

## Supreme Court of New Zealand

20 July 2009

## MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

David McAlister v Air New Zealand Limited (SC 49/2008) [2009] NZSC 78

## PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

The Supreme Court has, by majority, allowed an appeal by Mr McAlister, a senior pilot/flight instructor, who alleges that Air New Zealand Ltd has unlawfully discriminated against him in his employment on the ground of age, contrary to the Employment Relations Act 2000. At the relevant time the United States Federal Aviation Administration (FAA) had a rule prohibiting a pilot from holding the position of pilot-in-command (essential for a flight instructor) once that pilot was 60 years of age. When Mr McAlister turned 60 Air New Zealand demoted him to the position of first officer because a substantial part of his duties involved flying in United States airspace.

Overturning the Employment Court, the Court of Appeal found that there was no age discrimination. It compared Mr McAlister's position with that of other such pilots of any age who for any reason were unable to fly in United States airspace.

The majority of the Supreme Court (McGrath J dissenting) considers that the Court of Appeal applied the wrong comparator. It has said that the required comparison is simply with a similar pilot aged under 60. On that basis, there was discrimination unless Air New Zealand could take advantage of a statutory defence under s 30 of the Human Rights Act 1993 which applied if Mr McAlister's age was a genuine occupational qualification. If so, it would nevertheless be necessary, under s 35, for Air New Zealand to establish that it was, reasonably, unable to adjust its activities to accommodate the restriction placed on Mr McAlister by the FAA rule.

The majority of the Court has concluded that age was a genuine occupational qualification for Mr McAlister in terms of s 30 but it has remitted the case to the Employment Court for that Court to decide whether Air New Zealand can satisfy the requirements of s 35.

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