Federal Court  Cour fédérale

Date: 20210302

Docket: T-706-20

Citation: 2021 FC 191

Ottawa, Ontario, March 2, 2021

PRESENT: Mr. Justice Annis

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 MALCOLM MACDONALD, ROBERT WILLIAM JAMES, CAMIL GOEFFROY, 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, RAYMOND ROBERT COOK, 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

Applicants

and

ERIC WILLIAM ROGERS, ROBERT FRANCIS WALSH, ROBERT JAMES MCBRIDE, JOHN CHARLES PINHEIRO, WILLIAM RONALD CLARK AND STEPHEN NORMAN COLLIER, CANADIAN HUMAN RIGHTS COMMISSION, AIR CANADA AND AIR CANADA PILOTS ASSOCIATION

Respondents

JUDGMENT AND REASONS

I. Facts

[1] The Applicants are retired Air Canada pilots who reached the age of 60 between January 1, 2010 and December 15, 2012. For ease of reference, the group of Applicants will be referred to as the "Applicants" or "Nedelec group of pilots" to distinguish them from previous groups of pilots involved in similar proceedings.

[2] Pursuant to the collective agreement negotiated between Air Canada and the Air Canada Pilots Association (ACPA) and the pilots' pension plan applicable at the time, the Nedelec group of pilots were required to retire at the age of 60.

[3] The Nedelec group of pilots claimed that Air Canada and the ACPA engaged in a discriminatory practice and applied a discriminatory policy by requiring them to retire, in violation of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA* or the Act]. The Nedelec group of pilots filed complaints to this effect with the Canadian Human Rights Commission, which consolidated their complaints and referred them to the Canadian Human Rights Tribunal (Tribunal or CHRT) for inquiry.

[4] At the time that the Nedelec group of pilots were required to retire, section 15(1)(c) of the Act provided the following exception to allegations of discriminatory practice:

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;

[5] The application of this provision, and whether mandatory retirement amounts to discrimination under the Act, has been extensively litigated between Air Canada, the ACPA and different groups of pilots who were required to retire during various time periods. The history of this prior ligation can be summarized as follows:

a. The Vilven/Kelly group of pilots: These pilots were required to retire at age 60 in 2003 and 2005. The discrimination complaints filed by these pilots were dismissed as a result of section 15(1)(c) of the Act, as the normal age of retirement at the applicable time was found to have been 60. The final decision concerning this group was rendered by the Federal Court of Appeal in *Air Canada Pilots Association v Kelly*, 2012 FCA 209 [*Kelly* FCA], leave to appeal to SCC refused, 35014 (28 March 2013).

b. The Thwaites/Adamson group of pilots: These pilots were required to retire at age 60 between 2005 and 2009. The discrimination complaints filed by these pilots were dismissed as a result of section 15(1)(c) of the Act, as the normal age of retirement at the applicable time was found to have been 60. The final decision concerning this group was rendered in *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153, leave to appeal to SCC refused, 36630 (10 March 2016).

c. The Bailie group of pilots: These pilots were required to retire at age 60 before January 1, 2010, and their complaints were originally part of the same group as the Nedelec group of pilots. As a result of a motion to dismiss brought by the ACPA, the Tribunal dismissed their discrimination complaints, given that in the Vilven/Kelly and Thwaites/Adamson proceedings, it had been established that, under section 15(1)(c) of the Act, the normal age of retirement for commercial airline pilots in Canada up to December 31, 2009, was 60. The final decision concerning this group was rendered by the Tribunal in *Bailie et al v Air Canada and Air Canada Pilots Association*, 2017 CHRT 22 [*Bailie* CHRT]. This decision was not judicially reviewed.

[6] However, given that there was no factual or evidentiary record before the Tribunal in any proceeding regarding the normal age of retirement from 2010 to 2012, the Tribunal in *Bailie* CHRT agreed to proceed with the complaints of those pilots who reached the age of 60 between January 1, 2010 and December 15, 2012, that is the Nedelec group of pilots.

[7] As such, the parties were provided with an opportunity to argue what was the normal age of retirement between January 1, 2010 and December 15, 2012.

[8] As part of the case management process before the CHRT, the parties agreed to ask the Tribunal to consider certain questions relating to the matter in a sequential manner. The parties all agreed that the following preliminary question would be addressed by the Tribunal:

> What methodology should the tribunal use to determine what is the normal age of retirement for the Air Canada pilots who reached the age of 60 between January 1, 2010 and December 15, 2012?

[9] The parties provided submissions to the Tribunal on the preliminary question. As this was but a purely legal question, the parties did not submit evidence as to what constituted the "normal age of retirement". The sole issue to be determined by the Tribunal was the methodology to be used when applying section 15(1)(c) of the Act.

[10] Parallel to the proceedings on the preliminary question, the Applicants attempted to have the Tribunal revisit the constitutionality of section 15(1)(c) of the Act, which had been addressed by the Federal Court of Appeal in *Kelly* FCA. This challenge was dismissed by the Tribunal in *Nedelec et al v Air Canada and Air Canada Pilots Association*, 2019 CHRT 32. This decision was not judicially reviewed.

[11] On June 5, 2020, the Tribunal rendered its decision on the preliminary question, and concluded that a strict statistical analysis for the determination of the normal age of retirement should be applied to the complaints filed by the Nedelec group of pilots. The Tribunal, applying *stare decisis*, determined that it was proper to follow an earlier decision of the Federal Court in the Vilven/Kelly matter, *Vilven v Air Canada*, 2009 FC 367 at para 169 [*Vilven* FC] which accepted that "the determination of the normal age of retirement requires a statistical analysis of the total number count of relevant positions."

[12] On July 6, 2020, the Applicants sought judicial review of the decision.

II. **Questions in issue**

[13] The Applicants raise the following issues:

1) Did the CHRT err in its decision by refusing to adjudicate or to seriously consider the Applicants' submissions with respect to the alleged obsolescence of the provisions of section 15(1)(c) the *CHRA* in respect of these complaints?

2) Did the Tribunal unnecessarily fetter its decision by improperly assuming that the prior decision of this Court suggesting that a statistical analysis of the comparator pilot data was an appropriate manner for determining the methodology of determining the "normal age of retirement" was binding upon it in the circumstances of these complaints, and is the Tribunal, in a subsequent hearing, therefore foreclosed from exercising its discretion to choose the alternate "normative" methodology?

3) Is the use of the empirical or statistical methodology to determine the "normal age of retirement" consistent with Parliament's legislative intent in enacting the provision? and

4) On whom does the onus lie to establish a defence to the established *prima facie* case of discrimination?

[14] Air Canada states the following issues for consideration:

1) The appropriate standard of review; and
2) The reasonableness of the Tribunal's decision, that is whether it was reasonable for the Tribunal to conclude:
    a) That a strict statistical analysis for the determination of the "normal age of retirement" was to be favoured; and
    b) That section 15(1)(c) of the Act was not obsolete.

[15] The ACPA states only that the issue is whether the CHRT reasonably decided to adopt the "statistical" approach to s. 15(1)(c) of the *CHRA*?

III. **Standard of Review**

[16] In accordance with the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the framework to determine the standard of review is based on the presumption that an impugned decision is reasonable (*ibid* at para 16).

[17] The focus of reasonableness review must be on the decision actually made by the decision maker concerning both the reasoning process and the outcome. The Court should intervene only when it is truly necessary to do so (*ibid* at paras 17, 84–86). The reviewing court must determine whether the decision "is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*ibid* at paras 85, 99ff). A reasonable decision is justified in light of the particular legal and factual constraints that bear on the decision — "it is not enough for the outcome of a decision to be … *justifiable*[,] the decision must also be *justified*" (*ibid* at paras 85–86). The reviewing court must determine whether the decision "bears the hallmarks of reasonableness — justification,

transparency and intelligibility" (*ibid* at para 99). Finally, the onus is on the party who contests the decision to demonstrate that it is not reasonable (*ibid* at para 100).

[18] Where a reviewing court conducts reasonableness review for a question of statutory interpretation, the court "does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been" (*ibid* at para 116). The reviewing court simply ensures that the administrative decision maker has interpreted the contested provision in a manner consistent with the text, context and purpose, that is, in line with the modern principles of statutory interpretation (*ibid* at para 121).

[19] Further, while the CHRT is not bound by its prior decisions in the same way that it must follow decisions of the courts above it, a reviewing court should be concerned with the general consistency of administrative decisions. As the Supreme Court of Canada cautioned in *Vavilov* at para 9:

> Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

IV. **Analysis**

A. *CHRT's decision*

[20] The short decisional component of the Tribunal's reasons offered two lines of justification in rejecting the Applicants' argument to adopt a "Broad General Interpretation" methodology to determine the normal age of retirement in the place of the "Strict Statistical

Analysis" interpretation of section 15(1)(c) that had been applied in past similar Tribunal decisions.

[21] First, it accepted the Respondents' submission that the Federal Court in *Vilven* had affirmed the statistical methodology to determine the normal age of retirement. Consequently, the Tribunal considered itself bound the principle of *stare decisis*, particularly as the Applicants never argued that the Tribunal was not required to adhere to the principle. Second, the Tribunal noted that the factors that might suggest a departure from the statistical model were not put before the Tribunal by the Applicants.

B. *Stare decisis and application of section 15(1)(c) of the Act*

1) *Stare decisis*

[22] The CHRT pointed out that at paragraph 169 in the *Vilven* decision, the Federal 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" [emphasis added].

[23] The Tribunal relied on the principle that *stare decisis* should only be deviated from in the clearest of cases when there are competing factors that differentiate the matter before the Tribunal from the jurisprudence of the Federal Court. In this regard, it referred to its previous decision in 2019 CHRT 32, wherein it quoted from *R v Comeau*, 2018 SCC 15 at para 31, among other cases, for the principle that "[n]ot only is the exception narrow — the evidence must

‘fundamentally shif[t] the parameters of the debate’” to deviate from the principle of *stare decisis*.

[24] The Tribunal concluded there were not competing factors in this matter. The Applicants had stressed the absence of comparator positions as the watershed competing factor. However, as indicated above, the Court in *Vilven* FC confirmed that the statistical analysis methodology was based on the total number count of relevant positions. The statistical analysis applies with or without comparators, even if the Air Canada pilots make up the total count, so long as the age of retirement of everyone in similar positions to the Air Canada pilots is included in the total count.

[25] The Applicants argue at para 38 of its submissions that “[*s*]*tare decisis* applies to determinations of law, not to the processes used to arrive at those determinations.” No law is cited for the proposition that an interpretation that provides for a rule providing for a methodology of determination is not subject to the principles of *stare decisis*. The concept of *stare decisis* requires that rules formulated by judges in earlier decisions should be similarly applied in later cases bearing similar facts.

[26] The rule propounded in *Vilven* FC in interpreting section 15(1)(c) is that a normal age of retirement should be based on a statistical average of the total count of the ages or retirement of everyone in similar positions to the Air Canada pilots. The Tribunal implicitly concluded that the absence of comparators is not evidence that fundamentally shifts the parameters of the debate such that the average should not be based on the total count of relevant positions. The Court concludes that this is a reasonable decision.

[27] There is no sense of injustice by the fact that all are treated in the same manner as the other pilots. This goes to consistency of administration decisions and is in line with the Supreme Court of Canada's caution in *Vavilov* at para 9.

2) Whether section 15(1)(c) of the Act was obsolete in application

[28] The Applicants never advanced arguments demonstrating that section 15(1)(c) was obsolete. Instead, they argued that the CHRT failed to seriously consider their submissions with regard to the alleged obsolescence of the provision.

[29] They merely cite passages from Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis Canada, 2014) at 185 regarding statutes becoming obsolete either by application or by purpose or norm. Their submissions at paragraphs 35 and 36 are as follows, although it is to be noted that the Court concludes that only the "obsolete application" issue was the Applicants' contention:

> 35. As Professor Ruth Sullivan states … statutes may become obsolete in a number of different ways:
>
> > (1) Obsolete application. Although the legislative text remains in force, because of external change there are no longer any facts to which it can apply. Legislation prohibiting the capture or destruction of a species that has become extinct or regulating the treatment of a disease that has been eradicated illustrate this form of obsolescence.
> >
> > (2) Obsolete purpose or norm. Although the legislative text remains in force, its purpose or the assumptions or values it reflects are no longer accurate or appropriate and its continuing application may produce undesirable consequences. A statute that discriminated against illegitimate children or assumed that nurses are women would be examples.

> §6.44 ... If no facts exist within the ambit of a legislative provision, obviously it cannot apply.
>
> [Emphasis added]
>
> 36. In summary on this issue, the Tribunal had an obligation to seriously consider and decide, based upon the Applicants' submissions to it, whether Paragraph 15(1)(c) was still operable in respect of the Complaints before it, given the absence of mandatory retirement for pilots at any other airline in Canada, and necessarily, the impossibility of determining "normal age of retirement" for pilots forced into retirement at any specific age, pursuant to the provisions of the Paragraph. Its failure to do so rendered its decision unreasonable.

[30] Although not argued, it seems clear that the Applicants would contend that the total absence of comparator pilots to Air Canada pilots renders the statistical methodology obsolete. However, the Applicants did not pursue the argument that obsolescence represents a competing factor that differentiates this matter before the Tribunal from the jurisprudence of the Federal Court for the purposes of obviating the application of the *stare decisis* principle.

[31] This was the point made by the CHTR, that the departure from *stare decisis* was not argued by the Applicants. If not raised as an issue, it is difficult to criticize the Tribunal for failing to consider the question. Moreover, if not overcoming the first obstacle presented by the application of the principle of *stare decisis*, the Applicants' other submissions were similarly extinguished.

[32] The Court will nonetheless, respond to the Applicants' presumed "obsolete application" argument based on the premise that there were no comparator pilots left, thereby providing the basis to deviate from the principle of *stare decisis*. With respect however, it is not clear how

anything has changed by the fact that comparator pilots have disappeared that would allow the Tribunal to deviate from adopting the statistical methodology sanctioned by *Vilven* FC. The Court agrees with the Tribunal's conclusion, at para 33 of its reasons, that "[i]t cannot be said that there were no longer any facts to which paragraph 15(1)(c) could apply."

[33] The previous decisions applying the statistical analysis were ultimately determined by the dominant number of Air Canada pilots in the total number count of relevant positions, i.e. the overall representative group of employees occupying similar positions. Their numbers in combination with a small number of comparator pilots who retired at 60 years of age was sufficient for it to be the normal age of retirement pursuant to the Act. Nothing has changed in the application of a methodology based upon the total count of relevant positions, except that members of the comparator pilots group have been dropping from those in the similar past cases.

[34] The methodology that applies to implement the provision is not obsolete if based on the total number of relevant positions. The methodology continues to be employed in the same fashion as in the past, with the same result that the large number of Air Canada pilots ultimately has an overriding effect on the normal age of retirement for all pilots in similar positions.

[35] This is reinforced by the wording of the provision. It does not suggest that comparator positions need to exist for different employers in order for the legislation to operate. The provision operates at the level of the individual. This would include individuals under the same retirement plan, i.e. pilots of Air Canada. So long as the mandatory retirement age of an individual pilot is not lower than the normal age of retirement for other individual pilots of Air

Canada, there is no discrimination. No employee of Air Canada can claim that their age of retirement is lower than the normal age of any other individual pilot of Air Canada and thus, a victim of discrimination.

[36] Moreover, the Applicants advanced a similar argument in *Vilven* FC that because Air Canada's numbers distorted the norm, there was no appropriate comparator group. The Court described their submission at paragraphs 97 and 98, with its reasoning rejecting the argument at paragraphs 171–72 and 174, as follows:

> [97] The applicants further submit that even if the comparator group should properly be "Canadian pilots holding airline transport licenses", it would still be inappropriate to use statistical information with respect to retirement ages for Canadian airline pilots. This is because Air Canada plays such a dominant role within the Canadian airline industry. The high proportion of Canadian pilots flying for Air Canada means that the company would effectively set the industry norm.
>
> [98] In these circumstances, the applicants submit that there is no appropriate comparator group in this case. As a consequence, there can be no "normal age of retirement" for airline pilots, with the result that the defence under paragraph 15(1)(c) of the *Canadian Human Rights Act* should not be available to the respondents.
>
> …
>
> [171] I also agree with the Tribunal's observation that there are problems associated with using Canadian data for comparison purposes. Citing the Tribunal decision in *Campbell*, the Tribunal noted that because of Air Canada's dominant position within the Canadian airline industry, a comparison of pilot positions within Canada would result in Air Canada setting the industry norm. This would allow Air Canada to effectively determine the 'normal age of retirement' for the purposes of paragraph 15(1)(c) of the Act.
>
> [172] What the Tribunal did not mention was that the Tribunal in *Campbell* nevertheless went on to use the available Canadian data, noting that its concern with respect to the effect of Air Canada's industry dominance was somewhat tempered by the fact that the mandatory retirement age had been negotiated between Air Canada

> and Mr. Campbell's union. ACPA argues that this is also the case here, and that the retirement age in issue in this case was arrived at through negotiation between Air Canada and a very strong union.
>
> …
>
> [174] Therefore, despite the errors identified above, the Tribunal's conclusion that 60 was the normal age of retirement for employees in positions similar to those occupied by Messrs. Vilven and Kelly prior to their forced retirements from Air Canada was one that fell within the range of possible acceptable outcomes which are defensible in light of the facts and the law.

[37] Accordingly, there is no basis to consider that the absence of comparator pilots in similar positions would render section 15(1)(c) obsolete, or that the Tribunal was not required to apply the same methodology in similar circumstances to this matter in accordance with the principles of *stare decisis*.

C. *The failure to provide factors or a factual record in support of a new interpretation of section 15(1)(c) that would support a different methodology than the statistical approach in* Vilven *FC*

[38] The preliminary question placed before the CHRT stated "[w]hat methodology should the Tribunal use to determine what is the normal age of retirement" [emphasis added]. It is an issue of choice between allegedly competing methodologies. The Applicants failed to provide any reasonable submission that would allow the Tribunal to exercise its discretion to choose an alternative methodology than that used in previous similar cases.

[39] The Tribunal pointed out the absence of record or factors that would assist in assessing the appropriateness of an alternative methodology at paragraphs 32 and 54 of its reasons:

> [32] The flaw in the Coalition Complainants' argument is the lack of factual record before the Tribunal. In order for the Tribunal to come to any sort of conclusion about the normal age of retirement for a profession, it needs to have facts before it. This highly contentious matter is not one for which the Tribunal may take "judicial notice" and come to a conclusion in the absence of facts.
> …
>
> [54] Similarly, the factors that might suggest a departure from *stare decision* were not put before the Tribunal[.]
>
> [Emphasis added]

[40] There was no fettering of the Tribunal's determination, as alleged by the Applicants, when it failed to supplement their submissions in order to consider an alternative methodology. The failure was that of the Applicants in not making a case for their methodology, inasmuch as they presented no methodology or means to comprehend what it would entail.

[41] Nor is there any foundation for the Applicants' submission that the onus lies on the Respondents to establish a defence to an established *prima facie* case of discrimination. The Applicants advanced this submission apparently as an attempt to justify their own failure to provide evidence or a description of their normative methodology to replace the statistical model.

[42] The Respondents did not bear the onus where the central issue was one of choice between competing methodologies. The party advancing a fact or legal argument has the onus to prove it. The Respondents could readily rely on a methodology thrice applied, and upheld by the Courts. The evidentiary burden to present an alternative methodology, including its factors and the nature of relevant facts to prove its adherence to section 15(1)(c) to determine the normal age of retirement, rested with the Applicants. The Respondents' position based on the statistical

methodology is known and was understood to be that proposed to determine the normal age of retirement. The Respondents have made out what could be described as a *prima facie* case that, without an answer by the Applicants, ties the Tribunal's hands and determines the outcome.

[43] It is also no answer to argue that the Tribunal recognized that the fact situation would be one where there were no comparator pilots in positions similar to those of the Applicants. It was still incumbent on them to make a case supporting an alternative methodology, describing the factors and type of facts that would be relevant and consistent with a viable interpretation of section 15(1)(c) of the Act. Without this information, even made as submissions, the Tribunal was required to choose the statistical methodology as the only one presented to it.

D. *Is the empirical or statistical methodology to determine the "normal age of retirement" consistent with Parliament's legislative intent in enacting the provision?*

[44] The Applicants submit that the statistical methodology is inconsistent with the rule of law's requirement for certainty and avoidance of arbitrariness. The CHRT did not respond to this submission on the basis that its choice regarding the preferred methodology had been determined by the Federal Court in *Vilven*, which was binding in accordance with the principles of *stare decisis*. The Court nonetheless will consider the submission, which it rejects for the reasons that follow.

[45] The Applicants attempt to support a claim that the statistical methodology is void for uncertainty and arbitrariness with three lines of argument. They first cite passages from *Vilven* FC at para 313ff that were critical to a situation where a single airline, solely by being the

dominant carrier should be able to determine the normal age retirement for the entire profession in the industry. However, these comments were made in the context of the Court's rejected conclusion that section 15(1)(c) of the *CHRA* violated subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, not in respect of whether the provision was inconsistent with Parliament's intention. Otherwise, the Federal Court in *Vilven* was satisfied that the skewing of the norm of the age of retirement was not inconsistent with the intention of Parliament in enacting section 15(1)(c) of the Act, as evident from the earlier passages cited above.

[46] Second, the Applicants rely on extrinsic evidence as an aid to interpret Parliament's intention. The Assistant Deputy Minister (ADM), Policy and Planning of the Department of Justice attempted to provide some meaning to what is obviously an ambiguous provision when addressing the Standing Committee on Justice and Legal Affairs at the time of its enactment, then enumerated as clause 14(c) (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 30th Parl, 2nd Sess, No 6 (10 March 1977) at 21 (Barry Strayer)). The passage, with the Applicants' emphasis, is as follows:

> What Clause 14(c) means is that as long as the individual is obliged to retire at the same age as <u>everyone else</u> in his kind of employment, then it would not be treated as a discriminatory act to require him to retire.

[47] The Court agrees that the meaning of the provision is intended to describe a manner whereby ages of retirement in an industry may be determined to be discriminatory. However, with respect and recognizing the predictive nature of the statement, insofar as the statement describes a methodology whereby that determination is made, it appears to be in error.

[48] First, it is obvious that the provision was not intended to determine discriminatory retirement circumstances based on whether individuals were obliged to retire at the same age as everyone else. With varying ages of retirement in an industry, the normal age must be a threshold of one age to describe those below the threshold as being victims of a discriminatory retirement regime. Second, it is not helpful to describe the relatively narrow category of individuals in similar positions, as those more broadly encompassed by those being "in his kind of employment".

[49] The Applicants seized on both misstatements in support of, surprisingly, their own statistical methodology as an interpretation of the provision. They submitted that the data set should be based upon all members in the airline industry subject to mandatory retirement. They argue at para 44 of their submissions that "the use of a statistical analysis of the relative number of individuals in 'his kind of employment,' rather than 'everyone else in his kind of employment' (i.e. 100 % of those upon whom mandatory retirement is imposed), leads to a fundamental uncertainty in the determination of the scope of the application of the provision" [emphasis omitted and added].

[50] As the Court analyzes the Applicants' submission, they have changed "relevant" referred to in *Vilven* FC at para 169, which referred to those individuals in similar positions, to "relative" — which is of no assistance in interpreting section 15(1)(c) of the Act. More significantly, the Applicants' substitute the ADM's statement "everyone else in his kind of employment", for those in similar positions. Apparently, by this submission, having to determine what individuals are in similar positions introduces uncertainty and arbitrariness into the provision, in comparison

with simply making the data set for the statistical analysis that of every licenced pilot subject to mandatory retirement. It is not clear why this would be so, and no jurisprudence was offered to assist the Court in understanding the submission.

[51] Significantly, the Applicants ignore the binding conclusion in *Vilven* FC at paragraph 169 that "employees working in positions similar" to that occupied by a complainant is preferred as "it would be unreasonable for a very small airline to be weighted on an equal footing with a large airline such as Air Canada, in determining the industry norm". Instead, the Court stated at paragraph 170 that "[i]t 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."

[52] Second, the Court also rejects the Applicants' traffic analogy, at para 48 of their submissions, to demonstrate that the term "normal" would be uncertain for a highway statute making travel illegal "at a speed higher than the 'normal speed' of vehicles." This example fails to appreciate that legislation must govern or prohibit all forms of conduct. This necessitates differing language, including its specificity, to reflect the nature of the conduct to which it is intended to apply.

[53] The prohibited conduct of traffic speeding is intended to proscribe a single form of conduct that requires a narrow and strict description of the prohibition. Conversely, section 15(1)(a) of the *CHRA* is intended to provide a legal standard to define discriminatory conduct, itself a multifarious concept, applied in a wide variety of employment circumstances of Canadian

employers under federal jurisdiction. The Applicants' argument is akin to a submission that the foreseeability of "the reasonable person" as a standard of negligent behaviour is void for uncertainty and the rule of law, because it is applied broadly to all manner of prejudicial human carelessness.

[54] Third, the fact that legal standards may vary with circumstances, or are difficult to apply, does not mean that they are not what Parliament intended. In essence, this was the Applicants' remaining submission that the normal age of retirement is, as they describe at para 49 of their submissions, "subject to the vicissitudes of the market."

V. **Conclusion**

[55] The Court concludes that the CHRT's decision is justifiable and justified based on an internally coherent and rational chain of analysis with the outcome being reasonable in relation to the facts and law that constrain the Tribunal, while bearing the hallmarks of reasonableness — justification, transparency and intelligibility. Accordingly, the application for judicial review is dismissed.

[56] All parties requested costs be awarded following the Court's decision. The Court awards costs to the Respondents, taking into consideration that the necessity for separate submissions by the Respondents is not apparent.

[57] If the parties cannot agree on the costs payable by the Applicants to the Respondents within 15 days of the issuance of this decision, the Respondents are to provide the Court with

submissions not exceeding two pages supporting an award of costs no later than one week afterwards, with the Applicants to respond no later than one week later.

JUDGMENT in T-706-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs are awarded to the Respondents in amounts to be determined.

"Peter B. Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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