Federal Court of Appeal  Cour d'appel fédérale

Date: 20190809

Docket: A-187-17

Citation: 2019 FCA 218

CORAM: **PELLETIER J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

GORDON RONALD GREGG, DONALD RICHARD MACDONALD, GLENN SORKO, FRANK COATES, NANETTE JOZWIAK, WILLIAM HANNA (IN THE CAPACITY OF ADMINISTRATOR OF THE ESTATE OF DONALD LLOYD GERKE), FREDERICK MARK HANLEY, DAVID BAXTER, CHRISTOPHER CHARLES JOHNSTON, JAMES ARTHUR BRADLEY, BRIAN LEONARD SOWTEN, WILLIAM CHARLES SCHULTZ, RUSSELL IRVING COOPER, WILLIAM ALEXANDER HACKWELL, NOEL MARTIN LOURENS, ALEXANDER GEORGE WILLIAM HEMINGWAY, FRANÇOIS RAUSCHER and LARRY CROWLEY

Appellants

and

AIR CANADA PILOTS ASSOCIATION and AIR CANADA

Respondents

Heard at Ottawa, Ontario, on March 14, 2019.

Judgment delivered at Ottawa, Ontario, on August 9, 2019.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
DISSENTING REASONS BY: RENNIE J.A.

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REASONS FOR JUDGMENT

RENNIE J.A. (Dissenting Reasons)

[1] The appellants are former pilots of Air Canada. They were subject to Air Canada's mandatory retirement policy at age 60, which prevailed between March 2011 and October 2012.

During this time, paragraph 15(1)(*c*) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (Act), was still in force (repealed effective December 15, 2012). This paragraph provided that it was not a discriminatory practice for an employer to terminate an individual's employment upon reaching the "normal age of retirement" for that position. Claiming age discrimination, the appellants each filed a complaint with the Canadian Human Rights Commission alleging that the respondent Air Canada discriminated against them by entering into the collective agreement that imposed the mandatory retirement.

[2] On receipt of the investigator's Section 40/41 Reports, the Commission decided not to deal with the complaints under paragraph 41(1)(*d*) of the Act on the basis that it was "plain and obvious" that the complaints could not succeed. In reaching this conclusion, the Commission relied on the decision of this Court in *Air Canada Pilots Association v. Kelly*, 2012 FCA 209, [2013] 1 F.C.R. 308 (*Kelly*), and the decision of the Federal Court in *Vilven v. Air Canada*, 2009 FC 367, [2010] 2 F.C.R. 189 (*Vilven*). In *Kelly*, this Court upheld the constitutionality of paragraph 15(1)(*c*). In *Vilven*, meanwhile, the Federal Court (*per* Mactavish J.) concluded that a determination by the Canadian Human Rights Tribunal that age 60 was the "normal age of retirement" for domestic pilots from 2003 to 2005 was reasonable. In broad terms, the Federal Court determined since Air Canada controlled over 50% of the domestic air passenger market, its mandatory retirement age of 60 set the industry standard.

[3] The appellants now come before this Court on appeal from a decision of the Federal Court (2017 FC 506, *per* Annis J.) dismissing their applications for judicial review of the Commission's decisions. The Federal Court judge found that the appellants provided no

probative evidence to demonstrate that the situation of Canadian airlines had changed since *Kelly* and *Vilven*, and that, in consequence, their assertion that the normal age of retirement had increased in the intervening period was merely speculative (paras. 44-46).

[4] The appellants submit that neither *Kelly* nor *Vilven* are determinative of the subsequent complaints brought by former pilots of Air Canada, and that indeed other complaints also subsequent in time, most notably those in *Bailie et al. v. Air Canada et al.*, 2017 CHRT 22, are in fact before the Tribunal for adjudication on the merits. They further contend that the Commission misapprehended its proper function as a screening body of the Tribunal and not as an adjudicative body. In so doing, the Commission improperly imposed an onus on the appellants to establish the legal and evidentiary basis of their complaints, an onus they say is impossible to discharge under the circumstances as they are unable to obtain the statistical information that would establish the applicable normal age of retirement for 2011 and 2012.

[5] The respondents, on the other hand, reiterate the Federal Court's conclusions on the lack of evidence put before the Commission, and that absent a sufficient evidentiary basis on which to distinguish the factual context at issue in *Vilven*, the Commission reasonably concluded that it was plain and obvious the appellants could not succeed.

[6] As set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559, this Court's task on appeal is to determine whether the Federal Court, in reviewing the decision of the Commission, correctly identified the standard of review that it should apply, and properly applied that standard. On this, I am in agreement with

the parties that the standard of review applicable to a decision of the Commission under paragraph 41(1)(*d*) is reasonableness: *Wong v. Canada (Public Works and Government Services)*, 2018 FCA 101 at para. 19; see also *Khaper v. Air Canada*, 2015 FCA 99 at para. 16, 472 N.R. 381 and cases cited therein.

[7] The Commission performs a screening function vis-à-vis the Tribunal to, among other things, dispense with those complaints that it considers "trivial, frivolous, vexatious or made in bad faith" (Act, s. 41(1)(*d*)). In doing so, the Commission must decide, on the evidentiary record put before it, whether it is "plain and obvious" that the complaint at issue could not succeed: *Love v. Canada (Privacy Commissioner)*, 2015 FCA 198 at para. 23, 475 N.R. 390. This threshold is low, but it is not illusory. A complainant bears the onus of providing some credible evidence to satisfy the Commission that their complaint has merit.

[8] Here, the appellants were afforded full opportunity to present their position on why the Commission should deal with the complaints, both in their original complaint and in response to the preliminary Section 40/41 Reports. At this stage, and in light of *Vilven*, what the Commission effectively required from the appellants was some credible evidence that the "normal age of retirement" in 2011 and 2012 was no longer age 60 as it was during the 2003-2005 period. The appellants failed to do so beyond the assertion that "[p]ilot employment within the Canadian airline industry has been quite volatile since 2005."

[9] For their part, the appellants submit that insofar as any such evidence exists it lies in the hands of the respondent, Air Canada, which Air Canada could be compelled to provide before

the Tribunal under its subpoena powers. While I do not dispute that Air Canada may have information in its possession that would shed light on the applicable "normal age of retirement" in the industry, the appellants have not satisfied me that Air Canada is the sole custodian of such information or that this information is not otherwise publicly available. I also note there is no evidence to suggest that the appellants' efforts to obtain the necessary information have been frustrated by Air Canada.

[10] I turn to the appellants' second argument. It arises from the failure of the Commission to address, in its reasons, why it was "plain and obvious" that the appellants' case could not succeed while the complaints of 300 other similarly situated pilots (i.e. those who were required to retire between June, 2004 and February, 2012), were before the Tribunal awaiting adjudication. In this regard the appellants point to the Tribunal's decision in *Bailie v. Air Canada*, 2012 CHRT 6 to hold those complaints in abeyance pending the outcome of this Court's decision in *Adamson v. Canada (Human Rights Commission)*, 2015 FCA 153, [2016] 2 F.C.R. 75 (*Adamson*).

[11] *Adamson* addressed complaints arising during the 2005-2009 time period. It did not address complaints beyond that time period. I note, parenthetically, that on July 4, 2017, the Tribunal decided to allow the claims of those who retired after the *Adamson* time frame, to proceed to hearing.

[12] The Commission's decisions to reject the appellants' complaints were made in May of 2013. While those decisions were made prior to the FCA decision in *Adamson* that the normal

age of retirement was 60 for the 2005-2009 time period, the Commission knew, at the time it rejected the appellants' complaints, that the Tribunal was holding the complaints of other pilots forced to retire during an overlapping time period, in abeyance.

[13] The reasonableness of the Commission's decision must be assessed as of the date it was made – May, 2013. The Commission's decision is silent as to why some complaints relating to the same time frame are allowed to proceed to the Tribunal where they were held in abeyance pending *Adamson*, and others are not. The reasons fail to meet the *Dunsmuir* criteria of transparency and justification in this respect and render the decision unreasonable: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) at para. 47.

[14] Dismissing a complaint on the basis that it is plain and obvious that it cannot succeed requires an assessment of the complaint against objective benchmarks or criteria. Those include the facts, statutory and jurisprudential requirements and precedent. Here, the Commission was aware that the *Bailie* complaints, involving the same employer, the same policy and the same legal issue were awaiting determination by the Tribunal. I do not know how it could be said that the Gregg complaints were doomed to fail when the Tribunal had not adjudicated on the matter. An explanation is required.

[15] I have had the benefit of reading the reasons of my colleague Webb J.A.. I agree with much that he has said, as well as with his analysis and explanation of what may have been the reasoning which underlied the Commission's decision. I disagree, however, that it is the responsibility of a supervisory court to do the work of the decision maker of first instance, and to

piece together an after-the-fact rationalization of the decision, which then meets the *Dunsmuir* criteria.

[16] Inconsistency is pertinent to the consideration of reasonableness. As noted by Professor Paul Daly in "The Principle of Stare Decisis in Canadian Administrative Law" (2016) 49:1 R.J.T. 757 at 769, there is a "strong case for branding as reviewable those cases where statutory authorities inexplicably fail to act consistently". It follows that where a decision maker departs from a previous decision, the departure must generally be accompanied by an explanation justifying the departure; the previous decision provides a "direct contextual comparison against which" the reasonableness of the new decision can be assessed.

[17] The respondents do not have a response to this argument, other than to say that the *Bailie* decisions are "improperly raised" before the Court. They also rely on *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (*Newfoundland Nurses)*, and argue the Court to assume that a good reason existed, although it was not articulated.

[18] *Newfoundland Nurses*, of course, has been overtaken by *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 (*Delta Airlines*), and what the respondents urge this Court to do takes us down the road to speculation. As the Federal Court noted in *Komolafe v. Canada (Citizenship and Immigration)*, 2013 FC 431, 16 Imm LR (4th) 267, para. 11 (*Komolafe)*, as approved by the Supreme Court in *Delta*:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made

> or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[19] While not argued before us, *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 (*Wilson*), does not in and of itself, rationalize the two outcomes. *Wilson* involved two, separate, independent decision makers, applying two different but recognized lines of arbitral jurisprudence to arrive at different outcomes. Here, in contrast, there is one decision maker, applying a single test, in respect of the same subject matter and overlapping facts. The reasons call for explanation, and the failure to do so makes the decision unreasonable.

[20] I would therefore allow the appeal, quash the decision of the Commission and remit it to the Commission for redetermination in light of these reasons.

"Donald J. Rennie"

J.A.

WEBB J.A.

[21] I have read the reasons of my colleague, Rennie J.A. I agree with his articulation of the standard of review and his conclusion that the appellants failed to discharge their onus of providing some credible evidence to satisfy the Commission that their complaints had merit. However, I am unable to agree that the lack of an explanation of why the appellants' claims were dismissed while the complaints brought by the Bailie group were proceeding before the Tribunal renders the Commission's decision unreasonable in this case.

[22] I agree that the reasonableness of the Commission's decision must be assessed as of the date it was made. In this regard, it is important to review the circumstances as they existed as of that time.

[23] There are a number of appellants and it would appear that their complaints were not all filed at the same time. Ten of these appellants had received a similar preliminary assessment report recommending that a Tribunal be appointed to inquire into their complaints. The dates of these reports range from March 9, 2012 to July 12, 2012. The last one was issued in relation to the complaint filed by David Baxter. Paragraph 5 of this report notes that Air Canada was raising a defence under paragraph 15(1)(*c*) of the Act (which is referred to in this report as the *CHRA*).

[24] Paragraph 6 of this report states that:

> Recent decisions from the Federal Court and the Canadian Human Rights Tribunal have brought into question the availability of this defence. The Federal Court decided in *Vilven v. Air Canada* [2009], F.C.J. No. 475 ("*Vilven No. 1*"), that paragraph 15(1)(c) of the *CHRA* violates the *Charter* in that it offends one's

> right to equality on the basis of age. The Federal Court returned the case to the Canadian Human Rights Tribunal to determine whether paragraph 15(1)(c) can be demonstrably justified as a reasonable limit under section 1 of the *Charter*. On August 28, 2009 the Canadian Human Rights Tribunal released its decision where it concluded that "section 15(1)(c) of the *CHRA* is not a reasonable limit on the complainant's rights under s. 15(1) of the *Charter*".

[25] In paragraph 7, the report notes that this decision of the Tribunal was confirmed by the Federal Court in *Air Canada Pilots Association v. Kelly*, 2011 FC 120.

[26] Paragraph 12 of this report states that:

> 12. Having regard to all the circumstances of the complaint, it is recommended, pursuant to section 49 of the Canadian Human Rights Act, that the Commission request the appointment of a Human Rights Tribunal to inquire into the complaint because:
>
> - the Tribunal is already seized of other complaints against the same respondent having substantially the same issue.

[27] It is clear that the complaints filed by the Bailie group were before the Tribunal, when the preliminary assessment reports were written. The motion brought by the Air Canada Pilots Association (2012 CHRT 6) in relation to the complaints filed by the Bailie group was granted on February 28, 2012, which was before the first preliminary assessment report was written. It is not, however, clear from the preliminary assessment reports whether the "other complaints" referenced in these reports were the complaints brought by the Bailie group or some other group. Air Canada, in its response dated July 24, 2012 to the preliminary assessment report for David Baxter, did however include a specific reference to the Bailie group:

> As noted in the above-referenced Report, the facts, as they appear on the face of the above complaint, indicate that it raises substantially the same issues as those in a number of complaints which already have been referred to [the] Tribunal. Therefore, and in accordance with the approach being taken in the Bailie et al

> matter of the CHRT, Air Canada requests that the Chairperson of the Canadian Human Rights Tribunal consolidate the above-referenced complaint with all of those raising similar questions of fact and law which have also been so referred.

[28] Even if the complaints brought by the Bailie group were not the complaints referred to in the preliminary assessment reports, Air Canada, by this letter, highlighted the fact that these complaints were already before the Tribunal.

[29] On July 17, 2012, after the preliminary assessment reports referred to above were prepared and shortly before the response of Air Canada to the last report was provided, this Court released its decision in *Kelly*. This Court overturned the decision of the Federal Court referred to in paragraph 7 of the preliminary assessment report referred to above and found that paragraph 15(1)(*c*) of the Act was constitutionally valid.

[30] As a result, the circumstances related to the complaints filed by the appellants had changed significantly from the time that the preliminary assessment reports were written for ten of the appellants until the final decisions were made to dismiss their complaints. The previous recommendations to refer the complaints to the Tribunal were based on a decision of the Federal Court that had been overturned.

[31] This caused the person who wrote the preliminary assessment reports to revise the recommendations. The Section 40/41 Report (Supplementary) for David Baxter et al. (which was dated December 3, 2012 and completed by the same individual who prepared the preliminary assessment report) recommended that the Commission not deal with his complaint. All ten individuals, who had received a preliminary assessment report, received a similar Section 40/41

Report (Supplementary) and some may also have received an additional Section 40/41 Report. The other appellants each received a Section 40/41 Report. All of the reports issued after July 2012 were substantially the same.

[32] In response to the Section 40/41 Reports (Supplementary) and the Section 40/41 Reports, counsel for the appellants (who was also counsel for all but 3 of the complainants in the Bailie group in the motion heard by the Tribunal and referred to above), in letters to the Commission written in early 2013, addressed two matters identified as "erroneous assumptions". Each "erroneous assumption" was related to the interpretation of the decision of this Court in *Kelly*, referred to above.

[33] The final point identified in this letter follows the heading "Prejudice Resulting From Dismissal of the Complaints". This part focused on the prejudice that would result if the Supreme Court of Canada were to overturn the decision of this Court in *Kelly*.

[34] As a result, the entire response of counsel for the appellants to the Section 40/41 Reports (Supplementary) and Section 40/41 Reports was centered on the decision of this Court in *Kelly*. There is no reference to the complaints of the Bailie group that were before the Tribunal nor is there any indication that counsel felt that the reports should have addressed why these complaints were being dismissed while the complaints brought by the Bailie group were proceeding before the Tribunal. There is also no indication that in any other communication made by counsel for the appellants before the decisions of the Commission were released on March 20, 2013 (for some of the appellants) and May 1, 2013 (for the other appellants) that the Commission should

address why these complaints were being dismissed while the complaints brought by the Bailie group were proceeding before the Tribunal.

[35] In the circumstances of this case, the Commission should not be criticized for not addressing an argument that was not made. Counsel for the appellants would have known that the complaints brought by the Bailie group were proceeding before the Tribunal and that ten of the appellants had received a preliminary assessment report recommending that their complaints proceed to the Tribunal because "other complaints" were before the Tribunal. If the appellants believed that, following the release of the decision of this Court in *Kelly*, their complaints should still have proceeded to the Tribunal because the complaints brought by the Bailie group were before the Tribunal, this should have been raised in the appellants' submissions to the Commission. Having failed to do so, the Commission, in my view, did not err in not addressing this argument.

[36] As a result, I would dismiss this appeal.

"Wyman W. Webb"

J.A.

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT (2017 FC 506), DATED MAY 17, 2017, NOs. T-1114-13, T-859-13

DOCKET:	A-187-17
STYLE OF CAUSE:	GORDON RONALD GREGG, et al v. AIR CANADA PILOTS ASSOCIATION AND AIR CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	PELLETIER J.A.
DISSENTING REASONS BY:	RENNIE J.A.
DATED:	AUGUST 9, 2019

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