Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 40
Date: December 14, 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] The complainants are a group of retired pilots who allege that Air Canada and the Air Canada Pilots Association (the "respondents") discriminated against them by requiring them to retire at the age of 60 because of a mandatory retirement rule in their collective agreement. Most of the complainants are represented by counsel (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 rely on what was then 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". 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 decide if the respondents can rely on s.15(1)(c) as a defence to what would otherwise be age discrimination, I must determine three things:

1. what factors 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;
3. what the normal age of retirement was at those comparator airlines for 2010 to 2012.

[4] I decided the first of these questions in 2022 CHRT 30 (the "*Nedelec* Factors Ruling") and adopted the criteria from previous complaints that determined whether mandatory retirement for pilots was a discriminatory practice under the *Act*. Specifically, I found that to be included in the comparator group for the relevant period of January 1, 2010 to February 28, 2012 (when the last of the *Nedelec* pilots turned 60), airlines would have to meet all of the following requirements (the Vilven FC Factors):

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

(*Nedelec* Factors Ruling at para 40).

[5] I also set out a phased approach for identifying airlines in the comparator group, starting with an analysis of the first two Vilven FC Factors. The respondents were ordered to provide a summary table listing each of the Canadian airlines proposed for inclusion in the comparator group by any of the parties, identifying those airlines that did not have aircraft of different size and type based on the Canadian Civil Aircraft Register (CCAR) historical registry for the relevant period. The complainants were given the opportunity to respond to the summary table and conclusions. If they did not accept the information set out by the respondents from the CCAR at face value, they were directed to support these claims with relevant evidence and argument. Only those airlines determined to meet both factors would advance to the next stage of analysis as possible comparator airlines.

[6] The Coalition Complainants and Mr. Rogers filed responses to the respondents' submissions and the respondents filed a joint reply.

II. DECISION

[7] I accept the respondents' proposed list of airlines that are of varying size and varying type. The Coalition Complainants did not present sufficient evidence or authority to support their claims that I should adopt their interpretation of these factors and how they should be applied.

III. REASONS

[8] The respondents filed printouts from the CCAR for the relevant period, listing all airlines in the complainants' proposed list. They identified all aircraft flown by each airline, the types of aircraft, their size, and dates for when an aircraft entered and left the service of

an airline. Although the complainants had the opportunity to refute the respondents' submissions and to support their claims with evidence, they have not persuaded me to reject the respondents' list as presented or add the airlines that are included in their lists. The Coalition Complainants did not make submissions on airlines of varying "size".

"Size" and "type" are not synonymous terms

[9] In the *Nedelec* Factors Ruling I determined that I would apply *all* the Vilven FC factors (the 'conjunctive approach') (and that "..airlines determined to meet **both** factors will move forward to the next stage" [emphasis added] (*Nedelec* Factors Ruling at paras 38-40 and 44).

[10] The Vilven FC factors were also adopted by the Tribunal in *Thwaites et al.* v *Air Canada and Air Canada Pilots Association, 2011* CHRT 11 [*Thwaites/Adamson*] and ultimately upheld by the Federal Court of Appeal (FCA) in *Adamson v Canada (Human Rights Commission*), 2015 FCA 153 [*Thwaites/Adamson* FCA]. The FCA 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) (see *Nedelec* Factors Ruling at paras 19-20).

[11] The Coalition Complainants argue that aircraft of different types necessarily include aircraft of different sizes and that the Federal Court's decision in *Vilven v. Air Canada*, 2009 FC 367 [Vilven FC] is not an authority for distinguishing between these factors.

[12] The Coalition Complainants also suggest that aircraft "size" should be determined by an aircraft's weight rather than by passenger capacity. Finally, they argue that they are entitled to a fresh, unblemished interpretation of the human rights they assert, and that the appropriate comparators are other pilots who work in positions similar to the complainants, no matter the various aircraft operated.

[13] When I directed the parties to make submissions on the first two Vilven FC factors, this was not an invitation to reargue issues that I already decided. Further, I advised the parties that the issue of the appropriate test to apply to determine comparator airlines was not open for them to revisit at any time. The parties were expected to comply with my orders and move on (*Nedelec* Factors Ruling, at paras 11-14).

[14] Yet the Coalition Complainants continue to make submissions on the appropriate comparator factors and to argue in favour of interpretations previously rejected by the Tribunal and the courts in decisions that informed my reasons. The Coalition Complainants argue that I can collapse the distinction between size and type, despite my explicit finding to the contrary. I held that an airline must meet *all* the Vilven FC factors. Yet the Coalition Complainants failed to identify or reference sizes of each of the aircraft types in their submissions as I directed the parties to do, having chosen instead to argue that "types" are synonymous with "sizes".

[15] Further, as the respondents submit, the same arguments as the Coalition Complainants now advance about the meaning of "size" were rejected by the Tribunal in *Thwaites/Adamson (*see paras 28-29 and 162-166). Size refers to the aircraft's seating capacity, not weight, with distinctions drawn among small (1-39 passengers), medium (40-89 passengers) and large (more than 89 passengers) aircraft. While the Coalition Complainants submit that in Vilven FC, all airlines in the Agreed Statement of Facts were included in the comparator group, regardless of fleet composition, aircraft type or aircraft size, the FCA rejected the complainants' argument that Vilven supported their interpretation that "size" and "type" are synonymous (*Thwaites/Adamson* FCA at para 81).

[16] I acknowledge that for the Coalition Complainants and Mr. Rogers, comparing an Air Canada pilot and an Air Tindi pilot, while excluding a WestJet pilot from the comparator group, seems absurd. Mr. Rogers submits that while a line of reasoning may have been accepted as reasonable in the past, this does not mean that it has stood the test of time, or that some of the facts given may have been proven untrue.

[17] But as I already explained in the *Nedelec* Factors Ruling, while I empathise with the complainants, I cannot simply make up a new test or adopt new factors, particularly mid-

proceeding. 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. I cannot ignore a longstanding practice without justification or without a compelling basis to depart from established internal authority (see *Nedelec* Factors Ruling at para 24 and para 33, citing C*anada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 129 and 131).

[18] The onus was on the parties to present evidence supporting their interpretations within the framework I set out in the *Nedelec* Factors Ruling. It was not an opportunity to attempt to relitigate the same points previously argued and rejected, through the back door.

Varying "type"

[19] The Coalition Complainants and the respondents differ on whether some of the proposed airlines operated more than one "type" of aircraft during the relevant period. For example, the Coalition Complainants have included Sunwing and Westjet in their list and submit that they had 9 and 2 aircraft "types", respectively.

[20] I accept the respondents' submissions on the number of types of aircraft that the airlines in the list operated during the relevant period. The respondents rely on the CCAR entries that indicate the model of each aircraft operated by the airlines. They submit that while the Coalition Complainants suggest using the Type Designator Table of Transport Canada Civil Aviation to determine the different "types" of aircraft, this table discloses that Sunwing and Westjet only operated a single aircraft type during the relevant period. For example, the table lists all Sunwing models as being within the same Type Designator. Sunwing had twenty-two aircraft in service at various times during the relevant period, but all the Boeing models including 600, 700, 800 or Max Series, are within the same row, namely "TCCA Type Designator" B73C.

[21] The Coalition Complainants have suggested that the airlines listed are not the same "type" without providing authority for this position or evidence in support of their bald assertions that a "model" is a distinct "type" of aircraft. For example, they did not present support for their claim that a 737-8HX is not the same "type" as a 737-8Q8. In the absence

of support for their position, I prefer the respondents' characterisation, which also aligns with the Tribunal's interpretation of "type" in the past (see *Thwaites/Adamson* at paras 70-72 and at para 174).

[22] For similar reasons, I accept the respondents' submissions about Westjet. From January 1, 2010 to February 28, 2012, Westjet had just one type of aircraft according to the TCCA Type Designator, namely Boeing 737 aircraft marked as 737-800, 737-700 or 737-600 series. The Type Designator refers to all aircraft in the 737 Series 600/700/800 as being in the same row and "type", namely B73C.

IV. Destinations, airspace and passengers

[23] The Tribunal will convene a case management conference call (CMCC) with the parties to address the remaining criteria, namely transporting passengers, flying over both domestic and foreign airspace, and flying to both domestic and foreign destinations.

[24] I will canvass the parties' views on how to proceed most efficiently, including a consideration of the quantum of pilots employed by those airlines moving forward. In other words, even if all airlines in the list are included in the comparator group without consideration of the remaining factors, I will ask the parties for submissions on the numbers at play – that is, the number of pilots in the comparator group compared to those pilots employed by Air Canada during the relevant period.

V. ORDER

[25] The following airlines were of "varying size" and of "varying type" during the relevant period and move forward for determination with respect to the remaining Vilven FC factors:

Air Creebec
Air Inuit
Air North
Air Tindi
Buffalo Airways
Calm Air
Canadian North
Central Mountain Air (from 2011-09-29 only)
Enerjet (from 2011-01-10 only)

First Air
Flair Airlines Ltd.
Hawkair
Jazz
Kelowna Flightcraft
Morningstar Air Express
Nolinor
North Cariboo
Provincial Airlines (from 2010-09-30 only)
Regional 1 Airlines
Voyageur Airways
Wasaya (from 2011-08-06 only)

[26] The Tribunal will convene a CMCC with the parties to determine next steps.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
December 14, 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: December 14, 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)

Eric William Rogers, for himself

Fred Headon, for the Respondent Air Canada

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