IN THE SUPREME COURT OF NEW ZEALAND

SC 49/2008
[2009] NZSC 78

BETWEEN	DAVID MCALISTER Appellant
AND	AIR NEW ZEALAND LIMITED Respondent

Hearing: 25 and 26 March 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: R E Harrison QC and M A Lewis for Appellant
A H Waalkens QC and K M Thompson for Respondent
C Gwyn and M Coleman for the Attorney-General as Intervener
S Bell and F Joychild for the Human Rights Commission as Intervener

Judgment: 20 July 2009

JUDGMENT OF THE COURT

A The appeal is allowed.

B The declaration made by the Court of Appeal concerning the comparator is set aside and the case is remitted to the Employment Court for the remaining issues, identified in paragraph [44], to be determined by that Court.

C The appellant is awarded costs of $15,000 together with his reasonable disbursements, to be fixed if necessary by the Registrar.

REASONS

Para No

Elias CJ, Blanchard and Wilson JJ	[1]
Tipping J	[47]
McGrath J	[102]

ELIAS CJ, BLANCHARD AND WILSON JJ

(Given by Elias CJ and Blanchard J)

Introduction

[1] The Human Rights Act 1993 (the HRA) prohibits discrimination on the ground of age in relation to employment.[1] So does the Employment Relations Act 2000 (the ERA) which contains largely parallel provisions but limited to discrimination against existing employees.[2] Unfortunately, both sets of provisions pose difficulties of interpretation. There is the usual and perhaps unavoidable problem of identifying an appropriate comparator against which the employer's conduct towards the affected employee is to be judged. But there is also a superadded problem. Prohibitions under both statutes are directed to various kinds of discrimination against an employee. These may on their face appear to overlap one another, yet an express exception, where being of a particular age is a genuine occupational qualification,[3] is not available in relation to all of them.

[2] The present case was brought under the ERA by Mr McAlister, one of Air New Zealand Ltd's senior pilots, who was also one of its flight instructors.[4] When he turned 60 Air New Zealand demoted him to first officer because his age meant he could no longer fly as pilot-in-command of a Boeing 747-400 aircraft in the airspace of the United States of America. He ceased to be a flight instructor because Air New Zealand policy required that an instructor must be an aircraft captain able to perform the role of a pilot-in-command at all times. At that time, in September

---

1 Sections 21 and 22.

2 Sections 104 and 105.

3 Section 30 HRA, incorporated by reference by s 106 of the ERA.

4 The Employment Court judgment, reported at [2006] ERNZ 979, records at para [58] that 25 – 30 per cent of an instructor's time is spent on ground duties, about 30 per cent on line pilot duties involving no training duties and about 40 per cent on flight instruction duties.

2004, the International Civil Aviation Organisation (ICAO) had promulgated a standard which prohibited a pilot from holding the position of pilot-in-command if the pilot had attained his 60th birthday. ICAO had issued a recommendation to this effect to its members, which include New Zealand. New Zealand, along with a number of other countries to which Air New Zealand flies, including Australia, Fiji, Germany, Japan and the United Kingdom, had elected not to adopt the ICAO standard. However, certain other destinations to which the airline flew had done so, including Hong Kong, New Caledonia, Singapore, Tahiti and, most significantly, the United States of America. In fact, the United States Federal Aviation Administration (FAA) had made a rule in terms of the ICAO standard. Consequently, after Mr McAlister turned 60 he could no longer act as pilot-in-command on Air New Zealand's flights to or through the United States.[5] Air New Zealand had adopted a policy, which was not part of Mr McAlister's employment contract terms, as follows:

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

[3] Mr McAlister's contention is that the application to him of this policy offended against the age discrimination prohibition in the ERA. He brought a personal grievance claim alleging, under s 103(1)(c) of that Act, that he had been discriminated against by reason of age and also alleging, under s 103(1)(b), that there had been an unjustifiable action by Air New Zealand to his disadvantage.[6]

[4] ICAO and the FAA have more recently changed their minds and, since November 2006, permit pilots-in-command up to the age of 65, if the co-pilot is under 60. Air New Zealand's policy has accordingly been changed. So the problem posed by this case is no longer current but the interpretational questions remain of general importance, particularly since, as the Court of Appeal recorded,[7] retirement at 65 is the international norm and the New Zealand position of having no mandatory retirement age is relatively unusual.

---

5 Flights to Japan were also affected because the alternate landing place was in Guam.

6 The unjustifiable action claim has not yet been determined in the Employment Court.

7 *Air New Zealand Ltd v McAlister* [2008] 3 NZLR 794 at paras [33] – [34] (Arnold, Panckhurst and Keane JJ).

The statutory provisions

[5] We turn then to the relevant provisions of the ERA and the HRA. To begin with, s 103(1) of the ERA provides that a personal grievance means "any grievance that an employee may have against the employee's employer … because of the claim … that the employee has been discriminated against in the employee's employment". Section 104 then provides:

> **104 Discrimination**
>
> (1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105 …
>
> (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
>
> (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
>
> (c) retires that employee, or requires or causes that employee to retire or resign.
>
> (2) For the purposes of this section, **detriment** includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.
>
> (3) This section is subject to the exceptions set out in section 106.

The prohibited grounds of discrimination in s 105 include "age".[8]

[6] Section 106 requires s 104 to be read subject to certain provisions of the HRA, which include s 30. References in s 30 to s 22(1)(a) or (d) of the HRA are required to be read as if they were references to s 104(1)(a) and (c) respectively. Accordingly, s 30(1) of the HRA is read as follows:

---

[8] Section 105(1)(i). Subsection (2) of s 105 gives "age" the meaning it has in s 21(1) of the HRA which for present purposes is any age commencing with the age of 16 years.

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

[7] Section 30 itself is in turn subject to a general qualification found in s 35 of the HRA, subject to which s 106(1)(l) of the ERA requires s 104 to be read:

> **35 General qualification on exceptions**
>
> No employer shall be entitled, by virtue of any of the exceptions in this Part of this Act, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

Employment Court decision

[8] After finding that Mr McAlister's employment status was as both pilot-in-command and flight instructor, Judge Shaw said that the legal principles applying to an inquiry into whether there had been an act of discrimination were that:[9]

> (1) There must be a causal link between the detriment to the employee and the prohibited ground of discrimination.
>
> (2) The intention of the employer is irrelevant to this consideration where there is *prima facie* evidence that a decision was, at least, in part, based on a prohibited ground.
>
> (3) Where there may be more than one reason for an employer's action the test is whether the prohibited ground is a substantial operative factor.

[9] In Mr McAlister's case, there was direct evidence of Air New Zealand's reliance on age as a reason for its decision about him. The Judge described a letter sent to Mr McAlister because he was soon to reach age 60. It referred to the ICAO rules which limited the flying activities of pilots who reach that age and the consequential limitations on the extent to which such pilots could fly. It also

---

[9] At para [86].

referred to positions that were not affected by age restrictions. The Judge found that Air New Zealand did not intend to actively discriminate on the basis of age but that did not detract, she said, from the fact that, but for his age, Mr McAlister would not have been limited in the range of flying activities he could undertake. The effect was that he was treated less favourably than younger pilots with his qualifications and skills and in his position.[10] His treatment was based on a prohibited ground of discrimination.

[10] The Judge reached the conclusion under para (b) of s 104(1) that Mr McAlister's treatment was detrimental to his employment by comparing his treatment with the position of flight instructors/pilots-in-command who were under 60 doing similar work. They could continue to enjoy the privileges of their position. He could not.

[11] Judge Shaw also found "prima facie discrimination" under para (a). The appropriate comparison, she said, was between the conditions of work of the employee after the changes made by reason of his age and other employees who are not affected by the age restriction. Mr McAlister had received different disadvantageous conditions of work by comparison with the unaffected group of flight instructors/pilots-in-command.[11] She then considered whether age was a genuine occupational qualification under s 30. She rejected an argument that, although s 104(1)(b) was not referred to in s 30, the defence must apply to that paragraph because it would otherwise make a nonsense of the provisions. She said that the inquiry must focus on the job or job description of the person who was alleging discrimination. The genuine occupational qualification must relate to being a particular age or in a particular age group for that position or job. The qualification must be imposed for an honest reason related to that position. Section 30 required an employer to justify an act of age discrimination by showing that the policy relied on was genuinely imposed in good faith and in the belief that it was necessary for the performance of the position; that objectively viewed, the age limit was a necessary qualification for the position; and that any age qualification was for safety or any

---

10 At paras [88] – [89].
11 At para [99].

other reason. The latter was very broad but, applying a narrow interpretation, Judge Shaw found it must be a reason that was genuine and related to the occupation.

[12] Air New Zealand had submitted that as the basic functions of a pilot-in-command of a B747 were related to age because of the ICAO/FAA rules, age was a mandatory legal qualification. The Judge rejected that view "because New Zealand is bound by neither the ICAO age restrictions nor by American aviation law."[12] She acknowledged that the limitations on a B747 pilot-in-command which resulted from FAA rules restricted the extent to which the pilot could be rostered but found that this was "an operational difficulty not an occupational qualification". She considered that an approach should not be taken which broadened the exceptions to age discrimination and that a narrow approach permitted only statutorily imposed age limits being able to amount to a genuine occupational qualification which could be objectively established. In the light of this conclusion, the Judge did not find it necessary to consider s 35.

[13] The unjustifiable action grievance was couched as being flawed processes by Air New Zealand, particularly breach of the notice provisions in Mr McAlister's contract of employment. Air New Zealand had not sought to justify its actions except by denying it had discriminated against him. In the face of the finding of discrimination, there was no defence of justification. The Judge did not, however, fully resolve this claim because it was bound up with the question of accommodation under s 35 with which she did not need to deal.

The Court of Appeal decision

[14] The Court of Appeal addressed three issues, namely, the comparator group for the purposes of paras (a) and (b) of s 104(1); the application of "by reason directly or indirectly of a prohibited ground of discrimination"; and the application of "genuine occupational qualification". It said these overlapped, especially the first two, since a comparator group analysis might identify not simply whether there was any difference of treatment but also why any different treatment occurred.

---

[12] At para [119].

Sometimes, the Court said, a comparator group analysis was not necessary. But it was required in the present case. The usual approach was to refer to the circumstances of the aggrieved person at the time of the alleged discrimination, absent the prohibited ground of discrimination. But where age was a genuine occupational qualification, the comparator group must reflect that, otherwise employers would be held to have discriminated unjustifiably in circumstances where age was a genuine and proper basis for differentiation. The employee could then avoid the application of the genuine occupational qualification by relying on one paragraph of s 104(1) rather than another. But the Court recognised that this approach made the reference to s 104(1)(a) in s 30 unnecessary. It considered it did not need to resolve why this had been done.[13]

[15] The Court of Appeal focused on the claim under s 104(1)(b). The critical point, it said, was whether additional features of an inability to act as pilot-in-command on the majority of B747 flights for reasons other than age should be attributed to the pilots in the comparator group, who must comprise senior B747 pilots, holding flight instructor positions, who are less than 60 years of age and who are employed, as Mr McAlister was, on individual contracts. The Court considered the feature of an inability to act as pilot-in-command for other reasons was part of the relevant circumstances. To reach a true comparison it was necessary to place the comparator in the same circumstances as the aggrieved person except for the allegedly discriminating factor. In this case there were two suggested reasons for the detriment suffered by Mr McAlister. If the factor of the flight restrictions was to be omitted, the comparator groups would consist of pilots who suffered from no operational restrictions and the comparison would not be meaningful. It was not strained to attribute an inability to fly in United States air space for reasons other than age, the Court said, taking as an example the undertaking Air New Zealand's international pilots have given to keep their visas valid. A pilot who was disentitled from entering the United States would not be able to fly there, although technically qualified to do so. The Court accordingly considered that Judge Shaw had erred in her identification of the relevant comparator group under para (b) and that the same analysis applied under para (a). That comparator group analysis answered the

---

[13] At paras [81] and [82].

causation issue. The restrictions on Mr McAlister's ability to fly into the United States as pilot-in-command did not result from a prohibited discriminatory act but from the ICAO/FAA rule.

[16] That was sufficient to dispose of the case. Nevertheless, the Court of Appeal offered comment on the phrase "by reason directly or indirectly of any of the prohibited grounds". It said that, were it not for the ICAO/FAA restrictions, Air New Zealand would not have given any significance to the fact that Mr McAlister turned 60. That was "the occasion and not the reason" for his treatment.[14] A "but for" factual link was not sufficient. The Court did, however, reject the idea that if an apparently discriminatory practice was justified, it would not have occurred by reason of one of the prohibited grounds of discrimination, for that approach would incorporate the genuine occupational qualification justification into the causation analysis and minimise the role of s 30 as well as excluding consideration of the "reasonable accommodation" limitation.

[17] As to "genuine occupational qualification", the Court remarked that it did not agree that the application of s 30 was limited to situations where the formal qualifications for a position contained an age limit. The language of s 30 was broad enough to include situations where age was "important to the employer's operations as a consequence of the legal obligations which the employee has no alternative but to accept".[15] That could fall within the words "or for any other reason".

[18] Just how important age was in the context of an employer's operations would determine whether it could properly be regarded as a genuine occupational qualification. If, in order to maintain his position as a B747 flight instructor, Mr McAlister had to fulfil pilot-in-command duties on a B747 aircraft and as a practical matter he could not do that as a result of ICAO/FAA age restrictions, the Court considered that being beneath the relevant age would be a genuine occupational qualification:[16]

---

14 Quoting Gaudron J in *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at para [13].
15 At para [110].
16 At para [114].

> We consider that it would be artificial to refuse to recognise the constraints that the ICAO/FAA age restriction places on [Air New Zealand] in its international operations, particularly as New Zealand is in a minority in not imposing a mandatory retirement age on commercial pilots. In this context the real issue would be whether [Air New Zealand] would reasonably have accommodated [Mr McAlister], given that the restriction did not apply to all areas of [Air New Zealand's] international operations.

[19] The Court allowed Air New Zealand's appeal and remitted the case to the Employment Court for determination of the disadvantage grievance in light of its judgment.

Discussion

[20] Discrimination on the grounds of age has been prohibited in New Zealand human rights legislation since 1992. Initially, however, there was an upper age of 65, above which age discrimination was not prohibited.[17] The Human Rights Commission Amendment Act 1992 introduced a new s 16A into the principal Act, which applied to age discrimination in the context of the Employment Contracts Act. It exempted "pilots of aircraft within the meaning of the Civil Aviation Act 1990" from the general prohibition on discrimination on the grounds of age.

[21] This scheme was substantially changed by the HRA with effect from 1 February 1999, a date presumably set well in the future to permit time for adjustment by employers. The upper age limit was removed for the purposes of discrimination.[18] Although the Bill as introduced contained a provision equivalent to the former exemption for pilots, the exemption was removed on the recommendation of the Select Committee that a justifiable age limit would be dealt with as a "genuine occupation qualification".[19]

---

17 See definition of "age" contained in s 2 of the Human Rights Commission Amendment Act 1992.

18 Section 21(1)(i) of the Human Rights Act 1993.

19 Justice and Law Reform Committee, "Human Rights Bill" [1991 – 93], XXIII, AJHR, I.8B, para [2.6].

(a) The drafting problem

[22] The key provision on discrimination under the ERA, s 104, substantially mirrors s 22 of the HRA, dealing with discrimination in employment matters. The principal difference arises out of the fact that the HRA provision deals with hiring practices, whereas the ERA governs those already in employment relationships. We deal further with the inter-relation between s 104 of the ERA and s 22 of the HRA in paragraphs [30] to [32] below. For present purposes, it is enough to note that both apply s 30 (and therefore s 35) of the HRA by way of exemption for some types of treatment which would otherwise be discrimination.

[23] As it appears that the Court of Appeal's approach was driven by a concern about the apparently inconsistent drafting of s 104 and the difficulties of having the s 30 defence inapplicable to para (b), we move straight to that problem.

[24] When the task of interpreting and applying s 104 is attempted in a case of alleged age discrimination it is immediately noticeable that subs (1)(b) is not subject to s 30, so that there is no "genuine occupational qualification" defence available if there has been a breach falling within that paragraph. Therefore, on the face of it, the existence of a genuine occupational qualification provides a defence to an allegation of discrimination on the ground of age under para (a) where, for example, an employer omits to a afford an employee the same conditions of work as are made available for other employees of the same qualifications, experience or skills employed in the same circumstances (calling for a comparison of employee abilities to perform work to a certain standard), but does not provide a defence if the employer subjects the employee to any detriment in circumstances in which other employees "on work of that description"[20] are not subjected to that detriment (calling for a comparison of work types). It might at first sight be thought that the failure to offer the same terms would be a "detriment", which is a term of wide import and given in subs (2) an inclusive definition. Likewise, there is a defence under s 30 if

---

[20] The section has not previously mentioned work of a particular description. It appears that the phrase was copied from s 22(1)(c) of the HRA, which opens with the words "Where an applicant for employment or an employee is qualified for work of any description". The drafter has overlooked the absence of such opening words in s 104(1).

the employer requires or causes an employee to resign (under para (c)) but not if the employer dismisses the employee in the circumstances described in para (b).

[25] There is a similar apparent ex facie problem with s 22 of the HRA in relation to age discrimination. The s 30 exception attaches to paras (a) and (d) of s 22(1) but not to paras (b) and (c). Unlike s 104(1), s 22(1) deals with the treatment of *prospective* employees as well as of existing employees. This explains the differences in structure and language as between the two sections. The additional paragraph – para (a) of s 22(1) – addresses refusal or omission to employ an applicant on work of the description which is available. The existence of an occupational qualification is obviously relevant and the s 30 defence is made available. Noticeably in para (b) of s 22(1), which bears some similarity to para (a) of s 104(1), there is no reference to qualification and the s 30 defence does not attach. Instead, the paragraph speaks of "substantially similar capabilities".

[26] The drafting of these provisions is hardly a model of clarity, nor does the legislative history assist. But on a close analysis the difficulty to which we have adverted, and which caused concern for the Court of Appeal, can be resolved. Each of paras (a), (b), and (c) of s 104(1) is directed at different circumstances in which discrimination on a prohibited ground is unlawful. These different targets suggest reasons why the exemption provisions invoked by s 106 need not apply uniformly to the three circumstances identified in s 104(1). On the view we take:

- Section 104(1)(c) is a straight prohibition on any termination of employment by reason of age. In particular, it abolishes compulsory retirement ages.

- Section 104(1)(a) prevents inequality in conditions of employment by reason of age when the employee is compared with other employees with the same qualifications, experience, etc.

- Section 104(1)(b) prevents dismissal or detriment (which, as s 104(2) makes clear includes anything that impacts on job satisfaction or performance) where others employed on work of the same description would not be dismissed or subjected to such detriment.

[27] In the Employment Court and in the Court of Appeal, the appellant's case was argued on the basis of s 104(1)(b) and, only as an alternative, on s 104(1)(a). The reason for that approach seems to have been because s 104(1)(b) is not made subject to the s 30 HRA exception by s 106(2). The Employment Court Judge therefore did not consider application of the s 30 exception (or its s 35 modification) once she had concluded that a breach of s 104(1)(b) had been established. We are of the view that the appellant's complaint was properly brought under s 104(1)(a) rather than under s 104(1)(b) and that the Employment Court erred in its reliance on s 104(1)(b).

[28] The scheme of these three subsections covers the possibilities for those in employment. Mr McAlister could not have been dismissed by reason of his age and could not have been deprived of conditions of employment equal to those similarly qualified and experienced, unless an exception could be established and reasonably implemented by the employer in terms of ss 30 and 35 of the HRA. That is the effect of s 104(1)(a) and (c). While employed on work for which he was qualified, Mr McAlister's age could not have been used as a reason to dismiss him or to subject him to any detriment to which other employees employed by the same employer on work of the same description were not subject. That is the effect of s 104(1)(b). It is a necessary additional provision to ensure equality of treatment among those employed on similar work where there is no question of qualification for the job. Such discrimination is not adequately addressed by s 104(1)(a) which looks to equality in terms and conditions of employment available to others with similar qualifications and experience.

[29] This interpretation of s 104 avoids overlap between the provisions. If, as we think to be the case, there is no such overlap, the employee cannot, by choosing the subsection under which he claims, avoid the exception contained in s 30 of the HRA. Here, if the employer treated age as a qualification for the job, it had therefore to justify the treatment both as a genuine occupational qualification and as one not able reasonably to be accommodated by requiring other employees to undertake the work for which age is a genuine occupational qualification. If Mr McAlister's circumstances could be reasonably accommodated under s 35 of the HRA, then

s 104(1)(b) would prevent him being unequally treated by reason of age by comparison with other employees who undertake that work.

[30] It is suggested that there is lack of symmetry between s 104 of the ERA and s 22 of the HRA if s 30 is available as a defence to s 104(1)(a) but not s 22(1)(b), which is broadly equivalent to it. Section 30 of the HRA is expressed to apply to s 22(1)(a) (refusing or omitting to employ an applicant on work for which he is qualified which is available) and s 22(1)(d) (retiring a qualified employee or requiring him to retire or resign). It is not expressed to apply to s 22(1)(b) (offering a qualified applicant or employee work on less favourable terms and conditions than are made available to those of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description) or s 22(1)(d) (terminating employment or subjecting the employee to any detriment in circumstances where others employed on work of that description would not be terminated or subjected to such detriment).

[31] We do not think that the two provisions are indeed so similar that symmetry is to be expected. Section 22(1)(b) of the HRA itself combines aspects which are treated distinctly in the ERA in s 104(1)(a) and (b) (qualifications, experience and skills are the focus of comparison in the first, and work of the same description in the second). The language used in the HRA provision differs from s 104(1)(a) ("capabilities" rather than "qualifications, experience, or skills"). The consequences of breach are different.[21] More importantly, in the context of s 22(1) of the HRA, the application of s 30 (providing an exception where age is a genuine occupational qualification) is properly available only where age is relied on to refuse employment or to require an employee to resign and does not justify different conditions of employment. That is because s 22(1) applies only if a person is "qualified for work of any description". If an employer seeks to terminate or refuses to employ an applicant in those circumstances, it is effectively challenging the premise of qualification on which s 22(1) is based. Section 30 permits this because it expressly applies to s 22(1)(a) and (d). Section 30 does not apply to s 22(1)(b) because an

---

[21] Under the ERA an employee is entitled to pursue a personal grievance (s 102 and s 103(1)(c)), while under the HRA an employee is entitled to make a complaint to the Human Rights Commission (s 76(2)(a)).

employer who is willing to employ someone as qualified for work of that description cannot nevertheless invoke the genuine qualification exception to justify less favourable terms of employment for the work.

[32] The case is not the same in terms of s 104(1)(a). Under s 104(1)(a) the treatment of an existing employee is assessed by reference to the treatment of those of similar qualifications, experience or skills employed in substantially similar circumstances. The obligation is the affirmative one to offer the "same terms of employment, conditions of work" etc as to those similarly qualified. The issue of equivalent qualification is the critical inquiry and necessarily includes consideration of whether age is a genuine occupational qualification in the application of s 30. Section 104(1)(a) concerns the obligation to employ for particular work according to qualification. Section 22(1)(b) is about the ability to offer diminished terms for work for which the employee is qualified. It is not surprising that s 30 has no application to this question. It would however be an unaccountable gap in the ERA if s 30 did not apply to s 104(1)(a).

(b) The comparator

[33] Because of the conclusion that para (b) of s 104(1) has no application in a case of this kind, Mr McAlister's claim must stand or fall under para (a). That paragraph in fact contains the ingredients for possible comparators. The court is not entirely left to formulate its own concept of discrimination as it may have to do under s 19 of the New Zealand Bill of Rights Act 1990.[22] The issue is whether Air New Zealand "by reason directly or indirectly" of the prohibited ground of age discrimination has refused or omitted to offer or afford Mr McAlister "the same … conditions of work … as are made available for other employees of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances." In considering whether Air New Zealand's reason for its demotion of Mr McAlister was directly or indirectly age discrimination it is necessary to determine how a comparison should be made between his position

---

22 See *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

and those of the other employees of which para (a) speaks. Is the comparison simply with pilots/instructors of similar seniority and experience who are aged less than 60, as the Employment Court found (a simple before and after age 60 comparison), or is it with such pilots/instructors of any age who are for any reason debarred from acting as pilot-in-command in the United States, as the Court of Appeal decided? That Court, as we have seen, posited a pilot who did not hold a visa to enter the United States.

[34] In cases of alleged discrimination the choice of a comparator is often critical. We were referred to a number of decisions from senior courts in different jurisdictions which were said to provide guidance. For the most part, we did not find them especially helpful. Unless there are distinct similarities in the statutory scheme and in the type of discrimination which is being alleged, what is said in another jurisdiction about how to arrive at a comparator is of limited assistance. The task of a court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue, taking full account of all facets of the scheme, including particularly any defences made available to the person against whom discrimination is alleged. A comparator which is appropriate in one setting may produce a completely inapt result in another. It will certainly do so if it effectively deprives part of the statutory scheme of its operation.

[35] In *Lewisham London Borough Council v Malcolm*[23] Lord Neuberger of Abbotsbury was alert to the need for great care in this respect. His speech discussed what he called the narrower construction and the wider construction of a provision requiring use of a comparator in the Disability Discrimination Act 1995 (UK).[24] The case involved alleged discrimination by a local authority against a tenant on the ground of his mental disability. His tenancy was terminated when he vacated the tenanted property and sublet it. His action was said to have been influenced by his disability. By vacating the property he exposed himself to the risk that the local authority could then terminate the tenancy and it proceeded to do so. The statute

---

23 [2008] 1 AC 1399 (HL).
24 At paras [136] – [142].

forbade discrimination against a disabled person if "for a reason which relates to the disabled person's disability, [the landlord] treats him less favourably than he treats or would treat others to whom that reason does not or would not apply." The question for the House of Lords was whether the disabled person's treatment should be compared simply with that of a non-disabled tenant who had done the same thing or whose decision was unrelated to the disability, or whether it should be compared with the treatment of a tenant who had not sublet at all. One possible comparator (the narrower construction) thus involved stripping out the disability but not the reason. The other involved stripping out both the disability and the reason. Either reading was said to be linguistically defensible. Lord Neuberger clearly thought that the narrower construction better fitted the case, but he accepted that on that construction the reach of the section and its beneficial effect was very limited. He said that was, in principle, a powerful argument in favour of the wider construction, as an anti-discrimination statute should, at least in general, be construed benevolently towards the intended beneficiaries. But the wider construction would, by contrast, produce a "highly invasive" result.[25] His Lordship noted, significantly in our view, that some provisions had since the events in question been added to the statute which would in future mitigate the consequences of the narrower construction. What His Lordship was doing was balancing the pros and cons of the adoption of the alternative comparators in the context of the whole of the statutory scheme, including such checks and balances as did, or would in the future, exist. That, it seems to us, is the right approach, best calculated to lead to a nuanced result.

[36] A case of the present kind differs essentially from a case like *Malcolm* where the circumstance which led to the termination of the tenancy was the subletting. The disability and the subletting were said to be connected in the particular case but there was no inherent connection between them as there is in the present case between age and the ICAO/FAA rule. There is accordingly no need to further discuss what was said in *Malcolm* concerning a very different statutory scheme.

[37] In the present case, if the comparator used is the one which found favour with the Court of Appeal, namely comparison with pilots who cannot fly to the

---

[25] At para [142].

United States for any reason, it proves too much. There would then be no work to do for ss 30 and 35, which are an important part of the statutory scheme concerning age discrimination and introduce carefully stated checks and balances. However, if Mr McAlister's treatment is compared simply with that of a similar pilot of under 60[26] (of himself aged 59, if you like), then, assuming for the moment that the reason for his treatment was his age, the Court can move on to consider the s 30 defence and the s 35 qualification to the defence. If, on the other hand, his treatment is compared with a pilot of under 60 who cannot fly in the United States because he cannot lawfully enter its territory (no visa), the balance of the exercise is tilted too much the other way. The exercise would appear to lead to an obvious result, as the Court of Appeal found, since, freed of any need to come to an accommodation under s 35, Air New Zealand might well demote any pilot who for any reason could not fly its B747 planes to the United States. Not only would there be no opportunity for inquiry in Mr McAlister's case into whether there was a genuine occupational qualification which could not be reasonably accommodated but there would also be no need for an inquiry into whether the direct or indirect reason for Mr McAlister's treatment was or was not related to age. In other words, it would deny any role for the words "or indirectly" in the phrase "by reason directly or indirectly of any of the prohibited grounds".

[38] The correct comparator under para (a) of s 104(1) is therefore with other pilot/instructors who have not attained 60 years of age.

[39] We should add that it does not necessarily follow that, if para (b) had applied, the same comparator would be appropriate. In para (a) the comparison involves qualifications. In para (b) it involves types of work and there are no available checks and balances equivalent to ss 30 and 35. The comparator, as Mr Harrison QC put it, must allow the surrounding circumstances to work on both sides of the comparison. Having stressed the need for the comparator to be addressed to the context, we do not consider it is presently appropriate to pursue how a comparison might be made under para (b) as the selection of a comparator is driven in large measure by the particular circumstances and the manner in which an alleged discrimination occurs.

---

[26] It was agreed by counsel that, at the very least, it was necessary to remove the age of the pilots from the comparator group.

The circumstances which may arise under para (b) are likely to be quite different from those in the present case.

(c) "Directly or indirectly"

[40] But it remains necessary to show that his age of 60 was causative of the demotion of Mr McAlister either directly or indirectly. That is, as Mr Harrison submitted, a factual inquiry. What directly or indirectly caused Air New Zealand to act as it did? The argument of Air New Zealand is that it would not have demoted him were it not for the ICAO/FAA rule. But plainly that rule was itself directed at disqualifying pilots aged 60 or more. It would therefore be very artificial to say that the attaining of 60 was merely the occasion or trigger for the action taken by the employer. It cannot in our view be said that age was not a material factor in Air New Zealand's decision to demote Mr McAlister. Age was certainly, in this way, an indirect cause but we are inclined to think that, because it formed the basis of the ICAO/FAA rule, it is better regarded as directly causative of the demotion, notwithstanding that Air New Zealand would not have acted if the rule had not applied to Mr McAlister. Age and the rule were so entwined that it is unrealistic to regard the demotion as simply a result of the application of the rule. Mr McAlister has therefore made out his case under s 104(1)(a), but subject to the exception in s 30 which may provide a defence, so that no unlawful discrimination has occurred.

(d) The s 30 defence

[41] Because of the rule, being under 60 years of age was a qualification which Mr McAlister lacked in terms of s 104(1) in order to be able to fly to the United States. But was it also a genuine occupational qualification for the purposes of s 30? The Courts below disagreed on this question. Judge Shaw considered that only a qualification set by a New Zealand statutory provision fell within s 30. That was, in our view, an error of law and the Court of Appeal rightly rejected that position. The legislature could surely not have intended to put a New Zealand employer which operates internationally in the position of having unlawfully discriminated against its employee when it was forced to comply with a foreign law concerning employment which was a condition of its ability to do business in the foreign state. We can

accept that a s 30 defence may not succeed if a claimed occupational qualification has been promulgated in New Zealand but is unlawful in this country because it conflicts with an anti-discrimination provision of the HRA or the ERA. The employer might well in such a case be in a position to disregard or challenge the requirement for the qualification as being unlawful. An example would be if the Civil Aviation Authority ("CAA") purported to introduce a regulation in the same terms as the FAA rule without very explicit statutory authority to do so. We reserve our position on whether an airline which complied with such a rule pending the obtaining of a declaration from a court of its unlawful character would have a s 30 defence in the meantime but we observe that an airline could hardly disregard the postulated CAA edict while it stood. Where, however, a qualification imposed by the law of another country impacts significantly upon an employee's work, it is unrealistic not to treat it as a qualification for the purposes of s 104(1)(a) and s 30. It is equally unrealistic not to regard the ICAO/FAA rule as a genuine occupational qualification where it very substantially affected Mr McAlister's ability to perform his duties. He was contracted to act as flight instructor/pilot-in-command of a B747 for about 40 per cent of his working time, according to the finding of the Employment Court, but could not do so on a majority of Air New Zealand's B747 flights because of the rule.

[42] It does not seem to us to be of any significance that Air New Zealand's policy, based on the rule, was not expressly incorporated in Mr McAlister's employment contract. It would certainly be implicit in employment of this nature that the employee would remain fully qualified to undertake his agreed duties. Nor can the restriction to which the ICAO/FAA rule subjected Mr McAlister be fairly characterised as raising only an operational difficulty.

[43] The Air New Zealand argument is also inconsistent with s 26 of the HRA (which is applied by s 106 of the ERA). Section 26 provides an exception for those working outside New Zealand in some circumstances. Such an exception would be unnecessary if foreign laws and customs were treated as the reason for discrimination, not the age, gender or other prohibited ground which occasions their application. Nor is the argument consistent with the legislative history of the ERA provisions which, as described above at paragraph [21] omitted a proposed specific

exemption for pilots on the basis that age could be considered under the genuine occupational qualification exception where appropriate.

(e) Section 35

[44] The conclusion we reach that Air New Zealand had a defence under the s 30 exception to s 104(1)(a) is of course provisional because it is subject to the employer establishing under s 35 that it was, reasonably, unable to adjust its activities to accommodate the restriction placed on Mr McAlister by the rule. As this is a matter which has not been considered by the Employment Court, and as that Court also has not yet resolved the unjustifiable action claim and must in doing so take account of this Court's judgment, the case must be remitted to the Employment Court.

[45] Air New Zealand has to show that the activities it required Mr McAlister to undertake could not reasonably have been adjusted to enable him to concentrate on other duties while other pilots carried out the pilot-in-command functions on long-haul flights affected by the FAA restrictions. This, it seems to us, was always the critical area of dispute between the parties. It was unfortunately not reached because of the view taken in the Employment Court that the FAA restrictions were not capable of giving rise to a genuine occupational qualification if adopted as policy by Air New Zealand. Enough has been said at the hearing to indicate that the question of reasonable accommodation is a matter of substantial dispute, turning on detailed consideration of what is possible in terms of the rosters which would have permitted Mr McAlister to have the flying hours to maintain his qualification.

Result

[46] The appeal is allowed, the declaration made by the Court of Appeal concerning the comparator is set aside and the case is remitted to the Employment Court for the remaining issues, identified in paragraph [44], to be determined by that Court. The appellant is awarded costs of $15,000 together with his reasonable disbursements, to be fixed if necessary by the Registrar.

TIPPING J

[47] I am in general agreement with the reasons which the Chief Justice, Blanchard J and Wilson J have given, save on the relationship between paras (a) and (b) of s 104(1). I am in full agreement with the orders which they would make. I add my own perspective on two matters, and then deal with the point on which my reasons differ from theirs.

"By reason of"

[48] Under s 104(1) of the Employment Relations Act 2000 (the ERA), an employer discriminates against an employee if the employer subjects the employee to any of the listed[27] detrimental outcomes by reason directly or indirectly of a prohibited ground of discrimination. The first matter I will address concerns the phrase "by reason of". In the *Eric Sides* case[28] the Equal Opportunities Tribunal said this phrase meant that the prohibited ground had to be "a substantial and operative factor".[29] I respectfully consider that this statement is at least capable of being read as requiring too strong a link between the outcome and the prohibited ground.

[49] The correct question raised by the phrase "by reason of" is whether the prohibited ground was a material ingredient in the making of the decision to treat the complainant in the way he or she was treated. In this case the question is whether Mr McAlister's age was a material ingredient in Air New Zealand's decision to demote him. The policy of the legislation is that a prohibited ground of discrimination should play no part in the way people are treated unless there is good cause for it to do so. In the employment context there is good cause for treating a person differently on account of their age, if age is a genuine occupational qualification.[30]

---

27 In paras (a), (b) and (c) of s 104(1) of the ERA.
28 *Human Rights Commission v The Eric Sides Motors Co Ltd* (1981) 2 NZAR 447.
29 At p 465.
30 See s 30 of the Human Rights Act 1993 which is subject to s 35 considerations.

[50] For these reasons I agree with the use by the Chief Justice, Blanchard J and Wilson J of the equivalent phrase "material factor" in paragraph [40] of their reasons. Mr McAlister's age was self-evidently a material ingredient or factor in Air New Zealand's decision to demote him. While Air New Zealand had no choice but to respond to the American restriction and that factor is relevant to whether age was a genuine occupational qualification, the lack of choice does not mean that Mr McAlister's age was immaterial to Air New Zealand's decision. That would be an unrealistic and artificial view to take and would also have the lack of choice factor operating at the wrong stage of the inquiry.

The comparator issue

[51] The second matter concerns the comparator issue. In general terms discrimination by reason of a prohibited ground involves one person being treated differently from someone else in comparable circumstances. The approach of the Court to the comparator issue should be guided by the underlying purpose of anti-discrimination laws and the context in which the issue arises. Anti-discrimination laws are designed, as I have said, to prohibit employment and other relevant decisions from being influenced by any feature which amounts to a prohibited ground of discrimination. Exceptions allow what would otherwise be a discriminatory feature to be taken into account if there is good cause for doing so. A comparator is not appropriate if it artificially rules out discrimination at an early stage of the inquiry. By artificially I mean that the comparator chosen fails to reflect the policy of the legislation, which is to take a purposive and untechnical approach to whether there is what I will call prima facie discrimination, while allowing the alleged discriminator to justify that prima facie discrimination if the case comes within an exception.

[52] In some circumstances the relevant legislative provisions will dictate how the comparator exercise should be undertaken. In the present case, under s 104(1)(a) for example, the comparison is between the circumstances of the complaining employee and those of other employees "in the same or substantially similar circumstances". Subject to any applicable statutory provision, the most natural and appropriate

comparator is likely to be a person in exactly the same circumstances as the complainant but without the feature which is said to have been the prohibited ground.[31] That feature must be eliminated from the comparator employee in order to make sense of the comparative exercise.

[53] In the present case that elimination would produce, as the comparator, a pilot in exactly the same circumstances as Mr McAlister but who had not reached the age of 60. That is how I would apply the comparator concept in this case. The effect of doing so is, of course, the same as comparing Mr McAlister's terms and conditions before and after he turned 60.

[54] On that basis there is prima facie discrimination. It would be contrary to the legislative purpose to create an artificial comparator in the form of another pilot who notionally, for reasons other than age, was prohibited from flying into America. That would mean there was no prima facie discrimination and, as the Chief Justice, Blanchard J and Wilson J have pointed out, would remove the potential operation of ss 30 and 35 of the Human Rights Act 1993 (the HRA) from the inquiry, thereby preventing the overall structure and policy of the legislation from working properly.

[55] The long and the short of the present case is that prima facie Air New Zealand discriminated against Mr McAlister by reason of his age. That discrimination will, however, be justified under s 30 as a genuine occupational qualification[32] if Air New Zealand can demonstrate compliance with s 35. If it can do so, the prima facie discrimination will be overtaken by the establishment of an exception, and there will be no ultimate discrimination shown. I appreciate that the concept of prima facie discrimination has the capacity to be pejorative and the idea that it is "excused" by an exception will not necessarily assist in removing any stigma attaching to the prima facie position. That, however, is the consequence of a legislative structure which creates a general rule from which exceptions are allowed.

---

31 See the wording of the comparator provision in the legislation at issue in *Lewisham London Borough Council v Malcolm* [2008] 1 AC 1399 (HL).

32 For the reasons the Chief Justice, Blanchard J and Wilson J have given.

The paragraph (b) anomaly

[56] The point on which I differ from the Chief Justice, Blanchard J and Wilson J concerns the failure of s 106(2)(b) to apply the s 30 genuine occupational qualification exception to para (b) of s 104(1). Their solution is to curtail the reach of para (b) to cases which do not fall within para (a). This is done as a matter of interpretation but I regret I cannot read paras (a) and (b) on the basis that there is no overlap between them. Even if I could, I fail to see any logic in applying s 30 to para (a) but not to para (b). A prima facie breach of para (b) should be capable of justification under s 30 just as much as a prima facie breach of para (a). My approach is to treat this as one of those rare cases where the Court can correct a clear drafting error so as to have the s 30 exception applying to s 104(1)(b) cases.

[57] My reasons also differ from those of McGrath J, but in a different way. I regard the drafting error as being the failure to apply the s 30 genuine occupational qualification exception to para (b) rather than its application to para (a). A related point is that I do not regard the comparator exercise as demonstrating that there is no discrimination; rather I regard that exercise as demonstrating prima facie discrimination. Such discrimination is capable of being eliminated by the combined operation of ss 30 and 35 of the HRA.

[58] It is convenient first to set out the relevant statutory provisions. They are ss 22(1), 30 and 34 of the HRA and ss 104(1) and 106(2) of the ERA which provide:

Human Rights Act

> **22 Employment**
>
> (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—
>
> (a) To refuse or omit to employ the applicant on work of that description which is available; or
>
> (b) To offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for

training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or

(c) To terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or

(d) To retire the employee, or to require or cause the employee to retire or resign,—

by reason of any of the prohibited grounds of discrimination.

…

30 Further exceptions in relation to age

(1) Nothing in section 22(1)(a) or section 22(1)(d) shall apply in relation to any position or employment where being of a particular age or in a particular age group is a genuine occupational qualification for that position or employment, whether for reasons of safety or for any other reason.

(2) Nothing in section 22(1)(b) shall prevent payment of a person at a lower rate than another person employed in the same or substantially similar circumstances where the lower rate is paid on the basis that the first-mentioned person has not attained a particular age, not exceeding 20 years of age.

(3) Nothing in section 22(1)(a) shall prevent preferential treatment based on age accorded to persons who are to be paid in accordance with subsection (2) of this section.

…

34 Regular forces…

(1) Nothing in section 22(1)(c) or section 22(1)(d) shall prevent the Chief of Defence Force from instituting, under section 57A of the Defence Act 1990, the discharge or release of a member of the regular forces.

(2) *Repealed*.

…

Employment Relations Act

104 Discrimination

(1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105 …—

(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

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

…

106 Exceptions in relation to discrimination

…

(2) For the purposes of subsection (1), sections 24 to 35 of the Human Rights Act 1993 must be read as if they referred to section 104 of this Act, rather than to section 22 of that Act. In particular,—

(a) …

(b) references in section 30 or section 34 of that Act—

(i) to section 22(1)(a) or 22(1)(b) of that Act must be read as if they were references to section 104(1)(a); and

(ii) to section 22(1)(c) of that Act must be read as if they were references to section 104(1)(b); and

(iii) to section 22(1)(d) of that Act must be read as if they were references to section 104(1)(c).

[59] Section 30 of the HRA does not apply the genuine occupational qualification exception to either of the comparative provisions in s 22(1); that is, paras (b) and (c).

But, by dint of s 106(2) of the ERA, the genuine occupational qualification exception applies to one of the comparative provisions in s 104(1), namely para (a), but not to the other, para (b). The practical and logical problem deriving from this mismatch is evident from the circumstances of the present case, the facts of which are capable of fulfilling both para (a) and para (b).

[60] When Air New Zealand demoted Mr McAlister by reason of his age it not only omitted or refused to afford him the same terms of employment as were made available to other pilots of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances but for his age, it also subjected him to detriment in circumstances in which other pilots employed by Air New Zealand on work of the same description but who had not reached the age of 60 would not have been subjected to that detriment. I can find no escape from the conclusion that the demotion, unless excused under ss 30 and 35, was a breach of para (b) just as much as it was a breach of para (a). I will expand later on the reasons why I cannot accept there is no overlap. It is illogical to have the exception applying if the case is dealt with under para (a) but not if it is dealt with under para (b).

Section 22(1) of the Human Rights Act

[61] The starting point for unravelling this drafting anomaly is s 22(1) of the HRA. It is that section which sets out the general principles that apply to discrimination in employment matters. Paragraphs (a) and (d) of s 22(1) are conceptually linked, as are paras (b) and (c). The prohibitions on refusing or omitting to employ and on retiring, by reason of a prohibited ground, are absolute. In contrast, the prohibitions on offering less favourable terms and terminating or subjecting to detriment are comparative. They each involve a comparison with the treatment afforded to other employees in comparable circumstances, but for age.

[62] Paragraph (a) of s 22(1), which deals with prospective employees, is not reflected in s 104(1).[33] That creates a lack of parallel between the lettered paragraphs in ss 22(1) and 104(1), which may well have contributed to the drafting problem which has arisen.

[63] The premise on which the paras (a) and (d) prohibitions, and indeed those contained in paras (b) and (c), are framed is that the employee or prospective employee is qualified for the work concerned. That is evident from the introductory words of s 22(1). This general premise of appropriate qualification, applying as it does to all the lettered paragraphs of s 22(1), cannot therefore be the feature which explains why the genuine occupational qualification exception in s 30(1) applies only to paras (a) and (d). It is therefore necessary to examine further the conceptual difference between the two pairs of paragraphs.

[64] Paragraph (a) prohibits employers from refusing or omitting to employ job applicants who are qualified for available work, by reason of any prohibited ground of discrimination. Paragraph (d) prohibits employers from retiring or requiring or causing an employee to retire or resign by reason of a prohibited ground. Neither of these prohibitions involves any comparison between the treatment afforded to the person complaining of discrimination and that afforded to any other comparable person. The prohibitions are absolute in that sense.

[65] On the other hand, paras (b) and (c) introduce a comparative approach. In para (b) the comparison is with those having the same or substantially similar capabilities, who are in the same or substantially similar circumstances, and who work on work of the same description. In para (c) the comparison is with other employees employed on work of the same description. The difference between the two species of prohibition is therefore that, by virtue of s 30, breaches of the absolute prohibitions are excused in an age discrimination case if age is a genuine occupational qualification. Breaches of the comparative prohibitions are not excused on that basis, seemingly because they are focused on how the employee is treated by reference to other employees who are similarly situated except they do not possess the discriminatory feature. If they did, the alleged discriminator could excuse

---

[33] This is because the ERA does not extend to prospective employees.

himself by saying "I treat all people with the same feature alike and so I do not discriminate". That would damnify the whole point of the legislation.

Comparison with the position in the ERA

[66] Prima facie, one would have expected to see the same pattern carried into the ERA which deals, as does s 22 of the HRA, with employment matters. But, as already identified, the equivalent of s 22(1)(b), namely s 104(1)(a), is subject to the genuine occupational qualification exception, whereas the equivalent of s 22(1)(c), namely s 104(1)(b), is not. Paragraph (b) of s 104(1) is therefore consistent with the HRA but para (a) is not. Is there any textual clue why this may be so? The first textual difference is that s 104(1) does not contain the introductory words found in s 22(1), referring to the employee being qualified for the relevant work. This suggests, if anything, that both para (a) and para (b) of s 104(1) were meant to be subject to the genuine occupational qualification exception.

[67] The only other textual difference of any potential significance is the substitution of the words "qualifications, experience, or skills" in para (a) of s 104(1) for the word "capabilities" in para (b) of s 22(1). I do not, however, regard that change as shedding any light on the problem I am addressing. The relevant words simply serve the purpose of setting up the comparative exercise. I think it likely that the change was made to adopt more precise language. But the substituted language, in context, serves exactly the same purpose as the HRA language. I do not consider the word "qualifications" in para (a) of s 104(1) was in any sense designed to do the work of the word "qualified" in the introductory part of s 22(1). In that context the word "qualified" governs all the lettered paragraphs. In its ERA context the word qualifications forms part, and, for present purposes, an insignificant part, of only one of the lettered paragraphs.

[68] There is, however, a valid conceptual reason why Parliament must have realised that, for the purposes of s 104(1), it was necessary to apply the s 30 exception at least to para (a), despite s 30 not having been applied to para (b) of s 22(1) of the HRA. As earlier mentioned, the comparative exercise inherent in these paragraphs necessarily involves the discriminatory feature (here age) not being

present in the comparator. On that basis Mr McAlister's comparator pilot is treated as being aged 59 rather than 60. This results in there being prima facie discrimination because Mr McAlister was treated differently from his comparator by reason of age. But Parliament considered that this prima facie discrimination ought to be excused if age was a genuine occupational qualification. If being under 60 was a genuine occupational qualification for Mr McAlister, and Air New Zealand fulfilled the requirements of s 35, the prima facie discrimination would be excused by the s 30 exception.

[69] The comparative exercise inherent in both para (a) and para (b) of s 104(1) results not in a final finding of discrimination but only a prima facie finding which can be displaced by the s 30 exception. On this basis there was conceptual logic and good reason to apply s 30 to para (a) of s 104(1). But the same logic and good reason should have led to s 30 being applied to para (b) as well. This is the aspect of the case on which I respectfully disagree with McGrath J's analysis. As I have said, Parliament must have realised that, at least with age discrimination, the comparative exercise inherent in both para (a) and para (b) would necessarily lend to a finding of prima facie discrimination, if the difference in treatment was by reason of age. It was therefore necessary to provide that the genuine occupational qualification exception to age discrimination should apply so as to eliminate the prima facie discrimination. Otherwise there would be discrimination in circumstances which Parliament thought did not justify that conclusion; that is, when being of or under a certain age was a genuine occupational qualification. It cannot therefore have been intended that such cases would be dealt with on the basis that the comparative exercise would yield no discrimination at all.

The overlap/no overlap issue

[70] As earlier foreshadowed, I have difficulty with the view that paras (a), (b) and (c) of s 104(1) are each aimed at different and separate circumstances, with the effect being that there is no overlap between paras (a) and (b). This is a proposition not advanced by any counsel, including counsel for the Human Rights Commission.

Even if there is no overlap I also have difficulty with the proposition that s 30 was intended to apply to paras (a) and (c) yet not to para (b).

[71] Paragraph (c) of s 104(1) originated when age became a prohibited ground of discrimination. It was introduced to a subsection which already had dismissal covered by another paragraph. Paragraph (c)'s references to retiring and requiring or causing resignation must therefore have been intended to mean something other than dismissal or constructive dismissal in the broader sense. The reach of para (c) must have been intended to apply only to those at the end of their working lives. Employers who retired employees compulsorily on the ground of age must obviously have been the primary concern, as opposed to retiring them on other prohibited grounds.

[72] Were it not for para (b)'s reference to other detriment, the three paragraphs could be read as having a logical separation. Paragraph (a) would deal with discrimination within the employment relationship, para (b) with discriminatory dismissal, and para (c) with discriminatory retirement. But that is not an available analysis on account of para (b)'s reference to other detriment. Had this analysis been available it would have been self-evident that the s 30 exception should logically apply to all three paragraphs.

[73] In the result it is paras (a) and (b) which cause the overlapping problem. Paragraph (a) deals with discriminatory treatment during employment. Paragraph (b) deals with dismissal, that is bringing the employment relationship to an end by reason of a prohibited ground. That is its first focus. But it also deals with subjecting an employee to any other detriment by reason of a prohibited ground. The various disadvantages in para (a) must be regarded as detriments within the meaning of para (b). If anything, the inclusive definition of detriment in s 104(2) makes para (b) of wider potential reach than para (a). If para (a) deals with circumstances different and separate from those dealt with in para (b), so that there is no overlap between them, employees in para (a) circumstances may not be subjected to the specified within employment detriments, but there would be no prohibition on their employment being terminated by a dismissal on a prohibited ground. Dismissal other than in the sense of compulsory retirement is not dealt with in para (c). The no

overlap analysis thus has the prohibition on dismissal in the general sense applying only to those cases which fall within para (b) circumstances. That can hardly be right because the treatment that falls within para (a) and hence not para (b), on the no overlap analysis, does not include dismissal. The prohibition against dismissal on a prohibited ground must surely have been intended to apply not only to those in para (b) circumstances but also to those in para (a) circumstances, otherwise an employer would be better to dismiss the employee if otherwise entitled, rather than subjecting them to one of the detriments set out in para (a).

[74] I do not regard it as persuasive to reason that para (a)'s reference to qualifications means that s 30's reference to genuine occupational qualification must have been intended to apply only to para (a) and not to para (b). The rationale for having a genuine occupational qualification exception applies as much to para (b) circumstances as it does to those covered by para (a). The fact that para (b) is framed without reference to qualifications, experience or skills does not logically explain the absence of the s 30 exception from para (b). The reference in para (b) to "work of that description" is a little clumsy because the paragraph does not contain anything to which "that" description can relate. But it must be interpreted as meaning work of the same description as that on which the complaining employee was or is engaged. That necessarily implies that the comparator employee must have the same or substantially similar qualifications, experience or skills in order to have the comparator employee in the same or a substantially similar situation as the complaining employee in all respects except the presence of the prohibited ground.

[75] For these reasons I find myself unable to accept the reasoning of the Chief Justice, Blanchard J and Wilson J as regards the interrelationship of paras (a), (b) and (c) of s 104(1). They see each of these paragraphs as having a separate and discrete reach with no overlapping. I see para (c) as separate and discrete in its reference to retiring but paras (a) and (b) as necessarily overlapping. That is why I regard the failure of s 106(2)(b) to apply s 30 to para (b) as well as para (a) as a significant problem.

[76] Neither view represents a model of the draftsman's art. But, for the reasons I have endeavoured to express, I consider my approach produces greater harmony with the overall purpose of s 104(1). I find partial consolation for my disagreement with my colleagues in the fact that my view, and that of McGrath J on this point, accords with that advanced by all counsel.

Section 106(2) of the Employment Relations Act

[77] I return to the linkage problems inherent in s 106(2) of the ERA. It provides in subpara (b)(i) that references in s 30 of the HRA to paras (a) and (b) of s 22(1) of the HRA must be read as if they were references to s 104(1)(a) of the ERA. This cross-referencing has s 30(1) of the HRA reading "Nothing in s 104(1)(a) [of the ERA] shall apply in relation to any position or employment where being of a particular age or in a particular age group is a genuine occupational qualification …". That clearly makes the s 30(1) exception applicable to s 104(1)(a) cases.

[78] Subparagraph (b)(ii) of s 106(2) requires that references in s 30 to para (c) of s 22(1) must be read as if they were references to s 104(1)(b) of the ERA. The problem is that there are no references in s 30 to para (c) of s 22(1), albeit there are references to para (c) in s 34 of the HRA to which s 106(2)(b) also refers.

[79] There are further potential problems with this linkage to s 34. The references within s 34 are to 22(1)(c), when one would have expected them to be to both s 22(1)(c) and s 22(1)(b). As these two paragraphs are conceptually similar, and at least partially overlapping, the apparent distinction drawn between them is not self-evidently clear. This problem is the reverse of the s 104(1) problem which suggests that no studied distinction was being made in either case. Despite the reference in s 106(2)(b) to s 30 *or* s 34,[34] I am of the view that subpara (ii) of s 106(2)(b) was endeavouring to make s 104(1)(b) subject to the s 30 exception. The drafter's reference to para (c) of s 22(1) was an understandable, albeit erroneous attempt to apply s 30 to para (c)'s counterpart in the ERA, namely para (b) of s 104(1). What

[34] Meaning that the reference in s 106(2)(b)(ii) potentially has work to do via s 34.

seems perfectly clear is that s 106(2)(b) contains at least one, perhaps more, drafting problems. I do not see it as demonstrating, for what would, in any event, be illogical reasons, a deliberate decision to distinguish between paras (a) and (b) of s 104(1) as regards the applicability of the s 30 exception. The legislative history, which I will now address, supports that view.

Legislative history

[80] Section 104 was based on s 15 of the Human Rights Commission Act 1977, which provided (until the enactment of the Human Rights Commission Amendment Act 1992):

> **15 Employment**
>
> (1) It shall be unlawful for any person who is an employer, or any person acting or purporting to act on behalf of any person who is an employer,—
>
> (a) To refuse or omit to employ any person on work of any description which is available and for which that person is qualified; or
>
> (b) To refuse or omit to offer or afford any person the same terms of employment, conditions of work, fringe benefits, and opportunities for training, promotion, and transfer as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description; or
>
> (c) To dismiss any person, or subject any person to any detriment, in circumstances in which other persons employed by that employer on work of that description are not or would not be dismissed or are not or would not be subjected to such detriment—
>
> by reason of the sex, marital status, or religious or ethical belief of that person.

[81] There are two important points to note from s 15 of the 1977 Act. First, age was not a prohibited ground of discrimination in the Act (hence no para (d) existed). Secondly, the exceptions to discrimination listed in the Act,[35] albeit there was not, of

[35] Contained within s 15 itself.

course, an exception directed at age, applied to all the paragraphs of subs (1), and did not differentiate between them.

[82] By the Human Rights Commission Amendment Act 1992, para (d) was added to the Act (bringing in the retirement discrimination provision).

[83] The anti-discrimination material was first introduced into employment legislation in 1987, by s 211 of the Labour Relations Act 1987:

> **211 Discrimination**
>
> (1) For the purposes of sections 210(1)(c) and 218(1)(b) of this Act, a worker is discriminated against in that worker's employment if the worker's employer or a representative of that employer—
>
> (a) Refuses or omits to offer or afford to that worker the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other workers of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
>
> (b) Dismisses that worker or subjects that worker to any detriment, in circumstances in which other workers employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment—
>
> by reason of the colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief of that worker or by reason of that worker's involvement in union activities.

[84] This provision was carried into the Employment Contracts Act 1991, which for relevant purposes was amended in 1992:[36]

> **28 Discrimination**
>
> (1) For the purposes of section 27(1)(c) of this Act, an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer—
>
> (a) Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills

[36] By the Human Rights Commission Amendment Act 1992.

employed in the same or substantially similar circumstances; or

(b) Dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

(c) Retires that employee, or requires or causes that employee to retire or resign—

by reason of the colour, race, ethnic or national origins, sex, marital status, religious or ethical belief, or age of that employee or by reason of that employee's involvement in the activities of an employees organisation.

…

(3) For the purposes of this section, "age", "ethnic or national origins" and "ethical belief" have the meanings given to them by the Human Rights Act 1993.

(4) Subsection (1) of this section shall be read subject to the provisions of sections 15, 15A, 15B, 16, and 16A of the Human Rights Commission Act 1977.

[85] Age was introduced at this point, both implicitly by means of s 28(1)(c),[37] and expressly by referring to "age" at the end of subs (1). This was done because in 1992 the retirement age for superannuation purposes was raised from 60 to 65, and Parliament did not want employers retiring their staff at the age of 60, when they would not be eligible for superannuation for another five years. Importantly as well, subs (4) of this provision applied the exceptions in the Human Rights Commission Act 1977 for the first time to specific employment legislation and in doing so made no distinction between the three lettered paragraphs in subs (1). Prior to this, there had been no explicit exception to discrimination in employment legislation.

[86] In 1992, the Human Rights Commission Act was amended,[38] with s 15 now providing:

---

[37] The concept of retirement is inherently linked with age; albeit the concept of requiring or causing any person to resign seems akin to constructive dismissal which more naturally falls under para (b) of s 28(1) than under the age-related concept of retirement. This curiosity remains to this day.

[38] By the Human Rights Commission Amendment Act 1992.

15 Employment

(1) It shall be unlawful for any person who is an employer, or any person acting or purporting to act on behalf of any person who is an employer,—

(a) To refuse or omit to employ any person on work of any description which is available and for which that person is qualified; or

(b) To refuse or omit to offer or afford any person the same terms of employment, conditions of work, fringe benefits, and opportunities for training, promotion, and transfer as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description; or

(c) To dismiss any person, or subject any person to any detriment, in circumstances in which other persons employed by the employer on work of that description are not or would not be dismissed or are not or would not be subjected to such detriment; or

(d) To retire any person or to require or cause any person to retire or resign—

by reason of the sex, marital status, religious or ethical belief, or age of that person.

[87] Exceptions to s 15 based on age were then provided in s 15A:

15A Exceptions in relation to age

(1) Nothing in section 15 of this Act shall apply to preferential treatment based on age where—

(a) The position is one of domestic employment in a private household:

(b) The duties of the position in respect of which that treatment is accorded—

(i) Are to be performed wholly or mainly outside New Zealand; and

(ii) Are such that, because of the law of the country in which those duties are to be performed, they can be carried out effectively only by a person of a particular age.

(2) Nothing in section 15(1)(a) or section 15(1)(d) of this Act shall apply in relation to any position or employment where being of a particular age or in a particular age group is a bona fide occupational

qualification for that position or employment, whether for reasons of safety or for any other reason.

…

[88] This introduced a "bona fide occupational qualification" exception via subs (2). The exception applied only to paras 15(1)(a) and (d), and not to the comparative provisions of paras 15(1)(b) and (c).

[89] As originally framed, s 15A provided:

Exceptions in relation to age

(1) Nothing in section 15 of this Act shall apply to preferential treatment based on age where—

…

(b) For reasons of authenticity, as in theatrical performances, posing for artists, or being a model for the display of clothes, being of a particular age is a bona fide occupational qualification for the position of employment:

…

[90] Importantly, the original version of s 15A applied to all of s 15, and not just to paras (a) and (d). But the defence of bona fide occupational qualification was very narrowly defined – it applied only where authenticity was in issue. The clause was amended in the Select Committee,[39] presumably on the basis that differences in treatment that were justified could not be called discriminatory. Accordingly the clause was broadened but, for reasons not expressly addressed, its application was now limited to paras (a) and (d). The next step was the enactment of s 22(1) of the HRA, which has already been set out. The present s 30 of the HRA is similar to s 15A of the Human Rights Commission Act 1977 in its application of the exception only to paras (a) and (d).

[91] As regards the cross-referencing in s 106, a majority of the Select Committee which examined the ERA thought that employers should be entitled to treat employees differently on the basis of a prohibited ground if there was good reason

---

[39] Justice and Law Reform Committee, "Human Rights Commission Amendment (No. 3)", 24 March 1992, p 3.

for doing so.[40] There was no suggestion of differentiation between individual paragraphs. The majority thus recommended that the Bill include the exceptions to discrimination contained in sections 24 to 35, 74 and 149 of the HRA.[41] Bearing in mind that statement of purpose, it seems clear that in the confusion of crossing over s 22 of the HRA to the ERA, dropping subs (1)(a) of s 22, and including the HRA defences, the s 30 exception which was meant to apply generally was inadvertently applied expressly only to paras (a) and (c) of s 104(1) of the ERA, leaving para (b) as an unexplained omission.

[92] Furthermore, the Human Rights Bill had contained a provision that created an exemption from discrimination on the ground of age for pilots and air traffic controllers. But the Justice and Law Reform Committee deleted that provision, reasoning that:[42]

> [T]he exemptions do not conform to the principles underlying the bill and [the Committee] believes that the issue in question should be whether or not the exceptions are bona fide occupational qualifications. The interests of [Air New Zealand] could be met by placing reliance on clause 44(1) which allows an exception in relation to age where being of a particular age is a genuine occupational qualification, whether for reasons of safety or for any other reason.

[93] The Committee did not favour an employer being able to rely on a contractual provision allowing it to retire its employees once they reached the age of 60 (now 65). It considered the employer needed justification to do so. The Committee observed that:[43]

> [A]ge *per se* does not determine a person's ability or productivity and should not be used as the criterion for access to employment. Reliance should instead be placed on the person's ability to perform the task required.

[94] The views of the Committee make it even stranger that the anomaly caused by the partial application of s 30 of the HRA to the ERA was overlooked. The drafting technique of incorporation by reference, always an exercise requiring care, created a problem that cannot have been identified. The Committee envisaged that

---

40 Employment and Accident Insurance Legislation Committee, "Employment Relations Bill and Related Petitions" (2001) I.22A, p 157.

41 Page 157.

42 "Human Rights Bill" [1991 – 93], XXIII, AJHR, I.8B, para [2.6].

43 Paragraph [2.5].

the interests of organisations such as Air New Zealand would be met by relying on the fact that age could be a genuine occupational qualification for "any reason". In other words, it cannot have been intended that the s 30 defence would apply only to paras (a) and (c) of s 104(1) of the ERA. It must logically have been intended to apply also to para (b).

Power to remedy drafting errors

[95] The problem is one of inconsistency caused by cross-referencing. Sections 22(1) and 104(1) overlap but the overlap is inconsistent because of the inconsistent application of s 30 to each. The inconsistency with s 22(1) created by the application of s 30 to para (a) of s 104(1) must prevail because it is later in time and has a deliberate and specific focus. So much is relatively uncontroversial. But this sets up a further inconsistency by dint of the different treatment of paras (a) and (b). That inconsistency disjoins two conceptually paired provisions for no good reason. For reasons given elsewhere I do not consider paras (a) and (b) are intended to deal with two discrete and separate categories of employee or two discrete and separate kinds of situation. I therefore consider the different application of s 30 cannot have been intended and the only possible explanation is a drafting error.

[96] The question becomes what the Court can do to remedy this problem. The powers of the Court in the case of drafting errors are helpfully discussed in Burrows and Carter's *Statute Law in New Zealand*.[44] The Court can correct a drafting error by addition, omission or substitution of words if three conditions are satisfied: (i) the Court must be sure that there is a drafting error; (ii) the Court must also be sure what Parliament was trying to say; and (iii) the necessary correction must not involve too great a re-writing of the defective language. This last consideration is obviously a matter of degree and will often depend on the Court's assessment of whether, in the light of the overall interests of justice, when balanced against the proper role of the Courts, the redrafting exercise should be left to Parliament. Indeed, the more elaborate the necessary redrafting, the less likely it is that the first two conditions will have been fulfilled.

---

[44] (4th ed, 2009), pp 296 – 317.

[97] This formulation is supported by the decision of the House of Lords, and in particular the speech of Lord Nicholls, in *Inco Europe Ltd v First Choice Distribution.*[45] His Lordship said that the Court must be able to correct obvious drafting errors, and for that purpose, as part of its interpretative function, the Court may add, omit or substitute words. The conditions under which this may be done are necessarily strict so as to preserve the boundary between interpreting and legislating. That is why the Court must be sure there is a drafting error and equally sure what Parliament was trying to achieve.[46]

[98] I turn then to apply the criteria identified above to the circumstances of the present case. For the reasons earlier traversed, I am sure there has been a drafting error. But can I be sure what Parliament was trying to say? The application of s 30 to para (a) of s 104(1) is clear and express. The problem cannot lie there. Indeed, for reasons given earlier, it was entirely appropriate that s 30 be applied to para (a). Once that point is reached, there is no good reason why Parliament might have wished to distinguish between paras (a) and (b) of s 104(1) in this respect. As I have already pointed out the two paragraphs are conceptually paired. They are also overlapping. Paragraph (b), on the ordinary and natural meaning of its words, is capable of covering all the ground covered by para (a) through its reference to detriment. For these reasons I am sure Parliament cannot have meant the s 30 exception to apply to para (a) but not to para (b).

[99] The outcome Parliament must have been endeavouring to achieve requires the substituted s 30(1) to read:

> Nothing in s 104(1)(a) *or s 104(1)(b)* [of the ERA] shall apply in relation to any position or employment where being of a particular age or in a particular age group is a genuine occupational qualification.

[100] In order to achieve that reading, a very simple amendment to s 106(2)(b)(i) is all that is necessary. That subclause should contain a reference to s 104(1)(b) as well

---

[45] [2000] 1 WLR 586. Recently followed in a criminal case by the Court of Appeal for England and Wales in *R (Kelly) v Secretary of State for Justice* [2009] 1 QB 204.

[46] At p 592.

as a reference to s 104(1)(a). The provision, as notionally[47] amended, would then read:

> (b) References in section 30 or section 34 of that Act—
>
> (ii) to section 22(1)(a) or 22(1)(b) of that Act must be read as if they were references to section 104(1)(a) *and 104(1)(b)*; and
>
> (iii) as it stands
>
> (iii) as it stands.

[101] While there may still be difficulties in the relationship between subpara (b)(ii) and s 34, it is not necessary, for present purposes, to address them. I prefer this approach to that of the Chief Justice, Blanchard J and Wilson J, who achieve the same end result in the present case by reading s 104(1)(b) on the basis that it does not apply to any circumstance covered by s 104(1)(a), and then confining the case to para (a). That, with respect, involves a very substantial amendment to, or proviso to, s 104(1)(b). It represents not only a substantial amount of redrafting but also alters the substantive compass of an entirely clear statutory provision in a way which cannot be said to represent what Parliament was intending to achieve. Furthermore, the reading down of para (b) is only a partial solution to the problem; it still exists to the extent of the remaining scope of para (b). My approach simply has para (b) subject to the same exception as para (a).

McGRATH J

Introduction

[102] This appeal arises from a personal grievance proceeding brought against the respondent, Air New Zealand, by the appellant, who was a pilot-in-command of B747 aircraft. Upon turning 60 years of age, Air New Zealand demoted the appellant to the position of first officer because International Civil Aviation Organisation and United States Federal Aviation Administration rules prohibited pilots over the age of 60 from being the pilot-in-command of B747 aircraft within the airspace of the United States of America. The appellant alleged that, although

---

[47] I say notionally because courts have no power literally to amend a statute; they may, however, interpret the language of Parliament as if the amendment had been made.

capable and qualified, he was demoted to first officer by reason of his age, contrary to the prohibitions against discrimination in s 104 of the Employment Relations Act 2000.

[103] At the heart of the case is the question of whether the unfavourable treatment was due to the appellant attaining 60 years or whether it was because of a different factor, being the restrictions under foreign law which at that time precluded the appellant from flying into the airspace of certain countries as pilot-in-command of B747 aircraft.

[104] The conclusion I have reached is that the restrictions were the reason for the respondent adopting a policy which, when applied to the appellant, led to him being demoted. As well, I have concluded that under the scheme of the relevant provisions in the employment and human rights statutes, the application of that policy to the appellant was not a prohibited act of discrimination on account of his age. It is accordingly in my view unnecessary to consider whether exceptions to age discrimination in the employment legislation apply. Although my reasoning differs in some respects from that of the Court of Appeal,[48] these conclusions are the same as those of that Court and accordingly I would dismiss the appeal.

Summary of reasoning

[105] New Zealand legislation prohibiting discrimination in employment has since 1977 required that, in order to amount to discrimination, an action taken by an employer must, first, amount to one of a specified group of actions and, secondly, that qualifying action must have been taken for a reason that amounts to a prohibited discriminatory ground. The specified actions that can constitute discrimination in some instances have been defined in terms that require that an employee is given less favourable treatment than given to other employees in similar situations. In other instances no such comparison is involved in the definition of an action that may be discriminatory, if taken on a prohibited ground.

---

[48] *Air New Zealand Ltd v McAlister* [2008] 3 NZLR 794 (Arnold, Panckhurst and Keane JJ).

[106] Since age was made one of the prohibited grounds in 1992, both human rights and employment legislation have provided for exceptions to what otherwise would be prohibited age discrimination in employment. From the outset these exceptions were attached only to those specified qualifying actions which do not involve comparisons being made with the position of other employees. This reflects the legislative purpose that those specified actions which involve comparisons can only be justified through showing that the treatment is not less favourable than that accorded to the other similarly placed employees. Where, however, the actions can be so justified, they cannot be the basis of a finding of discrimination under the legislation.

[107] The present appeal puts in issue whether Parliament departed from this approach in the Employment Relations Act 2000. That Act includes a defence of genuine occupational qualification to age discrimination in the case of one only of two actions which involve a comparison with the treatment of other employees. In brief summary, the defence attaches to refusals to offer or afford to an employee the same terms of employment as are available for other employees in similar circumstances.[49] It does not attach to dismissal of or subjecting an employee to detriment when other employees on the same line of work would not be.[50] This has enabled the appellant to argue that Parliament's intention in 2000 was that a genuine occupational qualification requirement for an employer's action could not be a defence to discrimination under s 104(1)(b) and that the scope of that provision should be read accordingly. For reasons I develop, I am satisfied that the addition of the defence to apply to s 104(1)(b) was a drafting mistake. It reflected no change to either Parliament's purpose in relation to how specified actions of employers which involved comparisons could be justified, nor to the meaning of the provisions in s 104 of the 2000 Act which define the actions that might constitute discrimination.

[108] The effect is that whether the respondent's actions in relation to the appellant amounted to prohibited discrimination is to be determined by reference to the tests stated in the language of s 104(1)(a) and (b) of the Employment Relations Act which requires that certain comparisons be made. This language does not incorporate a

---

[49] Section 104(1)(a).
[50] Section 104(1)(b).

concept of prima facie discrimination. If an employer's action is not discrimination in those terms, no reference need be made to the genuine occupational qualification exception, nor to the provision which confines its scope where an employer can reasonably accommodate the employee's position.

[109] In applying the facts of the present case to s 104(1)(a) and (b), so read, I am satisfied that in neither case do the respondent's actions meet the requirement of treating the appellant less favourably than others as specified in those provisions. I now set out my reasons for these conclusions.

The statutory provisions

[110] The central provision concerning discrimination in the employment legislation is s 104(1) of the Employment Relations Act which relevantly provides:

> **104 Discrimination**
>
> (1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, … —
>
> (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
>
> (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
>
> (c) retires that employee, or requires or causes that employee to retire or resign.
>
> …

Section 105 sets out the prohibited grounds of discrimination for the purposes of s 104. They include "age".[51]

[111] It can be seen that under s 104 an employer discriminates against an employee if the employer takes action of a specified kind "*by reason directly or indirectly*" of any ground of discrimination prohibited by that Act. These words indicate that there must be a causative link between the prohibited ground and the treatment complained of for discrimination to occur under s 104. This means that it is not enough for a complainant simply to show that the unfavourable treatment would not have occurred "but for" the employee's age. The crucial question is, was the prohibited ground a *reason* for the unfavourable treatment. Whether the treatment was by reason of a prohibited ground, consciously or unconsciously, is a subjective inquiry which calls for consideration of the decision-maker's thought processes. It need not be the sole reason, but must have been a significant one. Although the inquiry is subjective in nature, whether the prohibited treatment was a reason for the treatment will usually be inferred from all the circumstances of the case.[52]

[112] The purpose of the inclusion of the words "directly or indirectly" in s 104(1) is to ensure that indirect discrimination is captured.[53] The concept of indirect discrimination is that addressed by s 65 of the Human Rights Act 1993 which prohibits conduct that is not apparently in contravention, but which on examination has the effect of excluding or imposing a disadvantage on a person or group on prohibited grounds. Indirect discrimination is directed to ensuring substantive as opposed to formal inequality. It is not to my mind an issue in the present case, which concerns a complaint of direct discrimination.

[113] The provisions of s 104(1) mirror equivalent provisions in s 22 of the Human Rights Act concerning discrimination in employment matters, although the 1993 Act contains an additional provision in relation to discrimination against applicants for

---

51 Under s 105(1)(i).

52 *Nagarajan v London Regional Transport* [2000] 1 AC 501 at p 511 per Lord Nicholls.

53 The words were inserted by the Employment and Accident Insurance Legislation Committee in order to make it explicit that indirect discrimination was covered ("Employment Relations Bill and Related Provisions" (2001) I.22A, at p 157).

employment. Sections 24 to 35 of the Human Rights Act provide for exceptions in relation to discrimination. They are imported into the Employment Relations Act and applied to s 104 by s 106. However, one of the exceptions, where being of a particular age is a genuine occupational qualification,[54] does not apply equally to s 22 of the Human Rights Act and the equivalent provision in s 104 of the Employment Relations Act. This exception does not apply to either of the two provisions in s 22 that define qualifying actions which require a comparison to be made between the aggrieved employee and that of other comparably situated employees,[55] but it does apply to both provisions in s 22 where no comparison is to be made.[56] The exception does however, inconsistently, apply to s 104(1)(a) of the Employment Contracts Act, even though it is a provision which requires a comparison be made with other comparably situated employees. In order to establish the effect on the meaning of the provisions in the 2000 legislation concerning discrimination on the ground of age, it is necessary to consider in some detail the legislative history.

The legislative history

[114] Provisions prohibiting discrimination in employment were first introduced to New Zealand legislation in 1977. Section 15 of the Human Rights Commission Act 1977 prohibited employers from taking certain actions by reason of "the sex, marital status, or religious or ethical belief" of persons who were employees or potential employees. In summary, employers could not on that account, first, refuse to employ persons on work for which they were qualified, secondly, refuse to offer or afford persons the same terms of employment and conditions of work as were made available to others with similar qualifications employed on similar work or, thirdly, dismiss or subject persons to detriment in circumstances where others employed on work of that description would not be. There were certain specific exclusions from the application of these provisions also expressed in s 15.

---

54 Section 30 of the Human Rights Act.
55 Section 22(1)(b) and (c).
56 Section 22(1)(a) and (d).

[115] The prohibitions were introduced into mainstream employment legislation in 1987 when the Labour Relations Act was enacted. These provisions did not address refusals to employ but otherwise reflected the terms of the prohibitions expressed in the earlier legislation. The 1987 provisions were carried forward into the Employment Contracts Act 1991.[57]

[116] In 1992, age was added to the prohibited grounds of discrimination under the 1977 Act.[58] As well, retirement of any person or causing a person to retire or resign was added to the actions which under s 15 it was unlawful to take on such grounds.[59] The reform only covered employment related age discrimination. These changes, which were also made to the Employment Contracts Act,[60] were driven by the decision of the government of the day to increase the age of eligibility for national superannuation from 60 years to 65 years. The legislation capped the age of prohibited discrimination at 65 years. Implicitly age discrimination was permitted when employees qualified for national superannuation. The amendment concerned was enacted under urgency.

[117] At the same time, the Human Rights Commission Act and the Employment Contracts Act were amended to provide for exceptions to prohibited age discrimination.[61] Section 15A(2) of the 1977 Act provided an exception where being of a particular age, or in a particular age group, was a bona fide occupational qualification for the position, or employment. This was the first time that the genuine occupational qualification defence in its present form was enacted. The exception applied, however, only to prohibited refusals to employ persons on work for which they were qualified and to retiring or causing employees to retire or resign, that is to acts prohibited under s 15(1)(a) and (d) of the Human Rights Commission Act. It did not apply to those prohibited by s 15(1)(b) and (c). The latter subsections required a comparison to be made with other employees. The exception also applied to the equivalent provisions of s 28 of the Employment Contracts Act.

---

57 Section 28.
58 Section 3(2) of the Human Rights Commission Amendment Act 1992.
59 Section 3(1) of the 1992 Amendment Act.
60 By s 22 of the 1992 Amendment Act.
61 Section 4 of the 1992 amendment inserted s 15A in the Human Rights Commission Act providing for "Exceptions in relation to age".

[118] As introduced to the House of Representatives, s 15A(2) was more narrow in its prescription of the type of age-based discrimination permitted. It was confined to situations in which the occupational qualification was "for reasons of authenticity".[62] The Select Committee considering the Bill recommended that the scope of the defence should be broader.[63] The Select Committee also, however, confined the application of the genuine occupation qualifications exception to refusals to employ and retirements. It appears from the Select Committee report that the reason for not extending the occupational qualification defence to refusals to offer the same terms as were available to others, or to dismissing or subjecting employees to detriment to which others would not be subject,[64] was that each provision required comparisons to be made with other employees who were in material respects in the same position. Refusals to employ and retirement of employees did not. The Select Committee's implicit reasoning was that no justification in terms of genuine occupational qualification was necessary or appropriate where the discriminatory effect could be measured by its impact in relation to the position of other employees in substantially similar circumstances. The comparison would demonstrate if the treatment was justified in which case the general defence should not be available. In other words the genuine occupational qualification exception was not to apply because a more direct test of whether the different treatment was justified in those circumstances was available.

[119] The following year the prohibitions on specified acts of discrimination in s 15(1) of the 1977 Act, as amended, were carried forward into s 22 of the Human Rights Act. This is the current provision in that Act. Section 30 is the current provision providing for the exceptions in relation to age to employment discrimination in the 1993 Act. It is the successor to the provisions that were introduced in 1992 and its differential application to the prohibited acts of discrimination according to whether comparisons can be made with other employees reflects the scheme of the former s 15A. Section 30 accordingly retains the genuine

---

62 Theatrical performances, posing for artists or being a model for the display of clothes were instanced.

63 Justice and Law Reform Committee, "Human Rights Commission Amendment (No 3)", 24 March 1992.

64 Under s 15(1)(b) and (c).

occupational exception from prohibitions in s 22(1)(a) and (d), while continuing to exclude it from (b) and (c).[65]

The drafting mistake

[120] When the Human Rights Bill, which became the 1993 Act, was introduced to the House it contained specific exemptions from age discrimination, which covered airline pilots and air traffic controllers. The Justice and Law Reform Committee deleted the specific provisions. The Committee's preference was that exemptions for such positions should be dealt with in conformity with the general underlying principles of the Bill which provided for occupational exceptions.[66]

[121] In 2000 the Employment Contracts Act was repealed and the Employment Relations Act was enacted. For the purpose of personal grievance provisions, s 104 of the 2000 Act sets out actions which, if taken by an employer in relation to an employee, on prohibited discriminatory grounds, one of which is age, will amount to discrimination.

[122] As already mentioned, the Employment Relations Act goes on in s 106(2) to incorporate the exceptions in relation to age discrimination in employment in s 30 of the Human Rights Act. The drafter did so by providing that s 104 was to be read subject to the exceptions in relation to employment matters in s 30. Section 30's references to subparagraphs in s 22 of the Human Rights Act were to be read as if they were references to s 104(1) of the Employment Relations Act. In particular references to s 22(1)(a) and (b) were to be read as if to s 104(1)(a) of the Employment Relations Act and references to s 22(1)(c) were to be read as if to s 104(1)(b). Finally references to s 22(1)(d) were to be read as if to s 104(1)(c).

[123] The effect of this exercise of the technique of drafting by cross-reference in setting out when the genuine occupational defence exception is available to prohibited acts of discrimination is as follows:

---

65 Section 30(2) and (3) introduced a specific new exception in relation to the rate of pay of persons under 20 years which is not relevant for present purposes.

66 "Human Rights Bill" [1991 – 93] XXIII AJHR I.8B, para [2.6].

Type of discrimination (summary)	Human Rights Act provision	Section 30 HRA exception applies	Employment Relations Act provision	Employment Relations Act s 106 exception applies
Refusal to employ	s 22(1)(a)	Yes	NA	NA
Offering employee less favourable terms	s 22(1)(b)	No	s 104(1)(a)	Yes
Terminating/subjecting to detriment	s 22(1)(c)	No	s 104(1)(b)	No
Retiring employee	s 22(1)(d)	Yes	s 104(1)(c)	Yes

[124] The outcome departs from the scheme that was adopted in 1992 and continued in s 22 of the Human Rights Act 1993 which of course remains in force. As a result the genuine occupational qualification exception applies under the Employment Relations Act to prohibited age discrimination that involves refusal or omitting to offer or afford to an employee the same terms of work (s 104(1)(a)), but not to the equivalent prohibition under the Human Rights Act (s 22(1)(b)). There is accordingly a mismatch in respect of the otherwise parallel provisions in the two Acts. As well, there is a logical difficulty in perceiving a rational basis for the apparent availability of the defence to age discrimination under s 104(1)(a) but not under s 104(1)(b) involving dismissal or subjecting an employee to detriment where others employed on work of the same description would not be.

[125] In light of the mismatch, in order to ascertain the meaning of the substantive provisions in s 104 and the meaning and application of the provision for the defence of genuine occupational qualification, it is necessary to examine the legislative history of the Employment Relations Act to obtain contextual assistance. This explains how it was that Parliament came to alter the way in which the defence applies inconsistently to the two statutes.

[126] When the Employment Relations Bill was introduced to the House of Representatives, cl 120 incorporated the provisions for discrimination in employment in the Employment Contracts Act 1991[67] with some minor amendment. The Bill did not include the provision in the 1991 Act for exceptions to prohibitions

[67] Section 28 of the Employment Contracts Act.

on discrimination.[68] The report of the Employment and Accident Insurance Legislation Committee of the House of Representatives referred to submissions seeking that the Bill should be amended to include the exceptions and said:[69]

> As a matter of clarity we have asked that clause 120 be redrafted so that it is clear on its face exactly what the prohibited grounds of discrimination are and what the exceptions relate to. This has led to the inclusion of three new clauses (clauses 120A, 120B and 120C).

[127] Clause 120B gave effect to the Select Committee's request. That clause became s 106 of the Employment Relations Act. It requires that s 104 be read subject to s 30 of the Human Rights Act and as already pointed out incorporated, by reference to s 22 of that Act, the prohibited acts to which the defences would apply. It is at this point that the legislative mismatch between the two statutes of attaching defences to the prohibited actions occurred. It is plain that the Select Committee did not have in mind any change to the policy reflected in s 22 of the Human Rights Act in incorporating cl 120B in its report to the House. It had simply requested clarity and specificity in the Bill concerning the application of the exceptions which had been omitted from the original version. The Select Committee believed it was carrying over all of the Human Rights Act provisions for defences into the employment legislation it was reporting on. The effect of the differing application of the defences in the Employment Relations Act does not indicate any change of legislative purpose in relation to when the defences would be available.

[128] How the mistake occurred is also apparent. The drafter was alert to the need not to incorporate subs (1)(a) of s 22 in the provisions incorporating prohibitions on discrimination in the Employment Relations Act. That provision addresses refusals of applications for employment, on prohibited grounds. It is accordingly concerned with actions taken prior to creation of an employment relationship, which the Employment Relations Bill did not cover. But the drafter then overlooked the need to reflect the consequences of that omission in s 106(2)(b), which required references to the exceptions in s 30 to be read as if references to s 104 in the new Act. A mistake of this kind is, of course, a risk when using the drafting technique of cross-reference to other legislative provisions.

---

[68] Section 28(4).

[69] "Employment Relations Bill and Related Petitions" (2001) I.22A, p 157.

[129] These factors assist in identifying the mistake that actually occurred. The policy of the Human Rights Act 1993 was to make available a defence of genuine occupational qualification only where it was not possible for an employer to justify actions taken through a comparison of the treatment of the grievance complainant with that accorded to other employees. That is why the defence under s 30 of the 1993 Act applies only to refusals to offer employment and to actions involving retirement of employees. The defence does not apply to offering an employee less favourable terms than are available to others, or to terminating employment or subjecting an employee to detriment when others would not be. These provisions contained their own comparative internal mechanism for demonstrating justification.

[130] Had this longstanding and continuing policy been correctly applied by the drafter, the defence would have been attached only to what is now s 104(1)(c). The drafting mistake was to apply the defence to s 104(1)(a). It was not to fail to apply it to s 104(1)(b). I differ from Tipping J on this point. I am satisfied that Parliament's purpose was never to attach the defence where comparisons with the position of other employees could demonstrate whether or not there was justification for acts that would otherwise be prohibited. In particular, it did not have that purpose in enacting the Employment Relations Act in 2000.

Meaningful comparisons under s 104(1)(a) and (b)

[131] It follows that, in applying a purposive approach to ascertaining the meaning of s 104(1)(a) and (b), as required by s 5 of the Interpretation Act 1999, these provisions must be read as requiring that the exercises in comparison they stipulate be conducted on a basis that will establish whether the acts were justified in each case. This purpose is that originally adopted in 1993 and it has not changed. The s 30 defence has been applied to s 104(1)(a) and not to (b) but as that was the result of a drafting error it, exceptionally, does not form part of the context which clarifies the meaning of s 104(1)(a) and (b). Their meaning is to be ascertained without reference to the defence. The result is that genuine occupational qualification circumstances are to be addressed in making the stipulated comparisons. This approach to ascertaining the meaning also has the advantage of not reading down the

broad language in s 104, which defines qualifying actions, which I understand to be the means by which the majority judgment addresses the drafting error.

[132] The appellant's case is principally focused on s 104(1)(b) and within its terms is based on a claim that Air New Zealand has subjected him to "detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment". This language clearly permits the issue of whether the appellant was discriminated against on the ground of his age to be addressed on an hypothesis. Like the Court of Appeal,[70] I consider that s 104(1)(a) is also to be read this way.

[133] On this basis the attributes of the group of pilots, with which the appellant is to be compared under s 104(1)(a) and (b) must, first, have excluded the factor of age which was the basis for treatment. The members of the group accordingly must be below 60 years. But as well, the comparator group must have incorporated any other features which are necessary in the circumstances to establish if the actions of Air New Zealand were discriminatory on account of age rather than a different justifiable basis.

[134] The comparison of the appellant must be with a group which will be of persons of a younger age but otherwise must be such that the relevant circumstances are not materially different. As L'Heureux-Dubé J of the Supreme Court of Canada once put it:[71]

> Comparison is only a fruitful exercise when carried out between groups that possess sufficient analogous qualities to make the exercise of the comparison meaningful.

[135] In the present case this imperative, which is inherent in the legislation, was addressed by the Court of Appeal through including as a characteristic of the comparator group members that, although technically qualified as senior B747 pilots, and also being flight instructors (as was the appellant), they did not meet regulatory requirements to fly into the airspace of the United States as pilots in command of

---

70 At para [87].
71 *Miron v Trudel* [1995] 2 SCR 418 at para [88].

such aircraft.[72] I agree that this factor must be present or the circumstances of the pilots under 60 in the comparator will not be materially the same as those of the appellant. In the special circumstances of this case including disqualification as a distinguishing characteristic of the comparator is not to make age, and thus what is prohibited, the difference. The particular disqualifying consequence is a factor relating to age, but one which does not form part of that prohibited ground insofar as it is a basis for separate treatment.

[136] The regulatory requirements factor must be included in the comparator group to make the comparison meaningful. The effect of doing so is that the appellant is unable to demonstrate that he was treated differently from those with whom comparison is to be made under s 104(1)(a) and (b). Accordingly his treatment was not discrimination.

[137] This means that the provision in s 30 for a genuine occupational qualification defence need not be addressed. In consequence the provision in s 35 for a general qualification on exceptions has no application. This does not, however, mean that the respondent is free from any restriction as to its treatment of the appellant. If the respondent did not make reasonable accommodation, that can be dealt with as part of the personal grievance under the general employment law.[73] It was on this account that the Court of Appeal, in my opinion correctly, remitted the case to the Employment Court for determination of the claim for a disadvantage grievance.

[138] I would accordingly dissent from the majority judgment and dismiss the appeal.

Solicitors:
Shanahans, Auckland for Appellant
G L Norton, Auckland for Respondent
Crown Law, Wellington for Intervener
Human Rights Commission, Auckland for Intervener

---

72 At paras [89] – [91].

73 Possible grounds might include being disadvantaged by unjustifiable action in terms of s 103(1)(b) and s 103A.