Federal Court  Cour fédérale

Date: 20130411

Dockets : T-1282-11, T-1283-11, T-1284-11

Citation: 2013 FC 368

Ottawa, Ontario, April 11, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

GEORGE VILVEN	**T-1282-11**
Applicant	
and	
AIR CANADA, CANADIAN HUMAN RIGHTS COMMISSION	
Respondents	

AND BETWEEN:

ROBERT NEIL KELLY	**T-1283-11**
Applicant	
and	
AIR CANADA, AIR CANADA PILOTS ASSOCIATION AND CANADIAN HUMAN RIGHTS COMMISSION	
Respondents	

AND BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION	**T-1284-11**
Applicant	
and	
GEORGE VILVEN, ROBERT NEIL KELLY, AIR CANADA, AND AIR CANADA PILOTS ASSOCIATION	
Respondents	

REASONS FOR JUDGMENT AND JUDGMENT

[1] These applications for judicial review arise from a decision of the Canadian Human Rights Tribunal, dated July 8, 2011, dismissing two human rights complaints pursuant to section 15 of *Canadian Human Rights Act*, RSC, 1985, c H-6 (*CHRA*). For the reasons that follow the applications are dismissed on the basis of mootness.

Facts

The Complaints

[2] These applications arise as a result of human rights complaints initiated by George Vilven and Robert Neil Kelly (complainants), who were both employed as pilots by Air Canada. They were required to retire on the first day of the month following their 60th birthday, pursuant to the mandatory retirement policy in place for Air Canada pilots since 1957, and which has formed part of the collective agreement between Air Canada and its pilots since the 1980s.

[3] Mr. Vilven was hired by Air Canada in May 1986. By the time of his retirement he was flying as a First Officer on an Airbus 340 aircraft. Mr. Kelly was hired in September 1972 and at the time of his retirement he was flying as the Captain and Pilot-in-Command (PIC) of an Airbus 340 aircraft.

[4] It is common ground among the parties that the complainants' employment did not end for any performance or medical reason. The only reason was the mandatory retirement policy as incorporated into the collective agreement. The applicants also note that questions of medical fitness and professional competence to fly is monitored and regulated by Transport Canada through

its licensing regime. In consequence, the rationale for the mandatory retirement policy is not for health-related reasons.

[5] Mr. Vilven filed a complaint against Air Canada with the Canadian Human Rights Commission (CHRC) in August 2004, arguing that forcing him to retire at age 60 violated sections 7 and 10 of the *CHRA*. Mr. Kelly filed a complaint against Air Canada and his union, the Air Canada Pilots' Association (ACPA), arguing a violation of sections 7, 9, and 10 of the *CHRA*. The two complaints were referred to the Tribunal by the CHRC and were heard and decided together.

Procedural History

[6] These complaints have had a lengthy and complicated procedural history, both before the Tribunal and before this Court. That history can be briefly summarized as follows:

a. The Tribunal first decided the complaints in 2007 (Tribunal Decision #1, 2007 CHRT 36). The Tribunal found that Air Canada could rely on paragraph 15(1)(c) of the *CHRA* as a defence (i.e. that the complainants' employment was terminated because they reached the normal age of retirement for employees working in similar positions). The Tribunal found paragraph 15(1)(c) not to violate section 15 of the *Charter*.

b. In *Vilven v Air Canada*, 2009 FC 367 (Vilven #1), Justice Anne Mactavish set aside Tribunal Decision #1. She found that paragraph 15(1)(c) of the *CHRA* was contrary to section 15 of the *Charter*, and she remitted the matter back to the Tribunal to determine whether it was saved by section 1 of the *Charter*.

c. The Tribunal re-determined the complaints in 2009 (Tribunal Decision #2, 2009 CHRT 24). The Tribunal found that paragraph 15(1)(c) of the *CHRA* was not saved under section 1 of the *Charter*. Since that provision was no longer a valid defence the Tribunal went on to find that the mandatory retirement policy was not a *bona fide* occupational requirement (BFOR) pursuant to paragraph 15(1)(a) and subsection 15(2) of the *CHRA*, and therefore found the complaints were substantiated. The Tribunal sought further evidence and submissions on the issue of remedy.

d. In *Air Canada Pilots Association v Kelly*, 2011 FC 120 (Vilven #2), Justice Mactavish reviewed Tribunal Decision #2. She upheld the Tribunal's finding that paragraph 15(1)(c) is not saved under section 1 of the *Charter* (A decision which was subsequently reviewed by the Federal Court of Appeal). Justice Mactavish upheld as reasonable the Tribunal's finding that mandatory retirement was not a BFOR before November 2006, but remitted the matter for re-determination in relation to the situation after November 2006. This decision is central to the within applications.

e. Member Wallace Craig (Member Craig) of the Tribunal re-determined the question of whether the mandatory retirement policy was a BFOR post-November 2006. This decision is the subject of the current applications for judicial review (Craig Decision, 2011 CHRT 10).

f. In 2010, the Tribunal made a decision regarding remedies to be granted in relation to the finding in Tribunal Decision #2 (Remedies Decision, 2010 CHRT 27). There

are outstanding applications for judicial review in respect of this decision which have been suspended because of the Craig Decision and this litigation.

Mootness

[7] I heard these applications in Ottawa on June 27, 2012 and reserved judgment.

[8] On July 17, 2012, the Federal Court of Appeal reversed the decision of Justice Mactavish and remitted the matter back to the Tribunal with the direction that the complaints of Mr. Kelly and Mr. Vilven should be dismissed.

[9] In consequence, I invited submissions from the parties on whether this application for judicial review was moot. The parties agreed that if the Supreme Court of Canada dismissed leave to appeal from the Court of Appeal, these proceedings are moot. In March 2013 the SCC dismissed leave to appeal.

[10] A critical factor to be considered in deciding whether to hear a case notwithstanding that it is moot is whether the decision in this case will have any practical effect on the parties. In my view, it will not. As matters stand, these applications are fully spent, and the central legal question fully determined by the decision of the Court of Appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications for judicial review are dismissed, without costs.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1282-11
STYLE OF CAUSE:	GEORGE VILVEN v AIR CANADA, CANADIAN HUMAN RIGHTS COMMISSION
DOCKET:	T-1283-11
STYLE OF CAUSE:	ROBERT NEIL KELLY v AIR CANADA, AIR CANADA PILOTS ASSOCIATION AND CANADIAN HUMAN RIGHTS COMMISSION
DOCKET:	T-1284-11
STYLE OF CAUSE:	CANADIAN HUMAN RIGHTS COMMISSION v GEORGE VILVEN, ROBERT NEIL KELLY, AIR CANADA, AND AIR CANADA PILOTS ASSOCIATION
PLACE OF HEARING:	Ottawa, ON
DATE OF HEARING:	June 27, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	April 11, 2013

APPEARANCES:

Mr. Raymond Hall Mr. David Baker	FOR THE APPLICANTS George Vivlen and Robert Neil Kelly
Mr. Daniel Poulin	FOR THE APPLICANT/RESPONDENT Canadian Human Rights Commission
Ms. Maryse Tremblay	FOR THE RESPONDENT Air Canada
Mr. Bruce Laughton, Q.C.	FOR THE RESPONDENT Air Canada Pilots Association

SOLICITORS OF RECORD:

Mr. Raymond Hall Barrister & Solicitor Winnipeg, Manitoba	FOR THE APPLICANTS George Vivlen and Robert Neil Kelly
Bakerlaw Toronto, Ontario	
Daniel Poulin – Legal Counsel Canadian Human Rights Commission Ottawa, Ontario	FOR THE APPLICANT/RESPONDENT Canadian Human Rights Commission
Heenan Blaikie LLP Montréal, Québec	FOR THE RESPONDENT Air Canada
Laughton & Company Vancouver, British Columbia	FOR THE RESPONDENT Air Canada Pilots Association