Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 26
Date: June 27, 2023
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 Line Pilots Association, International

Respondents

Decision

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 have to determine which comparator airlines employed pilots in positions similar to those held by the Complainants during the relevant period. I decided to apply the factors from previous proceedings that challenged the same mandatory retirement rule for Air Canada pilots to determine the list of comparator airlines (*Nedelec et al v. Air Canada and Air Canada Pilots Association*, 2022 CHRT 30 (the "Factors Ruling")).

[4] 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 that were set out in the case of *Vilven v. Air Canada*, 2009 FC 367 ("the Vilven FC factors"):

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

(Factors Ruling at para 40).

[5] The Respondents submit that the complaints should be dismissed because Air Canada employed more pilots during all the periods in question than all the comparator airlines. In other words, Air Canada's pilots are the dominant group and therefore define the normal age of retirement for employees working in positions similar to the positions of the Complainants.

[6] The Coalition Complainants do not disagree with the Respondents. They agree that the outcome of the complaints is inevitable in light of the Tribunal's Factors Ruling and the data the airlines provided about the number of pilots they employed. The other Complainants did not file anything in response to the Respondents' request to dismiss the complaints.

[7] The Canadian Human Rights Commission has not participated in these proceedings since I took carriage of these files in 2021 other than to observe case management conference calls (CMCCs).

II. ISSUES

[8] There are two remaining questions to determine the normal age of retirement for employees working in positions similar to the position of the Complainants and to decide whether the Respondents can rely on s.15(1)(c):

(i) Which airlines meet the remaining Vilven FC factors and should be included in the comparator group?

(ii) Did Air Canada employ the majority of pilots during the relevant periods?

III. DECISION

[9] The normal age of retirement for employees working in positions similar to the position of the Complainants is 60, the age at which they retired. Air Canada employed more pilots than the total of all the pilots employed by the comparator airlines during the relevant periods. The Respondents can rely on s.15(1)(c) as a defence, and the complaints are dismissed. The Complainants did not establish that the Respondents' mandatory retirement rule is a discriminatory practice.

IV. PRELIMINARY ISSUE

[10] Robert McBride, one of the Complainants, wrote to the Tribunal on June 2, 2023, to advise it that the Air Canada Pilots Association had ceased to exist and that Air Canada pilots are now represented by a different pilots' association. He raised a number of concerns about this change, including the fact that there have been other changes in counsel, representatives and the presiding member over the course of these lengthy proceedings. He also asked whether the Commission and Tribunal had been made aware of this change.

[11] Counsel for the Air Canada Pilots Association responded and advised that the Air Line Pilots Association, International (ALPA) and the Air Canada Pilots Association finalized a merger agreement as of May 17, 2023. According to the terms of that agreement, the ALPA became the successor union to the Air Canada Pilots Association and may be confirmed as a respondent in these proceedings. The Tribunal will amend the style of cause accordingly.

[12] The Tribunal confirms that it learned of this change when Mr. McBride and counsel for the ALPA contacted the Tribunal. There were no *ex parte* communications with the Respondent, the ALPA or any other party to these proceedings. In other words, the Tribunal did not communicate with any party without the other parties' involvement or without them knowing about it.

V. BACKGROUND – PREVIOUS RULINGS AND METHODOLOGY

[13] I have briefly summarized the steps taken in this file to explain why I am dismissing the complaints.

[14] In the Factors Ruling, I set out a phased approach for identifying airlines in the comparator group, starting with an analysis of the first two Vilven FC factors, namely whether airlines operate aircraft of varying size and whether they operate aircraft of varying types.

[15] After receiving the parties' submissions, I determined that 21 airlines operated aircraft of varying sizes and varying types and would advance to the next stage of analysis as

possible comparator airlines (*Nedelec et al. v. Air Canada and Air Canada Pilots Association*, 2022 CHRT 40 at para 25 [the "Size/Type Ruling"]).

[16] I then worked with the parties in case management to address how to fairly and efficiently determine which airlines met the remaining factors, namely flying to both domestic and international destinations, crossing domestic and foreign airspace, and transporting passengers.

[17] The parties agreed that a questionnaire would be sent to the airlines together with summonses to appear at the hearing. Air Canada prepared the questionnaire, and all parties had the chance to review and comment. They agreed on the wording of the questions which asked airlines how many pilots they employed during the relevant periods and whether they operated international flights, including points in the United States, and/or whether they were willing to provide quotes and arrange for an international charter on request to or from any international location, including the United States. The Tribunal issued the summonses and Air Canada served them on all the comparator airlines.

[18] Recipients of the summonses were also told that if they responded to the questions and provided the requisite material to support their answers, their personal attendance at the hearing may not be required. All parties agreed that this was the most efficient and expeditious way of gathering the remaining data needed to determine which airlines are comparators. The Tribunal scheduled hearing days to give the parties the opportunity to challenge the responses received and ask questions of the airlines' representatives, if required.

[19] Nineteen airlines provided a complete response to the questionnaire. One airline provided a partial response, and one did not respond. Air Canada collated the data received in response to the questionnaire and shared it in the form of a summary table in advance of the next CMCC. The parties had the opportunity to review the data in advance of our next CMCC.

[20] During the CMCC I asked the Complainants for their positions on the data received. The Coalition Complainants said that they were not in a position to disagree with any of the responses received. They also acknowledged that it was inevitable that the complaints would be dismissed given the methodology adopted by the Tribunal in its Factors Ruling and the number of pilots the airlines employed in the comparator group versus all those Air Canada employed. The other Complainants agreed and did not take issue with Air Canada's summary of the responses or its presentation of the data. They also agreed with the Coalition Complainants' assessment of the outcome of the complaints. The hearing dates were cancelled on consent of all parties, and Air Canada told the witnesses that their presence was no longer required.

A. The Coalition Complainants' request to stay the proceedings

[21] During the same CMCC, the Coalition Complainants asked me to stay the proceedings until the conclusion of the Federal Court's determination of its application for judicial review of the Tribunal's Factors Ruling, which I denied. I did not find that the interests of justice supported delaying the proceedings for an indeterminate amount of time. I also did not find it in the public interest to hold the complaints in abeyance while awaiting judicial determination of an interim ruling.

[22] Given the Complainants' statements about the inevitable outcome of these proceedings, I also set deadlines for the Respondents to provide brief submissions explaining why they believe on the basis of the data received that the complaints have no prospect of success and must fail. I gave the Complainants the opportunity to respond and set deadlines for reply submissions, as required.

[23] The Coalition Complainants agreed with the Respondents that the complaints must be dismissed if the methodology adopted by the Tribunal in the Factors Ruling is applied to the data provided by the airlines in response to the questionnaire. Yet the Coalition Complainants reiterated their request to adjourn a final decision in this matter until the conclusion of the judicial review of the Factors Ruling, arguing that if that ruling is overturned, the Complainants would then have to seek judicial review of an eventual final decision in

these complaints. In submissions dated May 24, 2023, they say that the judicial review is only “weeks away” from being heard by the Federal Court.

[24] I am not persuaded that I should revisit my decision denying the request to stay the proceedings. The Coalition Complainants had the option to wait until the conclusion of these proceedings to file a judicial review, particularly as the list of comparator airlines was not yet established when I issued the Factors Ruling, and no data had yet been received from the airlines about their total headcount of pilots. Their decision to proceed with a review of an interim ruling is not a basis to stay these proceedings until the conclusion of a judicial review and appeals. While the hearing of their application for judicial review may be scheduled for July 2023, a decision or possible appeal could take far longer.

B. Proceeding in an abbreviated way is fair and efficient

[25] I am making a final decision in these long-standing complaints through an abbreviated process and without an oral hearing. I have accepted summaries of uncontested evidence from counsel using the Tribunal’s powers under s. 50(3)(c) of the *Act*, and worked with the parties in case management to move forward in an expeditious and efficient way. I secured the parties’ consent to proceed on this basis, after having given them the opportunity to challenge the evidence and question witnesses. This approach has saved the parties and the Tribunal the time and expense of formally calling witnesses or introducing affidavit evidence.

[26] My decision to proceed this way reflects the parties’ acknowledgement that there was no benefit to continuing with a full hearing given what was known of the evidence at the time and the Tribunal’s previous rulings. The parties had already spent considerable time arguing over what methodology I should apply in these cases, as reflected in the Factors Ruling and the Size/Type Ruling. The Coalition Complainants also applied to judicially review the Factors Ruling. This highlights the fact that the methodology the Tribunal decided to adopt in these complaints was the issue the parties viewed as most contentious and significant to determine in these proceedings. In my view, proceeding in an expedited, abbreviated way to render a final decision in these complaints is proportionate to the remaining issues in

these complaints and favours the Tribunal's statutory obligation to conduct its proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow (s.48.9(1) of the *Act*).

VI. REASONS

(i) Which airlines meet the remaining Vilven FC factors and should be included in the comparator group?

[27] I prepared to rely on the uncontested data on the application of the remaining Vilven FC factors presented by Air Canada even though it was not presented in the usual manner. No party indicated an intention to challenge it or questioned its accuracy.

[28] Of the 19 airlines that responded to the questionnaire, the following airlines meet all the remaining factors and form the comparator group for the purposes of determining the normal age of retirement during the relevant periods:

- Air North
- Air Tindi
- Calm Air
- Canadian North
- Enerjet
- First Air
- Jazz
- Morningstar Air Express
- Nolinor
- North Cariboo
- Provincial Airlines
- Voyageur Airways
- Wasaya

[29] According to Air Canada, six of the airlines should not be included as comparators because they do not meet one or more of the remaining criteria. The other parties do not dispute these submissions, and I accept them on the face of the data received, which speaks for itself.

[30] Flair Airlines advised that it did not operate aircraft of varying sizes and types during the relevant period as it only operated three Boeing 737-400s. Although other aircraft

appeared in the Canadian Civil Aircraft Register, Flair Airlines explained that these were solely for private use and were not operated as part of its commercial business.

[31] Air Creebec, Air Inuit, Buffalo Airways, Central Mountain Air and Kelowna Flightcraft should not be included in the comparator group either. They did not transport passengers to both domestic and international destinations and through Canadian and foreign airspace during the relevant periods. More specifically, they did not operate international flights and were not willing to provide quotes and arrange for an international charter on request to or from any international location including the United States during these same periods.

(ii) Did Air Canada employ the majority of pilots during the relevant periods?

[32] In the Factors Ruling, I held that, once the Tribunal confirmed the comparator group and the number of pilots employed by the airlines, it may not be necessary to proceed any further. In other words, if Air Canada employed more pilots than all of the comparator airlines, the Tribunal may dismiss the complaints.

[33] I am applying the statistical analysis from *Vilven FC* (applied in *Thwaites et al. v. Air Canada and Air Canada Pilots Association*, 2011 CHRT 11) [*Thwaites*], upheld by the Federal Court of Appeal in *Adamson v. Canada* (Canadian Human Rights Commission), 2015 FCA 153.

[34] I have considered the entire period during which the Complainants retired. Air Canada divided the total period of January 1, 2020, to February 28, 2012, into five sub-periods that have start and end dates corresponding to changes in the evidence the comparator airlines provided. In an appendix to its submissions, Air Canada also provided the upper and lower limits of pilots the comparator airlines employed and similarly set out the number of pilots Air Canada employed during the relevant periods.

[35] I am prepared to accept this uncontested data, summarized by Air Canada and set out below. No party challenged it or questioned its accuracy, and all waived their right to examine or cross-examine the witnesses summonsed from airlines. The summary below sets out the number of pilots employed by Air Canada versus the pilot count of the

comparator airlines. It also shows the proportion of the total number of pilots the headcounts represent. In the case of the comparator airlines, a range is shown because it corresponds to the lowest and highest number of pilots employed during that period.

January 1 – June 30, 2010:

- Air Canada: 3083 pilots
- Comparator airlines: 2116.3 to 2121.3 pilots
- Total pilots: 5199.3 to 5206.3

Air Canada employed 59.22% - 59.3% of the total.

July 1 – December 31, 2010:

- Air Canada: 3028 pilots
- Comparator airlines: 2188.3 to 2198.3 pilots
- Total pilots: 5216.3 to 5226.3

Air Canada employed 57.94 - 58.05% of the total.

January 1 – June 30, 2011:

- Air Canada: 3011 pilots
- Comparator airlines: 2269.2 to 2295.2 pilots
- Total pilots: 5280.2 to 5306.2

Air Canada employed 56.74 - 57.02% of the total.

July 1- December 31, 2011:

- Air Canada: 3024 pilots
- Comparator airlines: 2475.2 to 2479.2 pilots
- Total pilots: 5499.2 to 5503.2

Air Canada employed 54.99 - 54.95% of the total.

January 1 – February 28, 2012:

- Air Canada: 3021 pilots
- Comparator airlines: 2447 pilots
- Total pilots: 5468

Air Canada employed 55.25% of the total.

[36] ALPA stated that based on Air Canada's chart, the aggregate headcount numbers for the listed airlines range from 2349 at the low end to 2726, even when including those airlines which self-reported as not meeting the Vilven FC factors and rounding up all headcount numbers at the high ends of their ranges. Air Canada's pilot headcount numbers range from 3011 to 3083 for the given periods, figures provided by Air Canada's counsel at the CMCC, which were uncontested and accepted at face value. In other words, even without filtering out comparator airlines that self-reported as not meeting the Vilven FC factors and taking all comparator airlines headcounts at their highest, Air Canada still employed more pilots than the comparators during each period.

[37] The Complainants also agreed at the last CMCC that the two airlines who either did not respond fully or not at all (Kelowna Flightcraft and Regional 1) would not have employed enough pilots to make a difference or tip the balance of the comparator airlines over Air Canada in terms of the number of pilots employed.

[38] The normal age of retirement is the age of retirement of the majority of pilots in the overall representative group of employees occupying similar positions (*Nedelec v. Rogers*, 2021 FC 191 at paras 33-35). As ALPA submits, the age of retirement is therefore still defined by Air Canada's pilots as the dominant group.

[39] I am therefore persuaded that, for the periods set out above, the normal age of retirement was 60. Air Canada's pilots represent the majority of the total pilots employed. I accept Air Canada's submissions that this conclusion holds even if I assume, without deciding, that the normal age of retirement of pilots at all the comparator airlines was an age other than 60. In other words, because Air Canada employed the majority of the pilots in the relevant periods, regardless of the actual age at which pilots retired at the comparator airlines, the normal age of retirement was 60 for that period because that was Air Canada's mandatory retirement age. This is the same reasoning or approach that the Tribunal followed in *Thwaites* at paras 181-82.

[40] The Respondents are therefore able to rely on s.15(1)(c) of the Act, as it then was. Their requirement that pilots retire at age 60 was permissible because the normal age of

retirement was 60. The Respondents' mandatory retirement rule does not constitute a discriminatory practice under the Act.

VII. ORDER

[41] The style of cause is amended in accordance with paragraph [11] above.

[42] The complaints are dismissed.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
June 27, 2023

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 Line Pilots Association, International

Ruling of the Tribunal Dated: June 27, 2023

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)

Robert McBride, for himself

Fred Headon and Christina Toteda, for the Respondent Air Canada

Malini Vijaykumar, for the Respondent Air Line Pilots Association, International