or flight routes. The first four sectors of training with a flight instructor is generally done on the Trans-Tasman route mainly Auckland to Melbourne or Brisbane. This training is followed with eight sectors of line training generally done on the Auckland-London-Auckland flight via Los Angeles. Most of that work is done by training captains. The pilot then undergoes two Trans-Tasman route checks again with a flight instructor.

[50] Mr Gatland, Air New Zealand's manager of flight standards, and Mr McAlister agree that in an average year a standards pilot could expect to spend

approximately 70 percent of work days performing standards or training work and 30 percent performing unencumbered line flying duties depending on the training requirements of other pilots although these figures are flexible. Mr McAlister says that each month he could easily achieve 80 hours of line flying by being rostered on routes other than those through or into US airspace which would mean that he would only need to do 30 percent of his hours on training which, taking leave into account, would fulfil his obligations as a flight instructor.

[51] It was Mr McAlister's first contention that post-60 he could fly long haul on Japan routes as PIC both as a line pilot and in his capacity as a flight instructor. There was voluminous evidence on whether this could be done without violating international age restrictions because of the need either to over-fly restricted territories on that route or to have such territories as designated emergency landing airports.

[52] By the end of the hearing, after further evidence was given by Mr McAlister and Air New Zealand about the New Zealand/Japan route, both Mr Harrison and Mr Thompson agreed that that issue could be parked and attention focused on other alternative suggestions by Mr McAlister.

[53] Mr McAlister's further evidence showed that CAP2 long haul duties for both line flying and training purposes are readily available without Air New Zealand having to create a specific CAP2 position for him. Captain Dunn said this is technically possible but the accommodation of such flying could not be done without cause and cost. He agreed that because Mr McAlister is outside the company's agreement with the unions it is more feasible to accommodate him personally.

[54] The difference of approach on this topic between Mr McAlister and Air New Zealand depends on the operation of the company's roster.

Rosters and how they work

[55] Air New Zealand's rosters are immensely complicated. The mathematics department at University of Auckland was called to assist with its design based on algorithms. Its purpose is to match available pilot resources to Air New Zealand's flight schedules.

[56] Tours of duty are planned by the rostering staff to ensure that all pilots have adequate line flying and flying to meet their training needs. Tours of duty on the international fleet include 1-day flights to and from Australia or 9-day tours of duty involving 4 flying days to and from London. Before the roster is constructed it has a

pre-assignment stage. At this point an appropriate number of standards pilots are incorporated manually into tours of duty to provide the training and checking of pilots in the most efficient way for the company. At this early stage of the process, rostered weekends off and assigned leave are also incorporated into the tours of duty as well as any particular and unusual requests for leave such as births, sickness, and other personal needs.

[57] At this point it becomes a bid package which is distributed to pilots who may bid for the tours of duty published in this package. Once their wishes are known, the computer is then instructed to generate the roster using the SBS. Having been checked for compliance with legal and employment agreement constraints, the roster is published.

[58] There was much evidence on the proportion of the components which make up the work of flight instructors. While there are differences between Air New Zealand and Mr McAlister's calculations, the position can be broadly summarised. Flight instructors' rosters include 25 to 30 percent of ground duties. These are not affected by age restrictions. Thirty percent comprise unencumbered line pilot duties, that is without training duties. The balance of approximately 40 percent is taken up with flight instructor training duties.

[59] Because the B747 routes are largely made up of flights which cross age-restricted territory, if Mr McAlister is to continue flying these aircraft after age 60, the challenge for the Air New Zealand's rosters is to give him enough long haul flights to meet the line flying and training duties. He had at least three suggestions as to how this could be done.

[60] First, at the manual pre-bidding stage, it is possible for the international fleet manager to direct that he be assigned to certain tours of duty such as Trans-Tasman and flying non PIC to Japan as CAP2. This would avoid US and other restricted airspace. If his details were programmed into the computer at the rostering stage with a tag indicating that he is not qualified for certain routes, the computer would make sure that he would only be allocated those duties where he was able to fly as an over 60 pilot. He estimated the PIC restrictions are limited to about two out of 109 flights, and if these could be avoided he could retain his currency.

[61] Next, he could fly as PIC on the Trans-Tasman Cairns sector which is shown on the roster as a long haul route. Long haul flights are more than 2000 nautical miles but during the hearing Mr Gatland established from the company records that

the distance from Auckland to Cairns is 1,976 nautical miles. Mr Gatland believes that either Cairns has been designated long haul in error or has been authorised to be used as a long haul route check on an interim basis.

[62] Third, in spite of restriction on PICs flying over or into US territory, Mr McAlister believes that he can still do some training in US airspace as a CAP2. According to the FAA rules where a pilot in training for a PIC position has the required demonstrated abilities and experience, the flight instructor may occupy an observer's seat. The trainee is therefore PIC and it is not necessary for the flight instructor to act in that capacity.

[63] In summary, with a combination of non-US airspace training on Trans-Tasman PIC duties and long haul flying as CAP2 in US airspace and on the Japan route, Mr McAlister believes he could achieve the 30-40 percent of flight instructor flying duties and that Air New Zealand can accommodate him as an age 60 PIC. His case does not depend on his ability or inability to fly PIC on the Japan routes.

[64] Air New Zealand says that the roster cannot be adjusted in the way suggested by Mr McAlister because:

- Although it is technically possible to roster him at pre-bid stage in the same way as training and checking needs are accommodated the results would be unreasonable. For example, it would be an exception to the way work currently is allocated to pilots on the SBS bidding system and it would result in Mr McAlister receiving more Trans-Tasman flying than other pilots. Air New Zealand believes that this would lead to a loss of goodwill from other pilots to such an extent that they may resign or bring personal grievances.

- Accommodating Mr McAlister in the roster by concentrating on CAP2 duties and flying the Trans-Tasman route would lead to financial costs although Captain Dunn was unable to quantify these and agreed that pre-bid costs would be minimal.

- The terms of Mr McAlister's leave entitlements and other matters under his employment agreement may limit required flexibility of rostering including the usual changes to the Trans-Tasman services.

- There is the potential for operational risks such as the danger of breaching the rules affecting foreign territories, breaching Air New Zealand's air

operator certificates, and not having airports as en-route diversions available for emergency landing. Steps to avoid these potential risks may involve extra fuel costs of more than $4,000 per flight.

- Planning flights around pilots affected by the PIC restrictions is not feasible or practicable because it compromises the fundamental principal of efficient flight planning which is to achieve the most effective flight plan.

- Air New Zealand prefers to use training captains for long haul flights rather than flight instructors. Although the company wants to preserve some flexibility to use flight instructors, the training captains are the most economic resource for these training tours of duty.

Issue 1

- How should the plaintiff's employment be characterised?

[65] For Air New Zealand, Mr Thompson argued that s2 of the employment agreement means that Mr McAlister's employment was as a pilot but subject from time to time to what Air New Zealand regards as privileges such as his qualification to operate as a PIC and fly a specific aircraft type or types and any additional responsibilities such as a standards pilot role. Air New Zealand says it is able to vary all of these privileges under the agreement. As long as he was employed as a pilot, he should be able to be deployed as required by Air New Zealand. However, it is Air New Zealand's case that whether the position is found to be as a pilot or flight instructor will not affect the outcome because Air New Zealand has done everything it could to have preserved his employment with the airline.

[66] Mr Harrison submitted that Mr McAlister was employed as and working as a B747 flight instructor and not as a B747 captain/PIC. Because a B747 flight instructor's duties involve a significant proportion of training both non-flying and flying, Mr McAlister does not always have to act as PIC and therefore could be reasonably accommodated by Air New Zealand in duties which do not infringe the FAA rules and which would enable him to maintain his position without demotion.

[67] In essence, it is submitted that as there are only a small number of B747 flight instructors and only one turning 60 in September 2004, it should have been possible for Air New Zealand to deal with Mr McAlister's case on an individual basis. Air New Zealand treated Mr McAlister's flight instructor role as merely incidental if not irrelevant. The removal of his flight instructor duties and reduction in rank was

detrimental treatment and forms the basis of the claim for disadvantage and discrimination.

[68] In *Smith v Air New Zealand Ltd*[2] the Employment Court materially found that s 2 of the same employment agreement means that captains on B747 aircraft are employed in the role of a pilot but subject to their qualifications to act as a PIC or operate specific aircraft types. In *Air New Zealand v Rush*[3] which followed *Smith* the Court found that the very broad power in s2 enabling Air New Zealand to require pilots to serve the company in performing duties is qualified by reasonableness which in turn must be interpreted in light of all other relevant provisions of the collective contract including those conferring rank.[4]

[69] In *Rush*, a pilot who turned 60 was considered by Air New Zealand to be unable to continue employment because he was unable to fly FAA restricted routes. The Court held that, while he was not entitled to insist upon having another PIC role within Air New Zealand, the company was obliged to consider what other pilot duties it might have been able to assign to him. The issue in that case was whether Air New Zealand was bound to offer him <u>any</u> opportunities for other employment roles within the airline. In the present case the issue is whether in offering other pilot roles to Mr McAlister Air New Zealand was obliged to have regard to his position of flight instructor.

[70] The heading to s2 is a guide to its construction. It is about area and incidents of duty. It concerns where and how pilots of all grades or rank are to perform the duties required of them by Air New Zealand. It does not govern the grades and positions of each pilot. This is determined by their appointment to these positions based on their qualification.

[71] I hold that while Air New Zealand has the right under s2 to direct its pilots to perform in specific locations and according to their rosters, it does not entitle Air New Zealand to disregard the specific positions held by each pilot in order unilaterally to shift a pilot between grades effectively demoting them from the positions to which they have been appointed.

[72] In the light of the cases and on the plain meaning of s2 of the agreement I find that, while the basis of Mr McAlister's employment was as a pilot, he had long been promoted to hold the grade of a standards pilot holding the qualification of a

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[2] [2000] 2 ERNZ 376 at 387 to 389
[3] [2003] 2 ERNZ 344
[4] At paragraph [44]

flight instructor. By age 60 his pilot's role had been enhanced to a very senior position. He held a specific position of flight instructor based on his qualifications, experience, and expertise. The extra qualification held by Mr McAlister entitled him not only to an increase in his salary but to certain rights to preferential treatment in relation to rostering such as not being required to carry out on-call duties.

Issue 2

- Did Air New Zealand discriminate against Mr McAlister?

[73] There are two claims of discrimination:

(1) Under s104(1)(b) of the Employment Relations Act 2000, it is alleged that Air New Zealand discriminated against Mr McAlister by reason of his age by subjecting him to detriment in circumstances in which other employees of Air New Zealand employed on work of the same description are not subjected to (the primary claim).

(2) Under s104(1)(a) of the Employment Relations Act 2000 it is alleged that Air New Zealand discriminated against Mr McAlister by reason of his age, by refusing to afford him the same conditions of work as is available to employees of the same or similar qualifications employed in substantially similar circumstances (pleaded in the alternative).

[74] As the principal question under this issue is whether there was an act of discrimination, it is first necessary to be clear what constitutes statutory discrimination. Discrimination in employment is dealt with in the Employment Relations Act 2000 in s104:

> ***104 Discrimination***
>
> *(1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or by reason directly or indirectly of that employee's [refusal to do work under section 28A of the Health and Safety in Employment Act 1992, or] involvement in the activities of a union in terms of section 107,—*
>
> *(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or*
>
> *(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are*

not or would not be dismissed or subjected to such detriment; or

(c) retires that employee, or requires or causes that employee to retire or resign.

(2) For the purposes of this section, detriment includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.

(3) This section is subject to the exceptions set out in section 106.

[75] Section 105 imports prohibited grounds of discrimination from s21(1) of the Human Rights Act 1993 and includes age as a ground of discrimination.

[76] It is the case for Air New Zealand that there has been no act of discrimination because under s104 an apparently discriminatory act is only unlawful if detriment is caused or different terms and conditions of employment are offered by reason directly or indirectly of the prohibited grounds of discrimination. What occurred in Mr McAlister's case was not by reason of his age but for the valid reason that IAOC and FAA had imposed terms that led to the Air New Zealand policy age 60.

[77] The question is one of causation: Did an act of discrimination lead to the end of Mr McAlister's employment as a B747 flight instructor/PIC, or was it for some other reason such as the IAOC/FAA requirements?

[78] The onus is on the employee to establish on the balance of probabilities that the detrimental action was caused by reason of the prohibited ground of age. There is no presumption of discrimination by the employer on the ground of age as there is for alleged discrimination on the grounds of Union involvement.[5]

[79] Mr Thompson also referred to an Australian case, *Qantas Airways Ltd v Christie*[6] where, in a similar factual situation to the present case, the reason for the dismissal a 60 year old pilot was held to be not his age but external requirements. Gaudron J said:[7]

Reason for termination

Before considering the issues in the appeal, it is convenient to note that it seems to have been assumed that, because Qantas required Mr Christie's employment to come to an end on his 60th birthday, that was the reason for its so doing. Certainly, it has not at any stage of the proceedings been argued otherwise. However, it may be noted that the mere fact that an employer requires or stipulates for employment to come to an end when an employee reaches a certain age does not necessarily direct the conclusion

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[5] Section 119 of the Employment Relations Act 2000; *Post Office Union (Inc) v Telecom (Wellington) Limited* [1989] 3 NZILR 527

[6] [1998] HCA 18; [1998] CLR 280

[7] At paras 12-13

> *that, if employment is terminated when he or she reaches that age, age is the reason for its termination.*
>
> *If, as here, employment comes to an end at an age stipulated by an employer, it will ordinarily be inferred that age was the reason for its so doing. But there may be exceptional cases where, an employee having reached the stipulated age, that is the occasion and not the reason for the termination of his or her employment. It is important to refer to this question because, in my view, the facts of this matter permit of an argument that, although Mr Christie's employment came to an end on his 60th birthday, it did not come to an end for that reason but, in terms of s 170DE(1), for "a valid reason … based on the operational requirements of the [Qantas] undertaking".*

[80] It is clear that these remarks were obiter and not applicable to the present case. The issue was whether Qantas had actually terminated the pilot's employment and whether the reason for the termination was based on the inherent requirements of his particular position (a statutory exemption in Australia to an otherwise discriminatory act based on age). It was not argued that the reason for the end of Mr Christie's employment was anything other than his age.

[81] The leading Employment Court cases on the question of causation in discrimination cases are *New Zealand Workers Union v Sarita Farm*[8]; and *Trilford v Car Haulaways Limited*[9] where the Court looked at the acts of the employer to ascertain objectively whether they amounted to acts of discrimination. In neither case was there direct evidence of discriminatory intent but the employees believed that the actions of their employers towards them could only be explained by reasons of their intention to discriminate.

[82] In *Sarita Farm*, Goddard CJ found that the principal question was whether it had been shown that, but for the discriminatory ground, the employee would not have suffered the detriment. He said[10] that the head of prejudice in issue must be shown to have been the reason which actuated the dismissals *'but for'* which the dismissal is unlikely to have taken place.

[83] In *Sarita* and *Trilford* the Court held that there was a need objectively to establish the employer's intention to discriminate. These findings were made in the context of allegations of discrimination based on the employee's perception and in the absence of any direct evidence of the alleged discrimination. The Court was left to draw inferences about the reasons for an employer's action in order to establish whether there was sufficient evidence to find a causal link between the

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[8] [1991] 1 ERNZ 510
[9] [1996] 2 ERNZ 351
[10] At p516

dismissal or disadvantage and an act of discrimination. In such circumstances the evidence of the employer's intentions may be relevant.

[84] However, where there is evidence that a ground of discrimination was at least one factor which influenced the employer's actions then the question of whether the employer intended to discriminate is not relevant. In *HRC v Eric Sides Motors Co Ltd*[11], it was held that it is not necessary to establish that the discriminator had an intention to discriminate. The important question is whether the complainant had been treated less favourably or discriminated against. As Kirby J said in *Christie*[12] the absence of a subjective intention to discriminate does not convert discriminatory conduct into neutral policy. He went on:

> *The [Australian] Act operates in the highly practical circumstances of an employment relationship. This warrants the adoption of a commonsense approach to the statutory requirements. The Act is fundamentally designed to achieve social change by the removal of artificial stereotypes. Unless otherwise excused, it requires, in effect, the assessment of an employee's capacities upon that employee's individual merits. Requiring this approach has a price. In part, that price is economic, involving various adjustments to accommodate the needs of particular employees. In part, the cost may involve a challenge to the political, moral or other biases of the employer. The Parliament must be taken to have accepted that, to conform to Australia's international obligations and to achieve the objectives which they set, such costs must be borne unless the employer is exempted or excused.*

[85] Where there is more than one reason for an employer's actions the test is whether the discriminatory ground is a substantial or operating factor. In an appeal from the Industrial Court of Australia about restrictive trade practices, the High Court of Australia[13] held that "*by reason of*" in s66B(2) of the Trade Practices Act 1971 (Cth) could mean that an unlawful reason, if not the sole reason, was at least a substantial and proximate reason for the appellant's actions. In New Zealand this has been applied in *Sides*.

[86] In summary, therefore, the legal principles which apply to an enquiry into whether there has been an act of discrimination are:

(1) There must be a causal link between the detriment to the employee and the prohibited ground of discrimination.

(2) The intention of the employer is irrelevant to this consideration where there is *prima facie* evidence that a decision was at least, in part, based on a prohibited ground.

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[11] (1981) 2 NZAR 447
[12] At para 152
[13] *Mikasa (NSW) Pty Ltd v Festival Stores* [1972] HCA 69; (1972) 127 CLR 617 at p656

(3) Where there may be more than one reason for an employer's action the test is whether the prohibited ground is a substantial operative factor.

[87] In the present case there is direct evidence of Air New Zealand's reliance on age as a reason for its decision about Mr McAlister. The January 2003 letter was sent to him because he was soon to reach age 60. It referred to the ICAO rules which limited the flying activities of pilots who reach that age and the consequential limitations on the extent to which such pilots could fly. It referred to positions that were not affected by age restrictions.

[88] On the face of it the question of Mr McAlister's age was an express and relevant factor in Air New Zealand's decision that he could no longer be a flight instructor or a PIC. The fact that Air New Zealand did not intend (and I find that it did not intend) to actively discriminate on the basis of age, does not detract from the fact that but for his age, Mr McAlister would not have been limited in the range of flying activities which he could undertake. The effect was that Mr McAlister was treated less favourably than younger pilots with his qualifications, skills and in his position.

[89] I find that the substantial reason why Mr McAlister's position as flight instructor and PIC was down graded from the time he turned 60 was his age. It was therefore based on a prohibited ground of discrimination.

(1) Discrimination by subjecting the employee to detriment by reason of age

[90] Was Mr McAlister subjected to detriment under s104(1)(b) of the Employment Relations Act 2000? The definition of detriment in subs (2) includes anything that has a detrimental effect on an employee's employment, job performance, or job satisfaction. I find that it was detrimental to his employment that, although capable and qualified, he was prevented by reason of his age from carrying out his flight instructor position and was transferred to a first officer position which resulted in him earning less than before.

[91] Section 104(1)(b) requires an inquiry into whether other employees employed by Air New Zealand in the same work were subjected to the same detriment.

[92] The method of comparing an employer's treatment of one employee against the treatment of others can be ascertained from *Northern Regional Health Authority*

v Human Rights Commission[14]. The Regional Health Authority's policy of only contracting with New Zealand trained medical practitioners was held to be discriminatory against doctors of non-New Zealand national origin. The case was brought under s65 of the Human Rights Act 1993 which refers to indirect discrimination, being conduct which has the effect of treating a person differently on one of the prohibited grounds of discrimination. Cartwright J compared the complainant group of overseas doctors with doctors who were not of overseas origin. Read together with the wording of s104(1)(b), that approach means that the appropriate comparison is between the treatment of the person who, on the face of it, is discriminated against on a prohibited ground and the treatment of other employees employed by that employer who do not have the characteristic which lead to discrimination. The comparator group comprises those doing work of the same description.

[93] In the present case, the comparison is between a flight instructor/PIC who has reached age 60 and those flight instructors/PICs who are under 60 but are doing the work of the same description that the grievant employee was doing before reaching that age. It is clear that the comparator group has not suffered the same detriment as Mr McAlister. They can continue to enjoy the privileges of their position. He cannot.

[94] I conclude that Air New Zealand has by reason of Mr McAlister's age subjected him to detriment which its other employees employed in the same work are not subjected to.

(2) Discrimination by refusing to afford him the same conditions of work as for other employees

[95] The alternative claim is that Mr McAlister has been discriminated against pursuant to s104(1)(a) by Air New Zealand's refusal to offer or afford him the same terms or conditions of work as are made available for employees of the same or similar qualifications, experience or skills, employed in the same or substantially similar circumstances.

[96] Mr Harrison submitted that in comparison with the detriment in s104(1)(b) the phrase "*conditions of work*" denotes an ongoing or systemic state of affairs of conduct in the workplace. The removal of Mr McAlister from the flight instructor position and his transfer to first officer were acts with continuing consequences. He

[14] [1998] 2 NZLR 218 at 238

is now treated and remunerated as a first officer and has had his flight instructor privileges withdrawn on an ongoing basis.

[97] Mr Thompson argued that since the changes to his employment Mr McAlister now has severe restrictions on his ability to exercise the privileges of a PIC and it cannot be said that he has the same or similar qualifications, experience, or skills as other employees who were not so restricted.

[98] I accept Mr Harrison's answer to this submission. It is unacceptable in principle to compare the characteristics of the grievant employee which he had after the alleged discriminatory act with those of other unaffected employees. Mr McAlister only suffered the severe restrictions by reason of a prohibited discriminatory act. The appropriate comparison is between the conditions of work of the employee after the changes made by reason of his age and other employees who were not affected by the age restriction.

[99] I find that after the changes, Mr McAlister continued to receive different, disadvantageous terms of employment and conditions of work by comparison with the unaffected group of flight instructors/PICs and was therefore *prima facie* discriminated against under s104(1)(a).

Issue 3

- Do any statutory exemptions apply in Air New Zealand's favour?

[100] Sections 24 to 35 of the Human Rights Act 1993 provide for exceptions in relation to discrimination. These are imported into the Employment Relations Act 2000 by s106(2). They are to be read as if they refer to s104 of the Employment Relations Act 2000 rather than to s22 of the Human Rights Act. In particular, references in s30 of the Human Rights Act to s22(1)(a) or s22(1)(b) of that Act must be read as if they were references to s104(1)(a) of the Employment Relations Act 2000.

[101] When the Employment Relations Act 2000 references are imported into s30(1) of the Human Rights Act it reads:

> ***30 Further exceptions in relation to age***
>
> *(1) Nothing in* [section 104(1)(a)] *or* [section 104(1)(c)] *of the* [Employment Relations Act 2000] *shall apply in relation to any position or employment where being of a particular age or in a particular age group is a genuine occupational qualification for that position or employment, whether for reasons of safety or for any other reason.*

[102] It follows that s30 of the Human Rights Act provides an exception to discrimination under s104(1)(a) and (c) but not to s104(1)(b).[15]

[103] Section 35 of the Human Rights Act provides a general qualification on all exceptions. It is also imported into the Employment Relations Act 2000 by way of s106(1)(l):

> *No employer shall be entitled, by virtue of any of the exceptions in this Part of this Act, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.*

[104] The effect of this qualification is that if there is a s30 genuine occupational qualification which justifies Air New Zealand treating Mr McAlister differently if Air New Zealand can find other pilots to do the training in restricted areas then Mr McAlister should not be treated differently. This would only apply if Air New Zealand can adjust its activities without unreasonable disruption.

[105] If s30 is to apply in this case, age must be a genuine occupational qualification for Mr McAlister's position. Section 97 of the Human Rights Act gives the Human Rights Complaints Review Tribunal the power to declare what constitutes a genuine occupational qualification in respect of a matter over which it has jurisdiction. It is not imported into the Employment Relations Act by s106 and is not available either to the defendant or to the Court in this case. However, because s30 relates to the Employment Relations Act 2000 and because the Employment Court has exclusive jurisdiction over employment matters, a consideration of genuine occupational qualification is a necessary incident of the Court's jurisdiction in cases under s104.

Genuine occupational qualification

[106] In *Smith v Air New Zealand* the s30(1) exception of genuine occupational qualification was held not to apply. That case was brought as a common law claim under the Employment Contracts Act 1991 and the discrimination aspects were only raised by Air New Zealand as a defence under the Human Rights Act. The Employment Relations Act 2000 implications of the discrimination claim were not covered in that case. It is therefore distinguishable from the present claims under s104 of the Employment Relations Act 2000.

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[15] Section 104(1)(c) is not pleaded and is not in issue in this case.

[107] In the absence of binding New Zealand case law[16] defining this statutory phrase, counsel referred to a decision of the Supreme Court of Canada, *Ontario Human Rights Commission et al v Borough of Etobicoke*[17] which concerned compulsory retirement of fire officers at age 60.

[108] In Canada the phrase "*bona fide occupational qualification and requirement for the position of employment*" provides an exception to prohibited age discrimination. It was interpreted by the Supreme Court as a two-stage test: a subjective test which requires that the mandatory retirement age must be imposed honestly, in good faith, and in the sincerely held belief that the retirement age is in the interest of the safe and adequate performance of the work; and an objective test which means that the mandatory retirement age must be related to the performance of the employment concerned and must be reasonably necessary to ensure the efficient and economical performance of the job without endangering the employee, their fellow employees, and the general public. The proof of such objective reasons must be evaluated by very strict standards.

[109] While that analysis of a similar but not identical Canadian statute is helpful, it is necessary to interpret the meaning of the words of the Human Rights Act 1993 in light of its purpose.

[110] In interpreting s30 of the Human Rights Act, I have regard to the special character of human rights legislation. In *Coburn v Human Rights Commission*[18] having extensively reviewed the authorities, Thorp J observed that the Human Rights Act and other similar legislation was designed to give domestic effect to New Zealand's international obligations. He held that the proper construction of s22 of the Human Rights Act requires an appropriate regard to the special character of human rights legislation and the need to accord it a fair, large, and liberal interpretation rather than a literal or a technical one. Human rights law is not to be treated as ordinary law in its application but as fundamental law.

[111] In *Director of Human Rights Proceedings v NZ Thoroughbred Racing Inc*[19] the majority of the Court of Appeal held that the Human Rights Act is no ordinary

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[16] There are least two Complaints Review Tribunal cases on this point: *Avis Rent a Car Ltd v The Proceedings Commissioner* 16/98 and *Proceedings Commissioner v Thoroughbred Racing NZ Inc* 31/99.
[17] (1982) 134 DLR (3rd) 14
[18] [1994] 3 NZLR 323 at 334
[19] [2002] 3 NZLR 333

statute and that its savings provisions, being exceptions to the basic prohibitions on discriminatory action, are to be read narrowly.[20]

[112] One of the purposes in the Human Rights Act, as expressed in its long title, is to provide a better regime of protection of human rights in accordance with United Nations human rights instruments. There is no United Nations convention or covenant which expressly mentions age as a prohibited ground of discrimination[21] but the UN Committee of Economic Social and Cultural Rights has noted that while it may not yet be possible to conclude that discrimination on the grounds of age is comprehensively prohibited by the International Covenant on Economic, Social, and Cultural Rights 1996, the range of matters in relation to which such discrimination can be accepted is very limited. The Committee went on to say that in the few areas in which discrimination continues to be tolerated such as in relation to mandatory retirement ages or access to tertiary education, there is a clear trend towards the elimination of such barriers. The Committee was of the view that states parties should seek to expedite this trend to the greatest extent possible.[22]

[113] In the light of the authorities and this international trend towards eliminating toleration of age discrimination, it follows that exceptions to such a fundamental law must be construed narrowly.

[114] Section 21B in Part 2 of the Human Rights Act concerning unlawful discrimination is also relevant. It provides that an act or omission of any person or body is not unlawful under Part 2 if that act or omission is authorised or required by law.

[115] I now turn to interpret s30 of the Human Rights Act. The section's reference to a position or employment means that the inquiry must focus on the job or job description of the person who is alleging discrimination. The general occupational qualification must relate to being a particular age or in a particular age group for that position or job. The word "genuine" implies that the qualification must be imposed for an honest reason related to that position. The phrase "*genuine occupational qualification*" as a whole indicates that it applies when age constitutes an occupational qualification for the position.

[116] Therefore, s30 requires an employer to justify an act of age discrimination by showing:

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[20] Ibid, at paragraphs [33] to [34]
[21] Brookers Human Rights Law 2.277
[22] The Economic Social and Cultural Rights of Older Persons: General comment No 6 (adopted at the 13th Session (39th meeting) 24.11.95)

(a) That the policy relied on was genuinely imposed in good faith and in the belief that it was necessary for the performance of the position.

(b) That objectively viewed, the age limit is a necessary qualification for the position.

(c) That any age qualification is for safety or any other reason. The latter is very broad but, applying a narrow interpretation, I find must be a reason that is genuine and related to the occupation.

[117] Mr Harrison submitted that the genuine occupational qualification defence is directed towards the employee's initial entry qualifications and/or the formal or legally prescribed qualifications for a particular position or employment such as a person working in a bar who must be aged 20 under the Sale of Liquor Act 1989. In any event, he submitted that in this case Air New Zealand has not identified the particular occupational qualification of the flight instructor position which is alleged to be genuine for the present purposes. He argued that as Mr McAlister continues to possess licences, certificates, and privileges required by the CAA in his employment agreement then there can be no genuine occupational age qualification that can justify the decision to prevent him from carrying out the position.

[118] Mr Thompson accepted that Air New Zealand has the onus of demonstrating that there is a genuine occupational qualification that amounts to an exception. In the present case age is considered by Air New Zealand to be a genuine occupational qualification because flights through or to the US, France, and the Federated States of Micronesia airspace represents the majority of the B747 operations and over 70 percent of Mr McAlister's flying work. As the basic functions of a PIC on the B747 are related to age by way of the ICAO/FAA laws he submits it is a mandatory legal qualification.

[119] However, it is the case that New Zealand is bound by neither the ICAO age restrictions nor by American aviation law. These foreign age restrictions are not mandatory in New Zealand. At the most they have an impact on Air New Zealand's international operations in a similar way to that demonstrated in *Christie* where the High Court of Australia held that they would constrain Mr Christie from being an equal participant in the bidding system which would skew the operation of the roster system.

Conclusion on genuine occupational qualification

[120] First, s30(1) only expressly applies to age discrimination under s104(1)(a). Mr Thompson submitted that even though s104(1)(b) is not referred to in s30 of the Human Rights Act it must also apply to s104(1)(b) because it would make a nonsense of the provisions if the exceptions did not apply. He took the example of a position where age is imposed as a statutory qualification but in the absence of the application of s30 could not be relied on. The first answer to that submission is found in s21B. If another enactment prohibits employment at a certain age this would prevail over the Human Rights Act. Secondly, and more importantly, such an approach would have the effect of broadening the exceptions to age discrimination, an approach which is inconsistent with the interpretation of fundamental human rights. It would be quite wrong to imply an exception which would have this effect.

[121] I accept that Air New Zealand developed the age 60 policy in the belief that the external imposition of age restrictions on PICs in certain territories amounted to an occupational qualification. It did not wish to restrict employment of any of its pilots on the grounds of age but genuinely felt that it had to. However, an objective assessment of the occupational qualifications for a PIC/flight instructor on a B747 contained in the relevant job description and the standards imposed by the CAA shows no relationship to age. The qualifications include rigorous capability testing but age has no part in the occupational qualifications.

[122] I acknowledge Air New Zealand's position that the limitations on B747 PICs which result from FAA restrictions restrict the extent to which PICs can be rostered but this is, I find, an operational difficulty not an occupational qualification. Indeed, Air New Zealand's witnesses accepted that Mr McAlister's qualifications were able to be kept current in spite of the restrictions.

[123] I am reluctant to find that only statutorily imposed age limits could amount to a genuine occupational qualification because there may be circumstances as yet unforeseen where age is such a qualification even though not imposed by statute and such cases may arise in another forum. However, the narrow approach to the construction of exceptions to age discrimination points to such limits being a valid guideline to an occupational qualification which can be objectively established. This interpretation is also consistent with s21B of the Human Rights Act.

[124] I conclude that s30(1) can only provide a justification for age discrimination under s104(1)(a) if the age restriction amounted to a genuine occupational qualification. In this case, Air New Zealand has not proven on the balance of

probabilities that this is the case. A narrow interpretation of the phrase must limit the exception to the occupational qualification. I acknowledge that there are resulting operational and perhaps economic difficulties for Air New Zealand. This is the price referred to by Kirby J in *Christie* of conforming with New Zealand's international obligations.

[125] In the light of this conclusion it is not necessary to consider whether Air New Zealand could adjust its activities in order for s35 to apply. Section 35 is a general qualification on the exceptions in the Human Rights Act and only applies if any of the exceptions entitle an employer to accord a person different treatment based on a prohibited ground of discrimination.

Issue 4

- Disadvantage grievance

[126] The second cause of action alleged that even in the situation where Air New Zealand has facilitated an alternative position for Mr McAlister as a result of restrictions imposed by foreign regulatory bodies, he has still suffered disadvantage. I have already found that this is the case. Mr McAlister has been unable to undertake a role for which he is qualified and capable and instead has been given employment at lesser rank and salary.

[127] Mr Harrison submitted that Air New Zealand's processes and decision making were flawed particularly by the breach of the notice provisions in Mr McAlister's employment contract.

[128] Mr Thompson argued that there has been no unjustified action by Air New Zealand against Mr McAlister because its policy and the steps it took were open to a fair and reasonable employer. Therefore there is, in his submission, no disadvantage to him.

[129] In fact, Air New Zealand did not separately advance this defence of justification other than its submission that it did not discriminate. In the face of the finding of discrimination there can be no defence of justification.

[130] Mr Harrison was critical of the company's age 60 policy for a number of reasons.

- It encompasses both line pilots and standards pilots and permits of no exceptions for either group in spite of significant differences in their numbers and major differences in job functions and descriptions.

- The policy is not contractual and the plaintiff was never consulted about it.

- The mandatory policy has never been subjected to any trial to see what the effects of alternative rostering would be on the feasibility of treating a flight instructor differently under the policy such as by rostering him at the pre-bid stage.

[131] It would be artificial to divorce consideration of Air New Zealand's age 60 policy from its obligations under the Human Rights legislation. While employers are entitled to set policies in relation to all manner of its operations, where such policies have a discriminatory affect it is incumbent on an employer to ensure that the policy is couched in sufficiently flexible terms to enable individuals with particular circumstances to be accommodated wherever possible. Such an approach is in accord with international trends referred to earlier.

[132] In this case Mr McAlister was outside the union's agreement with Air New Zealand on the age 60 policy and his circumstances were particular to him arising out of his seniority. In the light of these an attempt to accommodate him outside the terms of the policy could have been made. For example, a trial for a period of up to 6 months could have been attempted to test Mr McAlister's assertions that he could maintain currency and be accommodated into the roster as a flight instructor without causing undue disruption in spite of his age. Mr McAlister's stance on these matters was credible particularly in the light of his management experience in Air New Zealand which gave him insights into the operation of the long haul fleet and its rosters.

[133] In the course of the hearing of this case each party shifted its position more or less on factual matters based on evidence that came to light about flight routes and distances and rostering practices. It is highly probable that those matters and others raised in constructive dialogue could have resulted in a workable if not conventional accommodation of Mr McAlister's situation.

[134] The company's insistence on maintaining its age 60 policy did not permit this. Its unilateral changes to Mr McAlister's employment were unjustified and affected his employment to his disadvantage.

Summary of conclusions

1. The application of Air New Zealand's policy on age 60 in relation to Mr McAlister was based on a prohibited ground of discrimination.

   The discriminatory act subjected Mr McAlister to detriment under s104(1)(b) and the exception of genuine occupational qualification imported into the Employment Relations Act 2000 from s30 of the Human Rights Act does not apply to acts of discrimination under s104(1)(b). Therefore Air New Zealand has discriminated against him by reason of his age.

2. Air New Zealand has omitted to afford Mr McAlister the same terms of employment as are available to other employees in terms of s104(1)(a).

   The exception of genuine occupational qualification may apply to acts of discrimination under s104(1)(a) but Air New Zealand has failed to establish that age is a genuine occupational qualification for the position of a pilot and/or flight instructor and therefore does not apply.

3. Air New Zealand acted unjustifiably towards Mr McAlister by applying a fixed policy to him which, on its face, was discriminatory and has affected his employment to his disadvantage.

[135] Any issues as to costs, reinstatement, damages or other pecuniary remedies which arise from this judgment are to be dealt with in the absence of agreement between the parties by way of a further hearing of the Court.

[136] Counsel are invited to confer on this and apply for a fixture should that be necessary.

C M Shaw
JUDGE

Judgment signed at 11.15am on 24 November 2006

Solicitors: Shanahan & Co, for the Plaintiff
Air New Zealand Ltd, for the Defendant