Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 30
Date: September 23, 2022
File Nos.: T1536/8210 to T1599/14510; T1630/17610 to T1645/19110; T1664/01911 toT1681/03611; T1709/6213; T1710/6214; T1713/6217 to T1718/6222; T1721/6255;T1722/7711; T1755/11011 to T1768/12311; T1780/1012 &T1781/1112; T1793/2312 & T1794/2412; T1801/3112 to T1806/3612; T1858/8812 to T1861/9112

Between:

Gary Nedelec, Alexander Samanek, Michael S. Sheppard, Douglas Goldie, Gary Bedbrook, Pierre Garneau, Jacques Couture, Larry James Laidman, Robert Bruce Macdonald, Gordon A.F. Lehman, Eric William Rogers, Peter J.G. Stirling, David Malcom Macdonald, Robert William James, Camil Geoffroy, Brian Campbell, Trevor David Allison, Benoit Gauthier, Bruce Lyn Fanning, Marc Carpentier, Mark Irving Davis, Raymond Calvin Scott Jackson, John Bart Anderson, , Warren Stanley Davey, , Keith Wylie Hannan, Michael Edward Ronan, Gilles Desrochers, William Lance Frank Dann, John Andrew Clarke, Bradley James Ellis, Michael Ennis, Stanley Edward Johns, Thomas Frederick Noakes, William Charles Ronan, Barrett Ralph Thornton, Robert James McBride, John Charles Pinheiro, David Allan Ramsay, Harold George Edward Thomas, Murray James Kidd, William Ayre, Stephen Norman Collier, William Ronald Clark

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada and Air Canada Pilots Association

Respondents

Ruling

Member: Jennifer Khurana

I. OVERVIEW

[1] This is a case about mandatory retirement rules for pilots. The complainants are a group of 43 retired pilots who worked for Air Canada and were members of the Air Canada Pilots Association (ACPA). They allege that Air Canada and ACPA (the "respondents") discriminated against them by requiring them to retire at the age of 60 due to a mandatory retirement rule in their collective agreement. I will refer to the complainants represented by counsel as the "Coalition Complainants". Eric Rogers, Robert McBride, John Pinheiro, Patricia Clark (on behalf of the estate of William Clark) and Stephen Collier are representing themselves.

[2] The respondents deny the discrimination and rely on s.15(1)(c) of the *Canadian Human Rights Act* (the "Act") which allowed employers to terminate employment based on age if it was the "normal age of retirement for employees working in positions similar to the position of that individual" (s.15(1)(c) was repealed in 2012). Alternatively, the respondents argue that requiring pilots to retire at age 60 is a *bona fide* occupational requirement and that they could not accommodate the pilots without suffering undue hardship.

[3] To determine these complaints, I will first have to decide if the respondents can rely on s.15(1)(c) as a defence to what would otherwise be age discrimination.

[4] This requires me to determine three things:

1. what factors or test to apply to identify the airlines that employed pilots in positions similar to those held by the complainants;
2. which airlines, pursuant to those factors, are comparators and the number of pilots the airlines employed who occupied positions similar to those held by the complainants;
3. what the normal age of retirement was at those comparator airlines for 2010 to 2012.

[5] This ruling addresses the first of these questions, so that we can proceed expeditiously to question 2, and eventually question 3, if required.

II. DECISION

[6] The Tribunal will adopt the factors from previous complaints that determined whether mandatory retirement for pilots was a discriminatory practice under the "*Act*". This approach is fair and favours the consistent and expeditious hearing of the *Nedelec* complaints. I have briefly reviewed these cases below because they inform the context in which I made my decision about how to proceed.

[7] I have also provided direction to the parties about the evidence they will need to present so that I can determine question 2.

III. BACKGROUND

[8] When I assumed carriage of these files in September 2021, the respondents proposed a two-step process for the Tribunal to determine the appropriate comparator list of airlines and the remaining live issues in these proceedings. The complainants disputed this approach and argued that the respondents' proposal would violate their rights to a fair process and to be heard under s. 50(1) of the *Act*. They maintained that the Tribunal needed to hear evidence to even determine which test or factors to apply to identify the comparator airlines.

[9] In light of the complainants' objections, I gave the parties the opportunity to present other options and to set out the basis for their proposals. I directed them to make submissions on the test the Tribunal should apply to identify the comparator airlines and asked whether evidence would be required to determine which factors should apply. They were also asked to explain the nature of the evidence the Tribunal would need to hear to identify the airlines to be included in the comparator group and to provide estimates of the volume of the evidence required. Finally, I asked the parties to consider the time and resources required to proceed in their proposed way, noting the Tribunal's obligation to conduct its proceedings fairly and expeditiously. The Coalition Complainants, Mr. Rogers and Mr. Collier responded to the direction, as did ACPA and Air Canada.

[10] The parties disagree about whether previous cases dealing with mandatory retirement articulated a binding "test" to apply. However, for the purposes of this ruling, I am

using the terms “factors”, “test” and “criteria” interchangeably. In any case, these terms all get at the same thing – namely, the need to establish a clear basis to identify which airlines were comparators and how many pilots in similar positions they employed so that I can ultimately determine the normal age of retirement for the relevant period, if required.

The Coalition Complainants’ Proviso

[11] The Coalition Complainants qualified their submissions with a proviso that they were not waiving their ”statutory right, in whole or in part, pursuant to s.50(1) of the [*Act*] to be provided a full and ample opportunity to appear at the inquiry and to present evidence and make representations” on any of the questions that I put to the parties.

[12] As set out above, the purpose of this ruling is to determine the first question so that we can progress expeditiously to the remaining issues in dispute. In my view, proceeding in phases will be faster and more efficient for all parties and for the Tribunal.

[13] Administrative tribunals are masters in their own house. They can be flexible, provided the processes they establish are fair. “The aim is not to create ‘procedural’ perfection but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.” (*Knight v Indian Head School Division No. 19*, 1990 CanLii 138 (SCC), [1990] 1 SCR 653 at p.685, citing *de Smith’s Judicial Review of Administrative Action*, (4th ed., (1980), at p.240)).

[14] While the Coalition Complainants appear to suggest that the issue of the appropriate test for determining comparator airlines can continue to be revisited at any time, this ruling is my decision on that question, and the parties are expected to proceed accordingly. That includes complying with my orders below and moving on.

IV. BACKGROUND

[15] Before the *Nedelec* complaints, other groups of retired Air Canada pilots challenged the same mandatory retirement rule. The Tribunal dismissed their complaints, and these findings were upheld by the courts. Through the determination of these complaints and the ensuing judicial reviews and appeals, the Tribunal and the courts developed criteria to decide which airlines employed pilots in positions similar to those held by the retired pilots.

Vilven/Kelly - 2003 to 2005

[16] The pilots in *Vilven v. Air Canada*, 2007 CHRT 36 [*Vilven/Kelly*] retired between 2003 and 2005. The Tribunal determined that 60 was the normal age of retirement for pilots in similar positions and rejected the complainants' arguments challenging the constitutionality of section 15(1)(c) of the *Act*.

[17] The Federal Court upheld the Tribunal's finding that 60 was the normal age of retirement for pilots in similar positions (*Vilven v. Air Canada*, 2009 FC 367) [*Vilven* FC]. It also set out the following factors (the "Vilven FC Factors") for determining the relevant comparator group:

> … the essence of what Air Canada pilots do can be described as 'flying aircraft of varying sizes and types, transporting passengers to both domestic and international destinations through Canadian and foreign airspace'. There are many Canadian pilots working in similar positions, including those working for other Canadian airlines. These pilots form the comparator group for the purposes of section 15(1)(c) of the *Canadian Human Rights Act* (*Vilven/Kelly* at paras 111, 112 and 125).

[18] The Federal Court of Appeal declared section 15(1)(c) constitutionally valid and confirmed the complaints should be dismissed (*Air Canada Pilots Association v. Kelly* 2012 FCA 209, leave to appeal to the SCC denied 2013 CanLii 15565).

Thwaites/Adamson – 2005 to 2009

[19] The pilots in *Thwaites et al. v. Air Canada and Air Canada Pilots Association, 2011* CHRT 11 [*Thwaites/Adamson*] retired between 2005 and 2009. The Tribunal applied all the Vilven FC Factors (the "conjunctive approach") to determine the comparator group. The Tribunal found the normal age of retirement was still 60 and dismissed the pilots' complaints.

[20] The Federal Court of Appeal (FCA) ultimately upheld the Tribunal's decision (*Adamson v Canada (Human Rights Commission*), 2015 FCA 153 [*Thwaites/Adamson* FCA]. The Court also found that the Tribunal was not required to blindly follow the Vilven FC Factors, but that the decision limited the range of reasonable options open to the Tribunal when crafting the comparator group under paragraph 15(1)(c). It also determined that the Tribunal was allowed to apply the conjunctive approach when applying the Vilven FC

Factors [*Thwaites/Adamson* FCA at paras 66 and 78). The Supreme Court of Canada denied leave to appeal of the Thwaites/Adamson FCA decision (*Robert Adamson, et al. v Air Canada et al*, 2016 CanLii 12161).

Gregg – 2009 onwards

[21] A group of pilots whose mandatory retirement post-dated 2009 filed separate complaints. The Commission dismissed those complaints and found it was plain and obvious that the complaints could not succeed in light of *Vilven/Kelly* and *Thwaites/Adamson*. The Commission also found the complainants had not presented evidence that the composition of Canadian airline pilots had changed after 2009. Its decision was upheld by the Federal Court of Appeal (*Gregg v. Air Canada Pilots Association*, 2019 FCA 218).

***Bailie* and the *Nedelec* complaints**

[22] The complainants in this proceeding ("the *Nedelec* complaints") were initially part of a larger group of pilots consolidated into a single file called *Bailie*, which included pilots who had mandatory retirement dates between 2004 and December 31, 2009. The Tribunal adjourned *Bailie* while the *Vilven/Kelly* and *Thwaites/Adamson* matters worked their way through the courts (*Bailie v. Air Canada and Air Canada Pilots Association* 2012 CHRT 6).

[23] The Tribunal eventually granted ACPA's motion to dismiss the complaints for all pilots who turned 60 by December 31, 2009 because previous cases had already determined that the normal age of retirement prior to that date was 60 years of age (*Bailie et al. v Air Canada and Air Canada Pilots Association*, 2017 CHRT 22) [*Bailie*]. The Tribunal allowed the *Nedelec* complaints to proceed, because it did not have a factual or evidentiary record regarding the normal age of retirement for pilots who retired after 2009.

V. REASONS

A. Should the Tribunal apply the Vilven FC factors to decide which airlines to include in the comparator group for the relevant period?

[24] Yes. The Vilven FC factors have been applied to the complaints of all Air Canada pilots who retired from 2003 to 2009. Departing from the test for the *Nedelec* complaints would lead to the absurd and unfair result that a pilot who turned 60 after December 31, 2009 would be subject to different criteria than other complainants who were part of the same proceeding. The complainants have failed to justify why the Tribunal should reject a well-established approach that has been found to be reasonable by the courts.

[25] I agree with the respondents that deciding which factors to apply is a pure question of law. Although the complainants argued that I would need to hear evidence to even decide which criteria or test to apply, they have not provided authority for this position.

[26] The Coalition Complainants rely on *Thwaites/Adamson* FCA, in which the Federal Court of Appeal found that Vilven FC did not establish a binding precedent or a "comprehensive code" (*Thwaites/Adamson FCA* at paras 58-63). According to these complainants, the Tribunal should decide the comparator group and pilots to be included in that group based on the evidence and argument the parties present at the hearing.

[27] Mr. Rogers argues that "a pilot is a pilot is a pilot", and that what distinguishes pilots is the job that each one does, defined by the complexity required in that job. He submits that the test to determine comparator airlines should be based on the similarities of the respective technical expertise, training and aircraft sophistication the job requires. In the alternative, he submits that the airlines chosen must match a certain level of aircraft similar to Air Canada.

[28] Mr. Collier wants the Tribunal to adopt a "common sense" approach. He argues that the licence held by the pilot as opposed to their employer should be the basis for being included in the comparator group. In his view, any pilot holding a Canadian Airline Transport pilot licence and employed by a commercial carrier must be considered a valid comparator.

[29] The respondents submit that I must apply the Vilven FC factors, adopted in *Thwaites/Adamson*, for several reasons. They argue that doing so is fair and consistent, and that principles of *stare decisis,* abuse of process and judicial economy support this approach.

[30] I agree with the respondents that the complainants' submissions disregard the analysis from earlier cases involving other retired Air Canada pilots (see *Vilven/Kelly* FC, *supra* at paras 111, 112 and 125). Rather, the complainants want the Tribunal to apply their preferred criteria to determine the comparator airlines, including ones previously considered and rejected by the court in *Vilven FC*.

[31] I accept complainants' submission that the Vilven FC Factors do not constitute a prescriptive standard or a comprehensive code. Yet the FCA also held in *Thwaites/Adamson FCA* that applying those factors was reasonable.

[32] In my view the Vilven FC Factors are the appropriate test to apply. They reflect an effort to identify the features of pilots' work that are relevant to determining which pilots worked in similar positions. Section 15(1)(c) refers to similar positions, not qualifications or the type of licence a pilot holds. As Air Canada submits, the Vilven FC factors focus on objective factors that differentiate the positions of the comparator group and the complainants from others who may hold a pilots' licence or be able to fly the same type or size of plane.

[33] While administrative decision makers may not be bound by previous Tribunal decisions in the same manner that courts must follow precedent*,* if I choose to depart from a longstanding practice, I must justify that departure from established internal authority (Vavilov, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 129 and 131).

[34] In other words there must be a compelling basis to change approaches for the *Nedelec* complaints. The complainants have not presented me with one, despite the opportunity I afforded them to do so. They have not, for example, presented new legal issues, or argued that there has been a fundamental shift in circumstances that would justify adopting their preferred factors or approach. The complainants clearly disagree with the

criteria applied by the Tribunal in previous rulings and with what the courts decided on review and appeal. I empathise with the time and resources they and their families have put into challenging the issue of mandatory retirement. But that is not a basis to depart from what are reasonable and well-established criteria that have been tested by the courts.

[35] I also agree with Air Canada that departing from established factors when assessing the *Nedelec* complaints would require justifications based on facts unique to this subset of the larger group of pilots challenging their retirement and which distinguish them from those who retired before and after them. In my view, the complainants have not provided such justification.

[36] Adopting the complainants' approach without a sound justification for doing so, particularly at this stage of the proceeding, is unreasonable, arbitrary, impractical and unfair. It does not favour judicial economy, consistency, practicality, or as Mr. Collier requested – common sense.

[37] ACPA presented several sound legal arguments in their submissions setting out why the Tribunal is bound to apply the test or criteria previously developed and affirmed in previous cases. These submissions are grounded in the principles of issue estoppel, abuse of process and *stare decisis*. I need not deal with these arguments because I have already found a sufficient basis to apply the Vilven FC Factors which flows from Tribunal and court decisions. The Vilven FC Factors also align with the objective of s.15 (1)(c) of the *Act*, and by providing a means to identify which pilot positions should be considered similar to those of the complainants.

B. Should an airline have to meet all the criteria to be considered an appropriate comparator?

[38] Yes. The Tribunal will apply all the *Vilven* FC Factors set out in paragraph [16] above to determine whether an airline can be considered an appropriate comparator.

[39] In *Thwaites/Adamson* FCA the court held that the Tribunal was not required to apply all the Vilven FC Factors and could have chosen to apply a subset of them. But it also found that Justice Mactavish's approach in doing so was reasonable (see *Bailie* at para 19). It is

open to me to adopt the conjunctive approach, and I find that applying all the Vilven FC Factors serves the interests of consistency and fairness.

C. What evidence will the Tribunal need to determine which airlines are comparators and how will the parties introduce it?

[40] If a party proposes airlines to be included in the comparator group for 2010 to 2012, they must meet all of the following requirements:

1. They operate aircraft of varying sizes;
2. They operate aircraft of varying types;
3. They fly to domestic destinations(s);
4. They fly to international destinations;
5. They cross domestic and foreign airspace; and
6. They transport passengers.

[41] ACPA proposes a two-step process to present the evidence required to apply these factors, with which Air Canada agrees. In my view, this approach is expeditious and proportionate and will allow for the efficient determination of the remaining questions before the Tribunal. I have set it out below.

(i) Step 1 - Determining aircraft of different size and type

[42] The Tribunal will first determine the first two factors, namely whether the airlines flew aircraft of different sizes and different types. To that end, the respondents are directed to provide the other parties and the Tribunal with a summary table listing each of the Canadian airlines proposed for inclusion in the comparator group by any of the parties. The respondents will search the CCAR historical registry from January 1, 2010 to February 28, 2012 (when the last of the *Nedelec* pilots turned 60), and identify which airlines do not have aircraft of different size and type. If the respondents take the position that the information in the CCAR cannot be accepted at face value, they must support this claim with relevant evidence and argument.

[43] The complainants will then provide a response to the respondents' summary table and conclusions. If they do not accept the information from the CCAR at face value, they must support these claims with evidence and submissions. The respondents will be given the opportunity to reply to any submissions from the complainants.

[44] Where there is a dispute, the Tribunal will decide which airlines meet this stage of the test. All airlines determined to meet both factors will move forward to the next stage.

(ii) Step 2 – Destinations, airspace and passengers

[45] Following the first step, the Tribunal will convene a case management conference call (CMCC) with the parties to address how to obtain evidence most efficiently on whether an airline meets the remaining criteria.

[46] In particular, the Tribunal will require evidence to determine whether the airlines who met the first two criteria also transported passengers, flew over both domestic and foreign airspace, and fly to both domestic and foreign destinations. ACPA suggests issuing summonses to obtain this information, and Air Canada agrees that this may be necessary. We will address this in the CMCC, and I will canvass the parties' views on a way forward.

(iii) Determining the normal age of retirement of pilots at the comparator airlines

[47] Once the Tribunal has confirmed the comparator group and the number of pilots employed by these airlines, it may not be necessary to proceed to this final step. In other words, if Air Canada employed more pilots than all of the comparator airlines, the Tribunal may dismiss the complaints.

[48] If the number of pilots in the comparator groups is greater than the pilots employed by Air Canada, the Tribunal will have to calculate the normal age of retirement for the comparator group from 2010 to 2012 and compare it to the mandatory retirement age of 60. If the normal age of retirement for this group is equal to or less than 60, the respondents will have successfully established a defence under s.15(1)(c).

[49] Air Canada proposes this data be submitted by written sworn affidavits in the form of a questionnaire to the comparator airlines that would include evidence about their total number of pilots and whether they had any pilots working past the age of 60 during the relevant period. ACPA suggests that the Tribunal would need to issue summonses to obtain answers to these questions from airlines. I will address this with the parties at a CMCC if we arrive at this step and whether oral evidence is required to establish the normal age of retirement.

(iv) Hearing dates

[50] Air Canada also provided an estimate of hearing days that would be required for the Tribunal to review the evidence about the comparator group and to review the evidence about normal age of retirement within the comparator airlines, as appropriate. ACPA suggests less time may be needed. I will address this with the parties at the appropriate time, all with a view to making judicious use of hearing time.

VI. ORDER

[51] The Tribunal will apply the following factors to determine the appropriate comparator airlines:

> Canadian carriers employing pilots who fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace.

[52] Within 30 calendar days of the date of this ruling, the respondents must provide the other parties and the Tribunal with a summary table listing each of the Canadian airlines proposed by any of the parties for inclusion in the comparator group. The respondents will search the CCAR historical registry from January 1, 2010 to February 28, 2012 (when the last of the *Nedelec* pilots turned 60), and identify the airlines that do not have aircraft of different size and different type. The respondents must support any claim that the information in the CCAR not be accepted at face value with evidence and submissions.

[53] Within twenty calendar days of receipt of the respondents' report and accompanying materials, the complainants must provide their response to the other parties and to the

Tribunal. They must provide supporting evidence and submissions for any claim that the information in the CCAR not be accepted at face value.

[54] Within seven calendar days of receipt of the complainants' responses, the respondents may provide a reply, if appropriate.

[55] In the event the parties dispute which airlines flew aircraft of carrying types and sizes, the Tribunal will make an order and determine this list. Only those airlines meeting the first two criteria will move forward for determination with respect to the remaining Vilven FC factors.

[56] The Tribunal will convene a CMCC with the parties to determine next steps for the submission of evidence on whether an airline meets the remaining criteria.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
September 23, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1536/8210 to T1599/14510; T1630/17610 to T1645/19110; T1664/01911 toT1681/03611; T1709/6213; T1710/6214; T1713/6217 to T1718/6222; T1721/6255;T1722/7711; T1755/11011 to T1768/12311; T1780/1012 &T1781/1112; T1793/2312 & T1794/2412; T1801/3112 to T1806/3612; T1858/8812 to T1861/9112

Style of Cause: Nedelec et al v. Air Canada and Air Canada Pilots Association

Ruling of the Tribunal Dated: September 23, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Raymond D. Hall, for the Complainants (except Eric Rogers, Robert McBride, John Pinheiro, Patricia Clark (on behalf of the estate of William Clark) and Stephen Collier)

Stephen Collier, for himself

Eric William Rogers, for himself

Fred Headon, for the Respondent Air Canada

Christopher Rootham and Malini Vijaykumar, for the Respondent Air Canada Pilots Association