Federal Court Cour fédérale

Date: 20240705

Docket: T-1554-23

Citation: 2024 FC 1059

2024 FC 1059 (CanLII)

Ottawa, Ontario, July 5, 2024

PRESENT: Madam Justice Pallotta

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, 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, DAVID ALEXANDER FINDLAY, 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, DAVID ALLAN RAMSAY, HAROLD GEORGE EDWARD THOMAS, MURRAY JAMES KIDD AND WILLIAM AYRE

(Coalition) Applicants

and

ERIC WILLIAM ROGERS, ROBERT JAMES MCBRIDE, JOHN CHARLES PINHEIRO, WILLIAM RONALD CLARK AND STEPHEN NORMAN COLLIER

(Self-Represented) Respondents

and

CANADIAN HUMAN RIGHTS COMMISSION

Respondent

AIR CANADA, AIRLINE PILOTS ASSOCIATION, INTERNATIONAL

Respondents

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JUDGMENT AND REASONS

I. Introduction

[1] This application for judicial review relates to a decision of the Canadian Human Rights Tribunal (Tribunal) that dismissed complaints made by the applicants and the five individual respondents (Nedelec Group). The Nedelec Group are retired Air Canada pilots who allege that Air Canada and the Air Canada Pilots Association (ACPA), the predecessor union to the respondent Air Line Pilots Association, International (ALPA), had engaged in an employment practice that discriminated against them based on age, contrary to sections 7, 9, and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

[2] Until December 15, 2012, the collective agreement for Air Canada pilots required them to retire at 60 years of age. The pilots in the Nedelec Group turned 60 between January 1, 2010 and December 15, 2012. The central issue before the Tribunal was whether paragraph 15(1)(c) of the *CHRA* provided a defence to what would otherwise constitute *prima facie* discrimination based on age. Paragraph 15(1)(c), which was repealed as of December 15, 2012, stated it was not a discriminatory practice if "an individual's employment is terminated because that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".

[3] The five respondent pilots represented themselves before the Tribunal and they have not participated in this application. In these reasons, a reference to the respondents means Air Canada and ALPA.

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II. **Background**

[4] The Tribunal approached the inquiry in a sequential manner. It decided a preliminary question and then determined the complaints in a three-step process by issuing two interlocutory rulings prior to its final decision, reported at *Nedelec et al v Air Canada and Air Line Pilots Association, International*, 2023 CHRT 26 [*Final Decision*].

[5] First, the Tribunal decided the preliminary question of what methodology it should use to determine the normal age of retirement for the Nedelec Group: *Nedelec et al v Air Canada and Air Canada Pilots Association*, 2020 CHRT 16 [*Nedelec Methodology CHRT*]. The Tribunal concluded that it should use a statistical analysis, the same approach it had used to determine the normal age of retirement for other groups of retired Air Canada pilots who filed complaints, and not a "broad general interpretation" method urged by the Nedelec Group. The Tribunal reasoned it was bound by *stare decisis* to follow this Court's decision in *Vilven v Air Canada*, 2009 FC 367 [*Vilven FC*]. In *Vilven FC*, the Court agreed with an earlier Tribunal decision that a determination of the normal age of retirement requires a statistical analysis of the total number count of relevant positions: *Vilven FC* at para 169.

[6] *Nedelec Methodology CHRT* was upheld on judicial review: *Nedelec v Rogers*, 2021 FC 191 [*Nedelec Methodology FC*].

[7] Next, the Tribunal decided the first interlocutory issue, which was what criteria (also referred to as "factors") to apply in order to identify the airlines that employed pilots in positions similar to those held by the pilots in the Nedelec Group: *Nedelec et al v Air Canada and Air Canada Pilots Association*, 2022 CHRT 30 [*Factors Ruling*]. The Tribunal held that, to be included in the comparator group for 2010 to 2012, the airline would have to meet all of the following criteria: (i) operate aircraft of varying sizes; (ii) operate aircraft of varying types; (iii) fly to domestic destinations; (iv) fly to international destinations; (v) cross domestic and foreign airspace; and (vi) transport passengers. The *Factors Ruling* also set out the evidence the Tribunal would need and the process that would be followed for determining which airlines to include in the comparator group.

[8] The applicants sought judicial review of the *Factors Ruling*. Their application was dismissed on the basis that it was premature to review the Tribunal's interlocutory decision: *Nedelec v Rogers*, 2023 FC 950 [*Nedelec Factors FC*]. While the Tribunal had issued its *Final Decision* a week before the hearing, the Court found this was not the sort of exceptional circumstance warranting a departure from the prematurity principle, as contemplated by the jurisprudence: *Nedelec Factors FC* at paras 42-44.

[9] The Tribunal's second interlocutory ruling before its *Final Decision* decided which airlines met the first two criteria—that is, airlines that were operating aircraft of various sizes and

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types during the relevant period: *Nedelec et al v Air Canada and Air Canada Pilots Association*, 2022 CHRT 40 [*Size/Type Ruling*].

[10] The two issues that remained for the *Final Decision* were: (i) to decide which of the airlines identified in the *Size/Type Ruling* met the remaining *Vilven FC* criteria for inclusion in the comparator group; and (ii) to determine the normal age of retirement for pilots at those airlines between 2010 and 2012. The Tribunal would not need to decide the second issue if Air Canada employed more pilots than the comparator airlines, as that would mean Air Canada pilots defined the normal age of retirement for the 2010-2012 period.

[11] Questionnaires were sent to the airlines identified in the *Size/Type Ruling*. Air Canada collated the responses and shared a summary in advance of a case management conference. At the case management conference, the Nedelec Group stated they were not in a position to disagree with the responses. They acknowledged that the outcome of their complaints was inevitable, in light of the *Factors Ruling* and the data Air Canada had provided about the number of pilots employed by the various airlines: *Final Decision* at paras 6, 20. The Tribunal cancelled the hearing dates on consent. It gave the parties an opportunity to file written submissions and reached its decision through an abbreviated process based on the uncontested evidence.

[12] After deciding which airlines met the remaining *Vilven FC* factors, the Tribunal applied a statistical approach to find that the number of pilots employed by Air Canada exceeded the number of pilots employed by all comparator airlines combined, throughout the relevant period: *Final Decision* at paras 33-37. Consequently, the age at which pilots retired at the comparator

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airlines did not matter because Air Canada employed the majority of the pilots. The normal age of retirement for the period was 60, since that was Air Canada's mandatory retirement age: *Final Decision* at para 39. The Tribunal concluded that the respondents were able to rely on paragraph 15(1)(c) of the *CHRA* because Air Canada's pilot workforce set the normal age of retirement for the purposes of that paragraph: *Final Decision* at para 40.

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[13] The methodology of the *Factors Ruling* is the focus of this proceeding. The applicants' request for an order setting aside the *Final Decision* rests on procedural and substantive challenges to the *Factors Ruling*, which they say rendered the outcomes of the *Size/Type Ruling* and the *Final Decision* inevitable.

[14] The applicants submit that the rationale and outcome of the *Factors Ruling* are unreasonable according to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The applicants allege that the Tribunal: (i) fettered its discretion by misconstruing the prior jurisprudence, which led to flaws in reasoning and foreclosed contemplation of the appropriate comparator group of pilots; (ii) failed to apply binding principles for interpreting quasi-constitutional human rights laws; and (iii) unreasonably followed prior judicial review decisions involving other pilot groups when the applicants were not privy to those proceedings, and they were decided based on standard of review principles in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] that have been overtaken by *Vavilov*.

[15] The applicants also allege that the Tribunal breached their rights to adduce evidence and make representations on the core issue, contrary to subsection 50(1) of the *CHRA* and the principles of procedural fairness.

III. **Issues and Standard of Review**

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[16] The issues on this application are whether the Tribunal's decision should be set aside because it is unreasonable as alleged, and/or because the applicants were denied an opportunity to adduce evidence and make representations contrary to both subsection 50(1) of the *CHRA* and principles of procedural fairness.

[17] The parties agree, as do I, that the merits of the Tribunal's decision are reviewed on the reasonableness standard of review. This is a deferential but robust form of review that considers whether the decision, including the reasoning process and the outcome, is transparent, intelligible, and justified: *Vavilov* at paras 13, 99.

[18] Allegations of procedural unfairness are reviewed on a standard that is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is "eminently variable", inherently flexible, and context-specific: *Vavilov* at para 77, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 22-23, 174 DLR (4th) 193 [*Baker*], among other cases. The central question is whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54. Here, the procedural fairness issue is

whether the applicants had a meaningful opportunity to present their case and have it fully and fairly considered: *Baker* at para 32.

[19] ALPA contends the question of whether the applicants were denied an opportunity to adduce evidence and make representations involves two distinct sub issues that call for different standards of review. It states the applicants' allegation that they were denied the rights afforded by subsection 50(1) of the *CHRA* involves the Tribunal's interpretation of a statutory provision, which is reviewable on the reasonableness standard.

[20] There is some divergence in decisions of this Court that have considered whether procedural rights afforded by legislation attract the non-deferential procedural fairness standard of review or the reasonableness standard applicable to statutory interpretation questions of mixed fact and law. In my view, it is not necessary to decide which standard of review should apply to the question of whether the applicants were denied their full rights under subsection 50(1) of the *CHRA*, as nothing turns on it. First, the parties structured their arguments in a way that essentially merges the sub issues. ALPA argues that the Tribunal reasonably interpreted subsection 50(1) as requiring that it follow the rules of procedural fairness, and the Tribunal reasonably complied with subsection 50(1) because it complied with the rules of procedural fairness. Similarly, the applicants do not argue that subsection 50(1) affords greater rights than the rules of procedural fairness and they advance the same basis—being denied an opportunity to adduce evidence and make representations—to argue that the Tribunal contravened both subsection 50(1) and procedural fairness. Consequently, the Court cannot avoid deciding whether the Tribunal breached principles of procedural fairness, and that determination attracts a

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non-deferential standard of review. Second, for the reasons given in the analysis section below, even on a non-deferential standard of review, the applicants have not established that the Tribunal failed to afford them full rights under subsection 50(1) of the *CHRA*.

IV. **Analysis**

A. *Is the Tribunal's decision unreasonable?*

[21] As noted above, other groups of retired pilots have challenged Air Canada's mandatory retirement policy. For pilots who retired before December 15, 2012, the key issues centered around paragraph 15(1)(c) of the *CHRA*. The prior proceedings are part of the background for the issues raised on this application for judicial review.

- **Vilven/Kelly**: The Vilven/Kelly group of pilots retired between 2003 and 2005. As noted above, the Tribunal employed a statistical analysis to determine the normal age of retirement for employees in "positions similar" to this group, and found 60 to be the normal age of retirement under paragraph 15(1)(c). On judicial review, the Court agreed with the Tribunal that the determination of the normal age of retirement requires a statistical analysis of the total number count of relevant positions but found that the Tribunal had erred in identifying the appropriate comparator group: *Vilven FC* at paras 169-170. The Court described the appropriate comparator group as pilots working for Canadian airlines that transport passengers and fly aircraft of various sizes and types to domestic and international destinations, through Canadian and foreign airspace: *Vilven FC* at paras 125, 170. Since the evidence showed that over 50% of Canadian airline pilots retired by the age of 60, the Court upheld the Tribunal's conclusion on the

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normal age of retirement and found that requiring pilots to retire by 60 did not amount to a discriminatory practice: *Vilven FC* at paras 170-175. However, the Court returned the matter to the Tribunal on the basis that paragraph 15(1)(c) of the *CHRA* violated subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 and the Tribunal would have to decide whether it was "saved" under section 1. Ultimately, the Federal Court of Appeal found paragraph 15(1)(c) to be constitutionally valid: *Air Canada Pilots Association v Kelly*, 2012 FCA 209, leave to appeal to SCC refused, 35014 (28 March 2013).

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- **Thwaites/Adamson**: This group of pilots retired between 2005 and 2009, and the Tribunal found 60 to be the normal retirement age for this group as well. In doing so, the Tribunal stated it was applying the factors outlined in *Vilven FC* to determine the appropriate comparator group. While this Court agreed with the complainants that the Tribunal's decision was unreasonable (*Adamson v Air Canada*, 2014 FC 83), the Federal Court of Appeal disagreed and restored the Tribunal's decision: *Adamson v Canada (Canadian Human Rights Commission)*, 2015 FCA 153, leave to appeal to SCC refused, 36630 (10 March 2016) [*Adamson FCA*].

- **Bailie**: This group originally had 97 complainants who retired between 2004 and 2012. ALPA's predecessor brought a motion to dismiss the complaints without a hearing, which was granted in part. The Tribunal dismissed the complaints of pilots who retired in 2009 or earlier on the basis that Vilven/Kelly and

Thwaites/Adamson had determined the normal age of retirement for such pilots to be 60 years of age: *Bailie et al v Air Canada and Air Canada Pilots Association*, 2017 CHRT 22 [*Bailie*].

- **Gregg**: The Gregg group of pilots retired after 2009. Their complaints did not reach the Tribunal because the Canadian Human Rights Commission (Commission), which acts as a gatekeeper to the Tribunal, dismissed them on the basis that it was plain and obvious the complaints could not succeed in light of Vilven/Kelly and Thwaites/Adamson. The Commission had given the Gregg pilots an opportunity to present evidence demonstrating that the normal retirement age in the industry had changed since 2009 and found they did not discharge their onus. The Commission's decision was upheld by this Court (*Gregg v Air Canada Pilots Association*, 2017 FC 506) and by a majority of the Federal Court of Appeal (*Gregg v Air Canada Pilots Association*, 2019 FCA 218).

- **Nedelec Group**: The Nedelec Group also turned 60 and retired after December 31, 2009. They were originally part of the Bailie group. The Tribunal allowed their complaints to proceed to a hearing because there was no factual or evidentiary record before the Tribunal regarding the normal age of retirement between 2010 and 2012: *Bailie* at para 91.

[22] The applicants raise three main substantive challenges to the Tribunal's decision to dismiss their complaints. As noted above, the applicants' arguments focus on the *Factors Ruling* because that ruling effectively determined the outcome of the *Final Decision*.

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[23] First, the applicants submit the Tribunal misconstrued the prior jurisprudence involving the complaints of other pilot groups, fettering its discretion and leading to flaws in defining the appropriate comparator group in their case. The applicants contend the Tribunal incorrectly interpreted the Court's decision in *Vilven FC* as setting out a conjunctive approach that would limit the comparator group to pilots working for airlines meeting all of the factors, and incorrectly described such an approach as "longstanding practice". According to the applicants, *Vilven FC* does not require a conjunctive approach and the comparator group in that case included all pilots who worked for the airlines the parties had agreed were "representative" Canadian airlines. Furthermore, the applicants say there was no longstanding practice because Thwaites/Adamson is the only case that used a conjunctive approach to restrict the composition of the comparator group to a subset of the complainants' proposed group, and it is an anomaly.

[24] Second, the applicants submit the Tribunal erred by interpreting *Vilven FC* and other jurisprudence without regard for binding principles of statutory interpretation that apply to quasi-constitutional human rights legislation. The applicants argue the Tribunal turned those principles on their head by interpreting the rights guaranteed by the *CHRA* narrowly and the scope of the paragraph 15(1)(c) defence broadly. The Tribunal did so by constraining the airlines included in the comparator group. It applied inappropriate and irrelevant criteria relating to the commercial operations of comparator airlines instead of the functional aspects of the comparator airline pilots' jobs and restricted the comparator group according to the methodology of Thwaites/Adamson to airlines meeting all the criteria conjunctively. The applicants say the Tribunal's approach eliminated from the comparator group over 50% of airline pilots employed in the Canadian airline industry during the relevant time, and "extended the absurdity of the

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Thwaites/Adamson decision's outcome" by including pilots whose jobs were unlike those of the Nedelec Group and excluding pilots whose jobs were identical. Section 2 of the *CHRA* provides that all individuals should have equal opportunity to make for themselves the lives that they are able and wish to have without being hindered in or prevented from doing so by discriminatory practices, and provides no basis for greater tolerance of discrimination based on age. In view of the purpose of the *CHRA*, the applicants say it was unreasonable for the Tribunal to apply the methodology of Thwaites/Adamson to restrict the composition of the comparator group in their case, skewing the group in favour of the respondents, rather than adhering to the binding principles of statutory construction and the principles in *Vilven FC*.

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[25] Third, the applicants submit the Tribunal unreasonably followed prior judicial review decisions involving other pilot groups with no consideration for the *Vavilov* factors that are germane to the applicants' human rights. The applicants were not privy to those previous proceedings, and the proceedings were decided based on standard of review principles in *Dunsmuir* that have been overtaken by *Vavilov*. The applicants say the proceedings could have turned out differently if they had been reviewed with less emphasis on *stare decisis* and more emphasis on principles of statutory interpretation, the avoidance of absurdities, and the need for a rationale that is commensurate with the adverse consequences for the individuals involved, in accordance with the principles of *Vavilov*.

[26] Before turning to my findings and reasons, it is important to point out that the record before me is limited to the parties' written arguments filed in this proceeding, various reported Tribunal decisions, and various reported court decisions. The parties' records do not include

affidavit evidence or certified copies of any part of the record that was before the Tribunal, such as the parties' written arguments filed with the Tribunal. At the hearing, the applicants acknowledged that the only information before this Court about the record that was before the Tribunal comes from what is stated in the decisions themselves.

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[27] I am not persuaded that the Tribunal's decision was unreasonable.

[28] The applicants have not established that the Tribunal erred by misconstruing the prior jurisprudence, fettering its discretion, or adopting a conjunctive approach to the factors used for defining the relevant comparator group. I also find the applicants have not established that the Tribunal erred by interpreting prior jurisprudence and defining a comparator group without regard for binding principles of statutory interpretation or by the manner in which it relied on pre-*Vavilov* jurisprudence.

[29] It is helpful to reproduce some key passages of *Vilven FC*:

> [111] The essence of what Air Canada pilots do is to fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace.
>
> [112] … In light of the essential features of Messrs. Vilven and Kelly's positions, the appropriate comparator group should have been pilots working for Canadian airlines who fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace.
>
> …
>
> [125] To summarize my findings to this point: 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 paragraph 15(1)(c) of the *Canadian Human Rights Act*.
>
> …
>
> [170] However, as was explained earlier, I am of the view that the Tribunal erred in its identification of the "positions similar" to those occupied by Messrs. Vilven and Kelly. It is pilots working for Canadian airlines flying aircraft of various sizes to domestic and international destinations, through Canadian and foreign airspace, that form the proper comparator group.

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[30] In Thwaites/Adamson, the parties disagreed on how to interpret *Vilven FC*: *Thwaites et al v Air Canada and Air Canada Pilots Association*, 2011 CHRT 11 at paras 20-25 [*Thwaites CHRT*]. The respondents argued that the Tribunal should adopt the Court's formula in paragraphs 112 and 125 to define the comparator group: *Thwaites CHRT* at para 20. The complainants argued that the formula in paragraphs 112 and 125 of *Vilven FC* should not be applied literally, as the test was dictated by the facts of that case: *Ibid*. They argued that the reference to "both" domestic and international destinations in paragraphs 112 and 125 was meant to emphasize the Tribunal's error in limiting the comparator group to airlines that fly only to international destinations, the Court did not intend to adopt a more restrictive definition of the comparator group than the Tribunal, and the omission of a reference to various "types" of aircraft in paragraph 170 of *Vilven FC* made sense because the comparator group would otherwise exclude two of Air Canada's major competitors that fly one type of aircraft, even though their pilots do what Air Canada pilots do: *Thwaites CHRT* at paras 21-23. The Tribunal concluded that the differently-stated test in paragraph 170 should be regarded as inadvertence rather than a restatement of the test, the evidence in the case before it demonstrated that paragraphs 112 and 125 of *Vilven FC* described the essence of what Air Canada pilots do, and the criteria for

determining the appropriate comparator group should be the same: *Thwaites CHRT* at paras 24-25. The Federal Court of Appeal found the Tribunal was entitled to opt for a conjunctive approach and to rely on paragraphs 112 and 125 of *Vilven FC*: *Adamson FCA* at paras 66, 78-83.

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[31] Turning to the arguments in this proceeding, the applicants have not established that the Tribunal's approach was inconsistent with *Vilven FC*. They disagree with the Tribunal's interpretation of *Vilven FC*, but they have not pointed to a reviewable error that would render the decision unreasonable.

[32] The reasoning in *Vilven FC* does not clearly favour the applicants' position and there is no merit to the applicants' assertions that the Tribunal mischaracterized the Court's statements in *Vilven FC* or considered paragraph 125 of *Vilven FC* to the exclusion of other paragraphs. Furthermore, it appears that the applicants did not make arguments about the proper interpretation of *Vilven FC* to the Tribunal, and instead wanted the Tribunal to apply their preferred criteria. At paragraph 30 of the *Factors Ruling*, the Tribunal states:

> 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*.

The applicants have not shown that the Tribunal's characterization of their arguments was inaccurate.

[33] In the *Factors Ruling*, the Tribunal adopted the same approach and the same interpretation of *Vilven FC* as it did in *Thwaites CHRT*. I am not persuaded that the Tribunal committed any error in doing so. The Federal Court of Appeal found that the Tribunal in *Thwaites CHRT* did not act unreasonably or proceed on wrong principles when it applied the *Vilven FC* factors to the facts in a conjunctive manner: *Adamson FCA* at para 78. The applicants have not shown that the Thwaites/Adamson approach is an anomaly. Moreover, they have not shown that they made such an argument to the Tribunal and supported it with authority.

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[34] The Tribunal also did not fetter its discretion. Contrary to the applicants' allegation, the Tribunal did not misconstrue general statements in *Vilven FC* to be a prescriptive standard and then rely on it as the method for defining the comparator group for the Nedelec Group of pilots. The Tribunal expressly accepted the Nedelec Group's submission that the *Vilven FC* factors do not constitute a prescriptive standard or a comprehensive code: *Factors Ruling* at para 31. The Tribunal referenced the Federal Court of Appeal's statements in *Adamson FCA* that: (i) it was not required to blindly follow the *Vilven FC* factors, but *Vilven FC* limited the range of reasonable options in determining the comparator group; and (ii) it was not required to adopt a conjunctive approach to the factors and could apply a subset of them: *Factors Ruling* at paras 20, 39. The Tribunal also recognized, citing *Vavilov* at paragraphs 129 and 131, that administrative decision makers are not bound to follow precedent in the same way as courts: *Factors Ruling* at para 33.

[35] The *Factors Ruling* shows that the Tribunal turned its mind to deciding two questions: (i) whether it should apply the *Vilven FC* factors; and (ii) whether it should apply all of them (*i.e.* a

conjunctive approach). The Tribunal considered the parties' arguments and found that the appropriate test to apply was the one stated in paragraphs 111, 112, and 125 of *Vilven FC*—pilots flying aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace. In the Tribunal's view, these factors represented an effort to identify features of the pilots' work that are relevant to determining the comparator group of pilots in "similar positions" and a focus on objective criteria that differentiate those who hold a pilot's licence or are able to fly similar airplanes; it noted that paragraph 15(1)(c) does not refer to "qualifications": *Factors Ruling* at para 32.

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[36] The Tribunal was not satisfied of a reason to depart from the approach that was held to be reasonable in *Adamson FCA*. It stated (at paragraphs 34-35 of the *Factors Ruling*):

> [34] …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.

[37] The applicants now argue that, among other things: there was no basis for the Tribunal to arrive at the approach in Thwaites/Adamson, since not even one of the comparator airlines in *Vilven FC* conjunctively met every factor; even some Air Canada pilots do not meet all the factors; the Tribunal should have recognized that the comparator group would be defined by commercial attributes of pilots' employers rather than the functional attributes of their jobs; and the Tribunal unreasonably followed pre-*Vavilov* judicial review decisions involving other pilot groups with no consideration for the *Vavilov* factors that are germane to the applicants' human rights and the fact that principles in *Dunsmuir* have been overtaken by *Vavilov*. The applicants have not established they made these arguments to the Tribunal; based on the record before me, it appears they did not.

[38] As will be discussed in more detail in the next section, the Nedelec Group were given an opportunity to present reasons why the Tribunal should follow a different approach to determine the appropriate comparator group in their case. I agree with the respondents that the applicants did not explain how their group differed from other pilot groups in a way that warranted a different approach—as the Tribunal found.

[39] Air Canada submits the applicants believe the framework the Tribunal adopted for determining the normal age of retirement is itself unreasonable, but they have not pointed to anything in the Tribunal's *Final Decision* that is unreasonable. I agree. In its *Final Decision*, the Tribunal noted that the most contentious and significant issue in the proceedings was the methodology it adopted in the *Factors Ruling*. While the applicants do not agree with the methodology, they have not shown that the rationale or outcome of the *Factors Ruling* or the

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Tribunal's application of that ruling to the issues decided in the *Size/Type Ruling* and *Final Decision* lack transparency, intelligibility, or justification. The applicants have not shown that the Tribunal committed any reviewable errors that would render its decisions unreasonable according to the principles of *Vavilov*.

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B. *Were the applicants denied an opportunity adduce evidence and make representations on the core issue, contrary to both subsection 50(1) of the* CHRA *and principles of procedural fairness?*

[40] The applicants submit the Tribunal failed to give them "a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations", as required by subsection 50(1) of the *CHRA* and the principles of procedural fairness.

[41] The applicants say the Tribunal ignored the factual nature of the core question before it, which was to decide the composition of the appropriate comparator group for them, separate and distinct from other pilot groups. They say the Tribunal foreclosed their right to present evidence and cross-examine the respondents' witnesses about the functional aspects of their jobs in comparison to other Canadian airline pilots, what constitutes a "position similar", and which pilots should be included in or excluded from the appropriate comparator group for determining the normal age of retirement. Consequently, the applicants contend they were denied the right to establish a proper factual and evidentiary record that would allow the Tribunal to decide the core issue, and they have been left without a record that would allow the Court to review the Tribunal's decision within a factual and legal matrix that relates to them as a distinct pilot group.

[42] I find the applicants have not established that they were denied full rights under subsection 50(1) of the *CHRA* or the principles of procedural fairness.

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[43] As noted above, the parties' records on judicial review do not include evidence of the record that was before the Tribunal. Apart from what has been recorded in publicly available decisions, the Court does not have other evidence of the procedural history of the applicants' complaints or the submissions that were made to the Tribunal.

[44] Based on Tribunal and court decisions, it is clear that the applicants were given "a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations" and were not denied the right to be heard. The applicants participated in decisions about the process the Tribunal would follow to decide their complaints and they were given opportunities to address what they describe as the core issue—the composition of the comparator group.

[45] The Tribunal solicited the parties' input on procedure at various stages of the inquiry. Relatively early in the proceedings, the parties asked the Tribunal to consider certain questions in a sequential manner. The Tribunal decided it had the authority to do so, noting that its proceedings are to be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow: *CHRA*, s 48.9(1). The parties agreed to be bound by the Tribunal's decisions on the preliminary questions when making arguments on further preliminary questions and at the final hearing: *Nedelec Methodology CHRT* at paras 1-3.

[46] The parties agreed that the Tribunal would first consider what methodology to use to determine the normal age of retirement for the Nedelec Group: *Nedelec Methodology FC* at para 8. At this stage, the parties provided submissions but not evidence, as the Tribunal was deciding a question of law: *Nedelec Methodology FC* at para 9.

[47] The Tribunal then heard from the parties about the next steps. Air Canada and ACPA asked the Tribunal first to decide what test to apply in order to determine which airlines to include in the comparator group. The Nedelec Group disputed this approach. Their position was that the Tribunal needed to hear evidence to determine the test (or factors) that should be applied. The applicants argued that the proposed manner of proceeding would violate their rights to a fair process and to be heard under subsection 50(1) of the *CHRA*: *Factors Ruling* at para 8.

[48] As a result of the disagreement, the Tribunal asked the parties for formal submissions on the appropriate procedure: *Nedelec Factors FC* at para 19. It was not clear to the Tribunal why evidence would be required to determine the applicable test and it asked the parties to respond to the following:

> What test should the Tribunal apply in determining which airlines are to be included in the comparator group for the relevant period? What is the legal basis for your position, whether it is a new test or adopting or modifying the Vilven-Thwaites test? If you are arguing that the Tribunal needs to hear evidence to decide on the applicable test, explain why it is required for the Tribunal to decide on the applicable test. You do not need to submit the evidence now. You do need to provide a summary of the intended evidence, proposed timelines for providing the evidence, and what the form of the evidence would be (affidavit evidence, transcripts, oral testimony). The Tribunal will request evidence if it agrees it is necessary to decide the applicable legal test.

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[49] In response, the applicants argued that appropriate comparator pilot positions were those that were "functionally equivalent, in a broad, general sense (consistent with the SCC jurisprudence dealing with human rights adjudication)" to Air Canada pilots, and that this test was self-evident: *Nedelec Factors FC* at para 20. While the applicants argued it was necessary for the Tribunal to hear evidence to decide what test was appropriate, they did not explain what the evidence would be, apart from stating it would include a representative sample of *viva voce* testimony from members of characteristic groups: *Ibid*. They claimed it was not possible to state how much evidence would be required until Air Canada and ACPA closed their case: *Ibid*.

[50] Air Canada and ACPA argued the appropriate test was "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": *Nedelec Factors FC* at para 21. They argued the test was appropriate for a number of reasons, including that it was consistent with *Vilven FC* and *Adamson FCA*: *Ibid*.

[51] The Tribunal stated that the Nedelec Group provided no authority for their position that evidence was needed to decide on the factors that would define the comparator group; it agreed with the respondents that it was deciding a pure question of law: *Factors Ruling* at para 25. The applicants' submissions included a proviso that they were not waiving their statutory right pursuant to subsection 50(1) of the *CHRA* to be provided a full and ample opportunity to appear at the inquiry and to present evidence and make representations: *Factors Ruling* at para 11. The Tribunal addressed the proviso at paragraph 14, stating, "While the [applicants] appear to suggest that the issue of the appropriate test for determining comparator airlines can continue to

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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."

[52] At the next stage of the proceeding, the applicants were given an opportunity to present evidence and make representations on airlines that met the first two factors, namely operating aircraft of various sizes and types. According to the Tribunal, the applicants made submissions on the comparator factors themselves, which had already been decided, and they argued that size and type are synonymous without identifying the size of each type of aircraft: *Size/Type Ruling* at paras 11-14. The applicants also asserted that different aircraft models were distinct types without supporting authority or evidence: *Size/Type Ruling* at paras 19-22. The Tribunal accepted the respondents' proposed list of airlines. It found that the applicants did not present sufficient evidence or authority to support their claims that it should adopt their interpretation of these factors and how they should be applied: *Size/Type Ruling* at para 7.

[53] The applicants also had an opportunity to challenge information received from the airlines identified in the *Size/Type Ruling*. They stated they were not in a position to disagree with the information. The applicants acknowledged that the outcome of their complaints was inevitable and consented to have the hearing dates cancelled. The Tribunal allowed the parties to file written submissions and reached its decision through an abbreviated process based on the uncontested evidence.

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[54] Consequently, the record demonstrates that the applicants were provided a full opportunity to provide evidence, make representations, and address the issue of the composition of the comparator group.

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[55] With respect to the *Factors Ruling*, the applicants were given the opportunity to address what they contend was the core issue. I agree with ALPA that the Tribunal gave the applicants an opportunity to refute the view that the task was to decide a question of law. The Tribunal invited submissions on the test (or factors) that should be applied to define the comparator group and asked the parties to explain whether they were proposing “a new test or adopting or modifying the Vilven-Thwaites test”. The Tribunal also invited the applicants to explain what evidence they wished to adduce to address the issue, but they were unable to identify or describe the evidence that they would adduce.

[56] After it ruled on the appropriate test, the Tribunal gave the applicants an opportunity to provide evidence and make submissions on the composition of the comparator group before issuing the *Size/Type Ruling* and *Final Decision*.

[57] Essentially, the applicants assert they had an unqualified right to present evidence and make representations at an oral hearing before the Tribunal. They provide no case law in support of this position. In my view, an oral hearing was not required by subsection 50(1) of the *CHRA* or principles of procedural fairness: *Canada (Human Rights Commission) v Canada Post Corp (FC)*, 2004 FC 81 at para 17, aff’d 2004 FCA 363; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 685, 69 DLR (4th) 489; *Baker* at para 33. Subsection 48.9(1) of the *CHRA*

allows proceedings to be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[58] I agree with the respondents that the applicants had the opportunity to address the critical issues in dispute. They agreed to a phased process, had opportunities to present evidence, did not dispute data received from airlines, agreed to cancel the hearing, and agreed that the complaints should be dismissed based on the airline data. The applicants had a full and ample opportunity to appear, present evidence, and make representations in accordance with section 50 of the *CHRA*. There was no breach of procedural fairness.

V. **Conclusion**

[59] For the foregoing reasons, the applicants have not established that the Tribunal's decision was unreasonable or procedurally unfair. Accordingly, the application for judicial review is dismissed.

[60] The parties stated that they were able to reach an agreement on costs in previous proceedings and asked to be afforded a similar opportunity in this case. I am satisfied this is a reasonable way to proceed. If the parties reach an agreement on costs and require a cost order from this Court, they shall provide joint written submissions together with a draft order for the Court's consideration within 10 days of this Judgment. If the parties are unable to agree on costs, they shall submit a proposal and schedule for written cost submissions within 10 days of this Judgment.

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JUDGMENT IN T-1554-23

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. The Court has not ruled on costs. If the parties reach an agreement on costs and require a cost order from this Court, they shall provide joint written submissions together with a draft order for the Court's consideration within 10 days of this Judgment. If the parties are unable to agree on costs, they shall submit a proposal and schedule for cost submissions within 10 days of this Judgment.

"Christine M. Pallotta"

Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1554-23
STYLE OF CAUSE:	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, 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, DAVID ALEXANDER FINDLAY, 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, DAVID ALLAN RAMSAY, HAROLD GEORGE EDWARD THOMAS, MURRAY JAMES KIDD AND WILLIAM AYRE v ERIC WILLIAM ROGERS, ROBERT JAMES MCBRIDE, JOHN CHARLES PINHEIRO, WILLIAM RONALD CLARK AND STEPHEN NORMAN COLLIER AND CANADIAN HUMAN RIGHTS COMMISSION, AIR CANADA, AIR CANADA PILOTS ASSOCIATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 31, 2024
JUDGMENT AND REASONS:	PALLOTTA J.
DATED:	JULY 5, 2024

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