Federal Court Cour fédérale

Date: 20170517

Dockets: T-859-13
T-1114-13

Citation: 2017 FC 506

Ottawa, Ontario, May 17, 2017

PRESENT: The Honourable Mr. Justice Annis

Docket: T-859-13

AND BETWEEN:

GORDON RONALD GREGG, DONALD RICHARD MACDONALD, GLENN SORKO, FRANK COATES, NANETTE JOZWIAK, AND WILLIAM HANNA (IN THE CAPACITY OF ADMINISTRATOR OF THE ESTATE OF DONALD LLOYD GERKE)

Applicants

and

AIR CANADA PILOTS ASSOCIATION

Respondent

AND BETWEEN:

FREDERICK MARK HANLEY

Applicant

and

AIR CANADA

Respondent

AND BETWEEN:

FREDERICK MARK HANLEY

Applicant

and

AIR CANADA PILOTS ASSOCIATION

Respondent

AND BETWEEN:

DAVID BAXTER

Applicant

and

AIR CANADA

Respondent

AND BETWEEN:

DAVID BAXTER

Applicant

and

AIR CANADA PILOTS ASSOCIATION

Respondent

AND BETWEEN:

CHRISTOPHER CHARLES JOHNSTON,
JAMES ARTHUR BRADLEY,
BRIAN LEONARD SOWTEN,
AND WILLIAM CHARLES SCHULTZ

Applicants

and

AIR CANADA

Respondent

AND BETWEEN:

**CHRISTOPHER CHARLES JOHNSTON,
JAMES ARTHUR BRADLEY,
BRIAN LEONARD SOWTEN,
AND WILLIAM CHARLES SCHULTZ**

Applicants

and

AIR CANADA PILOTS ASSOCIATION

Respondent

AND BETWEEN:

**RUSSELL IRVING COOPER,
WILLIAM ALEXANDER HACKWELL, NOEL
MARTIN LOURENS,
AND ALEXANDER GEORGE WILLIAM
HEMINGWAY**

Applicants

and

AIR CANADA

Respondent

AND BETWEEN:

**RUSSELL IRVING COOPER,
WILLIAM ALEXANDER HACKWELL, NOEL
MARTIN LOURENS, AND ALEXANDER
GEORGE WILLIAM HEMINGWAY**

Applicants

and

AIR CANADA PILOTS ASSOCIATION

Respondent

AND BETWEEN:

FRANÇOIS RAUSCHER

Applicant

and

AIR CANADA

Respondent

AND BETWEEN:

FRANÇOIS RAUSCHER

Applicant

and

AIR CANADA PILOTS ASSOCIATION

Respondent

Docket: T-1114-13

AND BETWEEN:

LARRY CROWLEY

Applicant

and

AIR CANADA, AIR CANADA PILOTS ASSOCIATION

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This hearing concerned multiple applications for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 of the Canadian Human Rights Commission [the Commission] decisions dismissing the Applicants' Complaints against the Respondents on the ground that it is plain and obvious that the Complaints could not succeed.

[2] Two dockets were the subject of this joint hearing. Docket T-859-13 is the application of 17 applicants [Gregg and others] against the Respondents, Air Canada and the Air Canada Pilots Association [the Association]. The Commission dismissed their combined 34 complaints in decisions dated March 20, 2013. Docket T-1114-13 is the application of Larry Crowley [Crowley] against the Respondents, which was also dismissed by its decision dated May 1, 2013 and issued by letter dated May 17, 2013. The Complaints of the Applicants in both matters [together the Applicants] were dismissed on substantially similar grounds, although those offered in the Gregg application contained additional reasoning as described below. The Investigators' Section 40/41 Reports were identical, as were the parties' submissions in both dockets, except for some small differences in Air Canada's submissions. For the reasons that follow, the Applications are dismissed.

II. Background

[3] The Applicants are pilots whose employment was terminated by Air Canada in 2010 and 2011 pursuant to the provisions of a collective agreement in force between the Respondents, requiring the Association's members to retire at the age of 60. The Association is the designated bargaining agent for all Air Canada pilots.

[4] Between November 2011 and November 2012, the Applicants filed Complaints with the Commission against both Respondents in respect of their termination of employment by Air Canada.

[5] Subsequently, Section 40/41 Reports [the Reports] recommended the Complaints be dismissed. The Commission received submissions in reply to these Reports from the Applicants and the Respondents, although only the Applicants' submissions are contained in the record before the Court.

[6] In Decisions dated March 20, 2013 [the Gregg Decisions] and May 1, 2013 [the Crowley Decisions], the Commission decided not to deal with the Complaints under paragraph 41(1)(d) of the Act. It relied on section 15(1)(c) of the Act, which established an exception whereby the termination of employment upon reaching the normal age of retirement for a particular position was not discriminatory. This section has since been repealed. The decisions not to deal with the complaints were based upon a conclusion that the complaints were "frivolous" because two analogous cases concerning substantially similar allegations by other Air Canada pilots who

were terminated during the period from 2003 to 2005 had been dismissed and upheld by the Federal Courts: *Vilven v Air Canada*, 2009 FC 367 [*Vilven FC*] and *Air Canada Pilots Association v Kelly*, 2012 FCA 209 [*Kelly FCA*]. In *Vilven FC*, the Federal Court had confirmed that the normal age of retirement for Air Canada's pilots of 60 was not discriminatory. In *Kelly FCA*, the Federal Court of Appeal [FCA] found that section 15(1)(c) of the Act was constitutionally valid.

[7] As mentioned, the Commissions' earlier Gregg Decisions, although concise, were nevertheless more extensive, but otherwise identical to its decision in the Crowley complaints. The Decision used in the Gregg and related complaints is set out below. For comparative purposes, those excerpts from the Gregg Decisions that were <u>not</u> contained in the Crowley Decisions are identified in square brackets:

> As the Federal Court of Appeal has confirmed that section 15(1)(c) of the Canadian Human Rights Act is constitutional, and as the Federal Court has confirmed that 60 is the normal age of retirement for this respondent's pilots, it is plain and obvious that this complaint cannot succeed.
>
> [Counsel for the complainant argues in his submissions that new evidence is required in this case to prove that 60 is the normal age of retirement for the respondent's pilots. This would mean that each time one of the respondent's pilots is required to retire at age 60 the respondent would have to provide through statistical evidence that 60 is the normal age of retirement under section 15(1)(c). Such an approach is not in the public interest and fails to take into consideration the decision in the Federal Court of Appeal and in the Federal Court which were made in respect of the same position at the same employer. In such circumstances, unless there is evidence to suggest that 60 is not the normal age of retirement for the respondent's pilots (and the complainant has not provided any such evidence), the Commission is entitled to rely upon the decision in the Federal Court of Appeal and the Federal Court.

> An application in the Supreme Court of Canada for leave to appeal the Federal Court of Appeal decision does not alter the fact that the Commission is bound by these decisions.]
>
> In conclusion, pursuant to section 15(1)(c) and to the *Vilven* and *Kelly* decisions, it is not a discriminatory practice for this respondent to require its pilots to retire at the age of 60.

III. Jurisprudential Context

[8] The existing jurisprudential context is of particular relevance to understanding the Commission's Decisions and the parties' submissions, because the subject matter of these applications has been extensively litigated. I briefly set out a summary of the jurisprudential context.

[9] First are the cases relating to the Tribunal decision in *Vilven and Kelly v Air Canada and Air Canada Pilots Association*, 2007 CHRT 36 [*Vilven CHRT*]. The Tribunal concluded that the normal age of retirement of airline pilots in positions similar to those occupied by the applicants was age 60 and that paragraph 15(1)(c) of the Act did not infringe the *Charter*. The factual foundation for the decision included a Joint Statement of Facts that listed "all the major international and interline carriers with the ages at which pilots employed by them must retire" to determine the comparator airlines.

[10] On judicial review in *Vilven FC*, Madam Justice McTavish found the Tribunal had erred in determining comparator airlines by including foreign carriers. Rather than setting aside the decision, the Court selected the Canadian comparator airlines from the list. The Court thereafter, upheld the Tribunal's decision that 60 was the normal age of retirement. This conclusion was not

the subject of an appeal by the complainants. However, the Court proceeded further to quash the Tribunal's decision finding that section 15(1)(c) of the Act was unconstitutional, and remitted the matter to the Tribunal to determine whether the provision could be justified under section 1 of the *Charter*.

[11] Following upon Justice McTavish's decision, the Tribunal in *Vilven v Air Canada*, 2009 CHRT 24 found that section 15(1)(c) could not be justified under section 1 of the *Charter*. Justice McTavish upheld the Tribunal's decision in *Air Canada Pilots Association v Kelly*, 2011 FC 120 [*Kelly FC*]. However, it was subsequently overturned by the Federal Court of Appeal in *Kelly FCA* that found section 15(1)(c) could be justified pursuant to section 1 of the *Charter*. Accordingly, it directed the Tribunal to dismiss the complaints; thereby upholding Air Canada's retirement of its pilots at age 60 based on the Court's unappealed finding in *Vilven FC* that age 60 was the normal age of retirement.

[12] The second relevant line of jurisprudence raised by the Respondents in these applications commences with the Tribunal's decision dated August 10, 2011 in *Adamson v Air Canada*, 2011 CHRT 11 [*Adamson CHRT*]. The Tribunal again ruled that 60 was the normal age of retirement for Air Canada Pilots, but did so only after determining the appropriate comparator airlines after conducting an exhaustive analysis of the characteristics of the airplanes of airlines operating in Canada from 2005 to 2009 and the number and normal ages of retirement of their pilots. The Tribunal's decision was set aside by me in *Adamson FC*, but was restored by the FCA in its decision dated June 26, 2015 in *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153

[*Adamson FCA*]. The decision of the Federal Court of Appeal is of particular interest to the Applicants.

[13] These are not the only cases where the right to pursue a similar complaint is being raised, as there remain over 90 Air Canada pilots holding over 180 mandatory retirement complaints under adjudication before the Tribunal.

IV. Relevant Legislation

[14] The Commission's decision not deal with the complaints was made pursuant to sections 15(1)(c) (repealed effective December 15, 2012) and 41(1)(d) of the Act as they were at the date of the Decision:

Exceptions	*Exceptions*
15 (1) It is not a discriminatory practice if	**15 (1)** Ne constituent pas des actes discriminatoires :
[…]	[…]
(c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;	**c)** le fait de mettre fin à l'emploi d'une personne en appliquant la règle de l'âge de la retraite en vigueur pour ce genre d'emploi;
Commission to deal with complaint	*Irrecevabilité*
41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	**41 (1)** Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

[…]	[…]
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or	**d)** la plainte est frivole, vexatoire ou entachée de mauvaise foi;

V. Issues

[15] The following issues are raised in these applications:

1. Whether the Joint Statement of Facts that was before the Tribunal in the *Vilven CHRT* proceeding is inadmissible as not being before the Commission when rendering the Decisions?

2. Whether the standard of review of a decision of the Commission rejecting a complaint continues to require a less deferential judicial scrutiny than one dismissing a complaint?

3. Whether the Commission ought to have considered the Complaints as being "vexatious" rather than "frivolous" under section 41(1)(d) to determine whether or not to deal with them?

4. Whether the legal standard of proof to dismiss a complaint as frivolous under section 41(1)(d) of the Act required a consideration of the comparative degree of prejudice to the Applicants and Respondents?

5. Whether the Commission made a "legal decision" to dismiss the Complaints and whether section 41(1)(d) limits the scope of consideration of the Commission to that of the sufficiency of evidence?

6. Whether the Commission's conclusion was reasonable that it was bound by the decision of this Court in *Vilven FC*, and that therefore it was "plain and obvious" that these complaints could not succeed, including whether the Commission may rely on a form decision in the nature of "abuse of process by re-litigation" to reject the complaint?

7. Whether if finding the Commission's Decisions to be unreasonable, the Court should nevertheless set them aside as any redetermination will result in the Commission deciding not to deal with them?

VI. Scope of the Evidence on Judicial Review

[16] The Association submits that an exhibit in the Application Records should not be considered by this Court on Judicial Review as it was not before the Commission and circumstances do not warrant its admission. The impugned exhibit is the Joint Statement of Facts that was before the Canadian Human Rights Tribunal [the Tribunal] in the *Vilven CHRT* Tribunal proceeding and part of the record in *Vilven FC*. The Applicants point to this exhibit to support their submission that the Court's conclusion regarding the normal age of retirement in the *Vilven FC* decision was flawed, such that it could not be relied upon by the Commission as the basis for its decision.

[17] I find that the Respondents by their objection are confusing evidence that was before the Commissioner with evidence that provides the foundation for the *ratio decidendi* of a case being considered by the Court in a judicial review application. The Tribunal in *Vilven CHRT* and the Court in *Vilven FC* relied upon a Joint Statement of Facts in the process of determining the comparator airlines. My understanding is that there is no constraint on the Court's attention

being drawn to the specific facts in a case advanced as relevant to a matter, where this may include reference to evidence in the record, but not cited in the decision.

[18] As the issue raised by the Applicants is whether the approach used in *Vilven FC* was flawed, for the reasons they argue, the Court may be required to consider the pertinent evidence before the Court in that case. This would include the Joint Statement of Facts used to select airlines for the purpose of the statistical analysis of employees in similar positions as those of the Applicants. If necessary, I will therefore consider the document for that purpose only.

VII. Analysis

A. *Standard of Review*

[19] The parties agree that the applicable standard of review is reasonableness. I agree. In determining if the Commission's Decisions in these matters were reasonable, I must examine the justification, transparency and intelligibility of the process and determine if the Decisions fall within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2009 SCC 9 at para 47). This said however, both parties take positions on the standard of review and legal onus of proof that require further consideration.

[20] The Applicants argue that, according to the reasoning in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 [*Sketchley*], a lower standard of deference, which I have always equated with a higher degree of judicial scrutiny, no longer applies to decisions rejecting a

complaint at the screening stage. I cite the relevant passage from *Sketchley* at para 80 on this point:

> [80] However, when the Commission decides to dismiss a complaint, its conclusion is "in a real sense determinative of rights" (*Latif v. Canadian Human Rights Commission*, 1979 CanLII 2493 (FCA), [1980] 1 F.C. 687 (C.A.) at page 697 (*Latif*)). Any legal assumptions made by the Commission in the course of a dismissal decision will be final with respect to its impact on the parties. <u>Therefore, to the extent that the Commission decides to dismiss a complaint on the basis of its conclusion concerning a fundamental question of law, its decision should be subject to a less deferential standard of review.</u>
>
> [Emphasis added]

[21] The Respondents rely on the recent decision in *Wilson v Atomic Energy of Canada Limited*, 2016 SCC 29 [*Wilson*] for the proposition that under the reasonableness standard reviewing courts should not recognize varying degrees of deference depending on the nature of the decision (at para 18). Applying this reasoning, they take the position that differentiating situations based upon whether a decision is dismissed, or the request to dismiss is refused, require the same standard of deference and judicial scrutiny.

[22] It is not clear from the reasons in *Wilson* that the proposition cited by the Respondents was adopted by the other seven judges, apart from Abella and Cromwell JJ. Even then, it is not clear whether deference is now an outlier factor in terms of the degree of judicial scrutiny applied to reviewing a decision, or whether the criticism was of the "attempt to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference within it" because this "unduly complicates an area of law in need of greater simplicity" (*Wilson* per Abella J. at para 18, and Cromwell J.)

[23] In any event, whether or not *Wilson* stands for the proposition that deference should not vary depending upon the nature of the decision, this does not mean that reasonableness should not be assessed in light of its context. Justice Cromwell at paragraph 73 of *Wilson* recognized that "reasonableness, while "a single standard" nonetheless "takes its colour from the context"." He explained that reasonableness must, therefore, "be assessed in the context of the particular type of decision making involved and all relevant factors" citing *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para. 18 as follows:

> Reasonableness must, therefore, "be assessed in the context of the particular type of decision making involved and all relevant factors": *Catalyst Paper Corp*., at para. 18. However, in my opinion, developing new and apparently unlimited numbers of gradations of reasonableness review — the margins of appreciation approach created by the Federal Court of Appeal — is not an appropriate development of the standard of review jurisprudence.

[24] I understand that courts have always accepted that there is a fundamental contextual difference in the judicial scrutiny owed decisions that finally determine a matter, as opposed to those of an interim nature, where the matter is not disposed of. This distinction may be in terms of a right of appeal, or a judicial review application where the decision results in the dismissal of the matter, as in this case. The contextual distinction is based on the degree of <u>prejudice</u> caused to the applicant by the dismissal of the application, where the outcome is qualitatively different in its impact on the party whose complaint is rejected. On this premise, the substantive reasoning in *Sketchley* at para 80 continues to apply in terms of a higher threshold for reasonableness because "a dismissal decision will be final with respect to its impact on the parties".

[25] I also point out that whether the standard of review of reasonableness relates to deference or context, it appears that it is wholly, or at least almost, entirely subsumed in the more cautious approach that the Commission cannot decline to consider the complaint except where it is plain and obvious that it cannot succeed. Justice Rothstein appears to have been the first judge to provide the nexus between summarily ending the matter and the high threshold for not dealing with the matter in *Canada Post Corp v Canada (Canadian Human Rights Commission)* (1997), 130 FTR 241 (FC) at para 3, aff'd, 169 FTR 138 (FCA), leave to appeal to SCC refused [1999] SCCA No 323. Of more recent vintage to the same effect, see *Canada (Attorney General) v Carrol v Canada (Attorney General)*, 2015 FC 287 at para 92 [*Carrol*]: "Yet the idea of limited deference is consistent with the "plain and obvious" test, which remains good law".

[26] Additionally, even if more judicial scrutiny is required in situations of the dismissal of complaints, the Commission nevertheless has a broad discretion to dismiss complaints where it is satisfied that further inquiry is not warranted. In *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 (CA) at para 38 [*Bell Canada*], the Court held that "the Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report". I think this probably refers to the discretion with regard to policy or non-factual considerations that may affect the scope of categories under s. 41(1), e.g. whether legal conclusions may be the basis for a finding of frivolousness. The reality remains that the latitude for the preliminary dismissal of a complaint can only be exercised within the narrowest of confines of it being plain and obvious that it cannot succeed, which leaves little to no discretion (see *Carrol* at paras 90 to 102 on this discussion in relation to vexatiousness).

[27] In conclusion, while I find that there remains a contextual distinction depending on whether the Commission decides to deal with a complaint or not, it is off little practical effect given that test of the decision not to deal with it being plain and obvious, subsumes the higher standard. For that reason, I reject both parties' submissions regarding a standard of review that is not comprised in the plain and obvious test.

B. *The Appropriate Grounds and Relevant Factors for Dismissing a Complaint*

[28] While the parties are not at odds on the legal standard of "plain and obvious" for the dismissal of a complaint under section 41(1)(d), the Applicants appear to argue that the dismissal of a complaint should be considered under the "vexatious" factor. In this regard, they rely on the *Carrol* decision and others reviewing situations where "another process" before a different decision-maker than the Tribunal have already dealt with the question under that category. In *Carrol*, the Court concluded that vexatiousness factor under section 41(1)(d) did not extend to issues arising from the same matter being considered by a process external to the Tribunal. It found that the definition did not include other processes under this category, because it could not be said that they meet the definition of vexatiousness, i.e. "without reasonable or probable cause or excuse; harassing; annoying".

[29] I do not find the discussion in *Carrol* to have any bearing on this case. In that matter, the issues related to external proceedings that raise complicated issues involving concurrent jurisdiction and the application of issue estoppel. These issues were being argued under the "vexatious" factor in section 41(1)(d) of the Act . The matters at hand involve the Commission's public interest policy under the "frivolous" category against relitigating complaints which the

Tribunal has already decided for one group of complainants, only to face the same issues in complaints of another group of identical complainants, except with respect to whether the factual matrix has changed due to timing. As indicated, the Complaints were dismissed because there was insufficient evidence to suggest that it was not plain and obvious that they could not succeed based upon past decisions of the Federal Courts. The Applicants could not present sufficient evidence to suggest that there existed a different factual context based on the effluxion of a few years' time.

[30] For the same reason, I also do not find this decision to be a "legal" determination as is argued by the Applicants. Rather it is one based upon an insufficiency of distinguishing evidence in regard to past decisions. Similarly, I reject the Applicants' argument that the Decisions reversed the onus by requiring the Applicants to demonstrate that they could meet defences that would be raised by the Respondents. The Applicants were the first to submit that the "factual" conditions of airline membership in Canada had changed since 2005 when the Investigator recommended that the Complaints be considered frivolous. The Commission accepted the Applicants' premise as a ground for referring the matter to the Tribunal, but found that there was insufficient non-speculative probative evidence to support the Applicants' submission that the factual context had changed since *Vilven FC*. It rejected the Complaints on that basis, in addition to stipulating its view that revisiting already-decided matters each time a new complainant surfaces was not in the public interest.

[31] Furthermore, I am not convinced that issues of frivolousness under section 41(1)(d) are necessarily confined to the sufficiency of evidence. The Merriam-Webster online dictionary

provides a legal definition of the term frivolous as "lacking in any arguable basis or merit in either law or fact" [my emphasis]. I would think that the provision should be interpreted to allow complaints to be dismissed at the preliminary stage when based upon their lacking any arguable basis on merit in either law or fact as an example of the Commission's wide discretion recognized in *Bell Canada*.

[32] Finally, when considering the scope of evidence that is relevant to the determination of a frivolous complaint, I also reject the Applicants' argument that in this matter the Commission erred by failing to properly "consider and balance the severe prejudice" to the rights of the Complainants that would result by dismissing the complaints, in comparison with the prejudice dismissal causes the Respondents. In my view, prejudice is not a relevant factor in these Decisions. The factual situation involves the relitigating of matters that have been previously dismissed by the Tribunal and upheld by the Federal Court. The issue is whether the Complainants have provided sufficient evidence to demonstrate that it is not plain and obvious that the Complaints will not succeed on the same grounds as in these previous decisions. There is no scope for issues of prejudice to impact on this narrow factual assessment as described above. If prejudice plays any role, it will only be with respect to the standard of review, which I find is essentially comprised in the plain and obvious test not to deal with a complaint.

C. *Reliance on the Vilven decisions as a basis to dismiss the Complaints*

[33] I find that the Applicants' various substantive arguments with respect to their claim that the Commission misapplied the *Vilven* decisions to dismiss their complaints fall into two

different lines of criticism. On the one hand, they contend that the Federal Court of Appeal in *Adamson FCA*, considered the scope of the Tribunal's discretion in the *Vilven* series of cases and concluded that the Commission had a duty to thoroughly evaluate each subsequent complaint on its own facts and its own merits. By its failure to do so, the Applicants submit, the Commission unreasonably fettered its decision. Second, as reformulated somewhat by the Court, given the higher judicial scrutiny required by the Court of the Commission's decision to dismiss a complaint under section 41(1)(d), the Applicants submit that the Commission's factual determination that no changes had occurred in the airline industry was unreasonable given that the circumstantial evidence demonstrated that the Applicants were forced to retire up to six years after the retirements of the applicants in the *Vilven* and *Kelly* decisions.

(1) *Adamson FCA* is not relevant to the Commission's decision to dismiss the Complaints

[34] The Applicants contend that *Adamson FCA* held that each Complaint should be considered based on its own factual circumstances, and that by failing to do so, the Commission fettered its discretion. In support of this argument, they cite *Adamson FCA* at para 31 for the proposition that the Commission "was not required to blindly follow" *Vilven FC*:

> [31] … While I accept the principle that the directions of a reviewing court bind a tribunal sitting on a re-determination (see *Superior Propane* at paragraph 54), the rule does not apply in these circumstances. The Tribunal in this matter was not engaged in a re-determination following a judicial review. It was simply assessing the complaints at first instance. While there is obvious overlap with the *Vilven*/*Kelly* litigation, the matters have a different evidentiary record and should be considered distinct. The Tribunal was not required to blindly follow *Vilven FC*.
>
> [Emphasis added]

[35] It further found, at paras 57-59:

> [57] Although both deal with the doctrine of *stare decisis*, this finding is distinct from my earlier conclusion that the Tribunal was not required to apply *Vilven FC* because it was not engaged in a re-determination of these complaints. The practical result of these two conclusions is the same. The Tribunal was not obliged to apply the *Vilven FC* factors in the same manner as Mactavish J. suggested, but rather it had greater leeway in deciding how to make use of these factors.
>
> [58] These considerations all point toward giving *Vilven FC* a more limited role when reviewing the Tribunal's decision. The factors are not a formula that the Tribunal had to get right to survive a challenge on judicial review. More importantly, they should not be divorced from the particular factual context of the complaints and transformed into a prescriptive standard.
>
> [59] Given my conclusion that *Vilven FC* did not establish a binding precedent, I believe that the Judge's continual reference to "the *Vilven FC* test" detracted from a holistic consideration of the Tribunal's decision on judicial review and led the Judge to focus excessively on the reasons from *Vilven FC*.
>
> [Emphasis added]

[36] Both for the purpose of understanding my reasons rejecting these applications, and in order to explain why I do not consider *Adamson FCA* to be relevant to this issue pleaded by the Applicants, it is necessary to provide additional background to the distinctions in the factual foundations and reasoning in *Vilven FC* and *Adamson FC* that were the focus of the Court in *Adamson FCA*.

[37] The two Federal Court matters effectively involved the same parties; the distinguishing facts being that the applicants in *Vilven FC* consisted of Air Canada pilots required to retire

before 2004, while those in *Adamson FC* were required to retire during the period of 2005 to 2009.

[38] Additionally, and of considerable importance in the Court's view in these matters, though it was not raised as a factor in the Applicants' submissions to the Commission or as a ground to overturn the Commission's Decisions, the parties in *Vilven FC* had introduced a Joint Statement of Facts for the purpose of identifying the comparator airlines. Employees of these airlines were used by the Tribunal to determine the normal retirement age for pilots in positions similar to those in Air Canada. They were identified for major Canadian and international flagship airlines based on the factor of prestige and status of the complainants' positions in Air Canada. As indicated, Justice McTavish rejected reliance on foreign airlines. Moreover, in identifying the essential features of the complainants' positions, she similarly rejected prestige or status of the complainant's positions as a basis to identify the pilots in similar positions. Instead she described a six factor test to determine "what Air Canada pilots actually do". She thereafter carried out her statistical analysis of positions based on the six Canadian airlines (including Air Canada) remaining in the list of comparator airlines after the removal of the foreign carriers, but without any analysis applying her six factor test to these airlines.

[39] In carrying out its assessment in *Adamson CHRT*, the Tribunal conducted an exhaustive review of all of the airlines operating in Canada. It categorized them in terms of their characteristics that reflected the factors defined by Justice McTavish. It then selected those airlines which conjunctively exhibited all the factors. It was my opinion in *Adamson FC*, that the outcome using this methodology was unreasonable for retiring pilots, because the airlines

selected excluded Air Canada's principle Canadian competitors, which the parties had agreed were comparator airlines for the purpose of the Joint Statement of Facts in *Vilven FC* and which were also used by Justice McTavish for the purpose of her statistical analysis. I concluded that the factors should be applied disjunctively so as to avoid what I thought was the unreasonable outcome of none of Air Canada's major competitors being identified by the parties being used as comparator airlines.

[40] In setting aside the decision, the Federal Court of Appeal found, among other grounds, that I had focused excessively on the reasons from *Vilven FC* as though stating a "test". As described from the passages of the decision cited above, the Court stipulated that a more holistic consideration of the Tribunal's decision was required providing a broader discretion for it to apply the *Vilven FC* factors where "the matters have a different evidentiary record and should be considered distinct." I understand this referred to the fact that Justice McTavish was working with a Joint Statement of Facts, as opposed to the Tribunal's factual foundation determined on an entirely different basis of contested evidence involving all Canadian airlines.

[41] With this background in mind, I conclude that the Applicants overreach in their attempt to apply *Adamson FCA* to the circumstances of this case. These matters concern the reasonableness of the exercise of the Commission's discretion when determining whether a matter is frivolous. *Adamson FCA* is relevant only so far as it recognized the <u>discretion</u> of the <u>Tribunal</u> to treat each case based distinctly on its particular factual context when applying the direction of the Court in *Vilven FC*.

[42] The rejection at a preliminary stage involves a different exercise than that of the Tribunal inasmuch as the Commission is in fact applying a test, a very narrow one at that, to determine whether a matter is frivolous. The test described by the Investigator "is whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed." In my view, the application of this test allows for a wide scope in the exercise of the Commission's discretion, which is not constrained by any formula or basis of justification, so long as the Commission's conclusion is reasonable that it is plain and obvious the complaint will not succeed. For that reason, it is not unreasonable for the Commission to reject as frivolous a complaint without hope of success, based on previous decisions of the Tribunal, or of the Federal Courts review of them, where no additional evidence is provided that suggests that a different conclusion may arise if referred to the Tribunal.

[43] Accordingly, I do not find that *Adamson FCA* applies to the Commission in these circumstances. Nor does it dictate that the Commission must consider each complaint based on its own factual circumstances without having the discretion to compare these circumstances with matters already decided by the Tribunal concerning similar applicants to determine whether it is plain and obvious that they cannot succeed. Moreover, I disagree that the Commission decided that it was bound by the *Vilven* decisions when it indicated only that it could rely on the decisions for the purpose of determining whether the Complainants were frivolous based upon the lack of probative evidence provided by the Applicants that could suggest a different result.

(2) The Commission could reasonably rely on the *Vilven* decisions as the basis for its decision when the Applicants presented insufficient evidence that significant contextual differences would apply based upon the passage of time

(a) *The Applicants' evidence was speculative*

[44] The heart of the Applicants' argument is that the Commission could not purport to make a reasonable factual determination as to the validity of the mandatory retirement provisions for the Applicant pilots who were forced to retire <u>at a later date</u>, up to six years after the retirements in *Vilven* and *Kelly* in 2003 and 2005 respectively. They submit that the fact situation relevant to a pilot forced to retire at age 60 several years subsequent to *Vilven* and *Kelly* <u>could and likely would differ substantially</u> [my emphasis] from that of *Vilven* and *Kelly*, especially given the rapidly changing regulatory and employment environment of the airline industry in Canada and the narrow margin cited by the Court in arriving at its own statistical determination of the normal age of retirement issue in *Vilven FC*. Consequently, they argue that the Commission had a duty to thoroughly evaluate each subsequent Complaint on its own factual merits, which it failed to do.

[45] However, the Applicants provided no probative evidence to demonstrate that the situation of Canadian airlines had changed, instead speculating upon the effects of the effluxion of time during the relevant intervening period. As justification for their inability to obtain more probative evidence on changes in the circumstances of Canadian airlines, the Applicants argued before me that they could only obtain such information by way of subpoenas issued by the Tribunal, as was apparently the means used to procure information on some of the airlines in the *Adamson* CHRT decision.

[46] The Respondents reply, quite correctly in my view, that the Applicants' arguments on any significant change in the airline industry during the time period in question are speculative and that there was no probative evidence before the Commission that 60 years of age was not the normal age of retirement in the Canadian airline industry for persons in positions similar to those of the Applicants. They also submitted that any significant changes in the industry would have come to the attention of the numerous pilots in these matters, or the outstanding ones waiting to have their complaints processed. On this basis, I agree that the Commission's Decisions should be upheld.

(b) *The Adamson CHRT decision is not relevant to the reasonableness of the Commission's decision, based upon the issues as argued by the Respondents*

[47] The Respondents attempted to shore up their arguments by submitting that the Court should take cognizance of the Tribunal's ruling in *Adamson CHRT* of August 10, 2011 to bolster the reasonableness of the Commission's conclusion that the Applicants did not provide any evidence demonstrating changes in the airline industry. They argue the Tribunal's decision demonstrates that it was highly unlikely such evidence existed. Using the Tribunal decision in *Adamson CHRT*, the timing window for changes in the makeup of the Canadian airline industry would move from 2005 to 2009, being the years of retirement of the complainant pilots in *Adamson CHRT*. I reject this submission because I find a complete absence of any reference to the *Adamson CHRT* decision in the evidence filed in the parties' records. If not before the Commission, I cannot imply that it was a factor in its decision.

[48] I think that it should also be noted that it is the Applicants who have chosen not to attempt to rely on the distinctions made in *Adamson FCA* concerning its very obvious factual differences with those in *Vilven FC*, *viz*: "While there is obvious overlap with the *Vilven/Kelly* litigation, the matters have a different evidentiary record and should be considered distinct." This distinction was the basis for the Court's conclusion in *Adamson FCA* that I erred in not recognizing the discretion that such differences afforded the Tribunal to choose its own methodology in applying the factors outlined in *Vilven FC*. The Applicants nevertheless did not argue in this matter that a decision based upon a Joint Statement of Facts should normally not be sufficient to foreclose on future complaints by similar, but different complainants pursuing a different factual determination process by leading evidence to establish facts, i.e. the situation in *Adamson CHRT*, as opposed to agreeing on them.

[49] In conclusion, while on the one hand it is too late for the Respondents to advance the *Adamson CHRT* factual matrix to support its argument when there is no indication that it was raised at any time leading up to the Commission's decision; on the other, the Applicants are nevertheless, constrained by the manner in which they have chosen to present their arguments. The Applicants have confined their submissions to those based on the factual context of the passage of time since affecting the composition of the airlines since *Vilven FC*. They have done so without providing any probative evidence to support this otherwise speculative premise. As a result, I find no reviewable error in the Decisions.

D. *If the Commission's decisions are ultimately found to be unreasonable and referred back for redetermination, the Complaints will nevertheless be dismissed as frivolous based upon Adamson FCA*

[50] If the Commission's Decisions were found to be unreasonable, I nevertheless consider it unlikely that a different outcome would result if the matters were sent back for reconsideration by the Commissioner. Both the Tribunal's methodology in *Adamson CHRT* adopted from *Vilven FC*, along with its fulsome factual conclusions to determine the normal age of retirement in the Canadian airline industry have been upheld by the Court of Appeal in *Adamson FCA*. The shortened window of time differential of retirements between that of 2009 in the *Adamson* decisions, and 2010 and 2011 of the Applicants in these matters, combined with the exhaustive contextual foundation in the *Adamson* decisions would be taken into consideration in any redetermination of the decision not to deal with the Complaints. Given the facts in these matters, I see very little scope for the Commission's same reasoning being overturned when the case against relitigating an issue on the same facts has been fortified by *Adamson FCA*.

[51] Moreover, I am mindful of the Applicants' submissions during these hearings that they were unable to obtain evidence in support of their arguments without the assistance of the Tribunal to issue subpoenas for the production of the required industry information. In other words, the possibility of obtaining new evidence to support their submissions is in effect a "fishing expedition", inasmuch as it is only after referring the matter to the Tribunal that this evidence could be unearthed, if it existed. In such circumstances, if the complaints were returned to the Commission for redetermination, I think it highly unlikely that there exists any probative

evidence to suggest that 60 would not again be confirmed as the normal age of retirement in the industry applicable to Air Canada's pilots.

VIII. Conclusion

[52] In summary, I conclude that the Commission's Decisions in these applications fall within a range of acceptable possible outcomes based on the facts and law, while being justified by intelligible and transparent reasons.

[53] Accordingly, the applications are dismissed with costs to the Respondents. If the parties are unable to agree on an appropriate award of costs, the Court will dispose of this issue after obtaining the written submissions of the parties for its guidance.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review applications are dismissed with costs awarded to the Respondents to be agreed upon or otherwise determined by the Court.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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