Federal Court of Appeal | Cour d'appel fédérale

Date: 20150626

Dockets: A-105-14
A-111-14
A-112-14

Citation: 2015 FCA 153

CORAM: **PELLETIER J.A.**
TRUDEL J.A.
BOIVIN J.A.

BETWEEN:

ROBERT ADAMSON ET AL.
AND
AIR CANADA
AND
AIR CANADA PILOTS ASSOCIATION

Appellants

and

CANADIAN HUMAN RIGHTS COMMISSION
AND
DONALD PAXTON

Respondents

Heard at Ottawa, Ontario, on January 20, 2015.

Judgment delivered at Ottawa, Ontario, on June 26, 2015.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: PELLETIER J.A.
BOIVIN J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150626

Dockets: A-105-14
A-111-14
A-112-14

Citation: 2015 FCA 153

CORAM: **PELLETIER J.A.**
TRUDEL J.A.
BOIVIN J.A.

BETWEEN:

ROBERT ADAMSON ET AL.
AND
AIR CANADA
AND
AIR CANADA PILOTS ASSOCIATION

Appellants

and

CANADIAN HUMAN RIGHTS COMMISSION
AND
DONALD PAXTON

Respondents

REASONS FOR JUDGMENT

TRUDEL J.A.

I. Overview

[1] The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act), proscribes discrimination on the basis of an individual's age. Under section 7 of the Act, it is a discriminatory practice "to refuse to employ or continue to employ any individual" on the basis of a prohibited ground of discrimination, including age, unless the employer can successfully raise one of the defences available under section 15 of the Act. At the time the complaints at issue in these appeals were filed, an employer could attempt to demonstrate, for example, that a mandatory retirement rule (MRR) was based on a *bona fide* occupational requirement (BFOR) and that without the MRR, accommodation of the needs of the affected individuals would impose undue hardship on the employer, "considering health, safety and cost" (paragraph 15(1)(*a*) and subsection 15(2) of the Act). Alternatively, an employer could try to show that "an individual's employment [was] terminated because that individual [had] reached the normal age of retirement for employees working in positions similar to the position of that individual" (paragraph 15(1)(*c*) of the Act). Paragraph 15(1)(*c*) of the Act was repealed in 2011. The relevant sections of the Act are appended to these reasons (see Appendix I).

[2] Age as a prohibited ground of discrimination and these two defences—the BFOR and the normal age of retirement—are at issue in these consolidated appeals of a judgment of the Federal Court by Annis J. (Judge), issued on January 27, 2014 (2014 FC 83, [2014] F.C.J. No. 82) (Judgment) along with a 435-paragraph set of reasons (Reasons). By this Judgment, the Judge disposed of five applications for judicial review (three of these five applications are relevant for

the purposes of these consolidated appeals - T-1428-11, T-1453-11 and T-1463-11) of a decision of the Canadian Human Rights Tribunal (Tribunal), which had dismissed a group of complaints made under the Act.

[3] The Tribunal's decision dated, August 10, 2011, is indexed as 2011 CHRT 11, [2011] C.H.R.D. No. 11.

[4] The complainants are all past members of the Air Canada Pilots Association (ACPA) and former employees of Air Canada who were forced to retire at age 60 due to the MRR in the collective agreement between Air Canada and the ACPA. They brought complaints against both organizations, alleging that the MRR constituted a discriminatory practice under the Act.

[5] The Tribunal found that the MRR constituted *prima facie* discrimination. It rejected the organizations' BFOR defences under paragraph 15(1)(*a*) of the Act. However, it accepted Air Canada's defence under paragraph 15(1)(*c*), concluding that age 60 was the normal age of retirement for pilots in Canada. As a result, the complaints were dismissed.

[6] The three parties each applied for judicial review of a portion of the Tribunal's decision.

[7] In the Federal Court, the complainants successfully challenged the Tribunal's finding on the normal age of retirement (docket file number T-1428-11). That part of the Tribunal's decision was set aside and the issue remitted to it for re-determination in accordance with the Judge's Reasons and directions.

[8] Air Canada (docket file number T-1453-11) and the ACPA (docket file number T-1463-11) both took exception to the Tribunal's conclusion that neither had proven a BFOR under paragraph 15(1)(*a*) of the Act.

[9] The Judge dismissed Air Canada's application but allowed the ACPA's application. As a result, this issue was also remitted to the Tribunal with specific directions as to how to re-determine the validity of the ACPA's BFOR defence.

[10] The parties have each appealed to our Court from the Judge's Judgment.

[11] The complainants submit that the Judge should not have granted the ACPA's application for judicial review and should have instead upheld the Tribunal's conclusion that the ACPA could not rely on paragraph 15(1)(*a*) of the Act. They add that the Judge should not have dealt with the issue of *prima facie* discrimination and, in any event, was bound by previous jurisprudence on this matter (appeal A-105-14, related to T-1463-11).

[12] For its part, Air Canada submits that the Judge erred in allowing the complainants' application for judicial review on the normal age of retirement; further he ought to have accepted its BFOR defence under paragraph 15(1)(*a*) of the Act (appeal A-111-14, related to T-1428-11 and T-1453-11).

[13] The ACPA also submits that the Judge should not have granted the complainants' application for judicial review on the normal age of retirement (appeal A-112-14, related to T-1428-11).

[14] Finally, the Canadian Human Rights Commission (Commission), which appeared both before the Tribunal and the Federal Court, argues that the Judge properly set aside the Tribunal's finding on the normal age of retirement but erred in allowing the application with respect to the ACPA's BFOR defence and in adding a requirement that complainants under the Act prove "substantive discrimination".

[15] For the reasons that follow, I conclude that the Judge erred in substituting his own opinion for that of the Tribunal on the normal age of retirement. Therefore, I would allow the appeals of Air Canada and the ACPA on that issue.

[16] The record reasonably supports the Tribunal's finding at paragraph 181 of its decision that "… for each of the years 2005-2009, the majority of pilots working for Canadian airlines, including Air Canada, in similar positions to that of the [c]omplainants, retire[d] by the age of 60."

[17] As a result of my conclusion, I would not deal with the parties' submissions regarding paragraph 15(1)(*a*) of the Act, *i.e.*, the BFOR defences. Hence, I would dismiss the complainants' appeal in file A-105-14. I would allow the appeals brought by Air Canada and the ACPA in files A-111-14 and A-112-14.

[18] Finally, I would accept the Commission's invitation to comment on the part of the Judge's Reasons and Judgment that deal with the issue of *prima facie* discrimination. To this end, the Judgment is appended to these reasons as Appendix II.

II. Facts and Judicial History

[19] The facts of this case are straightforward. The same cannot be said for its procedural history. As mentioned above, the complainants (or the Adamson Group) are all pilots previously employed by Air Canada and who were members of the ACPA. The collective agreement between the two required that pilots retire at age 60. The complainants reached this milestone at various dates between 2005 and 2009. They brought complaints against Air Canada and the ACPA alleging discrimination contrary to sections 7 and 10 of the Act (also reproduced at Appendix I). The Adamson Group is part of a larger group of current and former Air Canada pilots called the "Fly Past 60 Coalition" who have challenged Air Canada's MRR.

[20] The first litigation on the MRR involved the complaints of two Air Canada pilots, George Vilven and Robert Neil Kelly, who were forced to retire at 60. This matter was finally resolved by our Court's decision cited as *Air Canada Pilots Association v. Kelly*, 2012 FCA 209, [2013] 1 F.C.R. 308 [*Vilven FCA*], which declared that paragraph 15(1)(*c*) of the Act was constitutionally valid. Given the Federal Court's earlier judgment in *Vilven v. Air Canada*, 2009 FC 367, [2010] 2 F.C.R. 189 [*Vilven FC*] upholding the Tribunal's finding that 60 was the normal age of retirement for pilots and the fact that the complaints of Messrs. Kelly and Vilven were caught by paragraph 15(1)(*c*), the Tribunal was directed to dismiss their complaints. The

Tribunal's decision, where it made the finding of the normal age of retirement, is cited as *Vilven v. Air Canada*, 2007 CHRT 36, [2007] C.H.R.D. No. 36.

[21] In addition, the complaints of yet another group of retired pilots have been referred to the Tribunal (the Bailie Group). In February 2012, the Tribunal granted the ACPA's motion to adjourn the proceedings in that matter until the Adamson Group's litigation has concluded (*Bailie et al. v. Air Canada and Air Canada Pilots Association*), 2012 CHRT 6, [2012] C.H.R.D. No. 6).

[22] Finally, I should note that the MRR has been eliminated from the current collective agreement between Air Canada and the ACPA. This change was obviously made in response to Parliament's repeal of paragraph 15(1)(*c*) of the Act through section 166 of the *Keeping Canada's Economy and Jobs Growing Act*, S.C. 2011, c. 24.

[23] Counsel for the complainants admits that neither this legislative amendment nor a favourable judgment from this Court could entitle the members of the Adamson Group to reinstatement, as none of them could go back to work as an Air Canada pilot. Indeed, the complainants retired and are now over 65 years of age. In accordance with international norms applicable to Air Canada, 65 is the maximum age for pilots-in-command. Moreover, if one member of the multi-pilot flight crew is over 60, the other must be under 60 (see Annex 1 to the *Chicago Convention on International Civil Aviation*, Tenth Edition, July 2006, art. 2.1.10, entitled "Limitation of privileges of pilots who have attained their 60th birthday and curtailment of privileges of pilots who have attained their 65th birthday").

[24] Thus, from a practical point of view, the Adamson Group states that a judgment from this Court upholding the Judge's ruling would possibly pave the way for an action in damages against Air Canada and the ACPA.

III. The Issues

[25] In view of my proposed disposition of these appeals, the relevant issues are:

1. What is the appropriate appellate standard of review?
2. Did the Judge choose and apply the appropriate standard of review when discussing the Tribunal's conclusion on the normal age of retirement?
3. Did the Tribunal err in concluding that age 60 was the normal age of retirement for pilots in Canada during the years 2005 to 2009?

[26] My comments on part of the Judge's Reasons and Judgment will appear at section 4 of my analysis. I will discuss the following:

- The Judge's consideration of the question of *prima facie* discrimination
- The Judge's modification of the three-part test developed by the Supreme Court of Canada for determining if a *prima facie* discriminatory practice constitutes a BFOR

IV. Analysis

1. The Standard of Review

[27] On appeal from a Federal Court judgment on applications for judicial review, our Court must determine whether the Judge identified the proper standard of review and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 45 [*Agraira*]; *Servicemaster Company v. 385229 Ontario Ltd. (Masterclean Service Company)*, 2015 FCA 114, [2015] F.C.J. No. 615 at paragraph 17).

[28] Stated differently, it means that we are stepping into the shoes of the Federal Court such that our focus is, in effect, on the Tribunal's decision (*Agraira* at paragraph 46, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 at paragraph 247).

[29] The standard of review applicable to the Tribunal's identification of the appropriate comparator group for determining the normal age of retirement is reasonableness. The Judge so held at paragraph 80 of his Reasons without further explanation.

[30] In my view, this issue essentially involves the Tribunal's interpretation of its home statute and the application of paragraph 15(1)(*c*) in the context of the complaints. Both of these considerations weigh heavily in favour of a reasonableness review. The Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 53-54 [*Dunsmuir*] held that reasonableness is the proper standard where a tribunal is dealing with a question "where the legal and factual issues are intertwined" or when it is interpreting a statute "closely connected to its function, with which it will have particular familiarity" (for a more recent application of this principle, see *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 at paragraph 36; also *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654). Similarly, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at paragraph 26, it held that the Tribunal's interpretation of a provision of the Act was owed deference. Accordingly, the Tribunal's determination of the proper comparator group for calculating the normal age of retirement, as well as its overall conclusion on this issue, are owed deference on review.

[31] I disagree with the complainants' submission that correctness is the appropriate standard. They argue that since the Tribunal was required to follow the directions of Mactavish J. from *Vilven FC*, the rule of *stare decisis* applies and the Tribunal's decision must be reviewed on a correctness standard. The complainants point to our Court's decision in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53, [2003] 3 F.C.R. 529 [*Superior Propane*] as support for this proposition. 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.* That decision should not be understood as mandating a correctness standard of review but rather as limiting the range of reasonable options open to the Tribunal when crafting the comparator group under paragraph 15(1)(*c*).

[32] I agree with the Commission's argument that existing jurisprudence on the proper comparator groups for Canadian pilots "affects the reasonability of the [Tribunal's] decision, not the standard under which it is reviewed" (Commission's memorandum of fact and law at paragraph 24). The Supreme Court in *Dunsmuir* held that reasonableness relates to both "the existence of justification, transparency and intelligibility within the decision-making process" and whether "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at paragraph 47). Accordingly, *Vilven FC*, at best,

constrains both the Tribunal's reasoning (*e.g.*, it could not reasonably avoid mention of the decision altogether) and the range of acceptable outcomes.

[33] In summary, then, did the Judge choose the proper standard of review? Yes. Did he apply it correctly? No. With respect, the Judge rather substituted his own opinion for that of the Tribunal. He imposed his own characterization of the factors enunciated in *Vilven FC* and applied them to the evidence to come to his own conclusion.

2. Did the Judge properly apply the reasonableness standard to the Tribunal's assessment of the normal age of retirement?

2.1 Paragraph 15(1)(*c*) *of the Act: the normal age of retirement*

[34] The Judge discusses the normal age of retirement from paragraph 86 to paragraph 132 of his Reasons. The Tribunal does so at paragraph 4 through to 182 of its decision. They agree on the basic interpretation and operation of paragraph 15(1)(*c*) of the Act.

[35] Paragraph 15(1)(*c*) operates as a defence and amounts to a limited exception to discrimination based on age when there is an industry practice regarding retirement age (see *Vilven FCA* at paragraphs 51-52). For ease of reference, I reproduce here paragraph 15(1)(*c*):

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;

[36] In practice, paragraph 15(1)(*c*) requires that the complainant establish a *prima facie* case of discrimination. Once done, the burden shifts to the employer to justify the discrimination on the basis of that provision, which mandates a comparison between the impugned standard and the normal age of retirement for employees working in positions similar to the complainant.

[37] As a result, the tribunal is required to first identify a comparator group consisting of those workers who hold similar positions. Next, the tribunal must calculate the normal age of retirement for the comparator group and compare it to the MRR. If the normal age of retirement for this group is equal to or less than the MRR, the employer has established the defence under paragraph 15(1)(*c*).

[38] Here, the Tribunal found that Air Canada had met its burden and dismissed the complaints.

2.2 The Judge's approach to the normal age of retirement issue

[39] After reproducing paragraph 15(1)(*c*) of the Act, the Judge began his discussion of the normal age of retirement by stating that the interpretation of the *Vilven FC* test was the central issue before the Tribunal. When correctly characterized, this test determined whether Air Canada could rely on this provision (Reasons at paragraph 88). I do not read *Vilven FC* as determining a test; from now on I shall refer to the *Vilven FC* factors.

[40] This said, the Judge then turned immediately to *Vilven FC* in search of its true meaning (Reasons at paragraphs 89 and following).

[41] In *Vilven FC*, the Federal Court identified the correct comparator group at paragraphs 111, 112, 125 and 170 of its reasons. Their relevant parts read as follows (emphasis added):

> [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] … 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.

[42] At the hearing of these appeals, as they had done below, the parties expressed their respective views as to which paragraph best summarizes the Federal Court's finding in *Vilven FC* with respect to the proper comparator group.

[43] All of the parties accept that the activities of other Canadian airline pilots must be examined on the basis of the factors identified in *Vilven FC*. These factors are:

- Flying domestically
- Flying internationally
- Transporting passengers
- Flying varying sizes of aircraft
- Flying varying types of aircraft

[44] The parties disagree sharply over which factors are paramount and, most importantly, whether these factors are to be read conjunctively, as decided by the Tribunal, or disjunctively, as found by the Judge. More particularly, they ask whether the word "both", which appears at paragraphs 112 and 125 of *Vilven FC* to qualify the expression "to domestic and international destinations", was voluntarily or accidentally dropped from paragraph 170 (I note that the word is also found at paragraph 111). For the Judge, the presence or absence of the word "both" is significant. A conjunctive formulation will exclude airlines which do not exhibit all of the factors taken from *Vilven FC* (Reasons at paragraph 93) while looking at the same factors disjunctively allows for the inclusion of pilots of any airline exhibiting any single factor from the above-mentioned list.

[45] The Judge was of the view that the Tribunal's conjunctive reading of the *Vilven FC* factors resulted in the elimination of "Air Canada's major competitors on a test meant to compare airlines based on the similarity of their pilots' functions and duties" (Reasons at paragraph 99). As a result, airlines considered in *Vilven FC*, namely the Canadian airlines Jazz, Air Transat, Skyservice, CanJet and WestJet, were excluded by the Tribunal when it crafted its comparator group.

[46] For the Judge, such an outcome was "patently unreasonable" and resulted from the application of wrong principles. Thus, it justified setting aside the Tribunal's decision. The remainder of the Judge's discussion would seem to be a closer examination of the Tribunal's reasons for the purpose of identifying how the Tribunal erred in its application of *Vilven FC*. In

this vein, the Judge specifically identified seven errors, including once again the elimination of Air Canada's main competitors. They are as follows:

1. the unreasonableness of the elimination of Air Canada's competitors;
2. the failure to conduct a functional analysis of the functions and duties of Air Canada pilots;
3. the failure to conduct a contextual analysis of the reasoning from *Vilven FC*;
4. the failure to consider paragraph 173 of *Vilven FC*, where the word "both" is also omitted;
5. the failure to properly assess paragraph 113 of *Vilven FC*, which dealt with the other five principal airlines in Canada transporting passengers to domestic and international destinations;
6. the failure to discuss paragraph 171 of *Vilven FC* and the concern expressed therein regarding Air Canada's dominant position within the Canadian airline industry; and finally
7. the failure to interpret the word "both" contextually.

[47] The reasons in *Vilven FC* and the elimination of Air Canada's competitors as a result of the Tribunal's approach here were the key elements of the Judge's analysis and his ultimate conclusion that the Tribunal's conclusion on the paragraph 15(1)(*c*) issue could not stand. It is therefore useful to examine *Vilven FC* more closely.

2.3 The Vilven FC decision and its applicability to the present complaints

[48] There is no doubt that *Vilven FC* presents factual similarities with the appeals at bar: Messrs. Vilven and Kelly were Air Canada pilots and had both complained about the same MRR challenged by the Adamson Group.

[49] In *Vilven FC*, the Federal Court found that the Tribunal had erred in its identification of the essential features of Messrs. Vilven and Kelly's positions. As a result, the Tribunal had also erred in its choice of the comparator group for the purposes of calculating the normal age of retirement under paragraph 15(1)(*c*) of the Act. In particular, the Tribunal had focused on the status and prestige attached to a pilot's position at Air Canada and made this an essential feature of the position. The Federal Court found this to be unreasonable. Rather, the Tribunal had to look at "the actual functional requirements of the positions" (*Vilven FC* at paragraph 107). It should have concentrated on the "objective duties and functional responsibilities" of a pilot's position in Canada to assess whether a position was similar to that occupied by Messrs. Vilven and Kelly (*ibidem* at paragraph 109).

[50] It is within that context that the Federal Court turned its mind to the essential features of Messrs. Vilven and Kelly's positions and wrote paragraphs 111 and 112, summarizing its findings at paragraph 125. I note that these paragraphs are found in the section of *Vilven FC* entitled "The characterization of Messrs. Vilven and Kelly's positions and the choice of comparator group." Paragraphs 170 and 173 come much later, once the Federal Court has already characterized the position. The latter paragraphs appear in the section dealing with the normal age of retirement for Canadian airline pilots.

[51] I also note that, in *Vilven FC*, the Tribunal's erroneous approach to the essential features of an Air Canada pilot's position was not determinative of the outcome of the case. Indeed, reviewing the Tribunal's finding on a reasonableness standard, the Federal Court upheld the Tribunal's conclusion that, for Canadian airline pilots, 60 was the normal age of retirement. The

Federal Court agreed with the empirical approach taken by the Tribunal in determining the issue, *i.e.*, a statistical analysis of the total number count of relevant positions in the Canadian airline industry. To this end, the Federal Court wrote at paragraphs 173 and 174:

> [173] The statistical information before the Tribunal with respect to airline pilots working for both Air Canada and other Canadian airlines flying aircraft of various sizes to domestic and international destinations, through Canadian and foreign airspace, reveals that at the time that Messrs. Vilven and Kelly were forced to leave their positions at Air Canada, several Canadian airlines allowed their pilots to fly until they were 65, and one had no mandatory retirement policy whatsoever. Nevertheless, 56.13% of Canadian airline pilots retired by the time they reached the age of age 60.
>
> [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.

[52] I see three factors limiting *Vilven FC*'s direct applicability to the matter before us.

[53] First, as previously discussed in the standard of review analysis, *Vilven FC* was a separate matter involving different complainants and different evidence. Notwithstanding the clear similarities between both sets of complainants, the proceedings are formally distinct. The complaints considered in *Vilven FC* were effectively resolved by our Court's decision in *Vilven FCA*, which upheld the constitutionality of paragraph 15(1)(*c*) of the Act. By contrast, the Tribunal here was assessing the complaints in first instance. As a result, it was not automatically constrained by the findings or conclusion in *Vilven FC*. The Tribunal had to decide for itself how to deal with *Vilven FC*, subject of course to the possibility of judicial review for reasonableness.

[54] Second, *Vilven FC* was based on a particular factual record. This is an important distinction. *Vilven FC* involved an agreed statement of facts (see *e.g. Vilven FC* at paragraphs 113-114), which was the basis for Mactavish J.'s finding that 56 percent of Canadian airline pilots retired by the age of 60 (*Vilven FC* at paragraph 173). Furthermore, this agreed statement of facts was in great part centered on the retirement ages for international commercial airline pilots (see Schedule A of the Agreed Statements of Facts, appeal book, volume 2, tab I-3 at pages 306-308, Exhibit C-2 before the Tribunal and Exhibit 3 to the affidavit of Harlan Clark, Director, of Labour Relations for Air Canada). In the case at bar, however, there was no agreed statement of facts and the parties introduced extensive evidence at the hearing. The Tribunal was required to sift through this evidence and decide how to use it in the normal age of retirement analysis. This difference suggests that *Vilven FC* should be viewed as intimately connected to its particular factual context.

[55] I note as well that the comparator group factors that Mactavish J. identified in *Vilven FC*, namely "fly[ing] aircraft of varying sizes and types, transporting passengers to both domestic and international destination, through Canada and foreign airspace," do not match the information contained in Schedule A attached to the Agreed Statement of Facts referred to above. For instance, Mactavish J. did not have evidence on the types or sizes of aircraft Canadian airlines flew or what destinations they served. While her analysis of the normal age of retirement was based on the Agreed Statement of Facts, the limited nature of this evidence meant that she could not put the comparator group factors into practice. The divide between the stated factors and the evidence in *Vilven FC* suggests to me that the decision was not intended to be an authoritative treatment of the proper comparator group for Air Canada pilots. Rather, the criteria were a way

of highlighting the error in the Tribunal's analysis, which had focused on subjective factors such as the prestige associated with working for a "major international carrier" (see *Vilven FC* at paragraphs 107 and 165).

[56] Third, *Vilven FC* represents a particular application of the normal age of retirement defence and did not purport to be a generalized interpretation of paragraph 15(1)(*c*) of the Act. In fact, *Vilven FC* was addressing the first part of the normal age of retirement analysis (*i.e.*, the proper comparator group) in the particular context of the two complaints. The doctrine of *stare decisis* is not at play here.

[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*.

[60] If *Vilven FC* was not a controlling precedent, this raises the question of what exactly its effect on the current proceedings was. In my view, the decision should be seen as informing the context in which the Tribunal's decision was made. Review on a standard of reasonableness is primarily a contextual inquiry: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraph 18. As stated previously, jurisprudence, including *Vilven FC*, restricts the Tribunal's range of options and constrains its analysis when determining the normal age of retirement. It does not follow that the Tribunal was required to apply the factors in the same manner as Mactavish J. intended. Accordingly, I find that the Judge took a wrong path when narrowly examining the wording from *Vilven FC* and comparing his preferred interpretation with that of the Tribunal.

[61] A court conducting review on a standard of reasonableness must take as its starting point the tribunal's decision and examine it in light of the law and the record before the decision-maker.

[62] It is worth repeating that where the standard of review is reasonableness, a reviewing court that finds the tribunal's decision unreasonable is not entitled to substitute its own decision for that of the tribunal. It can identify factors which the tribunal may wish to consider but it

cannot impose its views on the tribunal. The matter must be returned to the tribunal so that it may decide the matter for itself in light of the reviewing court's reasons. While these may provide a line of reasoning which the tribunal could profitably consider, the ultimate decision rests with the tribunal. The scope of its decision is limited only by the requirement of reasonableness.

[63] Here, the Judge's overall approach to *Vilven FC* was similar to an exercise in statutory interpretation. In other words, he seemingly concluded that *Vilven FC* needed to be correctly interpreted in the abstract before it could be applied to the case at hand. As a matter of fact, the Judge turned to *Vilven FC* before even discussing the Tribunal's decision. In my view, by treating the *Vilven FC* factors as a kind of legislation, the Judge erroneously moved away from the only legislative enactment that governed the issue and which would ultimately determine whether Air Canada and the ACPA could rely on the BFOR defence: paragraph 15(1)(*c*) of the Act. The provision barely figures in the Judge's analysis and is overshadowed by the *Vilven FC* decision. Said differently, *Vilven FC* was not a comprehensive code that, when properly interpreted, would determine the outcome of the complaints. In my respectful view, taking this approach led the Judge away from the task of assessing the reasonableness of the Tribunal's decision on its own merits.

[64] On that point, I note paragraphs 128 and 129 of the Judge's Reasons where he states:

> [128] Recognizing the deference owed the Tribunal, I nevertheless find that the Tribunal erred in principle in its interpretation of the direction of the Court in *Vilven* as imposing a rule consisting of a series of factors to be considered conjunctively, when the decision interpreted in its context clearly directed the Tribunal to apply those factors disjunctively.

> [129] On the basis of the foregoing, I adopt the reasons of Justice Mactavish in *Vilven* as properly determining the attributes of Comparator Airlines in so far as the enumerated factors are to be applied disjunctively. Otherwise, I would respectfully disagree with her decision on the basis of my reasons described above, which in my view require the enumerated factors identified in her decision to be applied disjunctively in order to avoid the unreasonable outcome of Air Canada's major competitors being eliminated as Comparator Airlines.
>
> [Emphasis added.]

[65] It follows from these paragraphs that *Vilven FC* can be read in more than one way.

[66] Here, the Tribunal explained its rationale for reading *Vilven FC* the way it did. The Tribunal was entitled, when applying the *Vilven FC* factors, to opt for the conjunctive approach and to rely on paragraphs 112 and 125 of *Vilven FC*. I discuss the Tribunal's decision in further detail below.

2.4 The Judge's error in relying on the elimination of Air Canada's competitors as a reviewable error

[67] Despite identifying several errors in the reasoning of the Tribunal, the Judge clearly fastened onto the fact that the Tribunal's approach to *Vilven FC* resulted in the elimination of Air Canada's major competitors (Reasons at paragraphs 94, 98, 99, 101, 107, 114, 120, 129 and 130). The other errors are mostly subsumed under this finding. As mentioned above, this is why the Judge found the Tribunal's decision to be "patently unreasonable".

[68] In my view, the Judge's focus on Air Canada's main competitors was misplaced. There was no evidence presented to the Tribunal with regard to the identity of Air Canada's major domestic competitors. This is not surprising, as the parties were focused on bringing evidence

relating to the *Vilven FC* factors; the notion of competitors is not one of the factors identified in that decision. To the contrary, in *Vilven FC*, Mactavish J. disapproved of the Tribunal's approach when the latter concluded that only pilots working for major international airlines should be included in the comparator group (*Vilven FC* at paragraphs 90 and 109).

[69] Rather, the listed factors were identified based on the actual requirements of a pilot's position, not on any of the commercial attributes of airlines.

[70] In their memorandum of fact and law at paragraph 85, the complainants assert that the Judge was entitled to use his "own common sense and common knowledge" when discussing Air Canada's major competitors. I disagree. The threshold for judicial notice is uncompromising. As stated in *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 at paragraph 53, quoting *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 at paragraph 48:

> … a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[71] Although stated in the criminal context, this rule applies as well to civil matters (see *e.g. Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61 at paragraph 237).

[72] One cannot say with certainty which airlines were Air Canada's major or closest competitors between 2005 and 2009. For one thing, this would require identifying the relevant elements or features for assessing whether two airlines are commercial competitors. These could be similar to the *Vilven FC* factors or entirely different.

[73] Moreover, the parties were not given the opportunity to lead evidence as to the appropriateness or relevancy of taking judicial notice of the finding, which, for all intents and purposes, disposed of the paragraph 15(1)(*c*) issue.

[74] In the end, I conclude that the threshold for judicial review was not met. The Judge could not set aside the Tribunal's decision on the normal age of retirement issue primarily on the basis of a consideration not supported by the evidence.

[75] The question then arises as to whether the Judge had other legitimate grounds to reverse the Tribunal on the issue of the normal age of retirement. This question takes me to the Tribunal's decision.

3. The Tribunal's decision – Did the Tribunal otherwise err in concluding that the complaints should be dismissed on the basis of paragraph 15(1)(*c*)?

[76] Contrary to the Judge's finding, the *Vilven FC* factors were not the main issue in front of the Tribunal. Rather, the validity of the paragraph 15(1)(*c*) defence raised by both Air Canada and the ACPA was at issue. To decide that particular point, the Tribunal had to determine the normal age of retirement for pilots working for Canadian airlines, including Air Canada, in similar positions to that of the complainants for each of the years 2005 to 2009. At paragraph 25 of its decision, the Tribunal outlined its task:

> What the Tribunal must do in this case is what the Court did in [*Vilven FC*], which is to ask and answer the question, what is the essence of what Air Canada pilots do?

[77] The Tribunal was willing to follow *Vilven FC* because the evidence showed that the appropriate comparator group fell to be determined in accordance with the factors identified at paragraphs 112 and 125 of *Vilven FC* (Tribunal's decision at paragraph 25).

[78] I have already determined that the Tribunal was entitled to its preferred reading of *Vilven FC*, so long as this reading was reasonable. In this case, it heard the parties' submissions on the "both" argument, opted for a conjunctive reading of the *Vilven FC* factors, and provided an explanation. It was not unreasonable for the Tribunal to adopt paragraphs 111, 112 and 125 of *Vilven FC* as a guideline for its analysis of the evidence on the normal age of retirement. At paragraph 125 of *Vilven FC*, Justice Mactavish concludes the section of her reasons dealing with the choice of comparator group by expressly stating that Canadian pilots who, amongst other things, fly aircrafts to both domestic and international destinations "form the comparator group for the purposes of paragraph 15(1)(*c*) of the Act" (emphasis added). On this basis, it cannot be said that the Tribunal acted unreasonably or proceeded on wrong principles when applying the *Vilven FC* factors to the facts in a conjunctive manner.

[79] Much was said at the hearing of these appeals about the Tribunal's decision to eliminate the five Canadian airlines mentioned in *Vilven FC* at paragraph 113. The complainants refer to it as the Tribunal's "glaring error". Had it included these five Canadian airlines in the comparator group, the Tribunal would have concluded in favour of the Adamson Group. In the complainants' view, the exclusion of these airlines is a reviewable error requiring our intervention (complainants' memorandum of fact and law at paragraphs 82-83). I disagree for two reasons.

[80] First, the exclusion of the five Canadian airlines was not done arbitrarily. It resulted from the application of the *Vilven FC* factors, read conjunctively, to the evidence accepted by the Tribunal.

[81] Second, I agree with the Tribunal that there is nothing in *Vilven FC* to suggest that Mactavish J. accepted that the airlines satisfied all of the factors set out in paragraphs 111, 112 and 125, given that the hearing proceeded on the basis of an Agreed Statement of Facts. As well, as mentioned above, Schedule A of the Agreed Statement of Facts did not provide information concerning all of the *Vilven FC* factors. Arguably, Mactavish J. was making the calculation to show that even if all Canadian airlines were included in the comparator group, the complaints would still have to be dismissed.

[82] In the present matter, the Tribunal heard extensive evidence on the choice of comparator groups. In the end, it accepted Captain Duke's evidence, a witness for Air Canada, to determine the comparator group for the years 2005 to 2008 (Tribunal's decision at paragraph 173). For the year 2009, it accepted the evidence of two witnesses, Captain Paul Prentice, a witness for the complainants, and Harlan Clark, a witness for Air Canada.

[83] There was evidence on record supporting the Tribunal's findings and conclusions. I find no reason to intervene.

[84] This should be the end of the matter, as I indicated at the outset that I propose to dismiss the appeals on the paragraph 15(1)(*c*) issue. But, at the explicit request of the Commission, I will

deal with paragraph 3(a) of the Judgment. I also want to say a few words about paragraph 3(d) of the Judgment.

4. Commentary on the Judge's Reasons and Judgment

4.1 Prima facie discrimination and paragraph 3(a) of the Judgment

[85] The Tribunal found that the mandatory retirement provision under the collective agreement constituted *prima facie* discrimination under the Act, as the complainants' employment with Air Canada was terminated solely because they turned 60 years old (Tribunal's decision at paragraph 3). None of the parties challenged this finding in their applications for judicial review. In addition, neither the parties nor the Judge raised the issue of *prima facie* discrimination at the hearing at the Federal Court.

[86] Nevertheless, the Judge directed the Tribunal to reconsider the question and decide whether the mandatory retirement provision amounted to *prima facie* discrimination. Only after the Tribunal found that there was *prima facie* discrimination would it turn to the issue of hardship. The Judge acknowledged that the parties had not raised this issue but justified his intervention on the basis that it is an error in principle to "decide a matter on an incorrect characterization of a fundamental issue" (Reasons at paragraph 345). In a lengthy discussion of this issue, the Judge hinted that a mandatory retirement policy should not be automatically treated as *prima facie* discrimination. Instead, the practice should be evaluated in context to determine if it causes "substantive discrimination" (Reasons at paragraphs 377-378). In addition, the Judge questioned whether the reasoning from the Supreme Court's decision in *McKinney v.*

University of Guelph, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 [*McKinney*] still applied or whether it had been overtaken by subsequent jurisprudence (Reasons at paragraphs 19-21).

[87] The parties agree that the Judge should not have considered the issue of *prima facie* discrimination. They request that paragraph 3(a) of the Judgment, which refers to this issue, be set aside.

[88] I agree with the parties that the Judge erred by considering a new issue that had not been raised by the parties without giving them an opportunity to provide submissions. In addition, I find that the Judge erred in law on the merits of the issue by suggesting that complainants have the burden of showing "substantive discrimination" under the Act. The Judge failed to follow binding jurisprudence on this question.

[89] There is no doubt that a judge has the discretion to raise a new issue at the hearing, provided that the judge gives notice to the parties as well as an opportunity to respond. The Supreme Court, in *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689 at paragraph 41, held that a court may raise an issue of its own initiative when "failing to do so would risk an injustice". To ensure that the court maintains its impartiality and treats the parties fairly, the court must provide notice of the new issue as early as practicable and ensure that the parties can properly address it (*ibidem* at paragraphs 53-59). While the Supreme Court made these comments in the context of a court raising a new issue on an appeal, I believe they are equally applicable when a court brings up a new issue on an application, such as an application for judicial review (see *e.g. Labatt*

Brewing Company Limited v. NHL Enterprises Canada, L.P., 2011 ONCA 511, 106 O.R. (3d) 677 at paragraphs 4-5).

[90] In this case, the Judge considered the issue of *prima facie* discrimination of his own motion, as it was not mentioned in the notices of application and not argued at the hearing. He did not provide notice to the parties and did not grant them the opportunity to provide submissions on this topic. Even if the Judge believed that this issue had to be raised to avoid an injustice, he nevertheless had to follow the proper procedures when exercising his discretion. He failed to do so. These omissions constitute an error of law and resulted in a breach of the parties' right to procedural fairness.

[91] The complainants and the Commission further submit that the Judge erred on the merits of this issue by implying that an individual should be required to show "substantive discrimination" as part of proving a discriminatory practice under the Act. The two parties argue that the Judge incorrectly imported principles and jurisprudence relevant to section 15 of the Charter and ignored the effect of both *McKinney* and this Court's decision in *Kelly FCA*. Air Canada and the ACPA made no submissions on this point.

[92] I agree with the arguments of the complainants and the Commission. The effect of the decisions in *McKinney* and *Kelly FCA* is to render mandatory retirement *prima facie* discriminatory under the Act. It was not open to the Judge to ignore these precedents and suggest that a complainant had to show that the impugned practice resulted in "substantive discrimination".

[93] *McKinney* concerned the legality of mandatory retirement policies at universities. The appellants in that case challenged the policies on two grounds: 1) they were contrary to section 15 of the Charter and 2) subsection 9(a) of the Ontario *Human Rights Code*, S.O. 1981, c. 53, which restricted the protection from age discrimination to individuals under the age of 65, violated section 15 of the Charter. The appellants argued that neither of these breaches was justified under section 1.

[94] The Supreme Court diverged on these questions, issuing five sets of reasons. Despite this disagreement, the judges took it as a given that a mandatory retirement policy was inherently discriminatory, both from the point of view of the section 15 of the Charter and the *Human Rights Code*. Justice La Forest, writing for the majority, found that it was difficult to argue that mandatory retirement was not "discriminatory within the meaning of subsection 15(1) of the Charter since the distinction is based on the enumerated personal characteristic of age" (*McKinney* at 278). Later in his reasons, Justice La Forest turned to subsection 9(a) of the Code and assessed whether it violated section 15 of the Charter "by reason of the fact that it confines the Code's prohibition against discrimination in employment on grounds of age to persons between the ages of 18 and 65" (*ibidem* at 289). His approach implies that, in the absence of the limitation under subsection 9(a) of the Code, there would be no question that mandatory retirement violated the statutory protection against age discrimination. In other words, a mandatory retirement practice is presumed to be discriminatory.

[95] Similarly, in its earlier decision in *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202, 132 D.L.R. (3d) 14 at 208, the Supreme Court unanimously held that a

policy of mandatory retirement at the age of 60 was in itself sufficient to find *prima facie* discrimination under the *Ontario Human Rights Code*, R.S.O. 1970, c. 318.

[96] In my view, these two cases establish the principle that a practice of mandatory retirement constitutes *prima facie* discrimination, which in turn is sufficient to make out a discriminatory practice under section 10 of the Act. The next question to consider is whether the Judge erred in failing to apply this principle in the case at bar.

[97] I find that the Judge did so err, given that *McKinney* remains a binding precedent. There can be no doubt that courts are bound to follow and apply authoritative precedents (see *e.g. Apotex Inc. v. Pfizer Canada Inc.*, 2014 FCA 250, [2014] F.C.J. No. 1090 at paragraph 114). In *Kelly FCA*, this Court held that *McKinney* was still good law as it pertains to the constitutionality of mandatory retirement schemes (*Kelly FCA* at paragraph 80). While the decision in *Kelly FCA* primarily dealt with whether the Supreme Court's section 1 analysis from *McKinney* applied to paragraph 15(1)(*c*) of the Act, the principle of *stare decisis* equally applies to other aspects of the Supreme Court's analysis. Specifically, any part of the reasoning that was necessary for the Court to reach its result has the force of binding authority. As discussed above, the implicit finding that mandatory retirement is a discriminatory practice was an essential part of the Supreme Court's analysis in *McKinney*. As a result, this legal characterization was a binding authority that the Judge had to follow.

[98] The Judge justified his direction to the Tribunal on multiple grounds, including his view that past jurisprudence on mandatory retirement had been decided without a full evidentiary

record and that broader public policy concerns needed to be taken into account (Reasons at paragraphs 347-350). Here, these are not compelling reasons for revisiting settled case law and not following a higher court's decision.

[99] In coming to this conclusion, I am mindful of the Supreme Court's decision in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at paragraphs 42-46, where it stated that a lower court can revisit binding precedent only if there have been significant changes in the evidence or the circumstances that fundamentally alter "the parameters of the debate."

[100] Having carefully considered the record, I find that this threshold is not met. The Judge was obliged to apply the principles from *McKinney* and uphold the Tribunal's finding that the mandatory retirement practice constituted *prima facie* discrimination under the Act.

[101] Accordingly, assuming that I would have proposed to uphold the Judgment, and also assuming that the Judge had properly raised the issue of *prima facie* discrimination, I would have granted the Commission's request to strike paragraph 3(a) from the Judgment as it is wrong in law.

4.2 Modification of the Meiorin test to apply to Unions: paragraph 3(d) of the Judgment

[102] While examining issues related to section 15(2) of the Act - the BFOR defences -, the Judge turned to the Supreme Court of Canada's judgment in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service*,

[1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 [*Meiorin*]. In *Meiorin*, the Supreme Court established a three-part test for determining if a *prima facie* discriminatory practice constitutes a valid BFOR defence (at paragraph 54):

> … An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[103] Here, the Judge was of the view that a proceeding where a union raises a BFOR defence constitutes "a novel situation" requiring the modification of the *Meiorin* test. To this end, he established a "hybrid BFOR test" which resulted in a four-part test where the Tribunal would, on re-determination, ask itself whether the "union adopted the particular standard in an honest and good faith belief that it was in the collective best interests of its membership" (Reasons at paragraph 220, emphasis by Annis J.).

[104] Because of my ultimate conclusion, I need not analyse the Judge's reasoning on that question and decide whether *Meiorin* needed to be modified to fit the factual matrix of this case and the parties thereto. I would therefore limit myself to saying that these reasons shall not be taken as an endorsement of the Judge's approach on this question and of paragraph 3(d) of his Judgment.

V. Proposed Disposition

[105] Consequently, I propose to dispose of these appeals as follows:

[106] I would allow the appeals brought by Air Canada and the Air Canada Pilots Association (files A-111-14 and A-112-14), set aside the judgment of the Federal Court and restore the Tribunal's decision.

[107] As a result, I would dismiss the appeal brought by Robert Adamson et al. (file A-105-14).

[108] Considering the circumstances of these appeals, I would order that the parties assume their own costs throughout.

[109] A copy of the reasons shall be placed in each of the individual files.

"Johanne Trudel"
J.A.

"I agree
J. D. Denis Pelletier J.A."

"I agree
Richard Boivin J.A."

Appendix I

Employment	Emploi
7. It is a discriminatory practice, directly or indirectly,	7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects:
(*a*) to refuse to employ or continue to employ any individual, or	*a*) de refuser d'employer ou de continuer d'employer un individu;
(*b*) in the course of employment, to differentiate adversely in relation to an employee,	*b*) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	
Discriminatory policy or practice	Lignes de conduite discriminatoires
10. It is a discriminatory practice for an employer, employee organization or employer organization	10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale:
(*a*) to establish or pursue a policy or practice, or	*a*) de fixer ou d'appliquer des lignes de conduite;
(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,	*b*) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Exceptions

15. (1) It is not a discriminatory practice if

(*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;

…

(*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;

Accommodation of needs

(2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(*g*) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would

Exceptions

15. (1) Ne constituent pas des actes discriminatoires :

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

[…]

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;

Besoins des individus

(2) Les faits prévus à l'alinéa (1)*a*) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)*g*), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de

have to accommodate those needs, considering health, safety and cost.

santé et de sécurité.

Appendix II

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application in T-1428-11 is allowed and the decision of the CHRT in respect of normal age of retirement is set aside and remitted to the same panel for reconsideration. Upon reconsideration, the Tribunal is directed to apply the factors of the test in *Vilven* disjunctively as described above. It is also directed to determine attributes of similarity of pilots of comparator airlines and those of Air Canada based on what pilots actually do, e.g. are the attributes of positions similar for pilots flying large and small planes in terms of the level of skill, knowledge and responsibilities each requires?

2. The application in T-1453-11 is dismissed.

3. The application in T-1463-11 is allowed and the CHRT's decision that ACPA had not established that the mandatory retirement provision in the collective agreement is a BFOR under sections 15(1)(*a*) and 15(2) of the Act is set aside and returned to the same panel with the following directions:

    a. ACPA and Air Canada may lead evidence and argue that the age 60 retirement rule in the collective agreement is not discriminatory.

    b. Section 15(1)(*a*) of the CHRA regarding a BFOR defence applies to employee organizations.

    c. The hardship factors in section 15(2) of the CHRA are not limited to safety, health and costs.

d. The Tribunal is to apply the four-step hybrid *Meiorin* test as described at para 220 above.

e. In determining whether hardship is occasioned to the comparator pilots by the elimination of the mandatory retirement provision in the collective agreement, the Tribunal will give due consideration to areas of concern of the Court described above, including permitting the introduction of admissible evidence on the effect of pensions in the determination of any adverse differential effect caused by the elimination of the mandatory retirement rule from the collective agreement.

f. If undue hardship is established to the comparator pilots, the Tribunal shall not dismiss the complaint against ACPA unless satisfied that the importance of upholding age discrimination in all the circumstances is not such that it cannot justify a lesser standard.

g. As ACPA and Air Canada are jointly liable for having adopted the age 60 retirement provision, a dismissal of the complaint against ACPA results in the dismissal of the complaint against Air Canada.

4. Applications T-971-12 and T-979-12 are dismissed without costs.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-105-14 A-111-14 A-112-14
STYLE OF CAUSE:	ROBERT ADAMSON ET AL., AND, AIR CANADA, AND, AIR CANADA PILOTS ASSOCIATION v. CANADIAN HUMAN RIGHTS COMMISSION, AND, DONALD PAXTON
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 20, 2015
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	PELLETIER J.A. BOIVIN J.A.
DATED:	JUNE 26, 2015

APPEARANCES:

David Baker	FOR THE APPELLANTS ROBERT ADAMSON ET AL.
Maryse Tremblay	FOR THE APPELLANT AIR CANADA
Bruce Laughton	FOR THE APPELLANT AIR CANADA PILOTS ASSOCIATION
Daniel Poulin Erin Collins	FOR THE RESPONDENT CANADIAN HUMAN RIGHTS COMMISSION

SOLICITORS OF RECORD:

Baker Law Toronto, Ontario	FOR THE APPELLANTS ROBERT ADAMSON ET AL.
Borden Ladner Gervais LLP Montréal, Quebec	FOR THE APPELLANT AIR CANADA
Laughton & Company Vancouver, British Columbia	FOR THE APPELLANT AIR CANADA PILOTS ASSOCIATION
Canadian Human Rights Commission Ottawa, Ontario	FOR THE RESPONDENT CANADIAN HUMAN RIGHTS COMMISSION