IN THE SUPREME COURT OF NEW ZEALAND SC 49/2008

BETWEEN **DAVID McALISTER**

Appellant

AND **AIR NEW ZEALAND LIMITED**

Respondent

Hearing:	25 and 26 March 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	R E Harrison QC with M A Lewis for the Appellant A H Waalkens QC with K M Thompson for the Respondent C Gwyn with M Coleman for the Attorney-General, Intervener S Bell with F Joychild for the Human Rights Commission, Intervener

---

CIVIL APPEAL

MR HARRISON QC:

If Your Honours please, I appear with my learned friend Ms Wilson for the appellant – Ms Lewis, for the appellant.

ELIAS CJ:

Thank you Mr Harrison, Ms Lewis.

MR WAALKENS QC:

Yes good morning Your Honours, I appear for Air New Zealand, together with Mr Thompson.

ELIAS CJ:

Thank you Mr Waalkens, Mr Thompson.

MS GWYN:

May it please the Court, I appear with Ms Coleman for the Attorney-General.

ELIAS CJ:

Thank you Ms Gwyn, Ms Coleman.

MS BELL:

May it please the Court, I appear for the Human Rights Commission with Frances Joychild.

ELIAS CJ:

Thank you Ms Bell, Ms Joychild. Yes, Mr Harrison.

MR HARRISON QC:

If Your Honours please, there are several issues for determination which can be shortly described as the comparator issue, the "by reason of"/causation issue and the genuine occupational qualification issue. The authorities tend to recognise that these issues overlap and run into one another, or may do so and at the end of the day, despite the various authorities from other jurisdictions that will be referred to, particularly by other counsel, it is my submission that this case turns on an interpretation of the relevant provisions of the Employment Relations Act, or ERA as I will call it, and the Human Rights Act, or HRA. So that the best thing for me to do I consider, is just launch in to a reasonably detailed run through the statutory provisions and we can work from the appellant's casebook, if you would, starting at tab 2 with the Human Rights Act provisions. Forgive me if this is all too familiar but we're starting off so I'll start gently.

If we go to tab 2 of my casebook page 33, you will there see the prohibited grounds of discrimination in section 21(1) and (i) is of course the age definition. Section 22 on page 36, this is the printout pagination at the bottom, deals with employment and the appellant's age discrimination grievance was brought, insofar as it relied on discrimination rather than unjustified action, under (a), 22(1)(a) and 22, sorry 22(1)(b) and 22 – no I'll start again, sorry. The ERA equivalents of section 22(1)(b) and 22(1)(c). I'll come to those provisions in a moment but the provisions on which he founded his Employment Relations Act grievance are derived from those provisions.

TIPPING J:

Mr Harrison, is there any significance in the introductory subsection (1) where an applicant is qualified for work?

MR HARRISON QC:

Yes there is but those words don't appear in the ERA provision on which he relied.

TIPPING J:

Yes, but –

MR HARRISON QC:

The reason for them is that this provision deals both with pre-employment discrimination and with discrimination when employed. That is to say, the person who comes along and says, give me a job.

TIPPING J:

Yes I appreciate that, I just – I'll say no more about it at this stage.

MR HARRISON QC:

All right. I think I do address that in my submissions. So that what we have is a scheme, I've added in the asterisks and the note at the bottom. We have a scheme where the section in the HRA from which section 104 ERA is derived,

drew a distinction. 22(1)(a) and 22(1)(d), had a relationship with section 30(1) in relation to age. Section 30(1) at page 40 says that nothing in those two subsections shall apply in relation to any position or employment where being of a particular age or a particular age group is a genuine occupational qualification whether for reasons of safety or any other reason. So the –

ELIAS CJ:

So this is a – it doesn't apply as opposed to it's an exception?

MR HARRISON QC:

Well it's – no the exception applies, that exception disapplies (a) and (d) to the extent that the exception applies, so it's an – to put it another way, as I read it, it's an exception defence to (a) and (d) of section 22(1) but not to (b) and (c).

ELIAS CJ:

Well I suppose that's its effect but it's expressed that the – that sections 22(1)(a) and (1)(b) don't apply. I'm sorry, it's your point that it's 22(1)(b) and (c) you're referring to?

MR HARRISON QC:

Well because our grievance was under section 104 it's a bit confusing for me to answer that question in those terms. The only point is that the scheme of the Act contains particular descriptions of actions which it's unlawful to do "by reason of" the prohibited ground and in respect of the four identified, only two are then made the subject of a dedicated exception in relation to age, section 30(1). So we have this position which can be summed up by saying there is no general dedicated exception relating to genuine occupational qualification in respect of age applying across the board to the four section 22(1) scenarios.

TIPPING J:

Yes but what is the difference between genuine occupational qualification and the overriding proposition of "is qualified"?

MR HARRISON QC:

The difference lies in the word “genuine” which, if we get to it, requires an examination of the qualification against some kind of appropriate – standard evaluation be it reasonableness, proportionality or something –

TIPPING J:

But surely that must be inherent in the concept of being qualified?

MR HARRISON QC:

No, I don’t accept that Sir. If that was the case, the whole scheme would be worded differently because can I just take you from section 30(1) to section 35 which is an important provision.

ELIAS CJ:

Sorry. Isn't though the quick answer that section 30(1) would not be necessary if age was a qualification within the meaning of section 22(1)?

MR HARRISON QC:

That’s the quick answer and indeed that’s in the body of my submissions but a longer way round is to look at section 35 which says that as regards all of these exceptions that the employer is not going to be entitled to accord different treatment based on a prohibited ground, even though some of the duties would fall within the exception if there were an adjustment, that’s the reasonable accommodation provision. So, you’ve got to read section 30(1) with section 35 and you end up in a far more nuanced analysis under the statutory scheme read as a whole than simply saying are you qualified, if not you’re out at the threshold enquiry of not being qualified. So those words are far more general in their application but they also, which is my earlier point, they also are not present in section 104(1) and the reason for the difference, as I explain in my submissions, is that the ERA provision is directed with two existing employees within the definition in that Act where as this provision has the scope to apply to job applicants.

So that's the scheme there and if we go to tab 1 and look at section 103(1) though that is the well known various definitions of personal grievance and you've got (c) the employee has been discriminated against in the employee's employment and there's also the usual disadvantage grievance provision which, as the submissions note, is at issue here but not in this Court.

So then section 104 deals with discrimination and it says, "an employee is discriminated against in that employee's employment and, I omit words, if the employer by reason directly or indirectly of any of the prohibited grounds for discrimination, I omit words, (a) refuses, again omitting words and summarising to offer that employee the same conditions of employment as are made available for other employees of the same or substantially similar qualifications, experience and skills. That's to be compared, whether it's a meaningful distinction or not, with the section 22(1)(b) provision which uses the expression similar capabilities rather than qualifications, experience and skills, employed in the same or substantially similar circumstances and then (b) dismisses that employee or subjects that employee to any detriment in circumstances in which other employees employed by that employer in work of that description are not or would not be dismissed or subjected to such detriment. "

So again the asterixs under (a). Section 30(1) is available. Under (b) it's not and we're in the territory as held by the Employment Court and not appealed of an employee being subjected to detriment, namely his demotion when he turned 60.

McGRATH J:

Is it fair to assume, or is it logical to assume, that the reason section 30(1) exception doesn't apply to section 104(1)(b) is that it has no equivalent in the Human Rights Act?

MR HARRISON QC:

No Sir, (1)(b) does have an equivalent, if we go to tab – the equivalent is (c) to terminate the employment of the employee or subject the employee to any detriment.

McGRATH J:

Thank you.

MR HARRISON QC:

For some reason one provision will no doubt dismiss or is used because it's used consistently in the ERA but I don't see a distinction between dismissing and terminatiing employment but again there's the detriment. So – but the pattern is there because both the (c) of 22(1) and (b) of 104(1), section 30(1) is not applicable.

TIPPING J:

Is it possible to see any logical distinction between the vice, if you like, in (a) and (c) where 30(1) is available, and the vice in (b) where it's not?

MR HARRISON QC:

I have pondered and pondered that question. One answer is for better or for worse it simply perpetuates a distinction in the HRA provision so you have to ask the same question of the HRA provision but – and perhaps that's the best way to approach it because –

TIPPING J:

In that provision we've got two that are in and two that are out?

MR HARRISON QC:

Yes and the first one that's in seems to be a pre-employment discrimination where there is no vested interest that's refused to – or omit to employ and it might be thought that the case for an exception is stronger at that stage than where you – paradigm case you fire an existing employee and the reason –

TIPPING J:

What's the difference between terminating the employment of the employee or retiring the employee? It seems to have the same effect.

MR HARRISON QC:

I knew someone would ask me that and again it's a question that I've pondered. It seems to me that it's probably, (d) is probably out of an abundance of caution dealing with the situation where there is a provision in an employment agreement that automatically terminates on a certain age. You've got this line of authority that – fixed term contracts, for example, where there's a Court of Appeal case that said that the automatic termination of a contract by effluxion of time is not a dismissal.

BLANCHARD J:

It's not a retirement either.

MR HARRISON QC:

But if –

BLANCHARD J:

It might apply to somebody who's considerably less than retirement age.

MR HARRISON QC:

Quite, I accept that, but if your automatic termination provision is described as a compulsory retirement, that is to say, under this contract, every employee must retire at age 60, leaving aside the question of whether that provision is itself unlawful, that could be described as a retirement of the employee. I agree, if you simply say, if you've got no contractual backing and you say your employment is terminated, which is what was threatened in the case of the appellant, then you're under (c) if you implement that, I mean (c) of 22(1), whereas –

TIPPING J:

I mean, (d) is really very peculiar, what's the difference between to retire the employee or cause the employee to retire?

MR HARRISON QC:

Well I mean I suppose you could get a situation where one way or another, there's pressure put on the employee by the employer, it's time to stand down, it's time for a younger man to take your place, you've been very –

BLANCHARD J:

Surely that's a termination or a dismissal?

MR HARRISON QC:

Well I'm not here to justify the presence of (d).

BLANCHARD J:

No, I appreciate that Mr Harrison, but we've got to try and make some sense of what appears to be botched drafting.

MR HARRISON QC:

Well I have given you an example of what I contend would be, if you treat (c) as requiring an action of the employer by way of termination of the employment, that is to say, "you're dismissed" or "you're dismissed on notice", then that covers (c). If, on the other hand, you have a contractual provision that triggers retirement when an age is reached, then there's some explanation for the presence of (d) and really I can't take it further than that. They saw contractual or enforced "retirement" as something that needed to be dealt with, and again, if we go back to this issue of the bona fide occupational qualification and my argument, I don't want to jump too far ahead, but my argument is that in many instances, you won't have a genuine occupational qualification unless the contract spells out the qualification and if the contract does not, but the employer ends it, you're more in (c) termination. If the contract spells out the qualification and ties that into a form of retirement because you cease to meet the qualification, you may be more in (d) territory

because then 30(1) bites and you have to ask whether the retirement, pursuant to an occupational qualification, involved a genuine occupational qualification, and if need be, you go on to ask whether, in turn, that could have been reasonably accommodated.

TIPPING J:

Is that – is the possible clue then, deriving from that, that (d) has a more consensual connotation whereas (c) is a more non-consensual? In other words, if it's in the contract that you have to retire then it's consensual, but you're not allowed to contract, are you, so as to bind yourself to a prohibited ground of termination or retirement?

MR HARRISON QC:

Well if we take this case, if the contract with Captain McAlister had said, it is a qualification of your employment that you are able to operate as pilot in command at all times and at whatever age and if you cease to be so qualified you must retire, an express contractual qualification, occupational qualification, let's assume that it is, if that had been in the contract, and it wasn't, then you might well say that that is not itself a provision that offends at the threshold. It's there in the contract and it has to be dealt with by an analysis in terms of 22(1)(d) coupled with 30(1) if need be, coupled with 35, and that would be the kind of scenario that would operate where you had an express contractual provision to that effect.

ELIAS CJ:

Can I take you back to – this is probably much too simplistic, but I'm still not sure why one does have to bother with section 22 of the Human Rights Act, except for some sort of taxonomy perhaps of section 104 of the ERA because section 106 doesn't invoke section 22 of the Human Rights Act at all, it simply directs you to read the whole of section 104 as subject to the following provisions and clearly that means one has to read it purposively which doesn't, I would have thought, necessarily entail looking at the particular provisions of section 22 and the classifications which, for the purposes of that Act the legislature has adopted. I mean, it could be a powerful argument the

other way but just looking at it internally to the ERA, why would you give away the argument that section 106 simply requires you to look at the substance of what's in section 30 and apply it to the whole of section 104? Because then we don't get into these peculiar matters. In other words, you'd be reading section 30 as saying there is no discrimination, there's no relevant discrimination in relation to any position or employment where being of a particular age is a genuine occupational qualification.

MR HARRISON QC:

There's a direct reason for, against that and I'll come to it in just a moment, but can I just say, I was dealing with section 22 because I was asked questions about the reason for the gap which is that section 30 (1) doesn't apply to 104.

ELIAS CJ:

I'm querying whether there's a gap.

MR HARRISON QC:

Yes, you're questioning that, well the reason why 106(1) doesn't provide the whole answer that otherwise would make perfect sense, is 106(2)(b).

ELIAS CJ:

Oh yes, I hadn't got to there.

MR HARRISON QC:

Which deals with –

ELIAS CJ:

Ah, yes I'm sorry, I'd forgotten, yes those were in your submissions.

MR HARRISON QC:

Yes, and it's summarised – it's a bit difficult to get your head around, but the Court of Appeal did get it right and they summarised the exercise that's needed in their judgment, I can refer Your Honours to the paragraph now but

it's in the submissions and the effect of it is as I have shown at page 133 where I annotated section 104(1). So we do have to grapple with this –

ELIAS CJ:

Yes, yes, thank you.

McGRATH J:

What was the paragraph of your submission that addresses this?

ELIAS CJ:

I didn't have the Act in front of me as I was reading the submissions. Maybe it's just the Court of Appeal decision that spells that out.

MR HARRISON QC:

I'll come back to it. I thought it was earlier on.

McGRATH J:

Come back to it later if that's easier.

MR HARRISON QC:

Yes. Anyway, looking at these provisions, so we've got the immediate scheme of the HRA and of the ERA. One can also note looking at section 106 that it does not import section 65 of the HRA and I'm afraid you don't have that in front of you but section 65 is the indirect discrimination provision in the Human Rights Act and that states that where you've got a conduct practice, requirement or condition not apparently in contravention of any provision, this is difficult as well, has the effect of treating a person or a group of persons differently on one or more of the preferred grounds of discrimination. In a situation where such treatment would be unlawful under any provision of this part other than this section that conduct et cetera shall be unlawful unless the person establishes good reason for it.

So that provision is not imported into the ERA –

BLANCHARD J:

Presumably though that's because section 104(1) has the words towards the beginning "by reason directly or indirectly"?

MR HARRISON QC:

Yes. This issue is relevant to the Crown intervention which comes late into the piece that "by way reason of" doesn't import a test of causation but some other form of enquiry, the nature of which is not clear to me –

ELIAS CJ:

But it's really based on Justice Gaudron's analysis, isn't it?

MR HARRISON QC:

Well I see it as completely different but I'll address that on its merits later but can I just say that the words in the Employment Contracts Act were "by reason of" and in a full Employment Court decision, it was prior to the ERA, it was held that those words covered both direct and indirect discrimination and the received understanding is that when the ERA was enacted the words directly or indirectly were inserted to make that plain to confirm the previous interpretation and put it beyond doubt and that in, in coming back to Your Honour, yes. So it's covered by those words but historically it's come about in a kind of convoluted way.

So that's the immediate provisions. I also deal in the submissions with the wider context of the HRA provisions because I submit that the structure of the HRA where – let me put it another way. Many of the issues such as the comparison question although determined in a case under the ERA, are almost bound to be applicable under the HRA. If you adopt the Court of Appeal's comparative approach, given the similarities in wording between section 104 and section 22, it's impossible to conclude that it wouldn't carry across, so that it is instructive to look at the broader scheme of the HRA and I've done that in my submissions from paragraph 29 on and I've gone through a series of provisions and just looking at how some have a quite detailed form of comparison spelled out.

Some have a more open ended comparison but it's a comparison that's required nonetheless and some appear at least on first reading, to involve no comparison whatsoever but simply the causal, I still call it a causal, enquiry "by reason of". So that's the scheme but you'll see, if you go through the HRA, that each time there is a provision, let's say it deals with provision of goods and services, there will be other balancing provisions by way of an exception based on reasonable accommodation of costs, feasibility and so on. So the point I make about all that is at para 35 of my submissions where I say there are two – if you look at all this, there are two things that are particularly noteworthy and critical.

First, that none of the provisions in the HRA talks of discrimination as such other than in the section headings. It's not a requirement of, nor indeed permitted, by these provisions I submit that the Court goes ahead and formulates it's own concept of discrimination as has to occur under section 19 of the Bill of Rights and the equivalent section 15 of the Canadian Charter. That's why, jumping ahead to what I will say later, the Crown's submissions that rely so heavily on these general provisions are beside the point. There is no one beautiful theory of comparator groups, in my submission.

So that's the point. These provisions, back to para 35, these provisions don't stipulate for discrimination as a component element. Their pattern is to identify particular actions which are taken "by reason of" a prohibited ground or we regard as unlawful unless some express exception or defence can be made out. Secondly, each of the various forms of activity dealt with in part 2 has its own dedicated exceptions whether by way of potential exclusion from what would otherwise be the scope of the activity, narrowing down activity, or in relation to the particular grounds of discrimination. If we look through those provisions, age and disability are most frequently addressed by dedicated exceptions. So I submit then broadly within this framework, this is para 36, each provision has an intended role to play in the scheme of things and when you've got a threshold provision such as 22, section 22, you don't use that as I call it, an all purpose gatekeeper. It doesn't strangle discrimination claims at birth by way of a rigorous comparator group and analysis because as I say,

looking at the legislation as a whole, there's a recognition that particular scenarios and particular grounds of discrimination require a more nuanced approach, that's what the exception is doing.

TIPPING J:

Is there anything that you're aware of Mr Harrison that, and this may be a completely wayward thought so don't hesitate to say so, that distinguishes between what one might call age per se, and the consequences of age? In other words, "by reason of", I'm just toying with the thought that by reason of age, might just mean because the simple fact of turning a certain age, whereas if that simple fact is accompanied by genuine consequences for the employer, then it couldn't be said that it's by reason of age, it's by reason of the consequences of age.

MR HARRISON QC:

Well this – in a sense, your question is directly addressing the concept of "by reason of" rather than the issue of the comparator group analysis but we have to acknowledge that the questions overlap and it may, in a particular case be chicken or egg and the concern that underlies your question can be dealt with in the context of a comparator group analysis and that's what the Court of Appeal did and what we objected to. They, in effect, say we're not going to treat age as, this man's age as unencumbered by what the employer claims was the consequences of its age for his operation, of his age for its operation, and that's done at the comparator group stage, but of course they also double round and say, if we're wrong on that, it is dealt with by causal analysis and that's an issue again on which judicial approaches have differed somewhat. In New Zealand, we have adopted, and I'll come to this, we have adopted the view that the "by reason of" test is a straightforward factual enquiry and it looks at the true reason, or if more than one reason was operative, to see if one of the two or more reasons was a prohibited ground.

TIPPING J:

But surely "by reason of" is no more than asking why the employer took this action? Is it anymore subtle than that?

MR HARRISON QC:

It may well not be, but you – what is, the subtlety arises when you try and apply that to facts and to cases where there may be more than one concern operating or more than one thing operating.

TIPPING J:

But surely in this case, it wasn't because he had turned 60 per se that motivated them, it was because he'd turned 60 and the consequence of that was that he couldn't fly into America.

MR HARRISON QC:

I don't accept that and what's more, I don't want to jump too far ahead because we have factual findings. In fact, I'm going to come to the evidence right now, it was the next thing I was going to do. We have factual findings based on the evidence and unless the Employment Court Judge misdirected herself in law as to the test she applied, there's an unappealable factual conclusion that age was a substantial reason for the action.

TIPPING J:

Well, yes all right, well –

ELIAS CJ:

You can't really say that that's a factual conclusion.

TIPPING J:

It's certainly not primary fact.

MR HARRISON QC:

In my submission, yes it is, yes.

ELIAS CJ:

Well, you mean it's a subjective intent that she's –

MR HARRISON QC:

Well no, well she just asked herself the question, "What was the reason for the action taken?" and said that age was the triggering reason, the difficulties for the respondent's operation did not prevent age being the triggering reason for the action taken.

ELIAS CJ:

Well that's the question of law here, isn't it?

MR HARRISON QC:

No, it's a –

ELIAS CJ:

Well because it's how you characterise it, whether you characterise it as a qualification or whether you characterise it as a motive in itself.

MR HARRISON QC:

My approach is to ask whether – what is the test of causation or what is the test for "by reason of", be it causation or whatever, what is the test, did the Judge correctly direct herself as to that test? She in fact applied two tests, belt and braces. If she correctly directed herself then if she reached the conclusion which she did, it's unappealable fact and I'm not going to, with respect, I'm not likely to be budged from that argument, but I also submit that the – I will be arguing that the analysis that relegates age to the background is wrong in terms of the statute anyway.

TIPPING J:

Was there any evidence that they would have done this to him at age 60 if he had still been able to fly into America? That might get you somewhere but I don't understand that to be the case.

MR HARRISON QC:

It's quite simple, they had – I'd like to come to the chapter in verse. They had a policy that said on reaching age 60, you have to opt to be demoted to a

lesser position or we'll dismiss you, that was their age 60 policy. It's a policy which is triggered by reaching a certain age. If you – and they then slightly varied it and involuntarily demoted him anyway rather than dismissing him outright, but in the most simplistic of terms, if you have a policy that addresses age 60 and you apply it to someone's detriment, you've done so by reason, directly or indirectly, of age.

BLANCHARD J:

Did they have such a policy for pilots who weren't flying to the United States, as pilot in command?

MR HARRISON QC:

No, the policy only relates to the international fleet. It doesn't relate to the domestic.

BLANCHARD J:

So it's clearly related to the United States' requirement?

MR HARRISON QC:

That, and any other jurisdictions that applied the age 60 rule.

BLANCHARD J:

Yes.

McGRATH J:

What about planes that were both international and national?

MR HARRISON QC:

I think you find that those are crewed by – separately by international fleet pilots and domestic fleet pilots, even if it's a plane that's used on domestic and international routes. Can I take us to the policy? There's – the policy itself is at volume 2 of the case at page 263, it's –

BLANCHARD J:

Was this policy part of the employment contract in any way?

MR HARRISON QC:

No. No, it seems to have taken the respondent an interminable time to get its house in order. If you look at the New Zealand, earlier New Zealand cases, *Smith* and another one there, analysed in a schedule to my submissions, it's really only in a collective employment agreement which came into being about the time that these events arose which is not before the Court I don't think, in which the issue was addressed as a matter of contract. That subsequent collective agreement was not one which applied to the appellant. By the time he was demoted. He was under an individual employment agreement, based on an expired collective so that this company policy which went through a number of variations and was never the subject of consultation with the appellant, was said to be what applied at the time of his demotion. So it's headed company policy for pilots attaining age 60 and then it sets out what's happened, advised what –

TIPPING J:

Isn't that crucial –

MR HARRISON QC:

Pardon?

TIPPING J:

Background to policy is crucial surely? One can't look at the policy without the reasons why it was introduced?

BLANCHARD J:

And particularly paragraph 2 of the background of the policy which indicates that if the position under ICAO and FAA regulations changes, the policy will be updated.

MR HARRISON QC:

The background to the policy is the age 60 rule and its implications. I don't –

TIPPING J:

There's no secret about that.

MR HARRISON QC:

There's no secret about that. But what it says is, it goes on to say –

TIPPING J:

Isn't it plain Mr Harrison, whatever you make of this as a matter of law, this policy demonstrates that it was not age per se, but the consequences of age? And I say deliberately whatever you make of that as a matter of law.

MR HARRISON QC:

What the policy shows is that age was regarded by the company as triggering certain consequences for all pilots who had a pilot in command role.

TIPPING J:

And you could bid, couldn't you, as I recall? You could bid for other positions –

MR HARRISON QC:

Yes.

TIPPING J:

– which wouldn't but if you missed out then that had certain consequences?

MR HARRISON QC:

But, but the appellant's point is this, and it comes through in the correspondence which I'd like to take Your Honours too. He says, I was a flight instructor. Flight instructors have a mixture of duties, what's known as line flying which is what ordinary pilots do, who don't have a training or checking role. Line flying is only one component of my work, about

60 percent I think, is common ground from memory. I also have a training/checking role in the air and I also have a ground training role in flight simulators and the like. So when the company says, these are the consequences of the age 60 rule and states that in its policy, he says, one, I don't accept those are the consequences even for an ordinary pilot, you've overstated it. Two, in any event this policy does not address my situation as a flight instructor. So he says, and always said, I can be reasonably accommodated. You can, and it's all set out, the judgment I can take you, the Employment Court Judge, you can do this, this and this. You can roster me and that is a reasonable accommodation. It's not as easy as demoting me but it's possible and in human rights anti-discrimination law terms, that is your obligation.

BLANCHARD J:

Is that an argument under section 35?

MR HARRISON QC:

Well it would be if section 35 were reached but instead, and this is about the comparator analysis and about the "by reason of", instead what the Court of Appeal said is, we're going to formulate a comparator group that means you never get to that point because we're going to compare you with a non-existent group of pilots who the company would treat the same way, so we never get to the more nuanced approach.

WILSON J:

Mr Harrison, to take up a hypothetical raised by the respondent in its submissions, if obviously hypothetically at the relevant time the Australian authorities also had this so called rule of 60 and as a consequence the appellant were not able to fly as pilot in command on any route operated by a 747, on that hypothesis would it have been unlawful to demote the appellant to first officer?

MR HARRISON QC:

Well, I think it's such an extreme hypothetical that the Court shouldn't be troubled about it.

WILSON J:

I think it does illustrate the point.

MR HARRISON QC:

But the answer maybe that under 104(1)(b) there's still a detriment with the demotion and no section 30 (1) exception applies. Now, if that is the case then there maybe a flaw in the legislation but it's not a reason to create a test, a comparator group test, which rules out all manner of other claims, including perfectly legitimate claims, at the threshold.

WILSON J:

Well it would seem surprising wouldn't it if the respondent were required to continue to employ the appellant as a 747 captain even though he was not able to fly as a pilot in command on any 747 route?

MR HARRISON QC:

Well, there are a number of responses to that. If this employer had got its act together, given that the age discrimination law came into force long, long ago, it would have had its pilots on contracts that addressed this issue. It did eventually do so and the problems are now being dealt with in a quite different way. But as it happens it has Captain McAlister on an individual contract, the contract does not say at any point, it's not been argued that it says, that contractually you must be able to fly to X percentage of destinations as a pilot in command. Now that's the obvious thing for an employer to do to safeguard its position and if there is such a contract then the analysis is different.

So we're dealing with this man and the other – it's important to note that his starting point, I want to take you to this correspondence, his starting point was not, I don't care what I can't do, I'm here and you can't demote me. His

starting point was, I can still be a flight instructor because flight instructor's positions are unique in the characteristics they've got. You can reasonably accommodate me and the Employment Court held he was right. Now characterising his situation in that way you ask yourself well, if there are some anomalies or gaps in the legislation ought they to be resolved by throwing his baby out with the whole of the bathwater, just because there could be more extreme hard cases on a hypothetical scenario and my submission is no.

Perhaps while I'm on this, if we just go back to the inter-relationship between section 104(1) and section 30(1) that's naturally been troubling all of us. And I mean basically if an asterisk appeared alongside (b), a lot of the problems in this case would disappear. People wouldn't be trying, as the Court of Appeal did, straining to import a de facto section 30(1) defence, at an earlier stage of the analysis it seems to me. So if that is the situation, and if I'm right in an argument I'm yet to come to, and I do want to develop, that each of these provisions, (a) to (b), is quite explicit in identifying its own comparator group, I want to develop that argument, but if they actually do identify their own particular comparator group, then the only reason you would do violence to the language that identifies the comparator group, would be to remedy a manifest absurdity in the statute on standard principles. To put it another way, the statute is quite explicit that 30(1) applies to (a) and not to (b), right? So when the Court of Appeal says we will effectively apply section 30(1) to (b) by defining comparator group as addressing genuine occupational qualification, that's what they do, they are doing violence to the statutory language. What I'm submitting is, you would only do that if you needed to, to avoid an absurdity. I'm not saying do it, I'm saying you would only contemplate doing it for that purpose. Therefore, you would only contemplate doing it when addressing the comparator group issue under (b).

TIPPING J:

I have to say I get close to thinking it's an absurdity. Unless someone can rationally justify.

ELIAS CJ:

Mr Harrison, can I take you to section 104, and I'm sorry because I should have looked more closely at it before coming in and it may be that the answer is in the submissions, but I was ruminating on your interesting submission that the section isn't really about discrimination it's about activity that is prohibited and so reading it in that light, and it seems to me that section 104(1)(a) that it's only (c) where you get directly to a direct discrimination that 104(1)(a) may be arguably answered in this case by the policy which applies to everybody as is the case with 104(b), (c) isn't. If they moved to retire that employee, then of course section 30 would apply and they could only do it if there was a qualification, if age was a qualification and that would have to be read subject to section 35. In other words, I really wonder whether section 104 doesn't have to be read as a whole in its own terms?

MR HARRISON QC:

It's – that's certainly as the starting point, but if we're going to interpret it contextually I think we need to look at the scheme, the broader scheme of the Human Rights Act as well.

ELIAS CJ:

Yes I don't doubt that, but it's – I'm really wondering whether it's as complicated as is being suggested, because (a) and (b) and you can see why (b) doesn't have section 30 in it, section 30 wouldn't apply because it's not about a qualification there, that's simply about the circumstances in which other employees wouldn't be dismissed, whereas (a) does have to have it because that's about qualification, but I would have thought that if it's read like this then the defence really for Air New Zealand to (a) and (b) is the policy evenly applied, but they may not retire the employee unless age is properly regarded as a qualification and even then, it has to be a reasonable qualification under section 35.

MR HARRISON QC:

Well I don't quite, with respect, understand an approach that differentiates between (a) and (c) when section 30 (1) applies to both of those. The difficulty with lumping (a) and (b) together is that the absence of 30(1) in the one case and not in the other and it is plain that a different comparison is involved under (a) and (b). Coming back to my submission that had the comment from Your Honour Justice Tipping that you said is close to an absurdity, I don't concede that, but should that point be reached, the solution, the judicial response is not to say we're going to apply the same comparator group to both (a) and (b), being the one that sweeps all before it and brings in the occupational qualification within the comparator. The response would be, I don't need to do that in respect of (a), because (a) is balanced by 30(1) and if he qualifies within (a) then he's routed to 30 (1) and possibly then the employer has to deal with section 35, reasonable accommodation. But (b), where Your Honour Justice Tipping, for example, to say it's absurd to apply that to this scenario without allowing for a reasonable accommodation enquiry, then you would formulate a comparator that allowed the surrounding circumstances to operate on both sides of the comparison.

TIPPING J:

The key distinction I can see between (a) and (b) on the one hand and (c) on the other but this doesn't, I think, assist the cause because (a) and (b) are treated differently, is that (a) and (b) involve directly a comparator, (c) doesn't.

MR HARRISON QC:

Yes.

ELIAS CJ:

But the reason for that is that (a) and (b), it seems to me, are dealing with different application to the same class of employees or application in the same circumstances, whereas (c) is a total prohibition on using age, say in this case, to retire the employee unless you come within the exception, in section 30 as qualified by 35.

TIPPING J:

But the difficulty I see is that the, I can't see any logical difference between (a) and (b).

ELIAS CJ:

One's about qualifications, experience and skills and the other is about the circumstances in which you are dismissed. So if age is not a qualification here, nevertheless it may be that the employee is being dismissed in the circumstances where he can't fly to the United States. It's just a wider – it's the application rather than the qualification for the job.

TIPPING J:

Well it says in circumstances in which other employees, I don't think naturally –

ELIAS CJ:

Would not be dismissed.

TIPPING J:

But that doesn't mean, other employees who reach the same age will be treated similarly but not all employees, so there is a distinction on the ground of age. You won't get this treatment unless you reach 60. I'm being the devil's advocate. You don't get this treatment of being subject to the policy until you reach 60 so it's a question of what's meant by other employees. There is a comparator, I suppose there's a hidden comparator there?

ELIAS CJ:

There's a direct comparator.

MR HARRISON QC:

Yes.

ELIAS CJ:

If the policy – and you take the policy in one hand, does it apply to all employees in this category? Now either age is a qualification and I think myself there are strong arguments against it being a qualification, textual indications, in which it's under (a) but or the circumstances are such that because you can't fly to the United States the policy is that you suffer the detriment. It's a wider – it's less a classification of qualification than just the fact that the circumstances impact upon the employment policy.

MR HARRISON QC:

Yes. The difficulty is that, that the differentiation between the provisions to which section 30 (1) applies and does not apply, may originally have made more sense under section 22 than under 104(1) because of section 22's intended operation in respect of pre-employment applicants.

ELIAS CJ:

Yes.

MR HARRISON QC:

And it may have been a kind of qualitative approach that's said, at the beginning of your employment and at the end when you're applying and when you're retiring, we are going to temper the approach by allowing the employer to rely on this exception about genuine occupational qualifications, but if you dismiss then that's going too far and if you dismiss "by reason of", that's discrimination and we – because you are an existing employee, it ought to have been sorted out at the beginning contractually and if it hasn't been and you do this in circumstances in which other employees would not be dismissed, that's it. But then of course the provision goes on to talk about subjecting to detriment and back to 104, that's the point at which the overlap with (a) arises.

You've got – because subjecting to detriment and in respect of an existing employee under (a) offering less advantageous terms on an ongoing basis, can overlap, and we say in this case does, because (a), he was demoted

which was a one off act of detriment but (b), on an ongoing basis he was offered the terms that flowed from his demotion, thus (a) and (b) were both available to him as a plaintiff and relied on. Whereas the distinction which omits 30 (1) in the one case and has it available in the other, made sense under the Human Rights Act, it makes less sense here. But, and this is coming back to the absurdity interpretation, because I'm not conceding that it is absurd, it's simply the effect of the statutory language in my submission with the greatest respect, it has to be given effect. If you do violence to the language in the interests of avoiding an absurdity, there's a spillover effect for the Human Rights Act provisions which may well be unsustainable.

TIPPING J:

Well it might not be absurd in that context or at least in some of that context but, yes. I understand you, it's a very extreme step to take, not to apply a clear – a prescription that it applies to one and not the other.

ELIAS CJ:

I'd just like to flag, and I'll leave it, that I'm not satisfied that section 104 doesn't make total sense and that the policy is an answer under (a) and (b). It's an answer under (a) if age is treated as a qualification. It's an answer at (b) if it's not a qualification but the circumstances, until the US changes its policy, which is effectively what the policy is, makes it an answer under (b) and you haven't reached (c).

MR HARRISON QC:

I'm not quite sure what the downstream implications of that interpretation are –

ELIAS CJ:

That's all right. I'm just flagging it and you can move on.

MR HARRISON QC:

Yes.

ELIAS CJ:

I'm sorry to have held you up on that.

McGRATH J:

Mr Harrison, just before we leave this focus. If we decide there is a gap in relation to (b) and we're looking to fill it as Parliament must have intended, do you have any particular suggestion and I appreciate we're very much now in a, you are in a reluctant position (b) in relation to your primary argument but do you have any position on your alternative argument as to words we might read in, perhaps qualifying the final words of 104(1)(b), to bring in the reasonable accommodation enquiry?

MR HARRISON QC:

Well, can I perhaps come back to that? I was going to, if I may –

BLANCHARD J:

Well it may be that (b) doesn't have anything to do with the situation which revolves around having a qualification and that it's talking about other forms of detriment.

ELIAS CJ:

Yes.

BLANCHARD J:

Otherwise, well put it this way, that's not going to do any substantial harm because you've still got to get through (a) on qualification and (a) is subject to section 35.

MR HARRISON QC:

Substantial harm, what? To my client's case?

BLANCHARD J:

Yes.

MR HARRISON QC:

Well the problem with that is that detriment is inclusively defined in subsection (2) of 104 and –

BLANCHARD J:

Yes but you're only reading out of it something that you might otherwise call a detriment which is arising because of a lack of a qualification.

MR HARRISON QC:

Well in other words –

BLANCHARD J:

So it's pretty confined and it doesn't involve an unfortunate comparator.

MR HARRISON QC:

Another way of putting that is to – maybe to argue that (a), (b) and (c) occupy different and not overlapping territory.

BLANCHARD J:

Yes.

ELIAS CJ:

Well it does on my analysis.

MR HARRISON QC:

That's Your Honour's –

ELIAS CJ:

It doesn't overlap.

MR HARRISON QC:

In which case you treat him as – the problem with that is that if you then say –

ELIAS CJ:

You don't have detriment –

MR HARRISON QC:

– the detriment – I find it difficult to see how his demotion could possibly be regarded as anything other than a detriment given that definition.

ELIAS CJ:

No but the gravamen is not the detriment. The gravamen is that it's a detriment that applies to everybody and (a) and (b) are about equality of treatment. It's only (c) that is a prohibition unless you can come within 30 as modified by 35. That maybe the legislative judgment.

MR HARRISON QC:

Yes. I'm not resiling from my primary arguments but obviously an interpretation that left us with a live claim under (a) is better than an interpretation that leaves us with no claim which seems to be –

BLANCHARD J:

If we're dealing with absurdity that seems to me the best route to go.

MR HARRISON QC:

Yes I –

BLANCHARD J:

And we are dealing with absurdity.

MR HARRISON QC:

Well the –

BLANCHARD J:

Subject to section 30 and section 35.

MR HARRISON QC:

Yes well jumping around a little bit the *Malcolm* decision in the House of Lords which adopted a chop it off at the threshold approach to comparator group analysis, caused something of an adverse reaction. The result is that they're now moving to an anti-discrimination law which has a general justification defence, so that whatever action is prima facie prohibited may be justified and a reasonable accommodation enquiry as part of that. If we're designing a perfect system, that may be a better way to go. This Court can't design a perfect system but equally, I'm arguing most strenuously, should not leave us in a position where a flight instructor is – has applied to him a policy which is designed for all pilots in a situation where he says he could be reasonably accommodated.

BLANCHARD J:

Well that you would argue under section 35?

MR HARRISON QC:

I would but of course we've got to get to first base on the by reason of age, and we've got to get to first base on the comparator group analysis to do that.

WILSON J:

Isn't this really an accommodation case, the appellant says that a status could have been maintained on reaching the age of 60 with certain adjustments, the respondent says it could not be?

MR HARRISON QC:

Well yes, it started off that way. I mean, we were trying to be reasonable, we were trying to say, and this is what we did say, yes you've got a policy but it's not designed for me, I'm a flight instructor and I'm not a 100 percent line flyer so you don't have to worry, you can roster me and that's what the correspondence did. So yes, that's right, but when of course when the chips were down and we pleaded our claim, we used the language that was there and it's not a question of sympathy of course, but at the end of the day, we have an employer who could have reasonably accommodated this man, said

it was too expensive and even when the age 60 rule went back up to age 65, still did not respond in the interim.

BLANCHARD J:

Mr Harrison, just remind me, did the Employment Court make any factual findings about accommodation?

MR HARRISON QC:

Yes, it did, this is dealt with in paragraph 74 of my submissions so that gives the chapter and verse and then set out is the quote from the Employment Court judgment.

BLANCHARD J:

So there isn't a final determination on that, this question of accommodation in the Employment Court as yet?

MR HARRISON QC:

That's right, and it's because of the point mentioned in para 75 of the submissions, Judge Shaw dealing with the disadvantage grievance went on to say there can be no defensive of justification so you couldn't say – if she wrongly relied on discrimination you couldn't say that her disadvantage grievance finding was solely based on reasonable accommodation, it had to be looked at again.

BLANCHARD J:

So on accommodation, if the matter's going to turn on that at the end of the day in this Court, the case would have to be remitted.

MR HARRISON QC:

It would have to be remitted for the reasons set out in para 75.

BLANCHARD J:

Thank you.

MR HARRISON QC:

Right, now because of the understandable intense focus on 104(1)(a) and (b), I think I would like to go to my detailed analysis at page 22. I'm going to be dealing with things out of order, but it's best to bring us right to this point because of the debate we've been having.

ELIAS CJ:

Where are you going to?

MR HARRISON QC:

Page 22, para 77, my submissions.

ELIAS CJ:

Yes, thank you.

MR HARRISON QC:

I say there at 77 that it's implicit in the comparison under (a) or (b), the complainant in fact possessed the characteristics of the prohibited ground relied on, that's to say be of the age, if it's age, although I footnoted a case where that proposition was not correct, if you direct homophobic taunting at an employee who's heterosexual, you can still be harassing him on the grounds of sexual orientation.

So in my submission therefore, at 78, the other, it's obvious, the other employees to be compared with the complainant must lack the prohibited ground relied on, but it's, the problem is when the prohibited ground has associated personal characteristics or features which impact on or are perceived rightly or wrongly to impact on the business operation in question and a particular disability may have an associated characteristic or feature, of inability to access particular premises or to perform a particular task or job function, and my submission broadly in terms of the comparator group analysis, and this is where we're at odds with the Crown and the respondent, is it must be wrong to attribute characteristics or features associated with the prohibited ground at issue to the intended comparator group, because if you

do that, you exclude completely without considering things such as reasonable accommodation, employer practices which directly or indirectly discriminate. I know examples don't always work, but I was trying to think of an example in another field of the Court of Appeal's comparator group approach and I've thought of the situation of a New Zealand Post employee.

If we assume that New Zealand Post has productivity standards for its posties, let's say there's a minimum average time for each delivery run, you've got to get through your run in three hours and that's on average you've got to do that, and suppose a postie suffers a leg injury and is permanently slower on her round, still gets the job done because they've only got one round to do but they're always slower and assume after appropriate warnings and counselling and so on the postie is dismissed for failure to achieve the minimum average times. Now, you immediately, when you look at that possibility, you've immediately got to go to section 29(1) of the Human Rights Act, which is at my materials, tab 2, page 40 of the pagination. So you've got further exceptions in relation to disability, "Nothing in section 22 of this Act shall prevent different treatment based on disability where the position…" I won't read it all but there's two accommodation type standards and also subsection (2) is relevant.

So you've got a dedicated exception for disability. Now, but what happens on the Court of Appeal's approach is, who's the correct comparator for the postie with a limp? On the Court of Appeal's approach, it's not a postie with no disability, but a postie without – who is slow moving for other reasons, for example, lazy or apathetic, who regularly just saunters around far too slowly but doesn't have a disability. And so the Court of Appeal reasoning goes, if New Zealand Post would also dismiss the lazy postie, the claim by the disabled person never gets to first base. It never makes it through the 104 or section 22 window of comparison and we never get to apply the balancing approach of section 29(1) coupled possibly with section 35(1) and that must be wrong, in my submission.

WILSON J:

Mr Harrison, it seemed to me, undertaking that same exercise in thinking of examples, that to take, again, a clearly hypothetical involving the respondent. If the respondent had a rule that guide dogs were not permitted to accompany blind passengers in the cabin, it would seem surprising if the respondent could defeat a discrimination claim by saying, well, other passengers aren't allowed to have their dogs in the cabin.

MR HARRISON QC:

Yes, that's an example given in the English case law with dog and restaurant rule.

WILSON J:

It is, I'm just thinking of it in the context of the respondent.

MR HARRISON QC:

The point is, you can't just take the ground in isolation.

TIPPING J:

The most natural comparator, I would have thought, was someone who lacked the feature of the complainant, is simply isn't of this age or is an ordinary postie, if you like. Is that too simple?

MR HARRISON QC:

No, it's not too simple, it's my argument for the correct comparator and in my submission, can I – sorry, I'll come back to that. My correct comparator has always been, that is set out in paragraph 82, page 24 of my submissions. The argument there is when an existing employee reaches an employer designated maximum age, detrimental consequences follow, the most natural comparison is between before and after, even though strictly that involves comparing the complainant employee with the same employee, but you can do the same thing by comparing the complainant employee once the set age is reached, with other employees who are both under the set age and similarly

situated to the complainant employee before he or she reached the set age, and that's the natural comparison, in my submission.

That leads to another point that comes through in the submissions I hope, which is that each ground of discrimination gives rise to its own particular comparison or comparator issues. We've seen with disability how disability becomes totally unworkable if you compare to an employee without a disability but with the same practical handicap, you can't possibly rule out disability claims at the threshold on that sort of analysis and similarly with age, as I say in the submissions, the distinctive thing about age is that every age is reached, and if you like –

BLANCHARD J:

If you're lucky.

TIPPING J:

Depends what age you're talking about.

MR HARRISON QC:

No, what I mean is, we won't all end up with a disability but whatever age is picked for whatever purpose, employment related or benefit related, it's always going to be reached and if you compare, your natural comparison is the one I've identified in my submission. So that's what I'm saying at page 23, paragraph 82 – sorry, 81. And over the page, and as I say at 83, the question is whether either 104(1)(a) or 104(b) requires some more elaborate exercise in comparison than that straightforward one, which was the comparison which the Employment Court Judge adopted. And just while I'm dealing with this, I'll have to go back to – are we breaking at some stage, Your Honours?

ELIAS CJ:

Yes, it's so interesting Mr Harrison.

MR HARRISON QC:

I'm pleased to hear.

ELIAS CJ:

Well it is. Thank you.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.55 AM

MR HARRISON QC:

Yes if Your Honours please, I was aiming to get to the part of my submissions which focuses directly on the wording of 104(1)(a) and (b) and we're just en route to that at page 24 of the submissions. I've dealt with the natural comparison and at 84, I make the point over to page 25 that the Court of Appeal accepts that decisions in other jurisdictions are of little or no assistance and that is certainly, has been our approach for the appellant. However, the Crown submissions make a lot more use of UK and Canadian case law and I'm going to have to turn to that in due course. That's on the comparator group analysis. At the moment I'm just addressing our language and at 85, I make the point that – I characterise the Court of Appeal's approach as an elaborate comparison involving, if need be, a hypothetical comparator group with a real danger that what the legislature intended as a practical and straightforward exercise becomes strained or unrealistic or both.

I didn't go through the criticisms which I made of that comparator, they're at paragraphs 19 to 22, but in essence what the Court postulated was, as a comparator pilot who's unable to fly PIC to the United States and an instance was of the pilot who hasn't got a valid visa to enter for some reason or other. Then they said at para 91 of the Court of Appeal judgment, "If the appellant would have treated such a pilot, these are impaired pilots, in the same way as it treated the respondent, then he hasn't been treated differently on the ground of his age." As I say there what happened here was that Captain McAlister was demoted to first officer because of course he could continue to enter the United States. It can't possibly be a valid comparison to

say that – a matter on which there is not a shred of evidence anyway, that the respondent would have treated the visa impaired pilot the same way. The visa impaired pilot could not have flown at all to the United States or through US airspace, could not have simply been demoted and rostered in the usual way, so if that comparison fails, what is the comparison.

The rejoinder of the respondent appears to be what matters is the comparison as a kind of theoretical exercise and you needn't look at the consequences but of course that, with respect, can't be right because the comparison is to compare the treatment of the two, the complainant and the postulated comparator group. How was the complainant treated, would the comparator have been treated in the same way, well this complainant was demoted so what is the comparator group if you, going back to page 25. If you're going to take an elaborate comparison approach, what is the comparator group and I, with respect, the respondent has failed to meet my criticisms of the Court of Appeal's comparison and as I say at para 86, the comparator group analysis must be just a means to an end. If you end up with a comparison that's artificial or unreal, you jettison the comparison, go back to the most natural comparison here which is the before and after approach that I advocated earlier. And as I say at 87 and I've argued this, the selected comparator group subverts the overall statutory scheme in the way that we've been through this morning.

So then there's the business about including or not including genuine occupational qualification in the comparator for both (a) and (b) and we've dealt with that. So I come to the analysis of the language from para 93 on, starting first with (b). The wording is summarised at para 94 and what my argument is that under (b) the comparison which the statute expressly directs has to be undertaken is whether the detriment had been applied in circumstances in which other employees employed by the respondent on work of that description are not or would not be subjected to such detriment and I stress at 95 two points. First of all, the use of the expression in circumstances in which other employees focuses the enquiry on the circumstances of the complainant employee in relation to the detriment

suffered. That's, I submit, is the natural meaning of those words, it's the detriment in circumstances of the complainant in which other employees would not be subjected to the detriment.

Secondly, the other employees are employed by that employer on work of that description. I interpolate that earlier in the submission I note that of that description doesn't have anything to relate back to and is a borrowing through from section 22 but nonetheless that anomaly aside, the language in my submission, back to the submissions, indicates that the comparison is with actual other employees and their actual other work. And so I submit that the two features of the wording run counter to the Court of Appeal's approach of using a hypothetical comparator group and imputing circumstances which are unrelated to those of the complainant employee other than absence of the relevant prohibited ground for comparison purposes.

TIPPING J:

Would you agree that the only implications that should be made in circumstances in which other employees et cetera, is that those other employees lack the prohibited ground feature? In other words, lacking the age issue?

MR HARRISON QC:

Yes.

TIPPING J:

It's the only implication that should be read in because that's obviously completely necessary.

MR HARRISON QC:

That's necessary and I have acknowledged that. Whether it's the only implication for all purposes I – but in this kind of comparison exercise that's my argument. But I do have a backup argument which I'll come to as well. So that's looking at this wording and then at 96, I point out what the Court of Appeal's approach is and I argue partway through 96 that that

approach is inconsistent with the express wording of 104(1)(b). Specifically it does not utilise a comparison with other employees employed by that employer on work of that description but instead invents a class of employees who are in reality unemployable in respect of, rather than employed on, the work being performed by the complainant, prior to the commencement of the discriminatory treatment. I say they are unemployable because the visa impaired pilot simply can't fly the international routes so how can you say that that's a comparison with other employees employed by that employer, flies in the face of the provision and as I say at the top of page 29, wrong in terms of the broader context of the statutory scheme.

I then go on to look at (1)(a) and the argument there is in a nutshell at 99, the Court of Appeal's chosen hypothetical comparator is inconsistent with the express language of (1)(a) because it failed to look for comparison purposes to other employees having the same or substantially similar qualifications, et cetera. Instead it imputed dissimilar qualifications in circumstances, namely that the hypothetical employee – other employee was disentitled lawfully to enter the United States. Now even if you assume, without conceding, that the ability to act as PIC in US airspace was part of Mr – Captain McAlister's job qualifications, even assuming that, the qualification which the Court of Appeal imputed for comparison purposes, was not the same, the language is having the same or substantially similar qualifications –

TIPPING J:

Well it actually imputed a disqualification?

MR HARRISON QC:

Well that's right. That's exactly my point here. Whether it's a disqualification or not it's not the same or substantially similar qualification that's imputed. It's a completely different qualification and as Your Honour says it's a disqualification. So my point here is that if you actually come to grips with the actual language of the expressly created qualification under either provision, the Court of Appeal's comparator approach is simply wrong, with respect. It

flies in the face of the language of both provisions and again para 100 is also inconsistent with the broader of statutory context.

ELIAS CJ:

I can't now remember whether section 26 of the Human Rights Act was an issue, the employment mainly outside New Zealand?

MR HARRISON QC:

No, no it wasn't.

ELIAS CJ:

It wasn't, no.

MR HARRISON QC:

And that's another part of my argument. You've got all these other provisions that deal with an overseas dimension and so on. None of them are relied on because they're not applicable, other than section 30(1). That's the only exception that was put forward by Air New Zealand and again it's the statutory scheme argument. The statutory scheme deals with the issue of jobs which have an overseas component. There are exceptions.

ELIAS CJ:

So the appellant is not – his work is not one that's mainly outside New Zealand?

MR HARRISON QC:

Well, that's right. Well in any event it's not relied on.

ELIAS CJ:

No I see.

MR HARRISON QC:

That issue was litigated and addressed in – there are two Smith and Air New Zealands which is confusing but Judge Colgan's *Smith v*

Air New Zealand and that's summarised in the appendix and the section 26 argument was run in that case and rejected for reasons that appear. The section 24 HRA exception likewise misfires and again it's the statutory scheme argument. Now, I just also mention because the question makes it worth mentioning, the exchange – that there's also the statutory history which is addressed, if Your Honours just note this, in paragraphs 8.5 and 8.6 of the Human Rights Commission's submissions. The Select Committee with the Human Rights Bill deleted a specific exception on the ground of age for pilots and air traffic controllers. This is at page 17 of the HRC's submissions and said no bona fide occupational qualification can look after it. In fact we've seen that it doesn't necessarily do so because it's not – it doesn't apply to all of the sub-paragraphs of 104 or 22, but that's germane to the point that's being made. All right, so that's the submission that we presented concerning this comparator issue. I want, however, to now look at some of the case law on that issue, dovetailed in with the Crown's submissions which do bring a fresh dimension to the argument, albeit that I very much quarrel with the approach.

The Crown approach is in complete contradiction to the argument I am advancing, which is that there is a significant difference between the general kind of anti-discrimination provision, our section 19 of the Bill of Rights and section 12 of the Canadian Charter, or for that matter, the US due process clause, where the Court has to create its own concept of discrimination and that of course was a feature of the Court of Appeal's first attempt to grapple with the issue in *Quilter* and I think Your Honour Justice Tipping's the only member of the *Quilter* Court or –

ELIAS CJ:

Guilty.

TIPPING J:

It's already been pointed out to me quite forcefully, Mr Harrison.

MR HARRISON QC:

Yes, but the Court of Appeal would have it quite different, but my submission is, we're not grappling with creating a concept of discrimination simply on the basis of a single word.

ELIAS CJ:

Can you just remind me what the language of section 19 is? Just vaguely.

MR HARRISON QC:

The language of section 19, of course I don't – it talks of the right to freedom of discrimination on the prohibited grounds, yes, everyone has the right to freedom from discrimination on the prohibited grounds.

ELIAS CJ:

Yes. Which leaves the matter wide open.

MR HARRISON QC:

Completely at large.

ELIAS CJ:

Yes, and it's in those circumstances that the search for comparators is normally undertaken.

MR HARRISON QC:

Well yes, I mean we have a search for comparators here, but we are guided by explicit statutory language, that's my argument anyway.

ELIAS CJ:

A statute, yes.

MR HARRISON QC:

And similar problems have arisen in Canada and for that reason, my argument is it's dangerous to the point of, with respect, being irresponsible simply to apply the approach of a Court that has to create the entire concept and its exceptions from a few words and the expression discrimination, in our case, to say we'll just borrow that. To do so is to ignore the checks and balances that the human rights legislation contains.

So that I submit is the fundamental flaw in the Crown approach and what we get, with the greatest of respect, if we go to the Crown's submissions at paragraph 19, having identified what they contend to be general principle, they say, "In the present case, the ERA expressly defines the relevant scope of disadvantage", I quarrel with that formulation and then says, "The first step falls to be considered on the basis of general principle and particularly by reference to a comparator analysis." They go on to say, "There's a commonality of approach", para 20, "The jurisprudence arising under general anti-discrimination provisions, such as section 15 of the Canadian Charter is therefore equally applicable to the comparator issues arising in this case." Now that, with respect, is a statement that's unsubstantiated by any analysis or any reference to authority, academic or otherwise, and it just cannot be the case, simply as a matter of statutory interpretation.

ELIAS CJ:

Just in terms of section 104 (1) (c), there's no comparator group required there at all, it's just a total prohibition, subject to the qualification argument under section 30 as modified by 35?

MR HARRISON QC:

Yes. So basically what we have in this case with the interveners is that the Human Rights Commission more or less sides with the appellant while the Crown sides with the respondent. The Human Rights Commission has an obvious interest in having human rights legislation that's workable and of broad application, but there's really no way to put this nicely, the Crown cannot be regarded –

ELIAS CJ:

I don't think it is a proper submission really.

MR HARRISON QC:

The Crown cannot be regarded as neutral in the stance which it adopts. It's constantly on the receiving end of discrimination claims brought pursuant to Part 1(A) of the Human Rights Act –

ELIAS CJ:

Nevertheless, it is entitled to put forward its argument here and we really don't go behind to examine the motives of litigants here Mr Harrison. You can attack their arguments, I think.

MR HARRISON QC:

Yes, but these submissions are developed from, my theory anyway, are developed from the work which the Crown has had to do in defending Part 1(A) discrimination claims. Part 1(A) of the Human Rights Act.

TIPPING J:

What does it matter where they came from? Surely it's their merits that is the key point.

MR HARRISON QC:

Yes. I accept that, but nonetheless, Part 1(A) which is the provision in the Human Rights Act which utilises the section 19 Bill of Rights Act general formula, is an area where the Crown is now having to litigate quite considerably and my point is –

TIPPING J:

You don't seem to be able to take a hint, Mr Harrison.

MR HARRISON QC:

Yes.

ELIAS CJ:

Or a direction.

MR HARRISON QC:

I'll move on.

ELIAS CJ:

You're doing very well on your argument, stick to it.

MR HARRISON QC:

I'll move on. The – if we look at the authorities relied on to support the kind of, what I call the elaborate comparator analysis, they fall within two categories. First, there are the Canadian Charter authorities which, as I have argued, concern a general provision and give rise to different problems. Secondly, and this is true of the English and Australian authorities, they concern differently worded specific anti-discrimination laws and I will need to refer to some of those to demonstrate how the different wording has dictated the outcome, just as I say our different wording dictates our outcome. So if we go to the case referred to at para 24 of the Crown's submissions, *Watt v Ashan*, that's at tab 10 of the Crown volume of materials. The key passage is indeed that which is quoted over the page at page 8 of the Crown submissions and that is at page 708 to 709 of the judgment. What's put forward by the Crown here is Lord Hoffmann summarises the *Shamoon* case by the principles set out on page 8 of the Crown's submissions and it seems to be an invitation to the Court to treat this as a statement of general principle. But on page 8 the paragraph numbered (2), that statement the comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be or assumed to be the same as or not materially different from those of the complainant. Now that is the statutory formula which we can see, because this is supposedly a summary of what the House of Lords held in *Shamoon*, which is heavily relied on. I'll take you to *Shamoon*. So the point – I'm simply saying there's no point on relying on *Carter v Ashan* because it's a summary of *Shamoon* which is a decision reached in reliance on an explicit statutory formula. My authority is tab 12.

BLANCHARD J:

Have we finished with *Carter v Ashan*?

MR HARRISON QC:

Yes I think we have. If we could just go to the judgment of Lord Nicholls at page 29 of the report. In paragraph 3 His Lordship sets out the definition of discrimination under the Sex Discrimination Act and then in paragraph 4 it said, "Thus where the act complained of consists of dismissal from employment the statutory definition calls for a comparison between the way the employer treated the complainant woman's dismissal and the way he treated or would have treated a man. It stands to reason that in making this comparison," I omit the words it is –

ELIAS CJ:

It's quite an easy comparison really isn't it?

MR HARRISON QC:

Yes, "... its necessary to compare like with like. The situations being compared must be such that gender apart the situation of the man and the woman are in all material respects the same." Then there's a reference to the section in question indented, 5(3), "A comparison of the case is if persons of different sex or marital status must be such that the relevant case circumstances in the one case are the same or not materially different in the other. This provision applies regardless of whether the comparator is an actual person or a hypothetical person."

So the point is, you've got an explicit statutory standard that does require the attribution of the same or not materially different circumstances on both sides of the comparison. And that's the danger of applying that kind of case.

We go back to the Crown's submissions, there's a reference to *Hodge* in Canada and the summary of that decision is towards the end. "Comparisons can be made only to those with whom the claimant can legitimately invite

comparison as a claim of discrimination can only be evaluated in comparison with others in a social and political setting." Now if we go to *Hodge* which is in the Crown bundle at tab 7 and it seems to me that the key statement is in paragraph 1 at page 6 of the printout. The judgment of the Court is delivered by Justice Binnie and he says, "A person asking for equal treatment necessarily does so by reference to other people with whom he or she can legitimately invite comparison. Claims of discrimination under section 15 can only be evaluated by comparison with the condition of others in social setting, political setting." And then further down, "A section 15(1) claim will likely fail unless it can be demonstrated that the comparison thus invited is to a comparator group with whom the claimant shares the characteristics relevant to the qualification for the benefit of burden in question apart from the personal characteristic that is said to be the ground of the wrongful discrimination."

Now, note please, that even though I'm saying the Canadian formulation doesn't help, it is different. It talks about shared characteristics rather than imputed circumstances and I don't want to get into a semantic debate here but it seems to me that there's room to argue that a claimant's characteristics can be quite different from imputed circumstances. So that's the Canadian test and as can be seen in the case which applied it, *Auton* which is at tab 6, which is a case really which complained of a lack of research and treatment for autistic children. The enquiry under section 15 of the Charter is worlds removed from the employment law scenarios. What is at issue in these Charter cases, if we just go to page 15 of the printout, starting at the very bottom of page 15 with para 19, where section 15 is set out over the page to the top of page 16, I won't read out the provision. So the case was involved with the guarantee of equal benefit of the law without discrimination based on mental disability. Para 21, the analysis in two parts, is there unequal treatment under the law, is the treatment discriminatory? They begin by saying that – oh, there's also a useful point made which is a general application at para 25, a warning against adopting a narrow formalistic analytical approach. You need to look at equality issues substantively and contextually. Then over the page, page 19, para 28, the specific role of

section 15(1) in achieving the equality objective is to ensure that when government's choose to enact benefits or burdens they do so on a non-discriminatory basis. Now I just ask how can a test that's developed in that context possibly be applied holus bolus to our anti-discrimination law.

They then go on, having ruled that there were no benefits denied because there were none due to these plaintiffs under law, they go on to look at the comparator group and the analysis is at page 26 and the key passage is probably para 53, page 27, quoting, or at least para-phrasing *Hodge* which we just referred to. So that exercise is aimed just at putting the Crown's reliance on the Canadian cases in context. And so when we get to paragraph 29 of the Crown's submissions where it's said that cases such as *Hodge* and *Shamoon*, adopt what might be described as the orthodox approach to comparators. In my submission, you're not comparing apples with apples, *Hodge* being the section 15 Charter case on a totally different planet and *Shamoon* applying a specific statutory formula which requires an exact attribution of circumstances to both sides of the comparison. So there's no such thing as an orthodox approach to comparators for our New Zealand purposes to be derived from either of those lines of authority, in my submission.

So I'll come back to the – there's a section in the Crown's submissions on causation which begins at page 11. I'll come back to that. I'd just like to perhaps move to the Crown's summary at page 23 of its submissions because I think trying to address that summary will explain the points of disagreement. The summary says, "One, there's an orthodox approach to discrimination which is largely shared irrespective of the particular context although clearly that approach can be ousted by any express statutory language."

BLANCHARD J:

I suppose you'd say by any express statutory scheme? Because that really seems to be your argument, that we have a different scheme in our legislation.

MR HARRISON QC:

I quarrel far more fundamentally with the proposition if I may, Your Honour. First, the first response is, there's no orthodox or presumptive approach to discrimination and in particular the comparator issue. I mean, that's the message I've been trying to put across so, it's wrong to characterise an orthodox approach as if that is the starting point and to say that it's largely shared, in my submission, there's nothing to share because there's no such orthodox approach. Then they go on to say, "Although clearly that approach can be ousted by any express statutory language." That completely misconceives the statutory interpretation task. It's as if the so-called orthodox approach is fundamental and you require express statutory language to depart from it. That can't be right, as a matter of interpretation and I've been trying to hammer what I submit is the correct approach which starts with the language and moves on to the scheme. I think the Interpretation Act says something about that. I could be wrong.

So that's the first point, then 76.2 says, "In almost every discrimination case, it will be necessary to compare the treatment of the claimant and comparator. The claimant and comparator must share the characteristics that are material, except for the prohibited ground. The prohibited ground itself remains the point of difference even when it's a genuine occupational qualification." In my submission it's because you can't generalise in this way, you also can't categorically state that the claimant and comparator must share the characteristics which are material to the question in issue.

Then the third proposition is that, is immediately, that statement which seems to be a categorical statement in 76.2 is then qualified, saying, "However, characteristics that are merely related to or associated with a prohibited ground must be shared by claimants and comparator unless inextricably and necessarily linked, such as in the case of pregnancy." Well my submission is that that's an impossible and unworkable distinction. To look at characteristics and then have to say well, are these merely associated with a

prohibited ground, in which case they are imputed to the comparator group, or are they inextricably and necessarily linked to the prohibited ground in which case they are not.

Now, this takes me to a more refined point about comparator groups, which is at the heart of the divergence of views in the Australian case of *Purvis*, sorry I haven't quite finished – I've finished with the Crown's submissions. The *Purvis* case is a good illustration of the difficulties that arise out of that final subparagraph of the Crown's submission and I just want to – how are we doing, I want to refer to that and one other Australian case as I think almost my parting shots on the comparator issue, we can then move on to "by reason of". *Purvis* –

ELIAS CJ:

Which volume?

MR HARRISON QC:

Sorry, this is my authorities at tab 22.

ELIAS CJ:

Thank you.

MR HARRISON QC:

Purvis was obviously a difficult case because the argument there was about a teenager who had severe brain injury and had behavioural problems including violent acts towards others, and he was removed from a state school because of his violent behaviour, and the question was whether he'd been discriminated against on the ground of his disability and of course, if he hadn't had the particular disability he had, he wouldn't have been engaging in the violent behaviour. So was he discriminated against because he – or was he treated the way he was because of his violence or was he discriminated against by reason of his disability? Now, the majority required a comparison which they saw as dictated by the statutory wording. That statutory wording is summarised, I'll try and find the provision as well – summarised at the top of

page 100 in paragraph 8 of the judgment of the Chief Justice, as Your Honours have it. Section 5 of the Act relevantly provides that a person, the discriminator, discriminates against an aggrieved person on the ground of a disability if because of the agreed person's disability, the discriminator treats the agreed person less favourably than the discriminator would treat a person without the disability in the same circumstances. So it's a similar sort of approach to the English approach in *Malcolm's* case where you have to impute, you have to impute to the comparator the same circumstances. Now, I can go right through the reasoning but because the language is different, what I actually want to do is just point to the reasoning, the dissenting reasoning which I rely on as more helpful in terms of general principle and that is two Judges, Justice McHugh and Justice Kirby –

TIPPING J:

What were they dissenting from, a conclusion that this wasn't discrimination?

MR HARRISON QC:

Yes. And because the majority said that because of the formula, you impute to the comparator group violence arising from a cause other than the disability. So the answer is, the school would have excluded a student displaying that level of violence to others so that the comparator group analysis worked to cut the claim off at that level. There are other things in the judgment, but that's the key point. So the judgment of Justice's McHugh and Kirby, the joint judgment starts at page 103 and at paragraph 14, difficult with the photocopying as it is –

BLANCHARD J:

It can't be 14.

MR HARRISON QC:

It can't be 14, no. I'm just looking at 14 to see why I included it. I think it's 114, that's the problem. It's at page 130 of the report, issue 3, the characteristics of the appropriate comparator. Page 114, "In this case as in most cases section 5 requires the construction of a notional person whose

treatment can be compared to that of Mr Hoggin. The need for such a comparator is open to the criticism that it limits the Act's capacity to deal with cases of direct discrimination. The United Kingdom commentators have attempted to reformulate the notion of direct discrimination so as to free it of the shackles of the comparator. One critic has said that a model predicated on comparability is particularly unsuited to the ground of impairment because the complainant simply cannot be said to be similarly situated to an able bodied person." Page 115, "The relevant comparator in this case is a person without Mr Hoggin's disability but for the purpose of section 5 what are the circumstances, are they the same or not materially different."

Then we go on at paragraph 119 under the heading, "The Characteristics of the Comparator. Discrimination jurisprudence establishes that the circumstances the person alleged to have suffered discriminatory treatment and which are related to the prohibited ground", key words and a reason for my adoption of them will be apparent, "are to be excluded. In *Sullivan v Department of Defence* Sir Ronald Wilson said, 'It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting an acceptable basis for a differential treatment, could be seized upon as rendering the overall circumstances materially different with the result that the treatment could never be discriminatory'." Then there's a quote from *Proudfoot* and a similar statement at 123, there's a quote from litigation *City of Perth v DL*, I'll come back to the High Court of Australia's decision in that case. So those cases are analysed then over the page, after the case law is analysed, para 130, "Provisions that extend the definition of discrimination to cover the characteristics of a person have the purpose of ensuring that anti-discrimination legislation is not evaded by using such characteristics as proxies for discriminating on the basic grounds covered by the legislation. But the purpose of a Disability Discrimination Act would be defeated if the comparator issue was determined in a way that enabled the characteristics of the disabled person to be attributed to the comparator. If the functioning limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of

the Act in many circumstances. They would certainly lose it any case where a characteristic of the disability, rather than the underlying condition, was the ground of unequal treatment."

It goes on to say further down the example of a person with dyslexia refused employment. "The proper comparator is not a person without the disability who cannot spell. Section 5(2) requires the comparison to be between a comparator without the disability who can spell and the dyslexic person who can spell with the aid of a computer that has a spell check." And so on.

So the point is this. That when the – whether you call them characteristics or circumstances and the Crown seems to talk – the Crown perhaps talks of characteristics, whether they are circumstances or characteristics so called, which are bound up with the particular ground of discrimination, it is not appropriate when formulating a comparison to attribute those associated characteristics or circumstances to the comparator group. To do so frustrates the purpose of anti-discrimination legislation.

So here, and without prejudice to my detailed arguments looking at the particular wording of the statutory provisions, here, just in principle it is not appropriate to take any limitations that accrue to Captain McAlister personally when he turned 60, in terms of where he can fly as pilot in command, to take those and attribute them to the comparator group because those limitations, the operational limitations if you like, are part and parcel of his personal characteristics, if they are characteristics at all, on reaching age 60 in that job. And if you don't adopt that approach, and you attribute or attempt notionally to attribute to the comparator group, these circumstances or characteristics which only come into being because of his age, if you attribute those to the comparator group you immediately frustrate the purpose of the anti-discrimination law in question.

ELIAS CJ:

Is there a temporal dimension here because if one views the position when the appellant was say a couple of years off turning 60, he was in exactly the

same position as all other employees. Is there something magic about what happens when he turns 60 that makes it discrimination because the same threat hangs over all pilots in this category?

BLANCHARD J:

I should say that for temporal reasons the Chief Justice is very sensitive about that particular age.

ELIAS CJ:

Yes it would have been much nicer if we'd had this argument a couple of weeks ago.

MR HARRISON QC:

Well, I thought I'd deliberately stay off Judges reaching retirement age because –

BLANCHARD J:

It's not 60.

MR HARRISON QC:

No, no, I know. I know that. I mean it's – I'm not sure. I've argued the point of the question I've argued that yes of course the comparison is worth the Judge who – the pilot who hasn't turned 60 here. If you're saying that he's not being discriminated against because all pilots who turn 60 will be treated the same, that begs the fundamental question about whether they should be so treated and also as I argued –

ELIAS CJ:

But might that not be an extra section 104 question? In other words, wouldn't one expect there to be a statutory prohibition on the adoption of a policy such as this?

MR HARRISON QC:

Well there is.

ELIAS CJ:

You say it's section 104, but –

MR HARRISON QC:

To be complete – strictly accurate about it, it's section 22 of the Human Rights Act.

ELIAS CJ:

Yes.

MR HARRISON QC:

Which says "It shall be unlawful to…" whereas section 104 simply says if you do X or Y, that gives rise to a personal grievance. So there is – there's a whole section in my submissions that deals with the point and the point is that Air New Zealand is a New Zealand employer, it is subject to the age discrimination law, the age discrimination law could have but did not carve out an exception for Air New Zealand's operations, all this stuff we've been through, and the way the issue arises is at its most remote, the ICAO standard to which New Zealand has filed a difference, or if we're talking when it was a 60, age 60 had filed a difference to that, I think they still have filed a difference to the latest one, so you've got an ICAO standard which at international law, we disagreed with in the most formal way we can. We've got –

TIPPING J:

Mr Harrison, isn't there a simpler answer to this? Say the example taken is, no Chinese allowed in this restaurant, the fact that it applies to all Chinese equally doesn't mean that it's immune from discrimination.

MR HARRISON QC:

To be sure –

BLANCHARD J:

No, that's an Irishman.

TIPPING J:

Or substitute an Irishman if you like.

ELIAS CJ:

That's coming into it, that's – I mean, that's definitely section 22. Well that's definitely contrary to the Human Rights Act and also to the Bill of Rights Act. I can see that you have a good argument under section 22(1)(a) in the sense that you're qualified for work of the description and it may be said that it's a discrimination not to provide it for you on the basis of age, but it's the equality provisions in (b) and (c) and in 104. However, as you say, we've gone through that, but it is a different dimension of it, to speak about it in temporal terms. When was he discriminated against? When he turned 60, in your view?

MR HARRISON QC:

Well first question, how was he discriminated against? By being demoted. When did his demotion occur? Well, around about the time – it's not that instantly the clock ticked over at midnight on the day of his birthday he began to be discriminated against, it's the demotion. That demotion followed almost immediately after his turning 60 and was because of it. Although Justice Tipping wanted me to have a short answer, it is important to note that as I was saying, there's an international law dimension which New Zealand's rejected, then Air New Zealand, and I'm not without sympathy for their position, Air New Zealand has to operate into the States so they've got to sign an operation specification which requires them to observe the under age 60 pilot in command stipulation of the United States, the FAA, and then there are perceived operational consequences when Captain McAlister, a flight instructor, turns 60, and I emphasise the word perceived. Now, how can it be said when our anti-discrimination law is quite clear and contains exceptions which in some large measure don't reach Air New Zealand, how can it be said that all that is personal characteristics of Captain McAlister to be equally somehow artificially attributed in the context of the comparison and I

hasten to add, how can it be said also that the same outcome adverse outcome is reached applying a "by reason of" test, but that is still before us.

So, just taking stock, we've got five minutes. What I might do is just turn to the "by reason of" issue and begin introducing that, if I may. The position is that, and I'm subject to correction by my learned friend for the respondent here, but certainly my view is that in both the Employment Court and the Court of Appeal, the respondent accepted and indeed argued that "by reason of" involved an enquiry into causation and it seems to me that it's adopted the same position in this Court. I'm here referring to paragraphs 93 and 96 of the respondent's written submissions. The Crown's submissions have rather set the cat among the pigeons, arguing that "by reason of" is not a causation based test. Quite what it is, is not clear to me, they seem to say that it's a subjective test, depending on the motive of the alleged discriminator. The Crown places reliance on two relatively recent House of Lords cases which I'll have to address.

I make the point that the issue – the challenge to the test "by reason of" in fact by reason, directly or indirectly of, more accurately, has not been a causation based test is raised by an intervener and not by the respondent. It's not a point taken in either of the two Courts below, so a starting point might well be that the argument is impermissible without leave, so I just, without taking up an absolute position on that, I just flag it as an issue because I'm not sure how far I need to go, but I'll be addressing after lunch the Crown argument without prejudice to that point.

The appellant's arguments on causation start at paragraph 50 of my written submissions where I address the question of the respondent's reason or reasons for its decision. Although I'm a minute or two early, that might be a convenient time, if Your Honours please. We have two days, I'll be finished well before close of play today, indeed, subject –

ELIAS CJ:

Where are you going after now, in your argument?

MR HARRISON QC:

I'm going to address the causational "by reason of" issue.

ELIAS CJ:

Yes.

MR HARRISON QC:

Then much more shortly, the genuine occupational qualification point because of course, the Court of Appeal effectively pretty much held that Captain McAlister's age was a genuine occupational qualification and we disagree with that. So those are the two remaining points and I anticipate being finished mid-afternoon.

TIPPING J:

Are you going to take the accommodation point any further or just rely on the request that it be sent back if it's reached?

MR HARRISON QC:

I'm relying on the request – I can't properly, I mean, if ex hypothesi the Employment Court was wrong on its discrimination finding, I can't properly argue that the reasonable accommodation finding, in respect of the disadvantage grievance, can stand because the two issues are mentioned together and you'd have to send it back to Judge Shaw to say well, would you reach the same result anyway, setting aside discrimination if that has to be set aside.

WILSON J:

It's really a question of fact isn't it, could a reasonable accommodation have been reached?

MR HARRISON QC:

Well it is but whether it needs to be addressed, it won't need to be addressed – depending on how the chips fall, it may not be, need to be addressed.

ELIAS CJ:

In any event, it can't be addressed here.

MR HARRISON QC:

In this Court, no I accept that.

ELIAS CJ:

Yes thank you, we'll take the adjournment.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.22 PM

MR HARRISON QC:

If Your Honours please, there are two authorities. Madam Registrar, those authorities, they are in two separate bundles of five so they need to be distributed twice over. It's the *Eric Sides* case and a case called *Trilford v Car Haulaways*. Hauling these out is needed because of the Crown's argument concerning "by reason of" and they will help to demonstrate that the test that Judge Shaw applied has been around for a long time. So, I'll come to those in due course. What I would like to do now because there was a certain amount of initial resistance, at least to my argument, that there was a factual finding on the "by reason of" age issue which is unreversible on appeal. I would like to just go to the underlying evidence which is in volume 2 of the case –

ELIAS CJ:

Are you confining it to the "by reason of", this is the argument, that there's a finding of fact?

MR HARRISON QC:

Yes, by reason of age.

ELIAS CJ:

I see.

MR HARRISON QC:

Nonetheless, I needn't take too long to do this. The material is in volume 2 but just referring to the Employment Court judgment, there is discussion of Captain McAlister's situation in Judge Shaw's judgment case volume 1, starting at around paragraph 6, page 17 of the case, volume 1. She identifies the issues as set out there. She goes on to describe, at paragraph 9, the flight instructor position and the civil aviation background. She deals with the issue of what Mr McAlister can and cannot do.

Perhaps the key passages that I want to refer to here are paragraph 40 at page 23, "It is accepted by Air New Zealand that since Mr McAlister turned 60 there has been no change in his ability to approve any of his duties so long as had the appropriate approvals from Air New Zealand." I think that should be the Civil Aviation Authority but anyway. "It is also accepted he could theoretically maintain his qualification but Air New Zealand maintain this is not practically possible given the restrictions imposed." It then goes on to look at training of pilots and at 47 notes that each of the standards roles, that's including a flight instructor, have defined purposes and responsibilities, training first officer, check captain and then 48, "As well as check captain responsibilities, a flight instructor assesses the level of competency, conducting route checks, final route checks" and so on. Critically then, as to the figures 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 training requirements, although these figures are flexible." So, he only has to do – on average, 30 percent of his time is spent line flying as a normal pilot needing to be pilot in command.

Then, there's a discussion about Japan which was parked as a side issue. Para 53, "Mr McAlister's further evidence showed the cap 2, there defined earlier, longhaul duties for both line flying and training purposes are readily available without Air New Zealand having to create a specific cap 2 position for him. Captain Dunn for the company 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." Then, significantly, "The difference of approach on this topic between Mr McAlister and Air New Zealand depends on the operation of the company's roster." That's looked out, basically Air New Zealand was saying, it's too difficult because we have a computerised roster. Mr McAlister is saying, no it isn't because the roster is built in stages.

In 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's and Mr McAlister's calculations, the position can be broadly summarised. Flight instructor's rosters include 25 to 30 percent of ground duties, these are not affected by age restrictions, 30 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. 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 Air New Zealand's rosters is to give him enough longhaul flights to meet the time flying and training duties." He had at least three suggestions as to how that could be done and I needn't go through that. Then 63, there's a summary of what Mr McAlister contends and at 64 there's the company's response.

The correspondence, turning to that. The correspondence about this issue starts with –

BLANCHARD J:

Before you leave Judge Shaw's judgment, where is her finding of fact that you are relying on?

MR HARRISON QC:

I was coming to that but if I refer Your Honour to paragraph 52 of my submissions.

BLANCHARD J:

Your submissions?

MR HARRISON QC:

Yes. Yes I mean I can take you to the – but if you want the findings listed, it's in paragraph 52. I can take you to the –

TIPPING J:

I thought you were going to tell us that here the Judge found specifically that whatever it was, was "by reason of".

MR HARRISON QC:

I am –

TIPPING J:

That, I would have thought frankly, isn't a discrete question of fact, it's mixed fact in law.

BLANCHARD J:

It's para 89 isn't it?

MR HARRISON QC:

Yes, it's there and leading up to it. It's paragraph –

BLANCHARD J:

Eighty nine has got the finding in it?

MR HARRISON QC:

Yes and the discussion that leads up to it starts at 77, question is one of causation. There's a discussion of the authorities, then at 87 it is said, "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."

ELIAS CJ:

I don't see why it's necessary to go to comparators at all for this question. Surely, there he was, qualified, now he turns 60 and he's downgraded. Isn't that just an obvious finding of fact?

MR HARRISON QC:

Well, I accept that, that's why in my submissions early on, I set out three questions and argue that this, all this is actually a very straightforward factual enquiry at all stages.

ELIAS CJ:

But it has been dressed up in the Judge's reasons with comparisons with younger pilots and so on. For the actual question of fact as to whether the age caused the loss of status, it's as plain as the nose on your face really, isn't it?

MR HARRISON QC:

I would submit so, but there are – a comparison is necessary, whether it's a full-blown complicated comparator group analysis or just saying A or B –

ELIAS CJ:

Whether it's discriminatory is then the next question, but that's not a question of fact, that's a question of mixed fact in law or maybe even just law, the fact having been found.

MR HARRISON QC:

That's why I submitted earlier that the "by reason of" question – provided she has directed herself correctly as to law, when she then says, when Her Honour then says, page 34 of the case, para 87, "In this case there is direct evidence of Air New Zealand's reliance on age" and goes on –

TIPPING J:

What was the case against that? Because I must confess, at a fairly simplistic level, as the Chief Justice says, it's – what triggered the disadvantage or the detriment was in turning 60. What was the argument against that, that you're having to head off, so to speak.

MR HARRISON QC:

Well the argument was that, it was baldly put that the ICAO/FAA restrictions were the true and sole cause of the demotion, and the argument kind of goes in a circle when –

TIPPING J:

Well they only apply at a certain age.

MR HARRISON QC:

That's right. I'm not arguing the respondent's case here. I agree it's simple, straightforward, and the difficulties lie elsewhere in the case. Indeed the Court of Appeal took that view, the Court of Appeal said it's a straightforward, factual enquiry. They thought the difficulty lay with the comparison exercise and we've all been there.

TIPPING J:

But the "by reason of" has got nothing to do with comparators.

MR HARRISON QC:

No, I accept that. That's what I'm saying, they thought the difficulty was with the comparison, but the Court of Appeal and I are at one on concluding that this is a straightforward, factual exercise "by reason of". So maybe I don't

need to go through the evidence. The evidence is canvassed in appendix A of my submissions where I do set it out. It's basically all in correspondence.

TIPPING J:

Well I don't think anyone disputes the primary facts, it's what conclusions of law derive from those facts is the crunch.

MR HARRISON QC:

Well I mean, there are various things I've got to get to first base on and the – as to the "by reason of", of course it's by reason directly or indirectly of, so that that makes my argument –

BLANCHARD J:

That's your best point really, the directly or indirectly.

MR HARRISON QC:

Yes. The Court of Appeal said Mr Harrison's wrong in relying on directly or indirectly because that's about indirect discrimination, and I say it's both about indirect discrimination and about the reason or causal enquiry and means that even if something is not in the forefront, if it's still substantially operating, that's sufficient, but I do want to just deal – before I, I'm not going to go much further into this.

The position then is, I just need a moment because I've moved around. I summarise the Judge's reasoning at para 57 of the submissions and I can just, it's more easily done addressing this, page 17. "In addressing causation, the judgment examines earlier Employment Court decisions. At 85, Judge Shaw refers to a situation of more than one reason for the employer's action, stating that the test in such cases is whether the discriminatory ground is a substantial or operating factor. The test is slightly restated in para 86 where it's described as being whether the prohibited ground is a substantial operative factor, and in para 89, the expression substantial reason is used." In para 88, there's a "but for" analysis, and I argue at 58 that overall Judge Shaw approached her decision by applying belt and braces, both a

"but for" test and a substantial reason operative factor test, and thus she covered the bases and reached the factual conclusion and I argue, did not misdirect herself in doing so, so that that conclusion was unappealable even in the Court of Appeal, which in fact agreed with the conclusion.

So that's the point, then the issue of law then becomes the one I addressed just before lunch. Is it a test of causation or is it some other test based on the employer's motive, as the Crown seems to argue and it advances that argument on the basis of two recent House of Lords cases which seem to cast doubt on the previous House of Lords authorities, which I have listed in my submissions. Just so we're following, the authorities are referred to at page 16 of my submissions and I summarise the position at paras 53 to 54 by saying that the words, "By reason directly or indirectly of any of the prohibited grounds of discrimination postulate an enquiry into the presence or absence of a causal link, that is to say the use of the word reason does not mandate a subject of intent or purpose or a motive to discriminate and the words directly or indirectly, as I've argued, support that." At 54, "That's not to say that the motive and/or the act or its reasons if known are irrelevant. Where ascertainable, these may be used to support but cannot of themselves negate a judicial finding of the necessary causative link." Then I cite the authorities in the two House of Lords, *Birmingham City Council* and *James v Eastleigh Borough Council* have been applied in New Zealand case law. Now, what the Crown says is that two recent House of Lords' decisions have changed the position so that it's no longer a causation enquiry. Now, I feel bound to address that argument, I can do so, you know, relatively shortly –

ELIAS CJ:

Or you could deal with it in reply?

MR HARRISON QC:

I can deal with it in reply, I'm happy to do that.

ELIAS CJ:

I'll just check.

TIPPING J:

I would prefer to hear the argument that's put up before the rejoinder to it.

ELIAS CJ:

Yes, well that's right, it's not in the principal submissions.

MR HARRISON QC:

So, in reply Your Honour.

ELIAS CJ:

Yes, thank you.

MR HARRISON QC:

In reply, very good. There is one other point that I want to address on the causation front, lest it's overlooked and at this is at page 19 of the written submissions, or it starts actually at para 63 just over the page. "The respondent asserts there was only one causally operative reason for the decision to demote, namely the ICAO/FAA restrictions. It is previously argued that reaching 60 triggers the restrictions, or to put it another way is the occasion which prevents Mr McAlister being PIC on the fleet." I go on to say that, as a matter of New Zealand employment law, reaching 60 triggered nothing, nor is it the analysis advanced by asserting that reaching 60 is the occasion. The statutory enquiry into the reason or reasons for the adverse action taken not permissible in that context to create a purely semantic distinction between the occasion for something happening and the reasonable reasons for it. All maximum ages are ultimately reached. If the reaching of the specified age has employer imposed adverse consequences, then these necessarily occur by reason of age even if the employer seeks to disavow age alone is the reason." That's purely the causal question but this is the next point –

ELIAS CJ:

Sorry, what para at you at? Is it 64?

MR HARRISON QC:

It's paragraph 64.

ELIAS CJ:

Yes, thank you.

MR HARRISON QC:

The next point, just a refinement of the argument, at 65. "A further and fundamental problem inherent in the respondent's identification of the restrictions is that they themselves involve a discriminatory standard, one not authorised by New Zealand law. Indeed, judged in terms of New Zealand law, the ICAO/FAA restrictions are unlawful by virtue of section 22(1)(b) and 65HRA. It is settled anti-discrimination law that the alleged discriminator cannot put forward a subordinate, that is non-statutory rule policy or contractual provision, as being the true reason as against the assertive discriminatory reason for its actions if the rule, policy or provision in question is itself discriminatory on a prohibited ground."

BLANCHARD J:

Is that true if it's a foreign law, with which the employer must comply?

MR HARRISON QC:

Yes because the Court is –

BLANCHARD J:

That seems very harsh. I was with you until we got to this paragraph which I felt went a step too far.

MR HARRISON QC:

Well, we're applying New Zealand law.

BLANCHARD J:

Yes but we're talking about what's going on in the United States.

MR HARRISON QC:

Well, yes but equally, if the – let me put it this way, if Air New Zealand had itself said, we believe there are pilot safety considerations –

BLANCHARD J:

That's not a fair comparison.

MR HARRISON QC:

No, no but let's go by stages. If Air New Zealand had itself introduced an age 60 rule based on pilot safety considerations, then that principle or rule or whatever, would be open to attack in this way.

BLANCHARD J:

So?

MR HARRISON QC:

So –

BLANCHARD J:

It's not an equivalent.

MR HARRISON QC:

Just hear me out Sir in the stages. If that is –

BLANCHARD J:

Do you need this argument?

MR HARRISON QC:

No but nonetheless, to the extent Air New Zealand claims that the true cause was the FAA restrictions to the exclusion –

BLANCHARD J:

That can still be a true cause, a true cause but you're able to argue that there may have been two causes but one is enough for you.

MR HARRISON QC:

One is enough for me and I would characterise the FAA restrictions as the explanation for, rather than the reason for, the action taken.

WILSON J:

Did they have a very simple "but for" argument here? "But for" the appellant turning the age of 60, he wouldn't have been demoted?

MR HARRISON QC:

Of course that is part and parcel of the submission and that's how, one of the ways in which Judge Shaw approached it. I'm happy to leave this but just in response to Justice Blanchard, if this case is being determined in accordance with New Zealand law, just as and I go back to the very start, in *North Health* the policy was struck down, in *Thoroughbred Racing* the rules of racing were struck down –

BLANCHARD J:

That was within the domestic jurisdiction.

MR HARRISON QC:

Yes, well I'm not asking the Court to strike down the FAA rules.

TIPPING J:

It's a tempting thought.

MR HARRISON QC:

You would only ever need to be relieved to hear that but what I am submitting is that in discrimination law terms, it's not permissible to rely on a standard which is in itself discriminatory unless it is in a statute having equal or superior force –

BLANCHARD J:

Well, I'm bound to say, I think that's a preposterous argument when applied to the foreign law by which Air New Zealand is bound.

MR HARRISON QC:

Well, Air New Zealand is bound, the Court is not and neither is Captain McAlister. In any event –

BLANCHARD J:

Well, I hear the argument.

MR HARRISON QC:

Very good. That's all I wanted to say on that "by reason of" issue and that argument is not needed of course if others are accepted. The final issue is the genuine occupational qualification issue which I had relegated to an appendix –

TIPPING J:

It could be relevant if you're driven back to paragraph (a) presumably.

MR HARRISON QC:

Which could be my –

TIPPING J:

This genuine occupational qualification.

BLANCHARD J:

It's very relevant.

MR HARRISON QC:

Yes.

TIPPING J:

Mmm?

BLANCHARD J:

It's very relevant.

TIPPING J:

Yes, it's crucial.

ELIAS CJ:

I was therefore looking, because I'm interested in this area, looking at these authorities which don't really seem to be directly on all fours with our case.

MR HARRISON QC:

Which authorities sorry?

ELIAS CJ:

Eastleigh and *Simpsons*-Sears. I haven't got to *Etobicoke*. However, sorry, I'm just taking you backwards when Justice Blanchard really does want to move on I think.

MR HARRISON QC:

Your Honour, is it the paragraph that I've been scared off by Justice Blanchard?

ELIAS CJ:

Yes, yes. Never mind, you carry on. I mean, further on.

MR HARRISON QC:

Yes, well I had moved on to dealing with section 30(1) and my submissions appear at page 42 in the appendix, appendix C. Now, we need to just keep an eye on section 30 (1) of course which is in my bundle of authorities at tab 2, at page 40 of the printout, "Where being of a particular age or in a particular age group is a genuine occupational qualification, or that position or

employment whether for reasons of safety or for any other reason." Now, the way I deal with this is to argue, as a starting point, that – let me put it this way, for a non-professional person, again a postie, you would expect the occupational qualifications genuine or otherwise to be contained in his or her employment agreement, ordinarily. That's my submission. I know that the Court of Appeal thinks that any operational difficulty is ipso facto an occupational qualification, I don't accept that. The words, "occupational qualification" emphasising qualification, mean something different to that. So, your first source is to look at the employment agreement, where you've got a professional person such as a pilot, your next source is going to be the statute or regulations that prescribe eligibility to carry on that occupation. So, the argument is, all of those, contract – something can be spelled out from the contract, expressly all by necessary implication, I would accept, or something that's stated elsewhere in a statute. It will be prima facie an occupational qualification. Now, the alleged qualification of being under the age of 60 appears in neither of those, neither the CAA rules nor the contract, and that's my starting point. So in order to make out a case that, despite the fact that the under age 60 does not appear in either of those sources, for Air New Zealand to make out a case that there was none the less there existed a genuine occupational qualification from another source, it would have to prove it.

BLANCHARD J:

Now, Mr Harrison, I would hate to drag you back into the row that we've just had, but at para 10 of the respondent's submission, they refer to Rule 119.81 of the Civil Aviation Rules, which require that an applicant for the grant of an airline operator certificate must provide the director with an exposition that contains, and then they refer to details of the procedures that ensure compliance with the laws of any foreign state in which the applicant's aircraft operates.

MR HARRISON QC:

That's a duty on Air New Zealand.

BLANCHARD J:

Yes, but doesn't that create a potential source of an occupational qualification if the laws of the foreign state, in this case the United States of America, would restrict Mr McAlister's ability to fly as pilot in command in the United States?

MR HARRISON QC:

His ability to fly to every destination that a B747 flies to is a practical restriction that exists once he turns 60. I don't accept that it is a genuine occupational qualification merely because Air New Zealand is bound to provide the CAA with an exposition.

TIPPING J:

Wouldn't you use the word qualification? An ordinary person might say, well once he's turned 60, he's not qualified to fly in the United States. It seems to me this is getting very, very semantic, the idea that it's not a qualification, it's a necessary restriction, if you like, upon him and he's no longer qualified to fly in the United States, whether it's genuine or occupational is another matter, but it's clearly occupational, seems pretty genuine. Whether it is such a problem that it can't be accommodated is a totally different subject.

MR HARRISON QC:

I don't accept that it is a qualification. If we look at what this man needs to fly as a B747-400 pilot, he needs various kinds of certificate from the CAA including his health clearance, and one can look to his contract, employment contract to see whether there are any other qualifications.

TIPPING J:

But isn't it a disqualification that he can't fly to the United States? He's disqualified, if you like, from flying to the United States.

MR HARRISON QC:

Well he's not actually, it's much more subtle than that.

TIPPING J:

Well as a pilot in command.

MR HARRISON QC:

Yes, he is – if he enters – if his plane flies into US airspace, Air New Zealand is in breach of its operational agreement with the FAA, and that is undoubtedly the case, so in that sense –

BLANCHARD J:

Would that not put them in breach of New Zealand law?

MR HARRISON QC:

No, I don't accept that it would, the exposition must be provided but there's no link into a breach of New Zealand law that I am aware of. Incidentally if anyone wants to see it, the foreign operations, the FAA foreign operations specifications are at page 228 of volume 2 of the case, just two short pages.

TIPPING J:

Are you wanting the idea of qualification in this field to be something to do with his skills in flying aircraft as opposed to where he can fly them?

WILSON J:

Because the word skills appears as well.

TIPPING J:

Yes, exactly.

MR HARRISON QC:

Not limited to that, there may be a range of requirements for a particular job and those will vary quite considerably, with a pilot he has to have the correct certification –

TIPPING J:

Well if I don't have a certain type of driver's licence, I'm not qualified to drive a bus. I mean, is that the sort of connotation you're trying to limit it to, that he's got an underlying qualification if you like, the fact that he can't fly to certain places is nothing to the point.

MR HARRISON QC:

It's not – it's to the point, but it doesn't qualify as an occupational qualification.

TIPPING J:

Well it isn't to the point, you can't have it sort of half to the point. I think you've got to say that it's got nothing to do with it, the concept of qualification has got nothing to do with where he can fly as opposed to the fact that he can fly, generally speaking. I think you have to put it that high, otherwise it makes no sense at all.

MR HARRISON QC:

I'm prepared to put it that high and I say again that it's for an employer such as Air New Zealand to identify the qualifications or to be able to point to regulatory qualifications in order for this provision to apply. The fact that he comes under some limitations as a flight instructor –

TIPPING J:

But say New Zealand's international routes were confined to America, the fact that he could fly but not fly to America wouldn't be much use to Air New Zealand.

ELIAS CJ:

Section 26 would kick in, wouldn't it?

MR HARRISON QC:

Section?

ELIAS CJ:

Twenty six of the Human Rights Act.

MR HARRISON QC:

It might well do at that point because you'd get them to wholly or mainly outside New Zealand, yes. I accept that. The – I note the degree of traction that argument is receiving, I think we also need to look at the issue of genuine occupational qualification and that will involve, I submit, a separate enquiry into the extent to which the particular restriction applies to the particular job function in question back to the argument that a flight instructor has only 30 percent line flying and so on. There may be an overlap with the reasonable accommodation issue but some meaning must be given to genuine –

TIPPING J:

Well it's just, I would have thought it means it's just – it's real, it's not trumped up.

MR HARRISON QC:

Well in other jurisdictions where the word is used, it has received the approach of operating as a reasonableness standard, but as a – I accept that as a matter of strict interpretation when you're reading section 30(1) with 35 in the next breath, you may not need to have genuine do as much work as I've suggested because you've got the section 35, reasonable accommodation enquiry to follow.

TIPPING J:

I think that's your client's real grizzle. That they haven't sorted themselves out enough to accommodate him. Isn't that the real gravamen of this case?

MR HARRISON QC:

It's the gravamen of his grievance and as I said earlier, it always was. He's a man who was a management pilot for Air New Zealand, he was part of

Air New Zealand management for a long time and, everyone acknowledges, highly respected. He went back to flying –

TIPPING J:

I'm not asking you to give him a testimonial. I'm simply saying, isn't that the gravamen of his case, that they haven't bent over backwards enough to help him?

MR HARRISON QC:

Well, I quarrel with the expression bent over backwards. I'm not giving him a testimonial Sir, what I'm saying is, he came at it from the outset with the perspective of someone who knew a lot about Air New Zealand flight management because of his background. From the beginning, if you go through the correspondence, he says, "I can be accommodated as a flight instructor."

TIPPING J:

I sympathise with that view, I don't know whether it's right or not but that's the real crunch of the case.

ELIAS CJ:

Except if it's decided under 104(1)(b), you don't get to section 35 on the interpretation that – whereas you do on the interpretation that I was putting to you earlier.

MR HARRISON QC:

Yes, I accept that. I have developed the argument about section 30 (1) in my submissions, going back to page 42 of the submissions, I note at paragraph 127 some other sections in the HRA that deal with qualifying bodies and talk about qualifications in that sense. Thus I argue that the ICAO/FAA restrictions are not qualifications and their effect on his job performance is simply a practical consequence of what Air New Zealand has signed up for. It's a practical consequence of what Air New Zealand has signed up and not a job qualification for this man. That's in essence the

argument that is set out in that appendix. Judge Shaw directed herself correctly I submit and she made a finding of fact. I also need, just quickly because I'm about to sit down unless there are any questions, also I do want to stress the objections to the Court of Appeal's conclusions. The Court of Appeal in effect went ahead and found facts expressing views that this was a genuine occupational qualification and in that respect, the Court I submit went too far.

That's all I want to say. I do note – oh, actually, can I have the Court's indulgence, just to back track because I know my client is, there is something my client is quite hot about in the respondent's submissions factually and he wants me to correct this statement which appears in the respondent's submissions at paragraphs 4, 41 and 48. In paragraph 4 it's said that, "The international requirements prohibited him from being able to act as PIC on the 747, in the vast majority 89 percent of the 747 operations" and that figure is repeated overall three times. That is not the position. There's no 89 percent figure in the Employment Court judgment. The 89 percent figure appears to be derived from paragraph 6 of the Court of Appeal judgment which is at page 59 of the case where the Court of Appeal said that, "The prohibitions affected 89 percent of the operations of the appellant's fleet." That has always been a disputed figure but in any event, to say that the prohibitions affected 89 percent of the operations of the flight is not the same thing as saying that it affected 89 percent of the appellant's job. You will remember the division of functions in to 30 percent line flying, 20 percent ground and whatever it was, 30 percent ground, in any event, so that is something I've been expressly requested to correct.

I also commend to Your Honours the extra judicial writing of Baroness Hale which is a piece in the casebook at tab 17, my casebook, November 2008 address in which she reviews the English developments and the cases such as *Eastleigh* and the more recent ones and also Her Honour's judgment in tab 14 *AL (Serbia) v Secretary of State* where with the concurrence if not admiration of other members of the House, she explains how general standards of discrimination law such as the US Constitutional Standard and

the European Convention Standard differ from the specific anti-discrimination legislation, both in England and I would argue here. Those statements, both in her judgment and extra judicially, support my analysis.

Now, unless I have any other matters I can help Your Honours with, those are the submissions for the appellant.

ELIAS CJ:

Thank you Mr Harrision. Mr Waalkens.

MR WAALKENS QC:

Thank you Your Honours. Perhaps I might firstly deal with, if I may, the genuine occupational qualification aspect which I'm conscious from my learned friend's argument really is at the end of it but because we've just dealt with it, it probably would make good sense to do that.

My submissions, at paragraph 64 and following, set out the respondent's response to that. We say that the Court of Appeal was correct and its main finding is at paragraph 110 of its judgment, where it comments on the significance of the, I call them the restrictions, the ICAO restrictions, as to how they directly impacted upon this man's ability to perform his work. That and as well, paragraphs 113 and 114 must be, in my respectful submission, unobjectionable observations by the Court of Appeal, particularly when if you needed to go to other jurisprudence on the topic, you'll see over the page in my submissions from page 17 and following. There are numerous decisions, some here in New Zealand, in Australia, in Canada and in America which all discuss this very common international rule, this Age 60 Rule and find it to be in terms consistent with what we in our Act call a genuine occupational qualification. I accept that the wording of those foreign jurisdictions statutes are not exactly the same but there's a great consistency in my respectful submission to the many cases that are referred to throughout that part of the submissions, consistent with finding this to be a genuine occupational qualification. Frankly –

TIPPING J:

I take it Mr Waalkens that the approach is somewhat broader than the suggested approach of qualifications just being, if you like, more generic as opposed to practical?

MR WAALKENS QC:

Certainly so, there's no purpose in reading down and restrictively the word qualification. Frankly, that's all I was going to say on genuine occupational qualification, Your Honours are obviously aware of the real conundrum caused by section 104(1)(a) and (b) and whether in fact you cannot even get to the genuine occupational qualification defence or response under a 104(1)(b) reply but I'll come to that in a moment.

There's one other thing I want to mention in case I lose sight of it, and that is that much has been said about and in fact the suggestion that perhaps the gravamen of the argument is the reasonable accommodation part of the case. It does need to be remembered that the appellant still, of course, has his disadvantage claim. That is set out in the statement of claim in volume 1 at page number 9, and that's yet to be determined by the Employment Court.

ELIAS CJ:

Sorry, what page?

MR WAALKENS QC:

Page 9 Your Honour, paragraph 2.7, roman numeral (II) on that page, the section that we are concerned with there is 103(1)(b), and that says that quite aside from allegations of discrimination that thus far we've concentrated on in this hearing, Mr McAlister claims unjustifiable action by reason of disadvantage and Your Honours will see the significance of that is that if you go to the prayer for relief on the next page, page 10, the same relief is being sought as under the discrimination aspect, and it's a fact that the issues to do with reasonable accommodation as it's colloquially described will of course arise and emerge under the consideration of that part of the case.

ELIAS CJ:

Sorry I'm a little lost on this, sorry to be slow about it, but what's the – the disadvantage is based on section 103(1)(c)?

MR WAALKENS QC:

That's right.

ELIAS CJ:

I thought that's what we were considering here.

MR WAALKENS QC:

No, did I say (c), I beg your pardon, it's (b), I beg your pardon Your Honour I've got that wrong, 103(1)(b), I do beg your pardon.

TIPPING J:

It's set out in 2.7 they're the alternative bases of claim, aren't they?

MR WAALKENS QC:

Yes.

TIPPING J:

One is discrimination and the other is unjustifiable action.

MR WAALKENS QC:

Yes, by virtue of disadvantage. And the point I make is that Mr McAlister will still have his hearing in terms of what he identifies as concerns about reasonable accommodation and so forth, that's yet to be determined by the Court.

ELIAS CJ:

Why wouldn't that totally overlap with what's claimed here in respect of discrimination?

MR WAALKENS QC:

It won't totally overlap Your Honour, because it refers to issues, as I understand it, for example, of allegations that the airline did not liase with Mr McAlister over the introduction of the policy and how it might impact upon his job at various stages, as well as whether in fact the roster could have been adjusted.

ELIAS CJ:

I see.

MR WAALKENS QC:

So it's not entirely the same.

BLANCHARD J:

But if he doesn't get home on section 35, it's going to be pretty small beer, isn't it?

MR WAALKENS QC:

Yes, well section 35 will be the essence of that argument.

ELIAS CJ:

But section 35 is the essence of the argument under discrimination?

MR WAALKENS QC:

Yes.

BLANCHARD J:

But there is an overlap.

MR WAALKENS QC:

There is an overlap. I just didn't want to overlook or draw your – fail to draw to your attention that that is an aspect of the case that the parties will have that determined.

Now if I could start then with the comparator issue, the first main issue, and the point has been well made that Air New Zealand have no option other than to comply with the international rule of 60 Rule when they fly into the ICAO/FAA space. I incidentally don't accept the criticisms about the 89 percent of the flights, but there is the finding in the Court of Appeal judgment and I think enough said on that. What's clear also, and I've emphasised this in my submissions at paragraph 22, Judge Shaw, at paragraph 9 of her judgment, that's in tab 1 at page number 17, made a finding, in the second sentence, "The Air New Zealand appointment process requires that an applicant for the standards role of flight instructor be a current company captain on the aircraft type and be able to perform at all times the role of PIC of the aircraft if required." So my learned friend Mr Harrison was commending to you a criticism that Air New Zealand ought to have got its house in order with better – a better contract that reflected these terms and so forth. There is largely a response to that criticism in paragraph 9.

The point that Justice Blanchard raised with my learned friend about relying on a law that is alleged to itself be discriminatory, his point, *James*, the English case *James*, that was members of the Court, a decision where a husband and wife attended the local swimming pool, both aged 61, and you may have read that they were told that the wife could get in free because she was a pensionable age, but the husband had to pay something like 65p or the like to get in.

ELIAS CJ:

But the wife got the pension at a younger age and therefore –

MR WAALKENS QC:

Yes. The local pension law had said 65 for men and 60 for women, so she was on the pension, he wasn't, although they were both 61, and he had to pay his 65p, he was unhappy about this and initiated this discrimination claim and succeeded. The case is noteworthy on those rather odd facts, but also that it's actually not a comparator group case, in any event, there's no comparison performed by the case there. My learned friend, in his written argument, does

rely quite extensively on that and aside from the point that Justice Blanchard raised with my learned friend, there is a Court of Appeal case that distinguishes *James* and I wanted to hand that to you, if I may, you don't have it in the casebook, it's called *Dhatt*, if I could just have copies distributed.

TIPPING J:

This is our Court of Appeal is it?

MR WAALKENS QC:

No, it's an English Court of Appeal, I beg your pardon Sir. The headnote adequately describes the facts that this was a claim by a plaintiff, or an applicant who was from India and on arrival in the UK, his passport was stamped appropriately, that he could work but in the work environment, he was asked to produce proof that he actually could work and when he produced his passport, he was ultimately suspended from work on the grounds or dismissed because the employer was not satisfied that he had the requisite approvals to be in the country, so he initiated a claim for discrimination alleging that his circumstances, the way he was treated, the relevant circumstances were not the same as others would have been treated and the comparable group, or comparator group, that he wanted to refer to you'll see in the top right hand part of the page 693, in fact if I can pick it up from the bottom of the previous page, this is the headnote. I'm sorry that it is so long, "In determining whether there had been discrimination under the Act..." and I'll come to the section in a moment, because it's important, "…required that the proper comparison to be made was between a person of a particular racial group and a person not of that group where the relevant circumstances were the same..." and let me take you back to this in a moment, "...which meant that the proper comparison was between the applicant and nationals of other states who were required to provide proof of their employment status and not between the employer's treatment of the applicant and British citizens or EEC nationals, as the man had said, while other Poms and people from Europe just simply don't have to produce their passports and therefore because I was, I'm being discriminated against." The statutory wording is not dissimilar to our section, in particular section 104(1)(b)

and if I can take you please to page 696 of the judgment, you'll see in line B a reference to the primary section, "A person discriminates against another if, in any circumstances relevant for the purposes of the provisions of this Act, if on racial grounds he treats that other person, the other, less favourably than he treats or would treat other persons." So that's not quite so directive but if you go down to line E, section 3(4) of the requisite or comparable section in the UK Act says, "A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1), must be such that the relevant circumstance in the one case are the same or not materially different in the other."

ELIAS CJ:

I don't know what that means.

BLANCHARD J:

How is this relevant?

MR WAALKENS QC:

Well it's not greatly dissimilar, in my submission, to the wording of our section 104(1)(b), in terms of directing towards a comparator group, but I particularly raise it with the *James v Eastleigh* point, this Council case that my learned friend relies upon where you'll see, at the bottom of page 698, line J, the Court distinguished the *James* approach to say it was the Council which stipulated it to be eligible for free admission in the swimming pool, the entrant had to have reached pensionable age, and this is a point that Justice Blanchard picked up on earlier, that Air New Zealand had no choice here, and likewise, at line C, in this particular case, they dealt with the circumstances in the UK where Parliament itself had – if Parliament itself had compelled that concessions be granted on the basis that the Council had voluntarily selected, then there would have been no objection, and I wrap this up – and likewise, to the same effect, if you go to the other judgments of the Court, likewise to the same effect, say that there's great distinction where there's a compulsion on the part, as I say here, with Air New Zealand having to comply.

TIPPING J:

Does not the statute, where concerned with section 104, in effect dictate the comparator group?

MR WAALKENS QC:

Yes it does, as this one does too.

TIPPING J:

So one really has to focus on that I suspect, rather than what other Courts may have said in other cases.

ELIAS CJ:

This is a very wide comparator group, this is much more comparable to say section 44, provision of goods and services, something like that, under the Human Rights Act isn't it? It's with the whole world, who's seeking that service.

MR WAALKENS QC:

Yes, except the wording of the statute is quite similar to our 104(1)(b), although this talks about dismisses as against the provision of services, which I accept is in an employment context, more narrow than the provision of services, the wording of circumstances in which others of that description would not be, is not very dissimilar to that – to this, and the case makes the point that in selecting the comparator, you must exclude the circumstance to leave simply alone, or leave remaining the alleged discriminatory act.

TIPPING J:

Well it's no more complicated, is it not, than what is meant by "other employees", because that expression appears in both (a) and (b) of 104(1), what attributes do you ascribe to "other employees"?

MR WAALKENS QC:

And in (b) it talks about in circumstances in which other –

TIPPING J:

Yes.

MR WAALKENS QC:

And the use in (b) of "in circumstances" is directed towards looking at the restrictions that were faced by this pilot and comparing employees in circumstances where there was a comparable act and I do say that the Court of Appeal's example picked was perfectly valid, but if that's not accepted, the other one that I've commended in my submission is of a pilot who may have a family history health problem of some kind, but not sufficient to disentitle him to be a co-pilot, but not sufficient to be a pilot in command, flying into America, not complying then with American FAA laws, he or she would likewise receive exactly the same treatment as Mr McAlister did in this case. So that principled approach to comparisons would reveal that there has been no discrimination in this case.

TIPPING J:

Does not "other employees" look more to the actual than the hypothetical?

MR WAALKENS QC:

Yes, but in arriving at a comparison with treatment, because it is treatment that you're looking at, it is entirely appropriate to look at a hypothetical. You are not forced to have to look at an actual example involving other employees, hypotheticals are perfectly appropriate and must be followed.

ELIAS CJ:

Well they might not need to be if an employer has a clear policy, you might just be able to compare by reference to that.

MR WAALKENS QC:

Yes, or there may be actual examples which there's no requirement to have to find hypothetical, I accept that, but looking to a hypothetical example to emphasise that age was not the reason why Air New Zealand made its decision, is perfectly arrived at and fairly arrived at by a comparator approach

of the type I've indicated. And what's clear from the case law and I agree with the Crown's submission in terms of the comparable or comparator process analyses, is that all of the cases, all of the international cases, irrespective of their statutory background, and I accept Mr Harrison's point that the Canadian statute, particularly, is more general but not so, could one say, about the English statutes. One must adopt a comparator group that's both meaningful and not artificial and to take out of the comparator group someone who doesn't have the restrictions to fly into America does create an artificiality.

If I could take you please to the speeches in the House of Lords decision of *Malcolm*, it's, as Your Honours will have seen, a case that was argued prior to the Court of Appeal's decision but the – I'm sorry, the case was reported after the, just before the Court of Appeal's decision was released, and that is at page, at tab, in my learned friend, Mr Harrison's bundle, tab 13, this being the case with the schizophrenic who had the – who sublet his flat and it was accepted that inextricably linked with the disability, was the explanation for the subletting of the flat, and again statute is in terms relatively similar to the section that we have in terms of the need to find a comparator and in the speech of Lord Bingham at page 531 at paragraph 11, His Lordship noted that, "I would accept that 'but for' the mental illness, Mr Malcolm would probably not have behaved so irresponsibly as to sublet the flat and move elsewhere" and then another sentence down, "But Lewisham, the council's reason for seeking possession that Malcolm had sublet the flat and gone to live elsewhere was a pure housing management decision which had nothing whatever to do with his mental disability."

BLANCHARD J:

Well, they didn't know about his mental disability, did they?

MR WAALKENS QC:

No. To similar effect, Lord Scott at page 538 noted at line H, paragraph 32, "If a tenant had been given notice terminating his tenancy because he has sublet in breach of the tenancy agreement, what is the point of making the lawfulness of the action taken by his landlord dependant on whether notice to

quit would have been served on tenants who had not sublet. In other words, you must include in to the comparator group those who had sublet the premises to make any proper or meaningful comparison." Applying that to these facts of our case, the true comparator has to include persons who have restrictions flying in to the relevant air space, otherwise and I'll come to this later when I talk about the reasons, otherwise you distort the true comparison.

The last speech that I want to take you to in this judgment is of Lord Neuberger's at page, looks like 565, the binding has just obscured the number –

TIPPING J:

What paragraph?

MR WAALKENS QC:

One forty, I'm sorry, Your Honour.

TIPPING J:

Thank you.

MR WAALKENS QC:

He poses the question, or the point halfway down that paragraph, "The complainant is logically bound to be able to satisfy the requirement is showing that his treatment is less favourable than would be accorded others to whom the reason for his treatment did not apply because without the reason there would not be the treatment." I would suggest that's strongly suggestive of the point that "but for" or without the reason that Air New Zealand have relied upon being the ICAO restrictions, there would not have been the treatment that Mr McAlister received and the comparator group to identify it properly must highlight and select those – distinguish those factors.

Purvis is the – I'm sorry, I see the time Your Honours, 3.35.

ELIAS CJ:

We'll carry on until 4.

MR WAALKENS QC:

Thank you. Until when Your Honour?

ELIAS CJ:

Four.

MR WAALKENS QC:

Four o'clock. *Purvis* is the next case I'd like to refer you to. It's tab 22 of my learned friend's casebook. You'll see the statutory wording which I think my learned friend Mr Harrison took you to, at page 100, paragraph 8 of that page and it's wording that's similar, I don't say exactly the same but similar to our 104(1)(b) again, using the wording, "same circumstances". "The discriminator treats the agreed person less favourably than the discriminator would treat a person without the disability in the same circumstances." Again, in the case it was accepted and rightly so, that the violence that was, or the violent behaviour had been caused by this pupil's disability and that it was a characteristic of the disability he had suffered, so that the two are intertwined. If I could take you please, to paragraph 224.

ELIAS CJ:

Two hundred –

MR WAALKENS QC:

Two two four, page 161, it's the first complete paragraph on that page, where in the majority decision Their Honours said the circumstances referred to in the section I've just referred to you, "Are all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the discriminator." This is another of the quotes, "It would be artificial to exclude and there is no basis in the text of the provision for excluding from considerations some of these circumstances

because they are identified as being connected with that person's disability." That responds to my learned friend's submission at paragraph 79, where he was criticising the point that it's wrong to include in the comparator group factors or circumstances that are related to or intertwined with the discriminatory act or the alleged discriminatory act, in this case age. I suggest that a more objective view of the what the purpose of a discriminator group is, is to not exclude the type of factor we're dealing with here which was the actual reason which motivated Air New Zealand's thinking, not age.

ELIAS CJ:

All of those old cases, where people were excluded from employment because they didn't meet certain height or weight or those features which are discriminatory, the indirect discrimination cases –

MR WAALKENS QC:

Indirect discrimination cases, yes, this is a direct discrimination case.

ELIAS CJ:

But the argument you are advancing to us seems to me to be saying that you have to – you don't look to the indirect effect.

MR WAALKENS QC:

The distinction here – Your Honour's quite right, I'm familiar with those cases. The difference here is, unlike the height imposed restrictions and some of these other indirect discrimination historical cases, they are entirely voluntarily identified by the employer. There's no compulsion on their part to have to adopt that policy, quite different here. So, there's two points. One, Air New Zealand has no choice than to operate in this – have the policy that it did, the one that's criticised as being the act of discrimination, or the discriminatory backdrop to it. Secondly, you must as I say, to give effect to a true comparison, factor out a matter of the circumstance arising if it's truly the reason why the employer has acted as it did in this case.

WILSON J:

Can I just test that Mr Waalkens in terms of the wording at section 104 and suggest to you that given that that section is directed at discrimination because of a specified characteristic, it's logical to exclude from the statutory comparison those with that characteristic. To take the point further, otherwise isn't the whole exercise meaningless because so long as the employer is acting consistently, discrimination on the specified ground can never be established?

MR WAALKENS QC:

All of the cases, including *Purvis*, including *Malcolm*, have exactly the same circumstance that Your Honour has just asked and yet plainly to identify the comparator group and to do justice and approach it properly to have a – the criteria that I indicated before, meaningful and not an artificial comparison, there's nothing objectionable about that. So the fact that the section is addressing conduct or behaviour does not mean that one cannot still adopt the comparator approach that I've indicated.

TIPPING J:

Is one way of looking at it to say that it's one thing to have the characteristic, it's another thing to have the characteristic plus something more which that, something more if you like is related to characteristic. This *Purvis* case seems to say that they weren't really acting because of the disability, they were acting because of the violent behaviour.

MR WAALKENS QC:

Correct.

ELIAS CJ:

But weren't they acting because he didn't give the notice or whatever? Wasn't that the basis?

TIPPING J:

Well leaving the more procedural issue aside, the essence of *Purvis* as I understood it was that those in the majority, as opposed to Justices McHugh and Kirby, in effect were saying he wasn't removed from the school because of his disability. He was removed from the school because of the consequences of his disability.

MR WAALKENS QC:

That is correct.

TIPPING J:

And the same with *Malcolm* –

MR WAALKENS QC:

Which was intertwined with the disability.

TIPPING J:

The same with *Malcolm* in a sense. He wasn't being discriminated against on the grounds of his mental handicap. He was being treated, the treatment he received on account of that mental handicap plus the action that resulted from that mental handicap.

MR WAALKENS QC:

The subletting, yes.

ELIAS CJ:

He was actually treated equally. They just didn't treat him more leniently. It's really a –

McGRATH J:

Affirmatively.

ELIAS CJ:

Yes, yes.

McGRATH J:

They didn't treat him affirmatively.

ELIAS CJ:

Yes. And they weren't required to. That's all the holding there suggests.

TIPPING J:

But it didn't matter why he sublet.

ELIAS CJ:

Yes.

TIPPING J:

He sublet because, well in part because he was schizophrenic but it didn't really matter why. Now in the violence case, he was violent and it didn't really matter why he was violent, seems to be the approach. Now how do you relate that to your present case?

ELIAS CJ:

In this case he's 60 and it doesn't really matter why he's 60, is that what –

TIPPING J:

I don't know, I'm asking Mr Waalkens to -

MR WAALKENS QC:

In this case he has restrictions into America and it doesn't matter how those restrictions have arisen.

TIPPING J:

It's the fact of the restriction not what caused them.

MR WAALKENS QC:

Yes and just to again give that illustration, I don't know if it's a clear one to you, but it addresses the point that my learned friend Mr Harrison is critical of in his response that the Court of Appeal's comparator suffers for the reason that the comparator would not be actually able to fly in America in any event without a valid visa. Someone with, and it's not even an extreme hypothetical, someone with a health condition which was sufficient to warrant holding a pilot in command licence, but nonetheless in America not be acceptable for flying into the country, would meet any objection that my learned friend has raised because that person would be able to fly in a different position like a first officer position or an assistant pilot position. There's no evidence of this, it's entirely hypothetical, but there's no problem with the hypothetical. In fact if you look at the pages I was taking you to, the majority decision in *Purvis*, it acknowledges the referral to a wholly hypothetical set of circumstances.

ELIAS CJ:

I really would have thought though that the words "by reason directly or indirectly" means you get over the threshold of whether it is "by reason of" age, it is. I think the more significant question is whether he's being treated alike with other employees who are all subject to the same disability if you want to call it that.

MR WAALKENS QC:

And with – yes Your Honour, I'm not confusing this with a reasons issue that I'm going to separately come to in a moment. I'm just addressing the comparator at the moment.

ELIAS CJ:

I really don't know that – I'm not convinced that the comparator isn't making things very murky.

BLANCHARD J:

It seems to me that you have to tailor your comparator very carefully and one of the things you have to bear in mind is the overall scheme of the discrimination legislation. You can't tailor a comparator which leads to some facets of that scheme not having any operation.

MR WAALKENS QC:

I think that's the same as saying the comparator has to be a truly meaningful comparator. It's got to be one that reflects what –

BLANCHARD J:

Well it's got to be meaningful but it's also got to be balanced, a point that I think comes out in Lord Neuberger's judgment in *Malcolm*.

MR WAALKENS QC:

I don't suggest that – look, I agree with that, it should be balanced. The statutory direction under our section 104(a)(b), (a) is, "As are made available for other employees of the same or substantially similar qualifications, experience or skills." So in my respectful submission that must include, as a comparator, people who have operational restrictions into America for whatever reason.

BLANCHARD J:

Even if that means that you never get to a section 30 which might be the appropriate place to be looking at operational restrictions?

MR WAALKENS QC:

The fact that you can also look at section 30 as under qualifications of genuine occupational qualification, doesn't preclude it from being used upfront and of course we have allied to this the problem with otherwise for claims under 104(1)(b) there cannot ever be a response and that must be directed towards why the comparator analysis must be a careful one conducted of the type that I'm commending to you.

BLANCHARD J:

Well I think I'd agree with you if (b) itself is given a construction which overlaps with (a) but if (b) doesn't apply in the circumstance where (a) applies, you won't have that problem.

MR WAALKENS QC:

Not that problem. If you were to find (b) doesn't apply then there cannot be any – the word qualification which is used in section 30, genuine occupational qualification, would signal that age is an appropriate qualification to take into account so when you look under (a), "Made available for employees with the same or substantially similar qualifications", you've got the same phraseology being used albeit in different statutes but under the same anti-discriminatory scheme, there cannot be objection to that. That is to have a properly considered comparator group up front and then if you get to discrimination and section then follows but it would be quite wrong to define the comparator group in a way that creates a requirement to have to look at section 30. It just distorts the whole purpose of having a meaningful and not artificial comparator and again I keep on coming back to these facts that Mr McAlister could not fly over FAA and ICAO space. He had a very significant flight restriction to compare his circumstances with someone of the same or substantially similar qualifications, experience or skill must adopt that restriction.

ELIAS CJ:

Suppose it wasn't such a significant part of the job. Are these concepts elastic?

MR WAALKENS QC:

It has to be substantially. The word "substantially", all skills employed in the same or –

ELIAS CJ:

Yes but that's to do with the qualifications. You are really talking about impact. The reason you're saying that age or the ability to fly to the United States, whether you keep them separately or put them together, is a qualification, is because of the impact on the job.

MR WAALKENS QC:

Well, if you had someone with – we say 89 percent, I hear my learned friend has a challenge to that but whatever the figure may be, if in fact it was a one percent, a very minimal intrusion, let us examine that and Air New Zealand said well, you have a restriction over one percent of the territory that we've got to fly, therefore we're going to treat you and we're going to demote you and put you into a different position. You would surely have discrimination there.

ELIAS CJ:

Where are the words that suggest that you have discrimination in one case but not in the other, where it's of more impact on the employer?

MR WAALKENS QC:

Well, it's not the –

ELIAS CJ:

If your argument in principle is correct?

MR WAALKENS QC:

I don't regard this as impact on the employer, so much as its directed to the qualifications, experience or skills, that are either the same or substantially similar circumstances. That couldn't be said to be the case.

ELIAS CJ:

They might all be employed in similar circumstances and they all have only one percent need to go to the United States, one percent of their time. I'm just wondering where all of these qualitative assessments come in on the

statutory language because you're saying, effectively I think, that's a qualification because it's such a significant part of the job?

MR WAALKENS QC:

Correct, correct. I can accept that there, well there will be extremes in the other direction and perhaps the one percent one is but an example.

ELIAS CJ:

Why doesn't all of this, just again, looking at the statutory language, why isn't all of that debate really centred around sections 30 and 35?

MR WAALKENS QC:

Because of what I said before, you must, you must – following the wording of the section and consistent with *Malcolm* and *Purvis* and I was going to take you to some other cases as well but they're the same type of principle. You must perform comparator analysis effectively and, as I say, meaningful and so forth, not artificially, to truly identify comparable –

ELIAS CJ:

But they may all be the same, they may be treated in exactly the same way. All right, it doesn't matter, I'll try and think it through.

TIPPING J:

Mr Waalkens, I must say that, shorn of all the trimmings, I would have been inclined to read (a) as saying, "As are made available for other employees without the age issue but otherwise of the same or substantially similar" et cetera. Now, according to your submission, that would not be sound because it would simply in effect make the comparator group people under 60 but otherwise generally of the same qualifications, skills, experience, et cetera as Captain McAlister. Then you move on –

MR WAALKENS QC:

Which creates the debate about whether that's reasonable or fair and we say it's not because they are not of the same circumstances and whatnot because, unlike the 60s, the under 60s, this man cannot perform the work –

TIPPING J:

Yes, well that may well be justifiable downstream but at step one – if you treat age as a qualification and you treat the comparators as having the same or substantially similar qualifications, you'll have them all over 60 and damnify the whole exercise.

WILSON J:

That's my concern.

MR WAALKENS QC:

Well, I can hear myself repeating myself here. The comparator would not be, would not meet the statutory wording if it didn't reflect this very significant operational restriction and to just simplistically take age as the qualification for example, would be comparing apples with pears, if the restriction of whatever type wasn't introduced into it.

TIPPING J:

The only problem for you I suppose is that in (b) you can't get at section 30(1)?

MR WAALKENS QC:

Oh, that's –

TIPPING J:

That's your fundamental problem.

MR WAALKENS QC:

That's a big problem, yes.

TIPPING J:

If it weren't for that, you might be more inclined –

MR WAALKENS QC:

I would still be saying what I've just said to you though.–

TIPPING J:

Yes, I appreciate that but it wouldn't lead to such strange and tortuous –

MR WAALKENS QC:

It would be a less harsh because I mean, it would plainly be a harsh result to have and extreme, to have a 104(1)(b) outcome in this case where, leaving aside the argument about genuine occupational qualification and the like, we just simply can't even get in to there and even begin to argue it.

ELIAS CJ:

I'm not sure why you are not concentrating on the language of 104 and the reference to – leaving aside all of this fascination with comparators which are so necessary where one is talking about the general threshold discrimination grounds, without this sort of context. (a) is about not affording the same terms of employment. Well, on one view, the same terms of employment are offered to all employees and similarly, (b) dismisses that employee in circumstances in which other employees wouldn't be dismissed. Well, the circumstances will be the same in which they are dismissed.

MR WAALKENS QC:

Mmm. Well, as I say, 104(1)(a) must in my submission, follow an analysis of the type I've commended to you but I see the time.

ELIAS CJ:

How much longer would you expect to be Mr Waalkens?

MR WAALKENS QC:

Subject to your enquiries, I would think – I mean that respectfully, I would think probably another half hour at the most.

ELIAS CJ:

Yes, thank you. All right, we'll take the adjournment now.

COURT ADJOURNS: 3.58 PM

COURT RESUMES ON THURSDAY 26 MARCH 2009 AT 10.05 AM

MR WAALKENS QC:

Good morning Your Honours. Yesterday afternoon I was still dealing with the comparator analysis and if I can just pick up on where we were at. It must be clear in, my submission, from all of the many cases that you have in the casebooks before you that all the jurisdictions plainly in discrimination law, have a focus on the comparator analysis, that is the upfront analysis, and it does behove the Court plainly to apply the section 104 criteria and as we say in this case identify a comparator that's in tune with the statutory direction for a meaningful comparator and to simply take in this case the comparison with the before age 60 or 65 and the after age simply usurps that very clear statutory direction.

Justice Tipping yesterday posed the question of my learned friend Mr Harrison, was it too simplistic to simply take a before 60 and an after 60 comparison. In my submission, yes it would be simplistic but there will be cases where that may be so. For example if Air New Zealand had introduced a policy across the board for domestic pilots with no other circumstance backing it up or related to it then one might be able to in that circumstance do a simply before and after age 60 comparison.

If I could take the Court back to section 104(1)(a) and just look at the criteria briefly again. Leaving to one side the first two or three lines, that is about terms of employment offering or affording the same terms of employment

conditions and so forth, it's useful to focus on the last few lines which set out qualifications on the one hand and also circumstances on another. If I can just read that offering the same terms of employment and so forth, "as are made available for other employees of the same or substantially similar qualifications, experience or skills."

We take the point that the restrictions that were faced, the ICAO/FAA restrictions, fall neatly within qualifications or perhaps skills but certainly in the last line the direction is towards those qualifications, experience and skills employed in the same or substantially similar circumstance and to not treat the restrictions as circumstances does violence to the very direction in the Act as to what one is trying to compare.

It is our submission that the inability of Mr McAlister given the ICAO/FAA restrictions to fly as a pilot in command into this significant space or part of the job very much creates a circumstance if not at least a qualification, experience or skill that must be factored into the comparison and again not to do that would, in my submission, do significant violence to the section and give a result that's –

McGRATH J:

Your point, just trying to link this back to what was looked at in *Malcolm*, you're really saying it would be the same in as if in *Malcolm* you'd just considered the comparator group with no disability as opposed to a comparator group with no disability who'd also sublet the premises?

MR WAALKENS QC:

Correct, that being the very circumstance in issue there and in fact I was – I would like to, if I could just briefly take you back to *Malcolm*. *Malcolm* is in tab 13 of the appellant's casebook. I would commend this is certainly the most recent or it's the most recent case at which I think we've all uncovered that a persuasive authority no less than the House of Lords, at paragraph 32 under tab 13, and I took you to some of this yesterday but if I can just return to it. In fact to make sense of it you'd need to start at paragraph 31, *Clark v Novacold*,

which is a case we haven't thus far looked at in any real detail but it's in the Human Rights bundle at tab 17, *Clark v Novacold* paragraph 31 was a case where an employee had a back injury that kept him out of work for about a year and he was dismissed because he couldn't do his work. In *Clark v Novacold* the comparison made by the Court, Lord Justice Mummery, was simply between employees of a group who didn't have the injury. That is, they didn't factor into the comparator someone with a back injury or someone who was away from work for a year.

Lord Justice Scott in *Malcolm,* as did the other majority Law Lords in that case, disagreed with *Clark v Novacold*. At paragraph 32 His Lordship said, "My Lords, I must respectfully disagree with what the Court in *Clark v Novacold* said. Mummery LJ's conclusion emasculates the statutory comparison. What is the point of asking whether a person has been treated less favourably than others?"

Now those words are slightly different but the essence of the exercise is just as our section 104(1)(a) or (b) is, that is to make a comparison of one group with another. If the others of those to whom the reason why the disabled person was subjected to the complained of treatment cannot apply. If a person has been dismissed because he's incapable of doing his job, what is the point of making the lawfulness of his dismissal dependent on whether those who are capable of doing their job would have been dismissed? If a person has been dismissed because he will be absent from work for a year, what's the point of making the lawfulness of his dismissal dependent on whether those who would not be absent from work will be dismissed? If a tenant has been given notice terminating his tenancy because he sublet in breach of a tenancy agreement, what's the point of making the lawfulness of the action taken by his landlord dependent on whether notice to quite would have been served on other tenants who had not sublet?

That's a very, in my submission, powerful indicator of again a proper focus on the comparator and the comparison.

TIPPING J:

Making it meaningful in terms of discrimination?

MR WAALKENS QC:

Correct.

TIPPING J:

The anti-discrimination policy of the legislation.

MR WAALKENS QC:

Correct and it's no – as tempting as it might be and I'll come to this in a moment, it will do violence to the policy of the Act, our Act, if this Court just simply takes the view well, let's defer a strict comparator analysis up front and deal with it all under sections 30 and 35.

BLANCHARD J:

But the problem with that approach is that it then denies sections 30 and 35 their operation so you're, it seems to me, offending against the scheme of the Act. Have you looked at what Lord Neuberger had to say at paragraphs 141 and 142? He went along in the end with the majority view about the comparator but he expresses his concerns about it and it's clear from paragraph 141 and 142 that he is very much looking at the overall scheme of the legislation.

MR WAALKENS QC:

Yes.

BLANCHARD J:

And is concerned to give the whole scheme effect. So whilst he went along with it in *Malcolm*'s case, I think he's indicating that the choice of the comparator is very much a contextual exercise and you don't choose a comparator which doesn't give effect to all these elements of the scheme of the Act.

MR WAALKENS QC:

But again coming back – there's two answers to that. The UK Act under defining discrimination has two limbs to it. We can see it at the top of page 534 of *Malcolm*, section 24(1), defining discrimination, part (a) and (b), (b) as you will see, and cannot show that the treatment is justified. Now in *Malcolm*, the House of Lords, because it took a proper approach, in my submission, to comparator, never had to get into the issue that Justice Blanchard is commending here, let's look at justification as an issue and let that be the scheme of it.

ELIAS CJ:

Weren't they really saying that the reason didn't relate to the disabled person's disability?

MR WAALKENS QC:

Well no they're not because that's actually the point, the decision to sublet was directly related to the disability in *Malcolm*. There's no dispute about that. That's the first point. And secondly –

ELIAS CJ:

Sorry, the decision to sublet was subject – I'm sorry, I haven't read this case with attention so I'm probably quite astray. The decision to sublet was because of his disability –

MR WAALKENS QC:

Correct.

ELIAS CJ:

– but the decision to terminate his lease was because he had sublet?

MR WAALKENS QC:

Yes, that's right. Which as much as we face the same argument here, the decision to deal with Mr McAlister on a demotion basis was because of the restrictions. Air New Zealand's decision was not one, and I'll come to this in a

moment, based on age. The inter-relationship in the *Malcolm* case, disability with the subletting which is established, is equally applicable in this case and you –

ELIAS CJ:

Well there was a proximate cause and there was an explanation for the cause in *Malcolm*. Here you only have the proximate cause, the age.

MR WAALKENS QC:

Well again there's a quite –

ELIAS CJ:

And you're seeking to go back to the motive for the age but it's the other way round?

MR WAALKENS QC:

No, no with the greatest respect, what the Act says is you've got to make a comparison between the circumstance and the circumstance is plainly the restrictions on travel. That's the circumstance. That ICAO or whoever designated that restriction may have done so because of age 60, doesn't change what in fact that this is, it's a restriction on the travel. It's not an age issue on Air New Zealand's part. That said, there is a separate exercise to be done. You must firstly look at their disparity of treatment and in making that comparison, as I said yesterday, it is and I say it in my submission. If you take away age in the mix and leave in the restriction, would Air New Zealand have treated someone else differently? Because that's got to be the test. The answer is no. If other pilots, for whatever reason, had the restrictions, Air New Zealand would have treated them identically. If you leave in the age but take out the restriction, would Air New Zealand have implemented a change? Answer, no. It just speaks volumes that again the circumstance that's driving this whole thing is the restriction not the age.

WILSON J:

But at least indirectly it's the age, isn't it?

MR WAALKENS QC:

Well that, Your Honour, we'll have to come to when we look at the "by reason of" but –

McGRATH J:

Can I just bring you back to, I think that you were going to make a point in relation to the English legislation considered in *Malcolm* at page 534. Your point really there, maybe I'm anticipating it wrongly, but the element of having to show the treatment is justified, just doesn't apply –

MR WAALKENS QC:

Correct.

McGRATH J:

– to (b)?

MR WAALKENS QC:

Absolutely, so because a proper look at the first step which is, has there been disparity of treatment, gives you the answer and it usurps the whole point of discrimination law for the Court to say well look, let's let some other Court sort out why and what all the wherefores and so forth are, if there's no difference in treatment, and I'm using those words colloquially because that's what (a) and (b) are both referring to, end of story. And it's not attractive at all, and quite wrong, in my submission, for the Court to take an approach, well, let's leave Air New Zealand with a discrimination finding per se, and then let them try and justify that, that's for this client and no doubt for other responsible corporates and the like, quite unattractive, and does mischief to the statutory.

McGRATH J:

Well it is nevertheless a somewhat startling conclusion and I'm thinking if it was just one of the ways Lord Neuberger came to look at this statute to say

that you don't impose on Air New Zealand in case like this something that requires them to make adjustments to the extent that that's not going to disrupt them unduly. That's really the consequence I think, of your argument and it may be what the statute requires, but it's not an attractive conclusion.

MR WAALKENS QC:

Well the problem with this case, and I'll come to the policy reasons in a moment, if you – if your judgment is tailored for that reason, there are many other disability cases that this Court's decision on comparators will do grave injustice to, you'll end up with dismissal cases under (b), this case under (b) there wasn't a dismissal, but you could easily get dismissal cases and there are many in the community of dismissals made where employers find someone, for disability reasons or whatever, cannot do the job and they dismiss them.

BLANCHARD J:

Is there no defence in relation to disability?

MR WAALKENS QC:

No. There's a section 29 defence, and that's in tab 1 of my learned friend's casebook, section 29, I'm sorry, tab 2, there are certain defences to those, but if you take –

McGRATH J:

Sorry, just not too quickly, we're looking at Mr Harrison's casebook?

MR WAALKENS QC:

Correct, tab 2.

McGRATH J:

The statute, yes.

MR WAALKENS QC:

Just to paraphrase this –

McGRATH J:

Section 29 was it?

MR WAALKENS QC:

Yes. We're looking at an age discrimination here, case, but section 104 and 103 are directed – there are many other forms of disability and discrimination that can arise in an employment circumstance, where it's related to disability, section 29 is the saving response for the employer and one can see that the responses in (a) and (b) are themselves quite restricted, and justification in its broader sense, just simply won't ever be able to be embarked upon unless you can strictly bring it within 1(a) or (b).

BLANCHARD J:

Maybe that's the policy of the Act?

MR WAALKENS QC:

Well the policy of the Act must be, under section 104(1)(a) and (b) to do a proper comparator up front, to look at circumstances, to look at qualifications, to factor those in. There must somewhere in the comparator, somewhere in the comparator the restrictions must bite in otherwise it's totally illusory to say, let's compare McAlister with an under age 60 or 65 year old man, it just does mischief to –

TIPPING J:

Is it your proposition that an under 60 year old man is not employed in the same or substantially similar circumstances?

MR WAALKENS QC:

Correct, because he doesn't have the restrictions.

TIPPING J:

And the restrictions are a material part of the circumstances?

MR WAALKENS QC:

They're a qualification, they're something that goes directly to the person's ability to do the work, it would be entirely different, I accept, for example, a law firm said age 65 partners have to retire. You could then quite simply take a before 65 and after 65 because there's no circumstance that's relevant to the comparator exercise to make it meaningful.

ELIAS CJ:

Well that's 104(1)(c) and there is no comparator there. You can't retire people. That, it seems to me, is a significant change effected by this legislation.

MR WAALKENS QC:

It's a (b) situation if you dismiss someone.

ELIAS CJ:

I'm just looking at (c). You cannot compulsorily retire someone.

MR WAALKENS QC:

No, that's true.

ELIAS CJ:

And there's no comparator required for that.

MR WAALKENS QC:

There will be examples, domestic pilots will be not able to fly over 60, comparatively, ICAO, which we can see changes in, they've changed the age 60 to 65, they've introduced also a rider with that, that that is provided the co-pilot is himself, or herself, not over 60, then they've lifted it up to 65 so you can see that they tinker around with the age rule. They might introduce a rule to say no pilots, whatever, co-pilot, Pilot in command, no pilots can fly into FAA/ICAO airspace aged over 65. Now if that happened, Air New Zealand,

with its hundreds of pilots who fly internationally, would not be able to, and I use the word accommodate rather loosely, but not be able to deal with it under a section 104(1)(a), they couldn't give some demotion or a different position because there's too many pilots so that they'd dismiss them, that would be a 104(1)(b) situation. They would have no defence at all because it's not a detriment claim, it's a dismissal claim.

BLANCHARD J:

That assumes that (b) applies in a situation where (a) applies.

MR WAALKENS QC:

Well it's not an (a) though.

BLANCHARD J:

I'd have to say I've got real doubts about that.

MR WAALKENS QC:

It's not an (a) situation though, Justice Blanchard, the circumstances that I've just given you because they're not offering the continuation of work for that group of pilots, they're dismissing them. It can only be a 104(1)(b) situation.

ELIAS CJ:

Well I would have thought it's a 104(1)(c) situation.

BLANCHARD J:

So would I.

ELIAS CJ:

They're compulsorily retiring and what the statute says you can't do that unless it's a qualification and then that has to be reasonable. I don't think it's necessarily against you, although it may be to a different end, to emphasise the qualification aspect. I would have thought that the scheme of the legislation with section 30 in the Human Rights Act being brought forward, is that, and particularly section 30, is that you can't discriminate on the basis of

age, unless age is a qualification and then it has to be justified and tempered by section 35. Then the legislation all hangs together well, and the reason (b) is not subject to section 30 is because it's not dealing with age as a qualification. Age as a qualification requires justification under (a) and (c) in the circumstances either of dismissal or treating them on different terms.

MR WAALKENS QC:

Well there's two answers to that. One is the, although we have a specific section 30, it's not dissimilar to the justification type issues that other jurisdictions raise, and you can see very clearly from *Malcolm* for example, House of Lords and recent no less, with some comment, not much but some comment of reluctance, that the proper focus must be on the up front comparator. You don't usurp by saying well look, let's let it all come –

ELIAS CJ:

There's no comparator in (c), it's just a strict, it's a legislative judgment that people cannot be compulsorily retired until – on any age, unless age is a qualification for the job under section 30 is tempered by section 35.

MR WAALKENS QC:

But under (a) and (b) when you have an (a) and (b) situation, which we have when we don't have (c), you must do the comparator meaningfully and properly, and the words in 104(1)(a) and (b) are so specific they call in (a) only a focus comparator, as I'm saying, rather than look, let's defer it all until section 30 –

ELIAS CJ:

Well what I'm suggesting to you is that if age is the reason, if it's by reason directly or indirectly of age, age must be a qualification under paragraph (a).

MR WAALKENS QC:

Yes, I'd accept that and the circumstance, beyond just age as a qualification, the circumstance is, people are in vast numbers unable to fly in to the air space. That's a circumstance that must be factored –

ELIAS CJ:

That's a circumstance which gives rise to age being the qualification?

MR WAALKENS QC:

Yes, if you're making –

ELIAS CJ:

Then it makes sense if (b) is not subject to section 30 because otherwise there's an unaccountable – but it's directed at a different circumstance, (c) is directed at compulsorily retiring, (a) is not giving people the same terms and conditions on the basis of age as a qualification, (b) is the circumstance where, well, you certainly can't – (b) I think, may well be directed at two points. One is, if you come within the exception to paragraph (c) because age is a qualification, you cannot then discriminate between employees who are subject to that qualification. You can't say, we'll keep you but not you, that's the dismissal thing but you've already done your section 30 analysis in getting there, so there's no anomaly in not having section 30 apply to (b) and the circumstances in which you are employed, the comparator there is the work that you are doing. So, if you must retain someone in your workforce, if you are justified under (a) because age is a qualification in changing the job that they are actually doing, you cannot discriminate between those who are on the reduced circumstances and again, you don't need to have access to section 30 because (b) is simply dealing with the cases when you've got through the section 30 exception and says, for those people who got through that, perhaps because there's a reasonable accommodation that can be made, you can't discriminate among those people, you've got to treat them equally. I think the legislation really can be read to hang together.

MR WAALKENS QC:

Well, I do take the point Your Honour, that to make the – to follow what section 104 and both (a) and (b) are directing in terms of the comparison, that does need to be made upfront before one gets in to section 30.

ELIAS CJ:

That's really simply treating age as a qualification, you can only ever discriminate between those of a certain age and those below that age, if age is a qualification for the work. That does take you, in all cases where you are relying on age, so I don't think you really have to worry too much about comparators. They are identified by the statute.

MR WAALKENS QC:

If this Court isn't to, or wasn't to determine a comparator exercise of the type that I've commended, it will do mischief to many other cases of discrimination in terms of the need to identify a proper –

ELIAS CJ:

But in other cases, it may well be necessary to identify the comparator with some care but it just doesn't seem to me that this is a section that requires that.

MR WAALKENS QC:

I was going to take the Court through the numerous other cases, *Purvis* where you have such a carefully constructed comparator group –

BLANCHARD J:

But they are all different circumstances, if I can use that word.

MR WAALKENS QC:

They're different cases, yes.

BLANCHARD J:

The point the Chief Justice is making is that the comparator has to be contextual. Different comparators will be required in different context, different statutory context, maybe even different factual context. In order to make sense of the whole thing by which I mean, the scheme of the legislation. Different legislation will have different schemes.

MR WAALKENS QC:

Yes, I accept that. What I, again what I say and particularly with reference to (a), is that on the one hand there is reference in the third to last line to the word "qualifications", similar qualifications and so forth but one is driven back inextricably at the end of 104(1)(a) to comparison of employees in the same or substantially similar circumstance and that can only be a reference back to, in this case, issues to do with the flight restrictions.

TIPPING J:

Mr Waalkens, if the Chief Justice's propositions are correct, your client will not be vulnerable in the case to a claim under (b).

MR WAALKENS QC:

Yes, I understand that.

TIPPING J:

You are only facing (a) in respect of which you've got the – what's that, genuine occupational qualification defence.

MR WAALKENS QC:

Genuine occupational qualification defence, yes.

TIPPING J:

Assuming that the comparator is the one you don't like. So, you get to the same result arguably, through a more open gate, there's a more open gate at the start but you get home because of the, if your argument is right because of the genuine occupational qualification. Isn't that a more principled approach to discrimination law, than to have the gate very narrow at the start, where you don't really need the protection behind it?

MR WAALKENS QC:

The gate needs to be present at the start because you have to make the comparison between similarity of treatment –

TIPPING J:

I appreciate there needs to be a gate at the start but to get your client home, you don't have to have the gate as wide as you would wish it because you've got the fall back on the GOQ. Now, I'm just wondering whether you're not trying to, in your client's interests, establish more than you have to to get the client home.

MR WAALKENS QC:

I'm conscious that it's not the end of the world for a section 30 response to the situation you've outlined but it's unattractive to have to go through all that exercise when there so clearly is no disparity of treatment, with a proper comparator analysis upfront which is what ought to happen and what is after all consistent with –

ELIAS CJ:

Yes, that's your preferred –

MR WAALKENS QC:

That's the preferred position.

ELIAS CJ:

– methodology. The only other aspect that I put to you is that you did rather talk about a finding of discrimination and then a section 30 thing but of course the statute envisages section 104 not applying, so –

MR WAALKENS QC:

Yes, I said, yes, I think I said –

ELIAS CJ:

It's not really a preliminary finding of discrimination at all.

MR WAALKENS QC:

Or disparity of treatment.

TIPPING J:

You haven't discriminated if you have a genuine occupational qualification situation.

MR WAALKENS QC:

Yes, I didn't –

TIPPING J:

So there's no pejorative finding against your client at step 1.

MR WAALKENS QC:

I didn't eloquently express that, I wasn't suggesting that it would be a finding of discrimination but there would be a preliminary finding of disparity of treatment per se upfront, for there to then be a consideration of whether it's justified by virtue of qualification or whatever.

TIPPING J:

I don't want you to think I'm necessarily against you on step – on your preferred analysis. I was just thinking aloud almost, as to how you know, you have got the same result if you like by the other route.

MR WAALKENS QC:

Yes, yes, could I just have a moment please. Now, I propose to move to the next limb of the argument, that's the "by reason of" unless there's any other matters you'd like me to traverse on the comparator issue?

ELIAS CJ:

No, that would be helpful, thank you.

MR WAALKENS QC:

It's clear from the Court of Appeal's decision that it did not have to make a decision on this so that is if the points are accepted by the Court of Air New Zealand's point on the comparator then you don't even need to get to the issue of "by reason of directly or indirectly" and the Court of Appeal made that

clear at paragraph 95. In my submission its analysis at paragraphs 96 to 105 which follow, that is the analysis of "by reason directly or indirectly" of any prohibited ground is wrong, it's clear from the Court's analysis that it relies heavily on the "but for" approach.

We can see that from firstly paragraph 98, the Court rightly referred to my criticism of the trial Judge's reasoning relying as she did so much on "but for" and I'll come back to that in a moment. You can at paragraph 100 the Court of Appeal again directed itself about issues of causation arise in many areas of the law, typically factual and legal in general but not always a "but for" factual link must be established but that alone may not be sufficient. And it's clear from, in my submission, from how one reads what they've – how they've then looked at this. They've simply deferred to Judge Shaw's decision which was that there had been a response "by reason directly or indirectly" of the prohibited ground.

Judge Shaw in her judgment at paragraphs 88 and 89, they are on pages 34 of the first casebook, very clearly relied predominantly on "but for" my learned friend Mr Harrison said she'd adopted a belts and braces type approach. One can see in paragraph 88 on the face of it age was an expressly relevant factor. The fact that Air New Zealand did not intend, and she finds they did not intend, to actively discriminate does not detract from the fact that "but for" his age, so again she uses "but for" as the directive, McAlister would not have been limited in the range of flying activities. And then 89, the substantial reason why he was downgraded was age. So the Court of Appeal haven't looked, in my submission, separately at whether the trial Judge was wrong and how she directed herself.

Now the intervener the Attorney General in its casebook at paragraph 12 has the House of Lords case of *Khan* and *Khan* we can see was a chief constable who had problems with seeking a reference because of some outstanding court claim or proceeding that had been brought against the police force and there's a pro of some outstanding court claim or proceeding that had been brought against the police force and there's a provision in that legislation that

prohibits behaviour of that type where it's linked to court proceedings or complaints of that type. And so a racial prejudice claim was brought by *Khan* against the police force and very much at the forefront of the issue was the terminology of that statue which is whether by reason that, whether than "by reason of", the conduct complained of was connected to a prohibited act.

And the speech of Lord Nicholls at paragraph 29 is the one that I would like to refer you to. That's tab 12 of the intervener Attorney General's casebook, paragraph 29, by reason that where Lord Nicholls said, "Contrary to views sometimes stated the third ingredient by reason that does not raise a question of causation as that expression is usually understood. Causation is a slippery word that normally gets used to describe a legal exercise. From the many events leading up to the crucial happening the Court selects one or more of them which the law regards as causative of the happening. Sometimes the Court may look for the operative cause or the effective cause. Sometimes it may apply a "but for" approach for the reasons I sought to explain in *Nagarajan* which is the case immediately before that at tab 11 of the Attorney's casebook.

"A causation exercise of this type is not required either "by reason of" section 1(a) or section 2 the phrase on racial grounds and by reason that denote a different exercise. Why did the alleged discriminator act as he did? What consciously or unconsciously was his reason. Unlike causation this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is question of fact."

And to like effect Lord Scott in a very brief extract from his speech at paragraph 77, Lord Scott, under the heading The Causation Point and just digressing for a moment I do not believe there's a great deal in the point as to whether it's strictly causation as an issue or something different. Lord Scott said at paragraph 77, "Was the reference withheld by reason that Sergeant Khan had brought the race discrimination proceedings. In a strict causative sense it was. If the proceedings had not been brought the reference would not have been given. The proceedings were a causa sine

qua non but the language used in section 2(1) is not the language of strict causation. The words “by reason that” suggests to my mind it is the real reason, the core reason the causa causans, the motive for the treatment complained of that must be identified.”

WILSON J:

There’s no reference to directly or indirectly there was there?

MR WAALKENS QC:

No there’s not Sir no. No there’s not. But whether –

BLANCHARD J:

And you’re arguing this is a question of fact?

MR WAALKENS QC:

It’s a question of fact which neither of the trial Judge, nor the Court of Appeal directed themselves properly on in conducting that enquiry of fact. You’ll see as I’ve taken you too that the Judge quite distinctly directed herself about a “but for” approach, one that I am critical of, and in fact if one was going to use a “but for” exercise the argument that had been put by me in the Court of Appeal was it ought to have also considered “but for” ICAO or FAA. But the Judge didn’t, she simply confined herself to “but for” age where this had happened and that’s simplistic and it produces a distorted outcome. So yes it is a simple factual exercise but the Judge has – what exercise she conducted clearly directed herself as to how to conduct that factual exercise on an improper basis.

ELIAS CJ:

Just thinking of your distinction between or what’s the causa causans and what’s behind it and which is first the chicken or the egg. In terms of section 26 of the Human Rights Act, or section 26 of the Human Rights Act on your argument would not be necessary because if the reason is the regulations of some other country, you would say that’s the cause, not the age. So clearly

the legislature is not, if one's looking at this as a whole package, is treating age as a reason for the distinction not the underlying prompt.

MR WAALKENS QC:

Yes although one must still look at what truly was for the alleged discriminator the reason that drove it. What was that and it may sound like I'm splitting hairs but it's fundamental that Air New Zealand was motivated only be –

ELIAS CJ:

Who would doubt that? No one's suggesting bad faith in this and just thinking suppose their reasons were the known – if it's demonstrated, the probability of mental deterioration after a certain age. On our argument, would you say the reason for the discrimination, it's not by reason of age, it's by reason of the probability of deterioration? See, I just don't –

MR WAALKENS QC:

No, no, that, I would see that a marked distinction from, in this case, Air New Zealand's reason being flight restrictions. They could be completely unrelated to age and it's factious to say –

ELIAS CJ:

Well, say it's safety?

MR WAALKENS QC:

The restriction is the driving force behind its decision.

TIPPING J:

Isn't it, you simply say, was this action by reason indirectly of his age and I would find it very hard because that's what the section says, "by reason directly or indirectly". I ask myself, was this by reason indirectly of age?

BLANCHARD J:

What was the driver behind the regulation? It was age.

MR WAALKENS QC:

There's no question about that.

TIPPING J:

It has to be indirectly, by reason indirectly of age. Otherwise, you're eliminating age altogether from the equation which is the sine qua non of the regulation.

WILSON J:

Perhaps, to put the same proposition a different way. Isn't the practical effect of the words directly or indirectly to introduce a "but for" test?

MR WAALKENS QC:

No, I don't accept that at all. The reason must be clearly identified and to just ask the "but for" you don't – you're not actually directing yourself to what actually was operative in the mind of the airline –

TIPPING J:

I could live with Lord Nicholls but with the addition of indirectly, I don't think you could say subjectively this was other than indirectly by reason of age.

MR WAALKENS QC:

Yes, well I'm hearing my argument is not attractive to you.

ELIAS CJ:

I might say, I would put it more on directly and so that their motive was the restriction. It seems to me, quite a direct connection.

MR WAALKENS QC:

Well, that's the argument on the "by reason of".

BLANCHARD J:

You might have an easier time on section 30.

MR WAALKENS QC:

Well, section 30, I had said what I wanted to say on section 30 when I started yesterday Justice Blanchard, unless there's anything else you wanted me to direct on that. My casebook sets out the cases that make it clear that other jurisprudence adopts a very similar approach to what is commended by Air New Zealand in these circumstances. Age 60 is very much a GOQ or words equivalent to that.

TIPPING J:

For me Mr Waalkens, your fundamental task is to get rid of paragraph (b). Now, as I understand it, you get rid of paragraph (b) by adopting what's been put to you primarily by the Chief Justice and Justice Blanchard. Is that a fair –

MR WAALKENS QC:

Correct, yes.

TIPPING J:

Because if you can get out of (b), then if all else fails, you come back to section 30 which you've already given us your submissions on and they have force.

MR WAALKENS QC:

Yes.

TIPPING J:

So, is there any other way, apart from what's been put to you from the bench, upon which you wish to submit that (b) can't avail McAlister?

MR WAALKENS QC:

No, there's not but it does need to be emphasised that there is some gymnastics that need to be performed with (b), to remove (b) and to indeed remove (b) for other discrimination cases that might also get caught up as a consequence of this, leaving any other litigants in 104(1)(b) situation with no recourse to the statutory protections and that's got to be unattractive and it's

for that reason because I don't – I accept some difficulty with entirely removing (b) and it's for that reason that I suggest the preferable stance is to have a more direct and focused and meaningful comparator group analysis upfront. That removes all of this difficulty, although it has the down –

TIPPING J:

I understand that. All I wanted to get from you was that, anything else you want to say about (b) that would help to eliminate it from the equation?

MR WAALKENS QC:

No, I believe not Sir, thank you.

ELIAS CJ:

I would like you to answer why the analysis doesn't work for other prohibited grounds? It seems to me to be quite consistent with the application of other prohibited grounds.

MR WAALKENS QC:

Well, if you take –

ELIAS CJ:

That is, you can't retire an employee or refuse to offer them the same terms and conditions of employment by reason of a prohibited ground, unless it is a qualification for the job.

MR WAALKENS QC:

If you take the *Clark* –

ELIAS CJ:

Or unless you come within one of the other exceptions which is effectively that sort of justification.

MR WAALKENS QC:

Yes.

ELIAS CJ:

So, you can't offer them different terms and conditions and you can't get rid of them.

MR WAALKENS QC:

If you take a *Clark v Novacold* situation, the man with the back injury or the back ailment, so he could not work for a year and the employer dismissed him, that would be a 104(1)(b) situation and yet without having a meaningful comparator analysis of the type I've been banging on about, you will not get to the disability related exceptions in section 29.

TIPPING J:

What is wrong with the view that (b) means that if you have two people off work for a year with a back problem, you mustn't fire one and keep the other on? That I think, in the simplest terms is what is being put to you.

MR WAALKENS QC:

Well, that's, that's –

TIPPING J:

What violence is that going to do across the board of this sort of problem?

MR WAALKENS QC:

That's fair but the *Clark v Novacold* situation didn't involve that, it involved –

TIPPING J:

No, I know it didn't but this is what is being put to you, that that's what (b) is there for.

MR WAALKENS QC:

That's (1) of (b), it's not entirely (b) at all, (b) is not confined just to that situation.

ELIAS CJ:

Well (b) is you have to be consistent. You have to treat people – internal consistency, internal equality but before you get there, you have to be able to justify action under (a) or (c).

MR WAALKENS QC:

Except the words "would not", perhaps indicative of it being more than just existing employees.

ELIAS CJ:

Yes.

MR WAALKENS QC:

That's what the Court of Appeal considered in it's judgment. So, it's not just dealing with the restricted *Clark v Novacold* situation of Justice Tipping's, there's a broader group of discrimination cases that can be caught up in this mire and if, as I keep on saying, you are not true to the focused comparator group analysis which is what the statute directs, you cause, you upset the policy of the way the Act works in other situations.

BLANCHARD J:

Were you suggesting a moment ago that the person in the *Clark v Novacold* situation would be within (b) but that section 29 would not apply?

MR WAALKENS QC:

Yes.

BLANCHARD J:

Why is that?

MR WAALKENS QC:

Well (a) and (b) of (1) are so limited, I mean one can construe of circumstances when neither (a) nor (b) would be available for a *Clark v Novacold* employer. That is the offering of these, what we would call other accommodation –

BLANCHARD J:

Well, isn't that a policy decision of the legislation?

MR WAALKENS QC:

But the policy focus on the legislation consistent with other law, other jurisdictions –

BLANCHARD J:

If the person could perform the duties of the position satisfactorily, only with the aid of special services or facilities, then it's not reasonable to expect the employer to provide them. What's wrong with that?

MR WAALKENS QC:

But if there's no – if that defence didn't apply to the *Clark v Novacold*, I accept that that might apply to them, but if it didn't apply to a *Clark v Novacold* employee –

BLANCHARD J:

Well if it didn't apply to them –

MR WAALKENS QC:

They don't have an exception.

BLANCHARD J:

They don't have an exception and that's what the Act provides for and it doesn't sound to me like an unreasonable outcome.

MR WAALKENS QC:

Except that you would never get into the argument of discrimination if a proper comparator analysis is –

BLANCHARD J:

Thus you would eliminate part of the policy of the Act which is embodied in section 29, that's exactly the argument I've been putting against you. That's why the comparator has to be looked at very carefully, because otherwise you eliminate section 29 by never getting to it.

MR WAALKENS QC:

This is precisely what happened in *Malcolm*, the House of Lords approach –

BLANCHARD J:

Malcolm is a different statute.

MR WAALKENS QC:

Different statute, but one with, as we saw earlier, with a justification and rider to it in subsection (2) which the House of Lords, albeit with a speech with comment of reluctance, recognised a proper comparator group up front was the way to consistently approach this.

ELIAS CJ:

Well section 29 applies to the whole of 104.

MR WAALKENS QC:

Yes it does.

ELIAS CJ:

So you don't even have the difficulties about –

MR WAALKENS QC:

Yes, it's wider than just…

TIPPING J:

I think your best point on the comparator group point is in the same or substantially similar circumstances. I think that's the key to your argument, I'm not saying one way or the other whether it's – but that has to be the fulcrum of your argument.

MR WAALKENS QC:

That is the fulcrum of it Sir, yes. Unless the Court has any other questions, those are my submissions. I, though, reserve the right, should I need it, to respond to anything that might arise that I haven't already addressed you on in the two interveners.

ELIAS CJ:

If anything new arises, we would certainly want to hear from you.

MR WAALKENS QC:

Thank you, Your Honour.

ELIAS CJ:

Yes, Ms Gwyn. Ms Gwyn, we've of course read your submissions so you may care to focus on points that have arisen or anything you want particularly to emphasise.

MS GWYN:

Thank you, Your Honour. I did want to cover four or five short points and the points I want to refer to are first, why the jurisprudence from other jurisdictions and in relation to other statutory schemes is both relevant and useful in this case, secondly, to touch on, again, why a comparator analysis is necessary, what's the purpose of the comparator analysis, third, the identification of the comparator group and in particular, to look at the identification of the comparator group where the reason for the action complained of and the prohibited ground overlap. Following from that, the causation or "by reason of" test and I will look at that only briefly, my friend Mr Waalkens has taken Your Honours to *Khan* and *Nagarajan* and then finally to look at indirect discrimination which is a matter that's touched on in the Crown's submissions

but not to any extent been dealt with in the submissions of either the appellant or the respondent.

ELIAS CJ:

Is this, in your contention, a case of indirect discrimination?

MS GWYN:

My contention Your Honour is that although the case has not, or at least not to date, been formulated as an indirect discrimination case, it is possibly one where an indirect discrimination claim could have been brought and if that were the case, it would answer some of the questions that the Court has posed about the desirability of getting to the exceptions and the defences and the justifications that an indirect discrimination claim would be the way of providing – or the way of giving effect to those provisions of the legislation.

ELIAS CJ:

That is just turning around Mr Waalkens' argument about what is the reason, is it, I'm just trying to understand where it's heading. So if he's right that it's the restrictions that are the reason for the discrimination, you say it's nevertheless a case indirect discrimination.

MS GWYN:

It may be Your Honour a case of indirect discrimination in that the appellant may be able to show that the policy that reflects those restrictions bears disproportionately on those over 60, so it's not a direct discrimination case on the basis of age, but indirect which allows for a different, if you like, more expand in process.

On my first point, while it's clear that the specific issue in this case is what is the meaning of "by reason of", a prohibited ground of discrimination in section 104(1) of the ERA. The issue that arises in this particular statutory context is common to discrimination cases, broadly. Those cases pose common difficulties and common methodological arguments and the authorities that are referred to in the Crown's submissions point to a consistent approach across

various statutory schemes, both specific anti-discrimination legislation such as the United Kingdom Disability Discrimination Act and broad general anti-discrimination provisions, such as section 15 of the Canadian Charter.

The submissions also point to a consistent approach across jurisdictions with, in particular, decisions of the final Appellate Courts in three common law jurisdictions, the United Kingdom, Canada, and Australia. What is clear, in my submission, from those authorities is that the mischief that's being addressed and the substance of the legislation is not straightforward and the appropriate approach to these issues is not straightforward, and certainly as the leading New Zealand case in *Quilter* indicates, this is, this being discrimination law, is anything but a simple area, and the speech of Baroness Hale, which I'll come to later, that's in my friend, Mr Harrison's authorities, makes that point very clearly, that this is a difficult area that Judges across many jurisdictions are grappling with.

Counsel for the appellant, my learned friend Mr Harrison, yesterday said that the Crown argument that this wider jurisprudence is equally applicable to this case is both dangerous and he said unsubstantiated by any analysis or authority. In response, I would say that the cases demonstrate that whether the prescribed discrimination has occurred – the question whether prescribed discrimination has occurred is a comparative exercise and that's so, the fact that it's a comparative exercise, whether the legislation in question is a broad open textured provision, such as section 15 of the Canadian Charter or section 19 of the Bill of Rights Act, and that's the *Hodge* or the *Auton* type cases, or whether the legislation is a more prescriptive statute, such as the Disability Discrimination Acts that were considered in Australia in *Purvis* and the United Kingdom in *Malcolm*. In all of those cases, it's clear that what the Court is undertaking to establish whether there has been discrimination, is a comparative exercise. More broadly, in response to Mr Harrison's point, I'd like to take Your Honours to the Canadian case of *Andrews* which is at tab 8 of the Crown bundle of authorities. In *Andrews*, the Court and this is particularly in the judgment of Justice McIntyre, makes the point that there is a clear crossover in terms of the analysis of discrimination under the charter and

under specific Human Rights statutes. In fact, Justice McIntyre looks to these specific Human Rights statutes that preceded the charter to determine what section 15 of the charter means. The passages in His Honour's judgment that are particularly relevant to this point, start at page 172, tab 8.

ELIAS CJ:

Is it 162?

MS GWYN:

Sorry, 172.

ELIAS CJ:

I have McIntyre J at 164.

MS GWYN:

I'm sorry Your Honour, his judgment starts at 164 but the relevant passages start at 172.

ELIAS CJ:

Oh, I see.

MS GWYN:

At paragraph (c) where His Honour says, "Discrimination as referred to in section 15 of the charter must be understood in the context of pre-charter history." He talks about the Human Rights Acts that preceded it. The, over at page 173 paragraph (a), "What does discrimination mean? The question has arisen mostly commonly in a consideration of the Human Rights Acts. General concept of discrimination under those enactments has been fairly well settled. Little difficulty drawing upon the cases in this Court" – that is cases under those Human Rights Acts, "to reach a decision about what discrimination means." Then over at page 174 paragraph (b), he refers to the Abella Report, a thorough study of systemic discrimination in employment and then down towards the bottom of that page, "I would say then the discrimination may be described as a distinction" and so on. Then over at

175, starting at paragraph 8, “The Court in the case at bar must address the issue of discrimination as the term is used in section 15(1) of the charter. In general it may be said that the principles which had been applied under the Human Rights Act are equally applicable in considering questions of discrimination under section 15(1).” He says, “Certain differences arise between the charter and the Human Rights Act” but none of those differences that he lists are in my submission, material to the point I’m making here.

TIPPING J:

Have we passed his reference that I think you cite in your submission, to the comparative concept, or are we coming to that, or do you not need to take us to that?

MS GWYN:

I wasn’t going to take Your Honour to it but I certainly can –

TIPPING J:

No, no, all right, okay. No, it doesn’t matter.

ELIAS CJ:

That’s page 164.

TIPPING J:

Is it?

ELIAS CJ:

Sorry, you’ve taken us to this in support of the proposition that the general and the specific require the same approach, is it?

MS GWYN:

That there’s a crossover Your Honour, between the approach to discrimination in both general and specific statutory provisions. I have an article which I can make – well, an extract from a text which I can make available to the Court later, from Ms McColgan’s text on discrimination, where she makes the same

point in effect, that an approach which considers provisions such as section 104 in isolation from the broader jurisprudence on discrimination, is not to be recommended and has its shortfalls.

McGRATH J:
Is that the material that is in the appellant's casebook?

MS GWYN:
No Sir, it's –

McGRATH J:
A different article?

MS GWYN:
It's a text called Discrimination Law Texts Cases and Materials by Aileen McColgan and I can hand that up at the break.

McGRATH J:
Thank you.

MS GWYN:
In a similar vein, in one of the cases in the appellant's bundle of authorities, tab 15, this is *AL (Serbia) v Secretary of State* for the Home Department. This is a case of an unlawful discrimination claim brought under article 14 of the European Convention on Human Rights and –

McGRATH J:
Sorry, tab 15, did you say?

MS GWYN:
Yes.

MR HARRISON QC:
The tabs are reversed Sir, they are out of order, it's 14 I think.

MS GWYN:

I'm sorry Sir, it's 15 in mine but 14 in Your Honours. I particularly wanted to take the Court to the judgment of Baroness Hale, whose judgment starts at page 1133 and in her judgment, Baroness Hale in considering what article 14 means, compares it with the United Kingdom's domestic anti-discrimination laws and in particular at paragraphs 22 and 23 of her judgment. At 23 she says, she talks about the article 14 right being different from our domestic anti-discrimination laws, "These focus on less favourable treatment rather than a difference in treatment. They also draw a distinction between direct and indirect discrimination. Direct discrimination for example, treating a woman less favourably than a man, or a black person less favourably than a white, cannot be justified." This question of the inability to justify direct discrimination is something that I want to come back too. "This means that a great deal of attention has to be paid to whether or not the woman and the man, real or hypothetical, with whom she wishes to compare herself, are in truly comparable situations. The law requires that these circumstances be the same or not materially different from one another." So, specific reference to the need under specific anti-discrimination laws for a comparator analysis.

The second heading that I want to move to is, the purpose of applying a comparator analysis. This is at the beginning of the Crown's written submissions but in summary, the purpose of the comparator analysis is to first, identify whether the prohibited ground is the reason for the treatment, so in this case, under section 104 of the ERA, is the treatment by reason of age and second, to identify whether others would have been similarly treated. Now, in my submission, even if one were to accept that under section 22 of the Human Rights Act and section 104 of the Employment Relations Act, one doesn't need a comparator to determine that second point, the comparator treatment. In my submission, the comparator analysis is still necessary to determine the "by reason of" question and the Court of Appeal made this point, in my submission, very clearly at paragraph 68 of their judgment.

ELIAS CJ:

Sorry, what paragraph?

MS GWYN:

Sixty eight.

TIPPING J:

Are you asking us to go there? It may be helpful?

MS GWYN:

Yes Sir, yes if you would. What the Court says there is as we have said, the three issues overlap and those are the three issues that they've identified back at paragraph 31, the identification of the comparator group, the application of the "by reason directly or indirectly" requirement, and the application of section 30. "As we have said, the three issues overlap. This is particularly true of the first two issues, comparator group and causation. This is because a comparator group analysis may identify not simply whether there was any difference of treatment between the aggrieved person and the comparator group, but also why any different treatment occurred". In other words, it might also address causation, see Lord Nicholls in *Shamoon*.

ELIAS CJ:

That would be so as a matter of fact in identifying the reason for an employer's action in a number of cases, but it really doesn't seem to be in dispute here, apart from the argument that we've heard addressed to us that the direct reason was the restrictions.

MS GWYN:

In my submission Your Honour it is – while it's clear that age is a factor in this case, there can be no dispute that the fact of the appellant turning 60 was a factor in this case, but in my submission, that's not – to say that, is not the same as to say that was the reason for Air New Zealand taking the action that it did, so it's not the same as saying it was "by reason of" as the statute

frames it, so while one can make a conclusion about the age being a factor in the mix, that's – it requires a further step in order to identify whether age was a reason.

ELIAS CJ:

Are you supporting the Air New Zealand's submissions on this?

MS GWYN:

I think there's a commonality in approach on this, yes Your Honour, and that is something I want to come back to, the – my friend Mr Waalkens has covered it in some detail this morning, but I do want to –

TIPPING J:

Well he didn't get a very good reception, but if you've got more light to shed on it, then that would be most helpful because I can – it's the question of the degree of subtlety with which one approaches these sort of things, it seems to me. At one level, you'd say immediately, of course it was indirect because of the age, but is it – are you going to say it's a more subtle enquiry than that? I mean, how do you distinguish between factor and reason?

MS GWYN:

Would it – it may help Your Honour perhaps if I come to that –

TIPPING J:

Come to it whenever it suits, but for my part, I would like to hear some further discussion about that.

MS GWYN:

Yes Your Honour, I appreciate that query and what I was proposing to do was to respond in a little more detail because it's a point that Mr Harrison made, also in respect of the Crown's submissions so I think it's an issue that I do need to deal with directly, but with Your Honour's leave, if I might come to that shortly.

TIPPING J:

Of course.

MS GWYN:

The next point I wanted to mention is the identification of the comparator group, and I think it's clear from the authorities that are before the Court, and *Shamoon* makes this point quite clearly, that identifying a comparator group needn't be an artificial, one size fits all exercise, it can be and may well be an organic and fluid process as Lord Nicholls in *Shamoon* says, that the identity of the relevant comparator might only be resolved by determining at the same time the reason for the less favourable treatment, so it's certainly not the Crown's submission that you have a rigid comparator analysis that fits each and every case. The application of the comparator analysis will be different in each case, the claimant and comparator obviously need to be alike in all respects that are material to the issue in hand other than the prohibited ground of discrimination, and –

WILSON J:

Just on that point, but you accept that the prohibited ground sought to be relied upon should be excluded from the comparator group?

MS GWYN:

Yes Sir. A separate question, which I'll come to shortly is whether associated reasons or characteristics ought also to be excluded.

WILSON J:

I understand that because if I may say so, what you just acknowledged seems to me to be the common sense of the situation because if you don't exclude the prohibited ground, you thereby really defeat the purpose of the protection don't you?

TIPPING J:

Well you'll obviously get a finding then that there was no difference in treatment.

WILSON J:

Yes.

MS GWYN:

As Your Honour Justice Blanchard, I think it was Your Honour noted yesterday there's a need to tailor the comparator very carefully bearing in mind the overall scheme of the legislation and that means that in each case, the application of the analysis will be different as you search for what the material circumstances in this case that form the basis of the comparison and that's going to depend on the purpose of the particular legislation, the context in which the particular case arose.

I'm about to move on to a, what I suppose is a subtopic so I wonder if that might be an appropriate time?

ELIAS CJ:

Yes, thank you, we'll take the adjournment now.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.48 AM

ELIAS CJ:

Yes Ms Gwyn.

MS GWYN:

Thank you. I just wanted to direct the Court to the relevant passages of the extract from McColgan that was handed up. The first is on the first page of text which is page 8 of the book, last pararaph, it lists the domestic legislation concerned with discrimination and then says, "These provisions cannot be considered in isolation from the wider context, in particular EU Law and

Human Rights Act." Then over at page 10, the second paragraph, "It's not altogether surprising, in light of the above, that the past decade or so has seen increasing pressure for a total overhaul of domestic discrimination quality legislation so as to replace the current jumble with a comprehensible coherent and principled structure." I simply point to those quotes as support for the proposition that one needs to look at anti-discrimination law broadly, that one can apply the same principles in slightly different statutory frameworks and different jurisdictions.

I'd like to go back to the point that I left off with before the break. As His Honour Justice Wilson said, it's a given that in applying the comparator analysis you exclude the prohibited ground. So, complainant and comparator should not share the characteristic that's the prohibited ground of discrimination, here, being over 60 years. The more vexed question is, what else do you exclude from the comparison –

TIPPING J:

You did actually say, "must be alike" – I don't think the microphones are on are they, oh yes. You did say, "must be alike in all respects except for prohibited ground", is that perhaps putting it slightly too high?

MS GWYN:

What I intended to say Your Honour was that one clearly takes out of the mix the prohibited ground –

TIPPING J:

Yes, of course.

MS GWYN:

– but then there is a question which I'm going to come to now but is there anything else other than the prohibited ground per se that also ought to be taken out of the comparison and in particular, whether characteristics or circumstances which are associated with the prohibited ground should or should not be attributed to the comparator group.

What the appellant says to that question is, "No." The limitations that attach to him, as to whether he can fly once he turned 60, are part and parcel of his personal characteristics and so those two as well as his age should be taken out of the comparison. The Crown submission in response is that it's only where the associated characteristics are necessarily and inextricably linked with the prohibited ground that one takes them out of the comparison. Otherwise, those factors are also attributed to the comparator and the two cases that the Court has already looked at that demonstrate this point particularly clearly are *Purvis*, the Australian case, at tab 22 of the appellant's authorities. If I could take Your Honours to that case. The legislation in question in *Purvis* is set out at page 110 of the judgment and in particular the definition of disability in relation to a person means and at (g), "a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgments, or that results in disturbed behaviour". So, in this particular statute the legislation actually encompassed within the definition of a disability, some of the manifestations of that disability. The question there was whether in establishing a comparator group the Court ought to attribute those manifestations of the plaintiff's behaviour which were violent – manifestations of his condition which were violent behaviour towards other students and staff in the school, whether those characteristics ought to be taken out of the comparison and what the High Court said is no. The violent behaviour needs to be attributed to comparator group as well, notwithstanding the specific language of the statute, in order to arrive at a meaningful comparison and to ascertain whether or not it was the prohibited ground that was the reason for the treatment.

Similarly the House of Lords decision in *Malcolm* which is at the appellant's tab 13. The legislation that was being considered in that case, it's set out in various places but including from paragraph 56, where it talks about the definition of disability, "A person has a disability for the purposes of this Act, if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities." Then over at paragraph 59, it refers to the provisions of the Act that deal with

discrimination in relation to premises and this, you'll recall, was the case of the council terminating Mr Malcolm's tenancy because he had sublet the premises in breach of his tenancy and at 59, sets out the relevant proportion of the definition, "...person (A) discriminates against a disabled person if (a), for a reason which relates to the disabled person's disability he treats him less favourably..." and so on. So, again, the definitions within the Act specifically referred to associated behaviour but also as in *Purvis*, notwithstanding that, the Court concluded that the behaviour here, the subletting of the flat, ought to be attributed to the comparator group, so that the appropriate comparison was not with other tenants who hadn't sublet their flat which is what Mr Malcolm contended but it was with other tenants who had sublet their flat. The only factor that was taken out of the equation was the disability per se.

TIPPING J:

How does that relate to age, or are you going to come on to that because age is a sort of neutral concept really, isn't it?

MS GWYN:

Yes, yes, Your Honour. I suppose the point of those cases and I think they are, the disability cases are in a way in a category of their own because the set of what you might call inextricably linked characteristics for disability, I think there's a sort of, bigger circle if you like, of what you might consider as being inextricably linked characteristics –

TIPPING J:

You are not inextricably unable to fly to America because of your age.

MS GWYN:

No, I agree Sir.

ELIAS CJ:

Sorry, can you just – I'm getting a little lost in where this is heading. What's the proposition applicable to this case that you are drawing from these cases?

MS GWYN:

I'm responding Your Honour, to the appellant's point where he says that the limitations that are attached to him once he turned 60 were part and parcel of his personal characteristics and therefore they should be taken out of the comparison. So the comparator, he says, shouldn't have any restrictions in terms of ability to fly in to the US attached to him. My point is well, that's at odds with what both the High Court of Australia and the House of Lords in *Malcolm* found, on much more specific statutory provisions where they said no, that approach isn't correct, you take out the prohibited ground from the comparison but you don't take out other factors –

TIPPING J:

You take out the age but not the inability to fly to America.

MS GWYN:

Yes, exactly Sir.

WILSON J:

You take out age but not a consequence of age.

MS GWYN:

Well, it is Sir. It's that distinction between consequences and what I would say are inextricably linked characteristics which, and the point I made before that in some ways, the disabilities cases are in a class of their own because one is more likely to find perhaps that there are inextricably linked characteristics.

McGRATH J:

What do you mean by inextricably linked in relation to age and disqualification from flying to America?

MS GWYN:

It's – perhaps the best answer to that Sir is where the, it's almost a proxy for – there are proxy situations, so for example, pregnancy and gender is an obvious one, where one could attempt to say I'm discriminating against someone because she's pregnant, not because she's a woman, but those two things are inextricably linked and, in effect, the associated characteristic becomes a proxy for the prohibited ground.

McGRATH J:

It's really part of it, inextricable in a sense is just part of a whole.

MS GWYN:

Yes Sir. But of course in New Zealand, the pregnancy and gender issue is specifically covered in section 21(1)(a) of the Human Rights Act which defines sex to include pregnancy.

TIPPING J:

Would it be helpful to suggest that it's not an intrinsic characteristic of age, that you're unable to fly to America?

MS GWYN:

Yes Sir, that's a good way of putting it.

ELIAS CJ:

I'm having trouble following this really, because, does it matter –

MS GWYN:

Well I think it does Your Honour because otherwise you have, if you say as my friend does, in this case you compare Mr McAlister with pilots under 60 who have no restrictions on their ability to fly into the US, that gives no content to the comparison, it doesn't help in ascertaining whether it was age or something else that was the "by reason of", and this is the very point that Mr Waalkens took the Court to in the *Malcolm* case where they discuss *Clark v Novocold* and I think those passages are helpful on this point.

ELIAS CJ:

But what prompts Air New Zealand to do this? It may well be the restriction, but the effect is, it attaches to anyone who is 60 years of age, so therefore, his employment is affected by reason of his age. I just – is that, why is that too simplistic?

MS GWYN:

I think it comes back Your Honour to the point I addressed earlier, which is that the fact that the restriction applies to Mr McAlister and others at the point they turn 60, may mean that the restriction has an undue impact on a particular category of people, but that's best pursued by an indirect discrimination claim.

ELIAS CJ:

I thought section 140 is about direct and indirect, does it matter?

MS GWYN:

This claim, as I understand, is brought solely as a direct discrimination claim, which is why, unless Air New Zealand can avail itself of any of the statutory exceptions, it doesn't have a broader ability to justify, there's no fallback position where it can say, well I don't fall with any of those specific statutory provisions but nevertheless I have a good reason –

ELIAS CJ:

But indirect would similarly have to be justified wouldn't it?

MS GWYN:

Yes it would Your Honour and in my submission, that may well be the appropriate approach in a case such as this, to say that the policy bears unduly on those over 60, it therefore, on its face, is indirect discrimination then that leads one to the kind of analysis that is set out in the decision of Justice Cartwright.

ELIAS CJ:

It doesn't bear unduly, it bears inevitably. I just find it impossible to say that that isn't by reason of age. It seems to me that the real issue in the case is elsewhere.

MS GWYN:

What section 104 requires, in my submission, is an enquiry of the reason why the employer acted as it did, which is a slightly different question from the way Your Honour is posing it, and –

ELIAS CJ:

How do you get to that on the language of the section? Is that simply the "by reason of", you mean, it's the employer's reason?

MS GWYN:

Yes Your Honour and this is the very debate that, or discussion that the Court has had with both Mr Harrison and Mr Waalkens, what does that mean when what is the appropriate test to establish the "by reason of" and what Mr – counsel for the appellant says is well, the test that Judge Shaw applied, which was a, well she applied two tests, substantive and operative reason and a "but for" test. He says that's the appropriate test. What the Crown says, and this is covered in my written submissions from paragraph 34, is that those aren't the appropriate tests, and that the House of Lords in *Nagarajan* and *Chief Constable of the West Yorkshire v Khan* have moved away from applying those tests, and the passage that Mr Waalkens read out from *Khan* at paragraph 29 of that judgment encapsulates this point very clearly and what he said is, "Contrary to views sometimes stated, the third ingredient –" , and in this particular case, the words were "by reason that", " – does not raise a question of causation as that expression is normally understood. Causation is a slippery word, but normally it's used to describe a legal exercise. From the many events leading up to the crucial happening, the Court selects one or more of them which the law regards as causative of the happening.

Sometimes the Court may look for the operative cause or the effective cause, sometimes it may apply a "but for" approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport,* a causation exercise of this type is not required, either by section 1(1)(a) which was on racial grounds, or section 2, "by reason that". The phrases "on racial grounds" and "by reason that" denote a different exercise. Why did the alleged discriminator act as he did? What consciously or unconsciously was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion, the reason why a person acted as he did is a question of fact.

ELIAS CJ:

Well even accepting it's a question of fact, why is – is not the reason why, directly or indirectly, age? I mean, aren't we dancing on pins here?

MS GWYN:

The reason why is –

ELIAS CJ:

Directly or indirectly is his age.

MS GWYN:

The reason – my response to that Your Honour would be that the direct reason is that the restriction prevents Captain McAlister from flying into the US. Your Honour may well be right that, indirectly, age is the reason but if that's so , then the appropriate way of pursuing that case is to deal with it as an indirect discrimination claim with the ability then to look at the questions as Justice Cartwright posted them in the *North Health* case, about why the restriction was imposed. The test she sets out there –

BLANCHARD J:

Well why then do the words directly or indirectly appear in section 104(1)?

MS GWYN:

Mr Harrison responded to that question yesterday as I recall, in a two pronged way. One, that it may be there's more than one reason and two, as I understand it, he accepted that it's also more broadly a reference to the possibility of a direct discrimination claim or an indirect discrimination claim, as provided for in section 65 of the Human Rights Act.

ELIAS CJ:

Well, I mean, causation may be a slippery concept but so is reason and it is just occurring to me that there's a lot of law about the difference between intention being the reason and motive. I would have thought that the reason here is much more, in the sense of what Air New Zealand is doing, is much more closely dependant on age. Its motive may be the – I'm not sure that I accept the analysis that you're adopting but in any event, I'm not sure that it matters.

MS GWYN:

Going to Your Honour's first point, I understand the question that Your Honour is posing and I think it's neatly explained in the speech of Baroness Hale that's in the appellant's authorities at tab 17. Having referred to the cases that preceded *Khan* and *Nagarajan*, she makes this distinction here between reason and motivation and I think it is an important distinction. It's at page 7 of that address and the last paragraph on that page she says, "Once it is established that the reason for the less favourable treatment is a prohibited ground, the motivation or purpose or explanation for the difference is irrelevant." Then she goes on to say, "Lord Nicholls has since emphasised that even the first on grounds of, by reason of, question is not an objective question of causation as that term is usually understood by lawyers but a subjective test, why did he do as he did, nevertheless it's convenient to label them the causation and the motivation issue because without clearly distinguishing between the two, much obvious discrimination might go with a remedy." So, the point there is that the first question, by reason of, does require the Court to look at why, Air New Zealand in this case, did as it did. The second –

ELIAS CJ:

Well, why it did it, was because he turned 60. What's the answer to that?

MS GWYN:

Why he did it, why it did it – the other answer would be, why it did it was because the FAA had a policy that had the effect of restricting Captain McAlister's ability to fly in to the US –

WILSON J:

Ms Gwyn, if I put it to you this way, in two propositions. First, the reason why the appellant was demoted was that he could no longer fly to the USA, proposition one. Proposition two, the reason why he could not fly to the USA was because he turned 60. Now, doesn't it follow from that analysis, that turning 60 was the indirect reason why he was demoted?

MS GWYN:

The reason why he couldn't fly in to the US was because the FAA has imposed a restriction on those who are over 60 being able to fly in to the USA. So, it's perhaps a subtle difference –

TIPPING J:

An age ground.

MS GWYN:

It's perhaps a subtle difference Your Honour but it's not a case of Air New Zealand itself selecting the age based criterion, it's imposed on it by the FAA restriction, so in a sense it's a triggering factor but it's not the reason.

McGRATH J:

The point and I know that you're not adopting Air New Zealand's position but would one way of seeing where this argument might lead, be to say that if Air New Zealand did it because it had to, without any desire to limit pilots over 60 from being in command and flying in to the United States, it was not

indirect discrimination. Would that be a way of sort of picking up on what you are saying?

MS GWYN:

Well, it was not direction discrimination.

McGRATH J:

Mmm?

MS GWYN:

It would not be direction discrimination.

McGRATH J:

Sorry, would not be direct discrimination, yes.

MS GWYN:

Yes, yes, as my friend –

McGRATH J:

That would be the way the argument would go and if you go back to Lord Nicholls, who I think was speaking of conscious or subconscious, it wouldn't be a subjective reason in those terms either –

MS GWYN:

It's not a question, as I understand it, of Air New Zealand seizing on an opportunity to say oh well, we Air New Zealand really don't want to have pilots 60 or over flying on these routes.

BLANCHARD J:

Are you saying it's not an indirect discrimination?

ELIAS CJ:

Yes?

MS GWYN:

No Sir, I'm saying it may well be an indirect discrimination –

BLANCHARD J:

Surely the word indirect is in section 104 because it's not in section 22. In other words, they've added it in to pick up indirect discrimination.

MS GWYN:

The difficulty Sir, is that the way the claim has been brought, it hasn't been brought as –

BLANCHARD J:

It's brought on section 104. Section 104 has indirect in it. If indirect means indirect discrimination, it's a claim brought at least on one basis on indirect discrimination.

MS GWYN:

Well Sir, if that's so then the Crown's submissions about the effect of bringing an indirect discrimination are relevant and the point there is that there is then an ability for Air New Zealand to, in a sense, justify it's actions in a way that's broader than the statutory exceptions. So, the point I'm trying to make and I'm not, from the Crown's point of view, trying to saying yes, it is a direct or no, it's an indirect. The point I'm simply trying to make is that if it's framed as a direct discrimination case then Air New Zealand has recourse only to the specific statutory exceptions or defences. If it's framed as an indirect discrimination claim, so if Captain McAlister were to say well, I accept that age wasn't the primary reason for the imposition of this policy but nevertheless it has an effect that bears disproportionally on me and those over 60, then Air New Zealand can justify the policy in a way that goes beyond the specific statutory exceptions and defences. The way that Justice Cartwright described in the *North Health* case –

ELIAS CJ:

But that was about, you know, where you were qualified and things like that, wasn't it?

MS GWYN:

It was a case of –

ELIAS CJ:

So, it was indirect and she said that the effect was that it discriminated against overseas qualified doctors.

MS GWYN:

But the allegation there was that the policy was discriminatory on the grounds of national origin and what happened was that the benefits in question were available only to those doctors who were trained in New Zealand, not those overseas trained.

ELIAS CJ:

Yes, yes.

MS GWYN:

So it was an indirect discrimination claim –

ELIAS CJ:

Yes but that is indirect. I would like to know how your argument squares with section 26 which doesn't seem to assume that if there are laws in other jurisdictions, what is happening here is simply indirect discrimination because we have to look at the whole legislative scheme.

MS GWYN:

Your Honour may have misapprehended my argument. I'm not saying its indirect discrimination because it's source, if you like, is legislation or rules outside of New Zealand, I'm saying it's indirect because it's not targeted

directly at a prohibited ground, but it has the effect of bearing disproportionately on a particular group.

ELIAS CJ:

I think I understand the argument.

MS GWYN:

And as my learned junior, Ms Coleman, notes that section 26 would also apply in an indirect discrimination case. I misunderstood what she was saying, that section 26 would not apply in an indirect discrimination case.

ELIAS CJ:

Would not apply in an indirect?

MS GWYN:

No.

McGRATH J:

Ms Gwyn I'm sorry, I think I may be missing something here, but why is it that we have to think in terms of whether a case is a direct or an indirect discrimination case under section 104 when, if the reason is direct or indirect discrimination the provision applies? So why is it, do we have to make – why is it do we have to think in terms of cases brought on one or other of those provisions? It's sufficient if it just fits in, if it's either direct or indirect isn't it? I'm not sure why you're drawing this contrast, as you have several times this morning, between whether it's a direct discrimination case or an indirect discrimination case.

MS GWYN:

The key distinction Sir is if it's, in my submission, if it's direct discrimination, then the employer is limited to – if you find that the prohibited ground was the reason, the employer is then limited to the specific exceptions or defences that are contained in the Act, so sections –

ELIAS CJ:

Thirty in this case.

MS GWYN:

– 24, 25, section 30 in this case, whereas if it's indirect discrimination, then there's the ability for the employer to attempt to justify the policy in a broader way.

McGRATH J:

Under what statutory provision?

MS GWYN:

Section 65 of the Human Rights Act, which of course, doesn't spell out the test, it talks about good reason.

TIPPING J:

So, this has been puzzling me too Ms Gwyn, if I can intervene, why are you allowed to, if you bring your claim under a particular statutory provision which has certain criteria and certain justifications, why are you allowed to justify yourself more widely if it's brought under one limb of the section as opposed to another? I would have thought you're confined to what the section provides.

MS GWYN:

It's the way in which the claim is formulated, so an indirect discrimination claim would be brought, for example, where a provision that's neutral on its face has a disproportionate impact.

TIPPING J:

I know the difference, but if you choose to bring your claim under section 104, whether it's direct or indirect, how do you get outside the criteria of 104 and the brought in justifications? Brought in by section 104(3)? Why is this free

floating ability to justify yourself more widely under section 60, whatever it was, if it's not directly brought in. I think I'm doing no more than pursuing Justice McGrath's question, but it just seems to me that there's a false assumption here.

ELIAS CJ:

Is section 65 referred to in section 106?

MS GWYN:

No, it's not, no.

ELIAS CJ:

So why are we bothering with it?

MS GWYN:

I think the test has been imported, for example, in the Justice Cartwright decision in the *Regional Health* case.

ELIAS CJ:

Well I think it would be better to focus on the terms of the Employment Relations Act.

TIPPING J:

Was Justice Cartwright's case a case under section 104 or its predecessor?

MS GWYN:

No it wasn't Your Honour.

BLANCHARD J:

To be fair to Ms Gwyn, she really got into this because of the suggestion that maybe the word indirectly was referring to indirect discrimination.

ELIAS CJ:

Well no, I thought that was the submission that she was making.

BLANCHARD J:

Well, she was picking it up from Mr Harrison.

MS GWYN:

Well the difficulty is, I understand Your Honours' questions, but of course, section 19 of the Bill of Rights Act doesn't explicitly refer to direct or indirect either, but nevertheless as the case law has developed, those two approaches have been adopted, so –

TIPPING J:

I suppose an answer to a question that's been put to you by both me and Justice McGrath is that it would be pretty odd if a claim was brought on a certain premise which turned out to be indirect. You could justify yourself more widely than one that was brought under a statute that had indirect incorporated within it, but you couldn't justify yourself more widely.

MS GWYN:

I don't understand the appellant here to be saying that Air New Zealand could justify its policy on a basis that's broader than a specific statutory –

TIPPING J:

No he's not, because he wouldn't want to. Anyway, I think, for my part, I find all this extraordinarily confusing and it's about time someone sorted out this whole inter-related mess.

BLANCHARD J:

Well it shows another example of legislative shorthand going haywire. Unfortunately there's a great temptation to try and keep a statute short by incorporating provisions from other statutes by reference, but it often just causes problems. I feel better now I've said that.

ELIAS CJ:

I think the statute makes perfect sense.

TIPPING J:

Well it could have been better put together.

ELIAS CJ:

Now, where do you want to take us now Ms Gwyn?

MS GWYN:

Perhaps the last point Your Honour that I would like to touch on is that – is the more general point that was made by the appellant but also Your Honours which is that the appellant says that applying a comparator analysis can have the effect of stopping a claim at first base and as my learned friend Mr Harrison said, you have section 104(1)(a) and (b) doing all the work of differentiating between a legal discrimination and permissible differentiation and he says that leaves no room for the operation of the statutory exceptions and qualifications. In some cases it's true that the application of a comparator analysis to ascertain whether there has been differential treatment by reason of a prohibited ground, will determine the case and that's appropriate, that one only gets to the exceptions if you find that a prohibited ground was the reason for the treatment. This comes back to the importance of not, if you like, skipping over the comparator analysis because it's that that enables you to determine what was the reason for the treatment. That isn't to say that some claims won't get beyond first base in terms of establishing that the prohibited ground was the reason for the treatment and then putting the employer in this case, to the point of fitting within the exceptions or qualifications but it is a question of at what stage the respondent has to do that justification, if you like. In my submission, the refining or the filtering is appropriately carried out at the outset when one looks at the "by reason of" question and it is done by way of a comparator analysis and in part 1(A) cases the reason for that is clear because the government has otherwise put, in the case of legislation for example, to possibly vast expense to justify a broad range of legislative choices and distinctions –

ELIAS CJ:

It seems to be accepting the submission we stopped Mr Harrison making yesterday.

MS GWYN:

Well, the second limb of that submission Your Honour is, that refining and filtering is also appropriate in respect of part 2 cases because one needs to be clear about the employer's reason before shifting the burden to the employer to see if the employer can fit within any of the exceptions or defences. So, it's that question of, at what point does the Court reach a finding that then shifts the burden where the employer has to say well yes, I have discriminated on a prohibited ground but I have a defence and I think that's an important point to make.

On the appellant's approach, by importing the statutory exceptions at that first stage, it really constrains the analysis and conflates what I say is the proper approach, to consider reasonable accommodation at an early stage rather than only once it's been established that there was direct reliance on a prohibited ground and that the prohibited ground was the real reason.

TIPPING J:

Does the direct/indirect factor possibly and may be even here, have some relevance to the comparator? You made the point that they are in a sense interlinked. I can conceive of a situation where the reason only being indirect, that might have an effect on the appropriate comparator. Are you with me conceptually?

MS GWYN:

Yes. I think that's right Your Honour. It may do and it comes back to the submission I made earlier, that the identification of the comparator and the identification of the reason, may be a process that's all bundled up together, that it's not necessarily a step by step process.

There is just one final thing and that's to just follow up on a point that's contained in the appellant's submissions and I think referred to also in the Human Rights Commission's submissions. It's in relation to the effect of the *Malcolm* decision in the UK and subsequent legislative change. The point there was, that following the House of Lords decision in *Malcolm* the government announced – the effect of the House of Lords decision in *Malcolm* was that in an indirection discrimination claim, knowledge of the disability was required in order for the reason to be related to the disability and –

BLANCHARD J:

What's that got to do with this case?

MS GWYN:

The effect of *Malcolm* was to effectively limit the ability to bring an indirect discrimination claim and so what's happened is that there's now a move to remedy that by a legislative change.

ELIAS CJ:

I really just don't think that that's terribly helpful in the present circumstances Ms Gwyn because we are not in that area of not knowing. I mean, it's obvious what the age is.

MS GWYN:

I won't hand it up then Your Honour given that indication. Unless the Court has further questions, I have no further submissions.

ELIAS CJ:

Thank you Ms Gwyn. Thank you Ms Bell.

MS BELL:

Your Honour, I will be brief. I was going to do this with my colleague. I was going to make a few introductory comments because I consider that the solicitor for the appellant Mr Harrison, has eloquently put my case in terms of the comparators and I don't know that I can add much more to it. Then I was

going to hand over to my colleague who was going to briefly describe the statutory scheme of the Human Rights Act –

ELIAS CJ:

Ms Bell, we don't normally do this. We normally would, in fact we don't always call on interveners at all but we don't normally permit them to split their argument but however, I think we would be assisted by hearing from the Commission on this matter, so perhaps next time you will bear that in mind.

MS BELL:

Yes, thank you. I simply wanted to say that while the Commission does accept that a comparator will be required in must cases, the effect of the Court of Appeal's decision is that the comparator was so complicated and highly technical that if this became the norm, it could significantly undermine the imunerative purpose of the Human Rights Act. We saw an example of that in the *Smith* case, where there was an attempt to, that my colleague referred to in his submission at para 111 yesterday, where the Court attempted to apply the approach of the Court of Appeal but found the approach a little strained and resorted instead to a more realistic basis of comparison which even then was problematic for us –

MR HARRISON QC:

Not sure which *Smith* case you are referring too –

MS BELL:

It was *Smith v Air New Zealand*, it was the disability case involving the use of oxygen and the ability to take oxygen on board a flight.

ELIAS CJ:

The Judge Colgan decision, was it?

MS BELL:

No, no, this was Judge Clifford.

ELIAS CJ:

Right.

BLANCHARD J:

What are you saying about that case?

MS BELL:

It came out immediately after the first McAlister decision, the McAlister decision came out and the Court effectively applied McAlister in a way that ended up with an extremely strained interpretation of the comparator which we would find extremely difficult to work with in terms of disability –

TIPPING J:

So your message is, keep the comparator as simple as possible, is that the essence of it?

MS BELL:

Yes, yes.

ELIAS CJ:

And what's the simple comparator here?

MS BELL:

In relation to – I think it's before and after age 60 in relation to –

ELIAS CJ:

Before and after age 60?

MS BELL:

The other point I wish to make is actually encapsulated very well in the comment of Sir Ronald Wilson in *Sullivan v Department of Defence*, which

we've cited at 2.4 of our submissions and is found in our casebook at page 4. *Sullivan* was a decision of the Australian Human Rights and Equal Opportunities Tribunal, and it involved two single male members of the Defence Force who claimed they were discriminated against by reason of their marital status because they were refused a relocation allowance, which were generally available to members of the Defence Force who had a family. The allowance was payable as a consequence of posting from one locality to another in Australia and the complainants preferred to live off the base even though they would have been entitled to subsidies if they'd lived on the base. The Tribunal held that they were less favourably treated than married personnel and Sir Ronald Wilson noted that, and he expresses it very well, "It would fatally frustrate the purposes of the Act if the matters, which had expressly identified as constituting unacceptable bases for deferential discriminatory treatment such as marital status could be seized upon as rendering the overall circumstances materially different with the result that the treatment could never be discriminatory within the Act."

ELIAS CJ:

Thank you Ms Bell. Yes, Ms Joychild.

MS JOYCHILD:

Good morning Your Honours. I wanted to talk about the overall scheme of the Human Rights Act and I know Your Honours have really got it in terms of it being discrimination, very specific provision with lots of exceptions, but I still thought it would be of assistance to draw your attention to three particular matters.

The first is section 97 of the Human Rights Act, which has not been referred to yet by anyone, but it is another exceptions provision. This section is a very broad section. It is wider than section 30, but only applies where a complaint has been made to the Human Rights Commission, and therefore it was perhaps what Justice Blanchard would say is difficult drafting. It doesn't apply under the Employment Relations Act, but it does emphasise the fact that there is a scheme of the Act where there are a lot of exceptions provided, and in our

submission, because of that, because the Human Rights Commission is also looking at many areas of discrimination, land and housing, employment, goods and services, not just employment and therefore it does suggest that there should be a simple consideration of discrimination rather than a more complex one.

TIPPING J:

This one isn't brought in.

MS JOYCHILD:

No.

TIPPING J:

Doesn't that suggest that, for whatever reason, they didn't want it in?

MS JOYCHILD:

Well I think the –

ELIAS CJ:

It only applies, doesn't it, when the Tribunal is seized of a complaint?

MS JOYCHILD:

No, it can apply as soon as a complaint is made by a person to the Human Rights Commission.

ELIAS CJ:

No, what I mean is that the – it has to be in respect of something within the jurisdiction of the Human Rights Commission?

MS JOYCHILD:

Yes it does, yes.

ELIAS CJ:

Which this isn't.

MS JOYCHILD:

Which this isn't and I'm making that point, but nevertheless, to look at the entire scheme, because this decision will also effect, to some extent, the human rights – the construction of human rights legislation. It certainly will in relation to 104(a), (b), and (c). It was simply to draw this to your attention.

ELIAS CJ:

Yes.

MS JOYCHILD:

The second matter to draw to your attention is the *Eric Sides* decision which was handed up yesterday. Unfortunately the wrong copy got into the Commission's casebook but this was a decision of John Wallace QC, as he then was and it is, from the Commission's perspective, the seminal decision, the one which it has followed for 28 years when it's been advising employers, advising goods and service providers and educational establishments as to what their obligations are, and it is our submission that this test, a substantial and operative factor test, should not be replaced by a comparator analysis which incorporates justifications into it. If you take the, Your Honours have it in front of you, I'll take you first to page 456 and look first at how Mr Wallace applied the substantial and operative test. At the bottom of that page, he says, he considers the facts, and this was a case where a young man rang up *Eric Sides*, who had advertised for a keen Christian to work as a forecourt attendant and he said he was interested in the job. He was a Presbyterian but he didn't witness every day, I'm taking the facts from – not exactly, but then he also said that he had had several short term jobs and he was currently unemployed. The issue for the Tribunal was, was the Christian element the reason or was it the fact that he was not a good prospect, he had, you know, unemployed, lots of short term jobs and at the bottom of page 456, the Tribunal says, "Taking into account all of the above factors, we find it impossible to say that the questions relating to religion, questions and answers, were entirely disregarded by Mr Sides when he told Mr Robinson that there was no use in coming for an interview." I also point out here this is

under subsection (a) which isn't a section in this case, but nevertheless it has been used by the Commission in all other sections of the Act. The Tribunal moves on, "There is no definition of this phrase in the Act, but we agree with Dr Barton that the most appropriate test is whether religious or ethical belief was a substantial and operative factor", and it cites the *General Motors* decision. There is also a very helpful discussion of the phrase "for the reason that" in the judgments of the High Court of Australia, and he says "The judgments in that case speak of it being enough if it is an operative reason, that is to say a substantive reason in the totality of reasons, and a substantial and proximate reason." And then applying that, they say, "In Mr Sides' case, we've not found it easy to determine the extent to which he was, in this instance, influenced by the religious factor. We think, for example, it's possible that had he received answers to the religious questions which were favourable, he might have encouraged Mr Robinson to come for an interview. We also accept that Mr Robinson genuinely considered he was turned down because of the lack of religious belief. Nevertheless, Mr Sides, in his evidence, made it clear that he gives great weight to a person's ability as a worker when considering employment, and that it was, in his view, an unfavourable factor that Mr Robinson, after several short jobs, was currently unemployed."

Moving down to the middle of the page, the Tribunal then concludes, "Whilst therefore, we consider that the religious issue was a factor in Mr Sides' decision, we are, after giving the matter most careful thought, left in doubt whether it was a substantial and operative factor, or expressed alternatively, whether it was a substantive reason in the totality of reasons. Being left in doubt, we consider that the burden of proof being on the plaintiff, we must give the benefit of that doubt to the defendant."

I take you now to page 45 –

TIPPING J:

That, if I may interpose, seems to be quite a subjective approach, rather more consistent with the more recent English cases than the previous English cases.

MS JOYCHILD:
Yes. I do agree with this.

TIPPING J:
You're comfortable with that?

MS JOYCHILD:
Well not entirely, but I'm nevertheless putting this before you because this is the decision that has been – the law, it hasn't been challenged up until now under the Human Rights Act, but I'll take you – and the facts of this case are different also from the facts of the case before you in that, in the case before you now, you have a policy which is inextricably linked with a prohibited ground of discrimination and there is a different enquiry there. This case was, you know, not very good employment experience on the one hand and religious belief on the other, so it was different in that way. I'm not suggesting it's entirely analogous but bringing it to your attention.

If we look at page 465 of the *Eric Sides* case, in the second to last paragraph, the Tribunal says, "In our view, however..." and these were arguments that Mr Dalgetty had submitted that the Act didn't specifically say it was unlawful to take religious or ethical belief into account in employing someone, he said if Parliament had intended such to be the position, it would have said so, and in the Tribunal said, "In our view, these arguments all overlook that the words used in section 15 are "by reason of", we previously refer to the interpretation in the Australian decision. If "by reason of" means that the religious element must be a substantial and operative factor, which we accept to be the correct test, then any person who refuses or omits to employ another by taking into account religious or ethical belief as a substantial and operative factor is in breach. This, in our opinion, is a simple, clear and sensible test which is

capable of being applied to factual situations although as we have already found, it may involve difficult judgments of fact."

I also would like to draw one other comment and that deals with Justice Tipping's question early on about the place of the word "qualified" at the beginning of section 104 and what it meant –

TIPPING J:

No, it's not actually at the beginning of 104, it's at the beginning of 22 and I think that really is the complete answer to my concern. I thought it was in 104 but it isn't, so I've repented of any wayward thinking I might earlier have indulged in.

MS JOYCHILD:

I see, I see. There are differences between the two and the wording also, on the word qualifications in section 22(1)(b) –

TIPPING J:

You needn't, unless you feel it has more general than setting me completely right, you needn't trouble on it from my point of view.

MS JOYCHILD:

Well, you might, in your own time, you may want to look at page 461 where they discuss the word qualified under section, under – but that's all.

TIPPING J:

Right, thank you.

ELIAS CJ:

In your own time.

TIPPING J:

In my own time, yes. I think I've persuaded myself Ms Joychild, you'll be pleased to hear, that I was completely off the beam, at least for the purposes of 104.

MS JOYCHILD:

I also point out a difference between the Employment Relations Act and the Human Rights Act and the wording of (b), 104(b). In that, under the employment, oh sorry, under (a) where they talk same – the Employment Relations Act talks about same or substantially similar qualifications and although that used to be the wording under the Human Rights Act, I notice it has changed to capabilities rather than qualifications –

TIPPING J:

I would be particularly helped myself if you had anything you felt you could say about that part of paragraph (a), this is 104(1) which talks about "employed in the same or substantially similar circumstances" because that seems to be quite close to the heart on this legislation of the comparator?

MS JOYCHILD:

Yes. Well, I think we would say that "the same or substantially similar circumstances" should not include the ground and it should not include anything inextricably linked to the ground, such as characteristics of the ground but also, we would say in a situation like this where the policy and the age were almost one or one caused the other, they should be taken out of the equation of a comparator.

I wasn't, I didn't fully understand Justice Elias' comments on subsection (b) and I just alert you to one concern I had that the similarly situated test which dogged the Americans for generations wouldn't apply and that was the test that said that, as all Jews in the Polish ghetto are being called up to go to Auschwitz, there's no discrimination because all Jews are being treated the same and it would of great concern if there was any construction of that –

ELIAS CJ:

Yes, no. I repent of that in terms of the whole of section 104 but the point that I was exploring was whether paragraph (b) is reached only once you have passed through the gate of a qualification, or occupational qualification. In those circumstances – which is why section 30 doesn't apply to (b) and that in those circumstances you start with people employed on the same work.

MS JOYCHILD:

Yes. Well –

TIPPING J:

Can I ask something, in following that up?

ELIAS CJ:

Yes.

TIPPING J:

Is (b) confined to two employees each of whom have been off work for a year because of a bad back and one of them gets fired and the other doesn't, or that sort of situation?

MS JOYCHILD:

I don't think so, not confined to that.

ELIAS CJ:

If one is just relating the matter to the work that each of these subclauses has to do, then you can't dismiss someone at all on the grounds of age because of paragraph (c), you can't refused or omit to give them the same terms of employment et cetera as for others similarly qualified. If however, age is a qualification then you may come within the section 30 exception as modified, then I think you have to apply whatever modification, whatever accommodation you are providing equally and I think that's the work for paragraph (b).

MS JOYCHILD:

Right.

ELIAS CJ:

I mean, that's a very tentative view but I think it's very easy to think that legislation doesn't make sense. I think that this approach does in fact make each of these sub – because even if you are able to establish that there is a qualification associated with age, how you apply the eventual section 35 amelioration to those employees within that category, must itself be equal. You can't say well, someone has – you are 100 and therefore we are going to treat you less well than the 97 year old, or something like that.

MS JOYCHILD:

Right, yes. Unfortunately, I think it does have a wider application than that and for example, the case I recall being involved in was a woman, a very simple case really and she said, I'm in charge of the linen at the hotel, I'm the head housekeeper, he's in charge of the fleet of cars, we've both got management responsibilities, we both have staff and yet he's paid more than I am because there's the sense that managing the cars is more important than managing the laundry. Now, we would say well, same or substantially similar, very different, he goes to the forecourt every day and she goes up to the fourth floor where the linen is but nevertheless they both are in similar circumstances. So, it's covering –

ELIAS CJ:

Isn't that, in drawing the distinction, isn't that caught by 104(a)?

MS JOYCHILD:

Yes, it is.

ELIAS CJ:

Yes.

MS JOYCHILD:

Oh sorry, yes, yes.

TIPPING J:

It's certainly, if I may say so, an attractive explanation for why the GOQ, if I may call it that, isn't applied to (b).

MS JOYCHILD:

Yes.

TIPPING J:

It's the first, if I may say so, I don't want to be – sensible proposition I've heard as to why that apparent anomaly isn't an anomaly at all.

ELIAS CJ:

It also explains why the comparison in 104(a) is with qualifications, experience and so on. In other words, comparing the – whereas (b) is in relation to the type of work.

TIPPING J:

I think (b), as the Chief Justice used this expression a little while ago but I'd also noted in the same terms, is to try and get internal consistency. In other words, if you've got people who are still there – but of course, then you've got the difficulty with the word "dismisses".

MS JOYCHILD:

Yes, or detriment.

TIPPING J:

Well, that's not so difficult.

MS JOYCHILD:

Oh because dismisses with (b) and (c) being – yes, dismissal and a retirement.

TIPPING J:

And this curious overlap between (b) and (c) or apparent –

MS JOYCHILD:

Yes.

BLANCHARD J:

It is very hard to see a lot of work for (b).

MS JOYCHILD:

If you look at the – the legislative history for (c) which was the Human Rights Act (d), that came in in 1992 when the government lifted the age of superannuation to 65 and it had to rather rapidly, this was –

ELIAS CJ:

Sorry, (d)?

MS JOYCHILD:

Yes, (c) which under Human Rights Act is 22(1)(d). That came in in 1992 to stop people being compulsorily retired and then having a gap of five years before they were eligible for national superannuation. So, it was – and before that, the dismisses was (c) and there was no comparable circumstances with the dismissal or the detriment.

BLANCHARD J:

Were you allowed to discriminate on the basis of age at that time?

ELIAS CJ:

Yes.

MS JOYCHILD:

From 1992 it was only between the ages of 16 and 65 it was unlawful. Now, it's open-ended. You can't discriminate on the ages up to when a person dies.

McGRATH J:

Is it the case then, that originally section 30 was applying only to (a), in relation to 22?

MS JOYCHILD:

The GOQ only came in with age, didn't it?

McGRATH J:

Sorry, the?

MS JOYCHILD:

The GOQ was certainly not in the original 1977 legislation. I think it only came in with age.

ELIAS CJ:

With the abolition of the ability to compulsorily retire on grounds of age.

MS JOYCHILD:

Yes, yes.

ELIAS CJ:

Yes.

MS JOYCHILD:

It also, yes and then a year after that, there was a huge explosion of grounds and we had disability and all the other grounds and the GOQ naturally applied to them as well but before then, it was just sex, race, marital status and religious belief, there was no GOQ.

The other thing that I thought would be useful for the Court was to look at the – there has been a major re-evaluation of New Zealand's Human Rights Law

eight years ago and I thought it would be useful for you to look at the report as it discussed this –

ELIAS CJ:

By whom, who was it by?

MS JOYCHILD:

The report was commissioned by, it was a ministerial report, commissioned by the Honourable Margaret Wilson as the Minister of Justice and it was prepared by Paul Hunt, Janet McLean, Peter Cooper and Bill Mansfield –

ELIAS CJ:

Oh yes, I remember that report.

MS JOYCHILD:

Yes. The importance of that report, at paragraph 34, they talk about the significance of the difference between part 1 and part 1(A) and part 2 of the Human Rights legislation and the importance of treating them differently. I will take you to paragraph 33 –

ELIAS CJ:

I think you might need to tell us first –

MS JOYCHILD:

Oh sorry, you've got –

ELIAS CJ:

No, about the structure of the Act, part 1(A) is, deals with what?

MS JOYCHILD:

Oh sorry. Part 1(A) was implemented as a result of this report.

ELIAS CJ:

I see. Ms Joychild, Justice Tipping who keeps his eye on such matters, tells me it's time to take the adjournment, so may be you'd like to come back to that after lunch.

MS JOYCHILD:
Yes.

ELIAS CJ:
Thank you, 2.15.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.16 PM

ELIAS CJ:
Ms Joychild.

MS JOYCHILD:
Your Honours I was going to take you to the point on the re-evaluation of human rights protections in New Zealand and to chapter 2 which refers to human rights law and in particular to beginning at paragraph 31 which is on page 2 of the report.

This report was looking at the Bill of Rights Act and the anti-discrimination provisions of the Human Rights Act and there's been discussion on that with the Crown suggesting that jurisprudence should be inter-mingled. While to some extent that might be right, there's a real caution in here about doing that I wanted to draw your attention to. At paragraph 31 the author said that the position then is that both the Bill of Rights Act and the Human Rights Act apply to the government. The former is specifically designed to do so, the latter is well suited to when the government acts in roles similar to those of private actors but less so when government acts as government. This in turn has a result that the two statutes differ in terms of the standards and processes that potentially govern similar acts of government. The perceptions

of the relationship between them have become blurred. For the purposes of clarity the New Zealand Bill of Rights Act should be regarded as stating the general anti-discrimination principle to which government acting as government should adhere and against which all enactments ought to be judged. The Human Rights Act 1993 should be regarded as a detailed working out of the government's duty to protect citizens from discrimination perpetrated by fellow citizens. Then it goes on as a general principle when the government is acting as an employer, landlord etcetera, it should be subject to the same standards and it is a private person. When it's acting as government the appropriate standard is that set in the New Zealand Bill of Rights Act. Any changes to anti-discrimination legislation should reflect these basic starting points.

Then moving to paragraph 34 it says, "It is appropriate for the private sector and government acting as ordinary person to be given specific guidance as to what is lawful and differentiating between people. The present prescript tenor of the Human Rights Act should remain subject to more guidance as to the purposes of which the exception should operate and to more extensive consultations with the private sector," and talks about the Employment Court.

Then at paragraph 35 it says, "Any detailed set of rules may have unintended consequences or fail to anticipate genuine justifications. It would be helpful therefore to include something like the section 97 general justification provision in part 2 of that so that it may be considered as part of the conciliation process."

Now it goes on in this vein. In my submission it's very clearly saying that it wants the specific regime, that's got a lot of certainty in it, to continue to imply to human rights issues between private citizens. And while the Crown referred this morning to two decisions where the Justices had thought it was helpful to call on the anti-discrimination provisions when interpreting the wider general open textured wording in the Bill of Rights, doesn't necessarily apply that it goes back the other way. We're not saying that the decisions don't have relevance but the first primary issue is to provide certainty, clarity,

consistency to employers, to companies, to goods and services providers, when they're trying to apply this legislation. And the Commission's initiative to intervene here was occasioned by the horror of it having to apply that comparator analysis and trying to explain to an employer what that meant. We're very concerned that a decision be made as simple as possible for – because it's only in having simplicity and clarity that human rights mechanisms are enforced and that a culture of human rights develops in the country and that's the aim of the Human Rights Commission which is to promote and advance a culture of human rights protections in New Zealand. And without that people are diffident about asserting their rights and as Baroness Hale said as a result of the *Malcolm* case, a number of disability discrimination cases had been withdrawn. They couldn't succeed.

The Commission's view is that *Malcolm* and *Purvis* were wrongly decided. We would hope that the minority decisions would apply in this country based on this legislation and that their characteristics of the ground are part of the ground and they have to be removed from the analysis. But it's not to say in *Purvis* that the school could not nevertheless expel the boy but it had to go through a process that it hadn't gone through at looking at how they could deal with his violent behaviour in another way given it was part of his disability. On the facts of that the school hadn't spoken to the teacher aide, to the parents, to the people who knew about the boy's disability, it had just dealt with it as a disciplinary matter. Likewise in *Malcolm*, it's not to say that at the end of the day the council may not have said no, you've broken the rule but it should have taken into account his mental health status, once it became aware of it.

I have just a couple of other brief comments. *Shamoon* and *Khan* which were referred to today are really the bread and butter cases that appear at the Human Rights Commission every week where a decision has to be made, a factual enquiry has to be made, as to whether the prohibited ground of discrimination was really operative or whether it was something else and they can be done without the use of comparators. With Justice Tipping's comment about the subjective test in fact I would say the "by reason of" test is capable

of objective factors as well as subjective. It was appropriate in *Eric Sides* that it be subjective because this was an employer making a decision but there maybe other situations where there are more objective factors to take into account and they can nevertheless be considered.

I think that's all I want to say unless there's any questions?

ELIAS CJ:

No thank you Ms Joychild. Yes Mr Harrison. Was there anything that arose Mr Waalkens, sorry?

MR WAALKENS QC:

Thank you Your Honour. Just two very brief points if I may. The first one emanates from Ms Joychild's submission about section 97 of the Human Rights Act which of course has a much wider application to excuses and explanations generally. As she had earlier said the fact that it together with section 65 don't apply, and cannot apply in the employment context, must add some emphasis in my submission to the need to have a more focused comparator group and it's a point that I had touched on earlier but it would, as I say, arise from that point about section 97 as well as section 65.

The other very briefly is Ms Gwyn had a discussion with the Court about the "but for" test and where that has a place if at all and looking at reasons and so forth. There's a useful passage in the speech of Lord Gough in *James v Eastleigh*, that's the pensionable age case, the 65p fee to enter the leisure centre at the swimming pool. At page 774, line D, Lord Gough made it clear that the "but for" test was certainly not appropriate for cases of indirect discrimination and he sets out some rationale as to why that's so.

So if I could leave those thoughts with you. That's all I would wish to say in reply, thank you very much.

ELIAS CJ:

Thank you. Yes Mr Harrison.

MR HARRISON QC:

Thank you. Your Honours have now heard from five counsel, myself included, and my aim is to address you briefly on the three major issues that have been identified but I hope to be adding value rather than simply repeating submissions. The suggestion put forward mainly in the first instance by Your Honour the Chief Justice this morning, explaining how 104(1)(a) could be utilised to the exclusion of (b) in this case, is if I may say so respectfully potentially, I stress potentially, an elegant way through the difficulties concerning section 30(1) that arise in this case. It's only one way and of course the other way is to read the provisions literally and note that section 30(1) just simply doesn't apply. But running with that possible solution what I want to say about it, if I may, is that it's only an elegant solution if ground A is not then strangled at birth in the context of this case by adopting a stringent comparator test because as you – if you adopt the way through and then say right, we're going to strangle the life out of the claim by the way we formulate the comparator, you've closed both avenues off and that's perhaps –

BLANCHARD J:

You presumably strangle (b) by the same means if you were going to do that?

MR HARRISON QC:

Well I've argued it's a different comparator. What I wanted to say – so what I wanted to look at, and the reason particularly why I'm addressing this is so I wanted to come to the words, in (a), in the same or substantially circumstances and spend, just having thought further about it, listened to the argument, spend a moment or two on that, before moving right to that language what I want to urge, and it's really, perhaps everyone accepts it, but you need to think about it again is that there are different comparison exercises for different prohibited grounds obviously. But a feature of the different grounds when one studies them is that they can come into being at different times. Some like race are continuous and always applicable so that if you take employment they'll be there at the beginning of the employment and at the end of the employment. Others, and disability will sometimes be an

example, maybe in existence at the beginning but then may change by becoming for example more severe in the course of an employment. Others will usually only arise partway through an employment and age is an example of that. Marital status will be sometimes an example of that and so we can go through each of these grounds and look at the temporal implications of the particular ground.

Now that takes me to my arguments about "in the same or substantially similar circumstances." There are, I submit, in relation to this age discrimination case, two ways of looking at that. The first argument and my first port of call, is in my para 82 and it's to argue that it's a before and after comparison. So that, in other words, the same or substantially similar circumstances that you attribute to the comparator group are those of the complainant before he turned 60, the before and after, so –

ELIAS CJ:

Yes, the Court of Appeal didn't think much of that but I wondered whether it was too readily dismissed in context.

MR HARRISON QC:

I urge it as a simple solution for this type of age case and it could apply for example, also to a marital status case. I mean, assuming you have an employer with strong religious values and suddenly the employee, the loyal trusted employee is dissolved, divorced and that is too much for the employer, I mean, you don't look at the aftermath, you look at the before and after it seems to me. Another way of approaching the comparison is to – if you don't accept that, then what do you clothe the comparator group with, what are the circumstances? If you say right, we will clothe the comparative group of under 60 flight instructors with the burden of the FAA restrictions, you've created a logical impossibility. You can't clothe them with a restriction which only vests when they turn 60, that's a nonsense. So, the employer's solution is to say all right and the Court of Appeal's solution, postulates some other kind of restriction other than age 60 to the comparator group. We had the suggestion of the visa impaired pilot and another suggestion from my

learned friend, I had difficulty following it but some kind of medical disability that the Americans recognise but we don't. I'm going to come back to that in a moment but my objection to that and it's in the submissions is, if you clothe them, if you clothe the comparator group with a restriction of some other kind, you are not attributing the same or substantially similar circumstances to them because you're not saying you are clothed with the FAA restriction, you are clothed with some other entirely different restriction which is actually going to be hypothetical and will operate in a different way. Now, I don't know if I need to deal with the alternative hypothetical, except to say that it seemed to involve supposing – let's just merely suppose that the United States imposed a restriction for family health reasons on first officers, sorry, on captains but it didn't apply to first officers and that would be a comparator group but I mean, there's no evidence, it's unworkable. Our CAA medical certification of pilots certifies all commercial pilots at the same level and the system under the ICAO, contracting countries accept each others medical certifications. So, the idea that you could have this hypothetical intermediate condition, not even yet in existence but potentially introduced, is just unworkable. So, that's what –

McGRATH J:

Are you really saying Mr Harrison, that the same or substantially similar circumstances test can only apply where it's a reality, it can't apply hypothetically at all?

MR HARRISON QC:

No. There may be circumstances where you need a hypothetical group. What I'm saying is that the hypothetical group has to be founded in reality. It doesn't have to actually exist but you can't, as this employer has done really only since we got to appeal level, raise groups which were not dealt with in the evidence for which there is no evidential foundation and I argue, no foundation in reality. You can't take a visa impaired pilot who you would not demote, you'd have to dismiss and treat that as the hypothetical.

We haven't quite got on to the hypotheticals too much but there's obviously, if you have a single employee/employer, like me and my secretary and I

discriminate against her, obviously the Court would probably strain to avoid the outcome where I say well sorry, I've only got one employee and I can't discriminate against her because I've got no actual other employee to compare with. That would be an extreme result and that's not the position I argue for but it's sort of intermediate to that.

Now, the other issue that has come up is this "by reason of" matter and I've heard the Court say well, does it really matter and I'm tempted to leave it at that but there is, I submit, one point at which it does matter. That is, whether by reason directly or indirectly of, is an objective test as I think we've always understood in New Zealand and I can come to chapter and verse of that, or a subjective test as some members of the House of Lords have started to argue and I stress some members.

ELIAS CJ:

This is on the subject of objective?

MR HARRISON QC:

Yes. My learned friend Ms Gwyn, referred to the judgment –

ELIAS CJ:

I wonder really whether it's all a little bit misconceived because if, as I must say I'm inclined to do, think it is a question of fact whether an action has been taken by reason of a prohibited ground, then you are simply searching for evidence from which you can conclude whether or not it was by reason of the prohibited ground. If you have a before and after situation like this, you don't need to go beyond that. If you have a statement of subjective intent by the employer, you don't need to go beyond that. It's in the other cases that you need to go to a comparator to find evidence from which you can conclude that there is discrimination by reason of the prohibited ground.

MR HARRISON QC:

If I may say so, to which you may need to go to a comparator.

ELIAS CJ:

To which you may need but it's only – these aren't, it seems to me, necessary methodological techniques, they are the ones you select as they are appropriate for the particular circumstances.

MR HARRISON QC:

Yes. I accept that but the position is that the way the law has been understood and this is by our Courts and I've referred to a series of decisions, following the two House of Lords decisions, *Birmingham City* being one of them, is to say it's a test of, it's akin to causation, it asks questions like "but for" and what is the dominate or substantial reason or ground, it then says motive or intent is relevant which is what Your Honour's saying but not a determinative, so that –

ELIAS CJ:

Well, it may be. It may be entirely determinative as in the *Sides* case, for example, if he had said "Fair cop, I intended to only hire someone…", that would have been the end of the story.

MR HARRISON QC:

Yes, but that's – it doesn't cut both ways, this is my point.

ELIAS CJ:

No, I accept that. If there's no evidence of intent it doesn't mean –

MR HARRISON QC:

Well that's it, you see if, as Lord Nicholls – if we, can I just illustrate it this way, by Lord Nicholls at tab 12 of the Crown's bundle, at para 29, the paragraph that you've been taken through, I wouldn't quarrel with anything that he says there, until the second to last sentence when His Lordship says, "Unlike causation, this is a subjective test."

BLANCHARD J:

Well it isn't. It just isn't.

MR HARRISON QC:

Well that's – that's why I'm on about it Sir.

BLANCHARD J:

Because it's an objective appraisal of what the motivation actually was and you may begin and end with a statement about motive, but on the other hand, you may reject that entirely as implausible and place your own interpretation on what the motive must have been.

MR HARRISON QC:

Well that's exactly my point Sir and that's –

ELIAS CJ:

It's a matter of evidence.

MR HARRISON QC:

Yes but if you place the onus on the discrimination complainant to prove a subjective state of mind, you are rendering the area much more unworkable.

ELIAS CJ:

Yes.

MR HARRISON QC:

If you have an objective test, but of course all evidence as to motive or intent is relevant, which is our test, then that makes perfect common sense. So that's the point I'm making, that the –

ELIAS CJ:

Just pause a moment, I think to be fair to Lord Nicholls though, he is indicating that it's a conscious or unconscious matter, so while he says subjective, he's not talking about a subjective subject.

BLANCHARD J:

Well there's another slippery word.

TIPPING J:

A consciously formed intention he's not talking about.

ELIAS CJ:

No, no.

TIPPING J:

It's very, very dodgy though because I've always understood this, Mr Harrison, that when you take in the indirect as well as the direct really means you're looking for some sort of sufficient objective link, if you like, between the prohibited ground and the treatment. If there's no link, then end of story. If there is a link, then prima facie, it's "by reason of."

MR HARRISON QC:

Yes, and that was to have been my ultimate point. Given the presence of directly or indirectly in our statute, whatever you make of these English dicta, they can't apply to our statute, what Your Honour has just said has to be the correct approach, an objective approach. But if we go back, I don't want to do it, but if we go back to what Lord Nicholls is saying what I said in *Nagarajan*, if you actually go back to what he said, he doesn't quite say what he says –

ELIAS CJ:

Here.

MR HARRISON QC:

– he said and if we also go to the other Judges, for example, Lord Hoffmann at paragraph 54, which –

ELIAS CJ:

In the – which case? *Khan*?

MR HARRISON QC:

Sorry, of *Khan* at tab 12, the Crown cited this as supporting its argument but all Lord Hoffman says is, this raises a question of causation. So – and the other point was the point that Ms Joychild was making that we've actually had a test that, both under the HRA and the ERA where the test has been laid down in terms of the older House of Lords' decisions and the statute's been re-enacted in the light of that, so I'm simply inviting you not to depart from the approach that is in the New Zealand case law which I've cited to Your Honours.

There's only one more point, and that is – relates to the genuine occupational qualification issue which I haven't quite given up on yet, and I put – I just want to put these points. It's critical when one assesses the evidence and the finding of fact by Judge Shaw, whether that should be overturned, that the plaintiff, the appellant, is a flight instructor. My points are these, being under 60 might well be a GOQ for an Air New Zealand line pilot, flying Pilot in command, let's assume it is, but in any event, whether it is a GOQ is for, always for the employer to make out on the evidence and the contract and the statutory qualifications are an important part of that. In this case, however, the issue is whether being under age 60 was a GOQ for a flight instructor, and Judge Shaw held that it wasn't proven that it was because, in part because the flight instructor had a different division of duties and responsibilities.

ELIAS CJ:

Can you just, I'm sorry, remind me what paragraph her finding is on that? I just want to see what terms it's in.

MR HARRISON QC:

Yes. The reason I'm looking for my submissions is that's where I'll find the – the matter's dealt with in my final appendix and the findings are summarised at paragraph 132 on page 43. It's at paragraph 134 of my submissions referring to 124 of the case on appeal, judgment of the case on appeal, and 124, where at page 41 to 42, case on appeal, para 124, in this case –

ELIAS CJ:

This is the operational difficulty, not an occupational qualification?

MR HARRISON QC:

Yes.

TIPPING J:

The problem in this case is it's a sort of matter of degree, isn't it? I mean, if he'd been fully, as you said, if he'd been wholly employed as a line pilot, it would be very difficult to argue. If he'd been fully employed within New Zealand for his training and so on, the issue wouldn't have arisen. So it's a matter of assessment ultimately isn't it, as to how significant the need to fly to America was in the overall scheme of his duties?

MR HARRISON QC:

Yes and it's a logically prior question to whether he could be reasonably accommodated.

TIPPING J:

That's another point.

MR HARRISON QC:

But and it may cover some of the same territory but my point is that it's for the employer to demonstrate that for a flight instructor, this man, being under the age of 60 was a GOQ. The Judge, and I can quickly complete this, so the Judge holds that that's not proven. My point is, that factual finding stands unless she misdirected herself in law. If she misdirected herself in law, then the issue, that issue, as well as reasonable accommodation, needs to be remitted to Her Honour for further consideration because the response is, you didn't ask the right test, but go back to the evidence that's before you and decide it over again.

ELIAS CJ:

Sorry, this hasn't been the focus of much argument today and I can't remember, how did the Court of Appeal deal with this?

MR HARRISON QC:

Well it – the Court of Appeal expressed some opinions that went close to the factual merits and inclined to the view that it was a GOQ for the flight instructor but that's – perhaps that's going a bit too far in characterising what they did. So what they said, page 91, the key passages are 110 and 111 of the case. In any event, my simple point is, you've got to find that Judge Shaw misdirected herself, and my argument is she didn't, but if you find that, it's another issue of factual determination which she has to make applying the law as Your Honours state it to be. It gets remitted back to her as well.

TIPPING J:

Could we make that finding ourselves?

MR HARRISON QC:

You don't have the evidence, in fact, because this was essentially questions of law, all of the notes of evidence which were quite voluminous were not provided.

TIPPING J:

I appreciate the point, yes.

MR HARRISON QC:

And of course, remitting it back to Judge Shaw, I'm not sure –

ELIAS CJ:

You might have to have another Judge.

MR HARRISON QC:

– how long she's going to be around, but I'd hate poor Captain McAlister, not to mention Air New Zealand, to be starting again from the very beginning, but

unless I can be of any further assistance, those are my submissions in reply Your Honours.

ELIAS CJ:

There's no question of any sort of agreed facts is there, if you want a determination?

MR HARRISON QC:

No.

ELIAS CJ:

Anyway, you might confer about that.

MR HARRISON QC:

Well it's difficult to agree facts when Her Honour's found facts in our favour.

ELIAS CJ:

Yes.

TIPPING J:

Well from this one, she's simply found that they haven't proved it, which is tantamount I suppose to a finding of fact.

MR HARRISON QC:

Well I'm saying it is, and it's unappealable unless she'd misdirected herself as to the test.

ELIAS CJ:

Is there any questions? No. Thank you Mr Harrison. Thank you counsel for a case very well argued, we'll reserve our decision on it.

COURT ADJOURNS: 2.52 PM