Federal Court Cour fédérale

Date: 20221122

Docket: T-234-21

Citation: 2022 FC 1598

Ottawa, Ontario, November 22, 2022

PRESENT: Mr. Justice Pentney

BETWEEN:

CHRISTOPHER PRIEST

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Priest, the Applicant in this matter, is an employee of the Canada Revenue Agency (CRA). He works in the unit that administers the Scientific Research and Experimental Development (SRED) program. Like other employees, when the CRA instituted new minimum educational requirements for his job Mr. Priest was granted acquired rights based on his previous education and experience.

[2] When the CRA posted a job opportunity that would have been a promotion for Mr. Priest, he submitted an application together with a request for accommodation. He claimed that the minimum job requirements for the position discriminated against him on the basis of age, because when he obtained his degree, programs in computer science were not available at the university level. He asked for an exemption from the educational requirements. This was refused, and Mr. Priest was screened out of the competition.

[3] Under the CRA policy, Mr. Priest's only form of recourse for being screened out was to seek Individual Feedback, which involved a discussion with the hiring manager, Mr. Kearney. Following that meeting, and some subsequent exchanges, the decision to screen out Mr. Priest from the competition did not change. He seeks judicial review of that decision, and he represents himself before this Court.

[4] For the reasons that follow, the application for judicial review will be granted. I find that the decision does not address the core elements of Mr. Priest's complaint of adverse effect discrimination based on age, and the record does not indicate whether the decision maker considered it.

II. Background

[5] Mr. Priest was hired by the CRA in 2009 as a Research Technology Advisor in the SRED program area, a position classified at the CO-02 level. At the time of hiring, he had a Bachelor of Science degree (*magna cum laude*) from McMaster University that he obtained in 1975, as well as a variety of further training courses in the area of computer science. In addition, Mr. Priest had teaching and job experience in that field. In 2019, Mr. Priest received an "Acquired Rights"

letter. This letter confirmed that as a permanent incumbent of a CO position, Mr. Priest was "deemed to meet the… minimum education standard **for your group and level only**, based on your education, training, and/or experience" (emphasis in original). The context for the letter was that the CRA had established higher or more specific minimum education requirements for various positions, including the CO position held by Mr. Priest.

[6] In the fall of 2020, a notice of job opportunity was posted for a Research and Technology Manager position with the SHRD program, at the CO-03 level. The education requirement for the position was stated to be "[t]he CRA's minimum education standard for CO", and candidates were required to include their education credentials with their application in order to be eligible for the competition.

[7] The CRA is a separate employer within the federal government system; this means it can establish its own policies regarding employment, including setting minimum education requirements for jobs. For CO-02 and CO-03 positions, the requirements that are relevant to this case were set out in the Procedures for Staffing adopted on June 17, 2019:

> A postgraduate degree from a recognized postsecondary institution with an acceptable specialization in a field of science or engineering relevant to the Scientific Research and Experimental Development (SR&ED) Program. Candidates possessing a bachelor's degree in engineering or computer science with an acceptable combination of education, training and/or experience will be considered as meeting the standard.

[8] This is the standard applied in the CO-03 job competition for which Mr. Priest applied. In his application, he set out his education and experience, and he outlined his allegation that the minimum education requirements discriminated against him on the basis of age:

> I graduated Magna Cum Laude with a Biology degree from McMaster University having taking every computer science course offered by the university at that time. In applying for the [CO-02 job that he occupied] my education was considered based on the [Computer Science] requirements and wording within the Staffing Policy as the SR&ED wording was recognized as creating structural age discrimination. My decades of IT experience and IT teaching were considered as supplementing my education as per the policy. I obtained acquired rights to be considered as having a bachelor's degree in computer science throughout my career with CRA. This statement is confirmed by my having been hired.

[9] Together with his letter of application, Mr. Priest submitted a "Request for Accommodation" which elaborated on his discrimination claim and set out his requested accommodation. He described his request in the following way:

> Whenever the minimum education standard is met, it is met for all CS positions within the CRA, unless the position being staffed requires a higher level education than the minimum standard.
>
> Permanent incumbents of CS positions in the CRA who, on June 16, 2014, did not meet the minimum education standards are deemed to have met the minimum education standard based on their education, training, and/or experience.
>
> These rights supersede the recent limitations placed on acquired right in contravention of the Human Rights Act for discrimination on the basis of age.
>
> …
>
> I request accommodation in adjusting the requirements or applying my acquired rights.

[10] Mr. Priest included references to several decisions from the United Kingdom and one from the United States (discussed below) that he said supported his claim that the education requirement discriminated based on age.

[11] On November 19, 2020, Mr. Priest was informed that the staffing board had screened him out of the hiring process:

> A review of your application indicates that you have not demonstrated that you meet one or more of the following staffing requirements as stated on the notice of job opportunity:
>
> ●You do not meet the minimum education for the CO-003 position

[12] The letter stated that Mr. Priest could request Individual Feedback if he believed that he had "been treated arbitrarily at the screening for prerequisites stage, concerning the choice of the above-noted staffing requirement(s)…"

[13] On December 3, 2020, Mr. Priest submitted his request for Individual Feedback:

> I am not being considered further due to an education requirement that discriminates on the basis of age. Per the duty to accommodate on CRA webpage… Agency employees and candidates for employment can request an accommodation to reduce or eliminate barriers related to the prohibited grounds of discrimination. A manager's duty to accommodate is a legal obligation outlined in the Canadian Human Rights Act and the Employment Equity Act. This places the responsibility on the hiring board. The hiring board in applying the education policy accedes to arbitrary and discriminatory treatment.
>
> The Commissioner has also advised that employee recourse procedures for staffing matters are provided under the CRA's Staffing Program in the form of Individual Feedback. Again placing the responsibility on the hiring board. The board is asked to modify the NOJO [Notice of Job Opportunity] to use the [Computer Science] wording for computer personnel as was requested in the accommodation request and include Mr. Priest in the pool. The board is requested to cease placing discriminatory NOJOs.

[14] On December 10, 2020, as part of the Individual Feedback process, Mr. Priest discussed his request with the hiring manager, Mr. Kearney. He subsequently sent emails to Mr. Kearney

on December 10 and December 15, 2020, providing his own summary of the discussion as well as some additional information.

[15] On January 7, 2021, Mr. Kearney provided his final decision on the Individual Feedback request, rejecting Mr. Priest's complaint that the requirement to have a Computer Science degree for the CO-03 position discriminated based on age. The decision noted that the job posting used the minimum education standard set for positions at the CO-03 level, and that the staffing policy "specifies a required education level and is applied equally to all applicants." The conclusion that the treatment of the minimum education standard was not arbitrary or discriminatory is explained in the following way:

> CRA accommodates all employees that are seeking to upgrade their educational credentials and skills through the Educational Assistance Program and educational leave. Chris [Mr. Priest] is aware that the education assistance program provides a number of benefits, including financial support and leave to employees looking to upgrade their skills in order to meet their career goals or business goals of the agency. Requests for education are solicited annually and reviewed on a year by year basis. Chris advised that he has not requested education assistance to upgrade his credentials.
>
> The Centre for Discrimination and Harassment was consulted concerning the issue of discrimination related to age. The advisor confirmed that requirements based on educational requirements do not discriminate based on age. Reduction in the minimum education standards are not a required accommodation for when an employee does not meet the minimum standard. Chris had been advised of the multiple programs that exist to support his academic credentials, with flexibility to undertake courses concurrently while working or during times of leave.

[16] Mr. Priest seeks judicial review of this decision.

III. Issues and Standard of Review

[17] The Applicant raises the following issues:

A. Whether it is a question of law that adverse impact discrimination can be caused by an (analogous ground of) education requirement?

B. Whether the education requirement creates an adverse impact on Mr. Priest based on age?

C. Whether the CRA discriminated against Mr. Priest based on age?

D. Whether Individual Feedback is the appropriate venue for resolution of a discrimination complaint on a policy?

E. Whether the complaint should be returned to Individual Feedback or whether the appropriate level is the Commissioner or Deputy Commissioner?

[18] The Respondent raises the following issues:

A. Was there a breach of procedural fairness?

   i. Is the Individual Feedback process procedurally fair?

   ii. Was the Individual Feedback process conducted in a procedurally fair manner?

B. Was the Decision reasonable?

[19] I would reformulate the issues in the following way:

A. Was the Individual Feedback process fair to Mr. Priest, in all of the circumstances?

B. Is the decision unreasonable?

[20] Questions of procedural fairness require an approach resembling the correctness standard of review, in which a reviewing court asks, "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] at para 54). As noted in *Canadian Pacific* at paragraph 56, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (see *Alvarenga Torres v Canada (Citizenship and Immigration)*, 2021 FC 549 at para 30).

[21] In my view, the substance of the decision is to be reviewed under the framework for analysis set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at para 2). The burden is on the Applicant to satisfy the Court "that any shortcomings or flaws relied on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33). The *Vavilov* framework is intended to reinforce a "culture of justification" in public administration (see paras 2 and 14). In part, it seeks

to accomplish this by requiring decision makers to be responsive to the main arguments brought forward by the parties (see para 125).

[22] Mr. Priest submitted that the correctness standard applied to the assessment of the substance of the decision, citing *Patterson v Canada (Revenue Agency*), 2011 FC 1398 [*Patterson*]. He argued that since his case involves the interpretation of the fundamental equality guarantees set out in section 15 of the *Canadian Charter of Rights and Freedoms*, as well as the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*], it fell within the exceptions set out in *Vavilov*.

[23] I do not agree. The first point to note is that *Patterson* pre-dates *Vavilov*, and so the analysis there did not reflect the framework set out in the latter decision. Second, the issue in *Patterson* was whether the *CHRA* protects family leave in the same manner as it protects maternity leave, which required the "[i]nterpretation of provisions of the CHRA that affect all of the Canadian work force" (para 30). In contrast, this case raises the narrower issue of whether applying the minimum education requirements to the position in question constituted adverse effect age discrimination. Not every case involving the interpretation or application of the *CHRA* will fall within the exceptions to the presumption of reasonableness review under *Vavilov*. In my view, this case does not raise any "general question of law of central importance to the legal system as a whole" and thus it does not fall within an exception to the general presumption of reasonableness review (*Vavilov* at para 58).

[24] In addition, there were a number of preliminary issues dealt with during the course of this proceeding, including amendments to the style of cause and questions regarding the adequacy of

the record that was produced under Rule 317. Previous rulings dealt with these issues, and it is not necessary to repeat them here.

[25] The Respondent raised objections to certain portions of Mr. Priest's affidavit which it said were either new information that was not before the decision-maker, or argumentative. The parties made submissions on this question at the outset of the hearing and I made a ruling so that all parties were clear regarding the record.

[26] In sum, Mr. Priest accepted some of the Respondent's objections, and I found certain other paragraphs of his affidavit to be inadmissible because they included new information, in particular about other hiring processes or other CRA employees' circumstances. I found some of the Respondent's objections to be not substantiated, largely because the paragraphs in question referred to information that the decision-maker was unquestionably aware of and that was pertinent to the decision under review. In this regard, it is relevant that this case involves an ongoing employment relationship, and so it is more difficult to isolate the information that would have been considered by the decision-maker than in a situation where the case involves two parties appearing before an independent tribunal.

[27] The general principles that apply are clear: in most cases, it is only the material that was before the original decision-maker that is to be considered on judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*]. There are exceptions to this rule, but none apply here: *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8 [*Sharma*]. My ruling reflected these principles, and I have not considered any aspects of the Applicant's affidavit that were found to be inadmissible.

IV. Analysis

A. *Was the Individual Feedback process fair to Mr. Priest, in all of the circumstances?*

[28] Although he did not expressly use these terms, Mr. Priest raised a concern that the hiring manager consulted with the Discrimination and Harassment Centre of Expertise (referred to as the DHCE) before hearing his submissions at the Individual Feedback meeting. He appears to suggest that the hiring manager approached the Individual Feedback discussion with a closed mind, because of the information he received from the DHCE as well as Mr. Kearney's awareness of his prior failed grievances with respect to similar issues. Mr. Priest also points to the fact that the hiring manager did not keep any detailed notes of the discussion with the DHCE and there are no other records to show whether that consultation included a discussion of adverse effect discrimination, which is his central complaint.

[29] I am not persuaded that Mr. Priest was treated unfairly in the circumstances. The requirements of procedural fairness must be assessed in relation to the context of the decision, and in this case the jurisprudence makes clear that screening candidates for a position or program is "not a decision of a judicial or adjudicative nature [and thus] calls for a less demanding standard of impartiality" (*Mital v Canada (Health)*, 2015 FC 571 at para 45). In *Anderson v Canada (Customs and Revenue Agency*), 2003 FCT 667, this approach was applied to the Individual Feedback process at the predecessor to the CRA, and the court found that the process complied with the requirements of procedural fairness.

[30] In this case, the manager's consultation with the DHCE does not give rise to a reasonable apprehension of bias, as that concept is understood in the relevant binding case law. The test is

often stated as asking whether "an informed person, viewing the matter realistically and practically – and having thought the matter through – [would] conclude" that the decision-maker would not decide fairly (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at p 394). More recently, a decision-maker's prior knowledge, experience, or activities have generally not been found automatically to give rise to an apprehension of bias. The point has been expressed in the following axiom: "There is, in other words, a crucial difference between an open mind and [an] empty one" (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 33).

[31] Here, Mr. Priest had raised a complex question about adverse effect discrimination, which both he and the hiring manager acknowledged was not the type of matter usually raised in the context of an Individual Feedback discussion. In light of this, Mr. Kearney's consultation with the centre of expertise on such matters was neither inappropriate nor a sign of a closed mind. There is no other evidence to substantiate this argument, and I therefore dismiss this aspect of the claim.

B. *Is the decision unreasonable?*

(1) Overview

[32] Mr. Priest argues the decision is unreasonable on several different grounds, including the failure to consider the equality guarantee in the *Charter of Rights and Freedoms*, that the hiring manager applied the wrong legal test, and that the decision contains no analysis of whether the minimum education standard constitutes adverse effect discrimination. He submits that the hiring manger, Mr. Kearney, was familiar with his earlier unsuccessful efforts to complain about the

educational requirements, and thus he was aware of the nature of Mr. Priest's concern that the education requirements constituted age discrimination. Mr. Priest contends that the hiring manager should have considered this during the Individual Feedback process because CRA had pointed to this process as the avenue for him to obtain relief.

[33] In addition, a theme that ran through Mr. Priest's submissions – both written and oral – is that he has been given the "run around" by the various CRA recourse avenues he has pursued. He says that no one in authority in CRA has answered his basic complaint: namely, that the strict education requirements imposed for CO positions discriminate on the basis of age, and there is no valid reason why the CRA did not apply the more flexible approach that was applied to Computer Science (CS) jobs.

[34] As will become evident below, some of his arguments can be dealt with quite quickly, while others call for a more probing analysis.

[35] Mr. Priest submitted that the Court should find that education constitutes an analogous ground of discrimination under section 15 of the *Charter*. This argument must fail for the simple reason that Mr. Priest did not raise the *Charter* question in the context of the Individual Feedback process or his request for accommodation.

[36] An application for judicial review is almost always limited to the facts and issues that were considered by the decision-maker. This is not the time to raise new issues that were never presented earlier, because judicial review is not a new hearing on the merits of the matter. Rather, it involves assessing whether the decision is reasonable under the *Vavilov* framework. There are recognized exceptions to this general rule, but none apply here.

[37] Therefore, it is not necessary to further discuss Mr. Priest's arguments on the section 15 equality issue, and in particular his contention that education should be recognized as an analogous ground of discrimination. That is best left for another day.

[38] Similarly, Mr. Priest acknowledged during the hearing that this is a judicial review of the decision on his Individual Feedback request, and not a review of any other previous decisions relating to his situation. There is a dearth of evidence regarding any involvement by the hiring manager in most of these earlier processes. Although his lack of success in these earlier processes may have contributed to Mr. Priest's sense of frustration about not getting the answers he seeks, this in itself does not make the evidence filed or conclusions reached in these other processes a pertinent matter for the application currently before the Court, other than as background context to the decision under review.

[39] This leaves the crux of Mr. Priest's argument, namely that the decision is unreasonable because Mr. Kearney applied the wrong legal test and did not answer his request for accommodation to address adverse effect discrimination on the basis of age. There are several components to this argument, which I will discuss in turn.

(2) Reasonableness review of an Individual Feedback decision

[40] Before entering into this analysis, it is helpful to place this in its proper legal and conceptual framework in accordance with *Vavilov*. Simply put, this case raises the question of what reasonableness review requires when examining the decision of a hiring manager in the context of a relatively informal discussion with an employee about a job competition. As Mr.

Priest acknowledged during the hearing, this is some distance removed from the traditional decision-making process by an administrative tribunal or a legally trained labour adjudicator.

[41] In *Vavilov*, the Supreme Court of Canada established a number of useful principles that guide the analysis of this question. One overarching consideration is the recognition that reasonableness review must take account of the context within which the decision was made. Flowing from this, the Supreme Court reminds reviewing courts that: "'Administrative Justice' will not always look like 'judicial justice', and reviewing courts must remain acutely aware of that fact" (*Vavilov* at para 92). Courts must respect the specialized knowledge and expertise that administrative decision makers bring to the tasks Parliament has assigned to them.

[42] *Vavilov* confirms that where reasons for a decision are required and were provided, reasonableness review will focus on the reasons that were actually provided (as opposed to those that might be conjured up after the fact by creative lawyers or entrepreneurial judges). This is because "reasoned decision-making is the lynchpin of institutional legitimacy" (*Vavilov* at para 74).

[43] The Supreme Court offers the following guidance, which is particularly apt in the current case:

> Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter… Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power… As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more

> likely to feel they were treated fairly and appropriately if reasons are given"…
>
> The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process… (*Vavilov* at paras 79-80).
>
> [citations omitted]

[44] Therefore, a reviewing court must pay careful attention to the reasons provided by the decision-maker, understood in light of the evidence and argument that was before them at the time, and with due regard to the institutional context. The role of a reviewing court is not to undertake a new analysis of the underlying question – a point that is particularly important in this case because Mr. Priest asked, among other things, for a determination that the education requirement amounted to adverse effect discrimination based on age. That is not my role here; instead, I am required to determine whether the Individual Feedback decision is reasonable, and if not, to send it back for reconsideration.

[45] The following passage sets out the framework that applies to assessing whether the Individual Feedback decision is reasonable under *Vavilov* (para 85):

> As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[46] From this, it is clear that the analysis must examine two types of questions: first, is the decision consistent with the applicable law? In this case, that involves the CRA staffing policies that apply. Second, is the decision based on clear and logical reasoning that addresses the key facts as well as the issues that were put before the decision-maker? One element of this is the

basic logic of the decision; another is whether it reflects the main evidence and arguments submitted. These are important because of "the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95).

[47] One significant element of reasonableness review concerns the degree to which the decision is responsive to the main legal and factual questions raised by the case. *Vavilov* explains this in the following way:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard… The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis"… or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" … To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning…
>
> [citations omitted]

[48] At the end of the day, "a reviewing court must ultimately be satisfied that the decision maker's reasoning 'adds up'" (*Vavilov* at para 104), taking into account the institutional context, the expertise of the decision-maker, and the evidence and arguments brought forward by the parties.

[49] In this case, several points should be underlined at the outset:

1. The Individual Feedback mechanism is meant to provide an opportunity for a relatively informal discussion between a candidate for a position and the hiring manager; it serves as a form of recourse for aggrieved candidates who feel they have been treated in an arbitrary manner, but also as a means of explaining why they did not succeed in the staffing process with a view to improving their chances next time;

2. individual Feedback is a relatively informal discussion between the hiring manager and the candidate; it is not equivalent to a formal grievance process;

3. the hiring manager has expertise in the SRED program and familiarity with the CRA staffing rules and process;

4. neither party is legally trained; and

5. the "reasons" for the decision are contained in a form that was created by CRA to capture the request for, and main outcomes of, the Individual Feedback discussion.

[50] With this background, we turn to the substance of the arguments on the reasonableness of the decision.

(3) Mr. Priest's Submissions

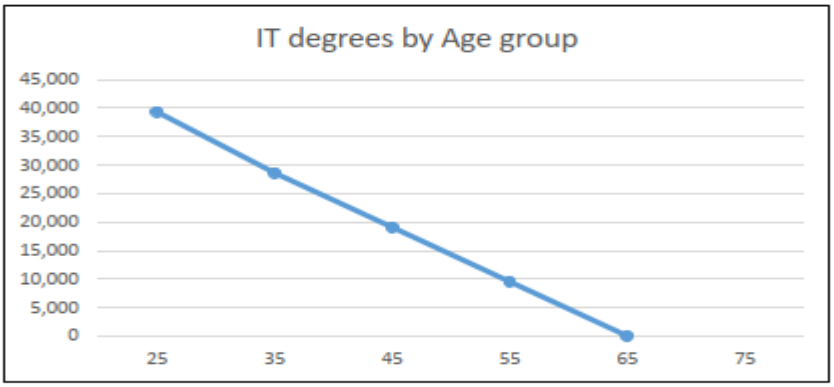
[51] The core of Mr. Priest's request for Individual Feedback, which appears to have been treated by the parties as merged with his Accommodation Request, is that the minimum education requirements that were applied to the CO-03 job competition discriminated against him on the basis of age. This is evident from the documentation, including the Individual Feedback form he completed, the application letter and the formal Request for Accommodation document he submitted, and Mr. Kearney's notes from the Individual Feedback discussion. The claim requires some elaboration, because an understanding of his point is essential in assessing whether the Individual Feedback decision is reasonable.

[52] In simple terms, Mr. Priest's argument is rooted in the fact that Computer Science programs did not exist at universities in Canada when he first obtained his degree. Because such programs were only adopted in subsequent years, he argues that the age profile of individuals holding such a credential is skewed towards the younger cohort. Mr. Priest produced the following graph in support of his argument:

IT degrees by Age group

Decade/Years	25 to 34	35 to 44	45 to 54	55 to 64	65 to 74	75 and over
bachelor level	39,360	28,650	**19,100**	**9,550**	0	
Starting age for graph	25	35	45	55	65	75

Bolded points are extrapolations



Data from StatCan Catalogue number 99-012-X2011040

STEM degrees include Science, Technology, Engineering and Mathematics

https://www150.statcan.gc.ca/n1/pub/81-582-x/2010004/tbl/tbld2.8-eng.htm

				born	age
1998	IT	2,865		1976	39
2008	IT	3,936	1.37382	1986	29

[53] Mr. Priest submits that this age distribution among degree-holders is also reflected in more general attitudes in the computer science profession, which he says is marked by rampant ageism. He acknowledges that the CRA did not intend to screen him out of the CO-03 job competition because he is older, but he argues this is irrelevant. Human rights law has long recognized that rules that apply to everyone may provide formal equality but nonetheless be discriminatory where they have the effect (or impact) of imposing a disadvantage on a particular group because of characteristics associated with the group.

[54] The minimum education requirement that was applied to screen him out of the CO-03 competition is just such a rule, according to Mr. Priest. He says that the Individual Feedback

decision must be overturned because his manager did not deal with his essential claim. He points out that there is no mention of adverse effect discrimination in the decision, nor is it clear whether this was discussed when Mr. Kearney contacted the experts at the DHCE. Instead, the statement in the Individual Feedback decision that the educational requirements policy "specifies a required education level and is applied equally to all applicants" demonstrates that they focused only on formal equality.

[55] On the Accommodation Request, Mr. Priest submits that the decision shows that the decision-maker lacked a proper understanding of the term as it is understood in the human rights context. The decision states: "CRA accommodates all employees that are seeking to upgrade their educational credentials and skills through the Education Assistance Program and educational leave." Mr. Priest alleges that the CRA equates accommodation with assistance that it provides to all employees. It does not reflect the usage of the term in human rights law, where the idea is that achieving substantive equality will sometimes involve special measures in order to address a situation of disadvantage experienced by an individual because of a group-related characteristic.

[56] Mr. Priest contends that the statement that the DHCE "advisor confirmed that requirements based on educational requirements do not discriminate based on age" does not indicate whether his adverse effect claim was ever considered, and is not consistent with the case law he cited in the following passage from his Accommodation Request:

> Regarding the degree vs age issue, the arguments and ultimate determination provided by *Homer vs the Chief Constable* and *Games vs University of Kent* provide guidance that has direct correspondence. [hyperlinks omitted]

> In America, the case which established the concept of Adverse Impact or Systemic Discrimination determined that education could be used to create a discriminatory barrier. See Griggs v Duke Energy [hyperlink omitted]. This case also has direct correspondence to the use of education to create a barrier limiting the age of candidates.

[57] A brief summary of these decisions will be helpful to understand the nature of Mr. Priest's claim on this issue. In *Homer v Chief Constable of West Yorkshire Police*, [2012] UKSC 15 [*Homer*], the case concerned a claim of adverse effect discrimination (referred to in the United Kingdom as "indirect" discrimination) based on age, arising from the imposition of education requirements. Mr. Homer had retired from the police force at the age of 51, and then began working with a specialized unit that provided legal advice and support to police forces in the United Kingdom. He was not a lawyer, but was hired based on his lengthy experience with the criminal justice system. Over time, the education requirements for this unit were increased, and towards the end of his career, Mr. Homer was denied a promotion because he did not have a law degree. His claim of indirect discrimination was upheld, because it was not realistic to expect him to obtain a law degree when he was 62, given that he would be forced to retire at age 65. The U.K. Supreme Court found "(a) requirement which works to the comparative disadvantage of a person approaching compulsory retirement age is indirectly discriminatory on grounds of age" (*Homer* at para 17).

[58] In *Games v University of Kent*, [2015] IRLR 202, the U.K. Employment Appeals Tribunal upheld a complaint that a requirement that candidates for full-time lecturer positions in the University's School of Architecture have a PhD amounted to indirect discrimination based on age. Mr. Games had extensive experience in the field of architecture, and had been a sessional lecturer at the University for many years, but he did not hold a PhD. He said that when he was a

student in the 1970s, it was unusual for architecture lecturers to have a PhD because most of them sought to obtain the professional accreditation they needed to be able to practice their profession rather than pursuing advanced degrees. He noted that in the period since he obtained his qualifications, the number of people obtaining PhDs in architecture had increased dramatically. The evidence substantiated this claim. Based on the principles established in *Homer*, the Employment Appeal Tribunal found that the rule amounted to indirect discrimination.

[59] The final case cited by Mr. Priest is *Griggs v Duke Power* (1970), 401 US 424 [*Griggs*], which he correctly identified as the fountainhead decision on the concept of adverse effect discrimination. The U.S. Supreme Court described the issue in the case in the following way:

> We granted [leave to appeal] in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify [African Americans] at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites (*Griggs* at pp 425-426).

[60] The U.S. Supreme Court found that such rules could violate the law. It described the objective of the Civil Rights Act:

> It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze' the status quo of prior discriminatory employment practices (*Griggs* at p 429-430).

[61] The court concluded that although the company said it had adopted these rules to improve the overall quality of the workforce, and without any intention to discriminate, this did not mitigate their responsibility under the Civil Rights Act:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability (*Griggs* at p 432).

[62] This summary explains why Mr. Priest referred to these decisions in support of his claim that the minimum education rules amounted to adverse effect discrimination based on age. He asserts that the failure of the decision to deal with this claim, or to discuss these cases, makes the decision unreasonable, pointing to the blanket statement that the DHCE advisor had advised the hiring manager that "requirements based on educational requirements do not discriminate based on age."

[63] Mr. Priest argues that the Individual Feedback decision completely failed to address his discrimination claim or to deal with his request for accommodation. He says that these gaps are fatal to the decision. The hiring manager had the ability to seek an exemption from the minimum education requirements but failed to do so, and Mr. Priest argues this was not reasonable in the circumstances because he had proven that the rule resulted in age-based discrimination.

(4) The Respondent's Submissions

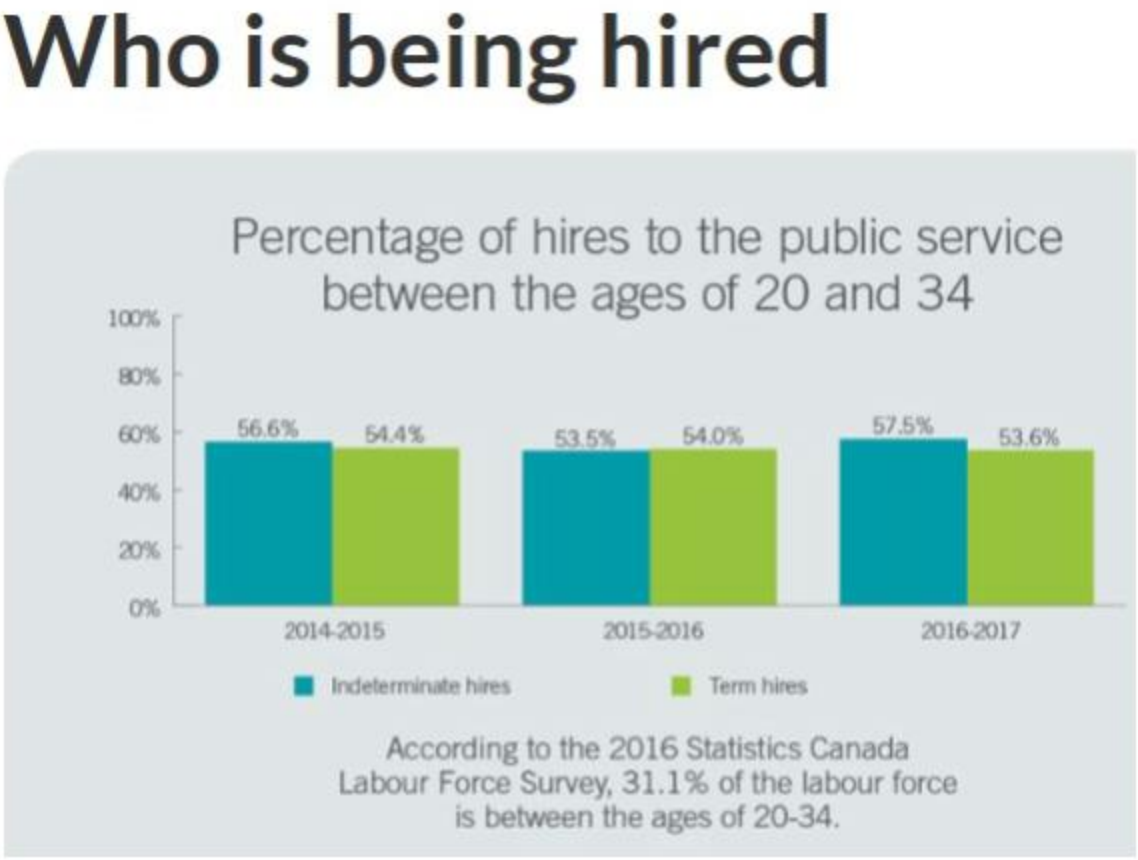
[64] The Respondent submits that the decision must be read in its context, with due regard for the informality of the process and the fact that the Individual Feedback process is part of an ongoing dialogue between the hiring manager and an employee. In addition, the Respondent acknowledges that the decision does not contain a formalistic discussion of the applicable legal

tests, but submits that this is not required under *Vavilov*. Instead, the focus should be on whether the decision responds to the central issues raised by Mr. Priest, based on the way he characterized his complaint.

[65] On this last point, the Respondent asserts that the documentation makes clear that Mr. Priest's issue was his request for individual accommodation under the *CHRA*. They say the Individual Feedback request was not a more general challenge to the minimum education standard, but rather was focused on steps that would allow Mr. Priest to continue to compete for the CO-03 position. The Respondent argues that this is central to an assessment of whether the decision is reasonable.

[66] Under the *CHRA*, a request for accommodation requires that three things be established: the individual must have a protected characteristic (which is undisputed here, since age is one of the listed grounds); an adverse impact must have been experiences (also undisputed, since Mr. Priest was screened out of the competition); and there must be a connection between the protected characteristic and the adverse impact. The Respondent submits that this is the key point, because Mr. Kearney found an insufficient nexus between Mr. Priest's age and his inability to meet the education requirement.

[67] The Respondent points to Mr. Kearney's evidence regarding the information that was provided by Mr. Priest in the context of the Individual Feedback discussion, which shows that the only statistical evidence that was produced was the following graph:



[68] Although Mr. Kearney's notes from the meeting indicate that Mr. Priest discussed the more general issue of age discrimination and computer science degrees, these were simply allegations not supported by any evidence. Mr. Priest had the opportunity to present all of his evidence to Mr. Kearney, but he failed to do that. The Respondent contends that it was therefore reasonable for Mr. Kearney to not delve further into the discrimination allegation because it was not supported by the evidence. When looked at in the context of the decision – namely a discussion between a manager and employee – the decision was responsive to the issues as framed by Mr. Priest, and meets the requirements of reasonableness.

[69] In response to Mr. Priest's argument that the CRA misunderstood the meaning of the term "accommodation", the Respondent makes two points: (1) accommodation is only required

under the *CHRA* where a nexus has been established between the adverse effect and the protected ground, which was not done here; and (2) paid educational leave is a form of accommodation for those whose prior educational experience was harmed by their experience of discrimination, because it is one means of enabling such individuals to overcome the "built-in headwinds" that an education standard may impose. In addition, the Respondent points to the comprehensive policies CRA has adopted on harassment, discrimination and accommodation, including accommodating employees in the context of hiring and promotion processes.

[70] Finally, the Respondent contends that some of the specific remedies proposed by Mr. Priest are not appropriate in the context of a judicial review. In particular, the Respondent submits that this is not a case for a "directed verdict" or a more general declaration that the education standard is discriminatory. If the decision is found to be unreasonable, the Respondent argues that the only available remedy is to return the matter to the decision-maker for reconsideration.

(5) Discussion

[71] As discussed above, my assessment of whether the Individual Feedback decision is reasonable must follow several key guideposts, including consideration of the context for the decision and the reality that a manager's decision on an Individual Feedback request should not be found wanting because it does not look like a decision written by a lawyer or judge.

[72] The core of what is required can be described as responsive reasons. The first element of this is whether the reasons reflect the essential facts of the matter, in light of the law (or in this

case – the policy) that applies. That is the “box” or “frame” within which the decision must be taken. A decision that goes outside of that box is likely to be found to be unreasonable.

[73] The second element considers the reasoning in the decision, which can be understood as is the map drawn inside that box. The reasons must demonstrate how the decision-maker reached the result, by applying the law to the facts and explaining the reasoning process. To borrow a phrase, it must be possible to “connect the dots” of the analysis, or at the least to discern the direction of where the main points of the reasoning was heading (see *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 cited with approval in *Vavilov* at para 97).

[74] Applying this guidance to the case before me draws out two competing considerations. First, there is significant force in the Respondent’s argument that the Individual Feedback decision should be understood with reference to how Mr. Priest framed his request, and in the context of the relative informality of that process. I also agree with the Respondent that the ongoing relationship between the parties is an important consideration.

[75] On this point, I agree with the Respondent that the lack of formalistic legal analysis on the finer points of adverse effect discrimination or the duty to accommodate does not make the decision unreasonable. Similarly, it was reasonable for the manager to omit a specific discussion of the case law cited by Mr. Priest in his accommodation request. The key question is whether the decision shows that the hiring manager actually grappled with the essence of Mr. Priest’s complaint, and then explained the reasoning in a manner that shows why the decision to screen him out was not reversed.

[76] Having considered all of these factors, however – and viewing the decision in light of the requirement of responsive reasons - I find persuasive Mr. Priest's argument that the decision and the underlying record do not indicate that there was any consideration of the most important aspect of his request, namely the question of whether the he experienced adverse effect discrimination on the basis of his age when he was screened out of the competition for failing to meet the minimum education requirement. On this point, the Respondent's argument about examining the decision in light of the ongoing relationship between Mr. Priest and Mr. Kearney takes on a new light.

[77] Mr. Kearney's notes from the Individual Feedback meeting are instructive. The notes begin by listing the issues raised by Mr. Priest, including that: "(t)he [hiring] board is asked to modify the NOJO to use the [Computer Science] wording for computer personnel as was requested in the accommodation request and include Mr. Priest in the pool." This demonstrates that one important element of Mr. Priest's request was properly identified in advance of the Individual Feedback meeting.

[78] The notes also include "Pre-Meeting Notes" presumably prepared by Mr. Kearney in advance of the discussion as a reminder of certain key elements. This section includes reference to the minimum education standard for CO-03 positions, and notes that while CO positions require "a minimum Masters Degree, or for engineering or computer science a Bachelors Degree with applicable experience", CS positions merely require a "Degree or Diploma in CS, or any degree and 3 years of IT experience." This indicates that a key element of Mr. Priest's argument was also understood; he consistently compared the CO and CS education requirements, and argued that the flexibility reflected in the CS standard should be applied to him.

[79] On the point of the nexus between age and education, the notes state the following:

> [Mr. Priest] provided a detailed history of computer science degrees. Indicated Mcmaster didn't have a computer science program when he graduated, discussed how waterloo didn't issue computer science degrees until 2002. Discussed industry practices including experience rather than degrees because the degree didn't exist. He noted that computer science is not regulated by a profession like accounting or engineering. Discussed how computer industry has rampant age discrimination. He described an interview he had years ago where he was asked about "disperience". He explained how the term was used to identify old training that would have to be unlearned to then understand concepts like OOP instead of linear programming. (spelling as in original)

[80] In addition, the notes show that Mr. Priest referred to the cases he had cited and explained how he thought they applied to his situation:

> Chris discussed the need to accommodate when discrimination is present to prevent artificial barriers. He asked if I considered the court cases that he provided and referred to the US case which indicated that a fixed education criteria can be discrimination based on race. He further summarized that the requirement of an applicant be a recent graduate is an example of a discriminatory process by age. He asked how many people under 60 have CS degrees and how many people under 30 in the software industry do.
>
> I advised that cases deal with specific facts of those cases. For example, the idea of requiring a recent graduate is not the same as requiring degree.

[81] Further evidence about the nature and specificity of the claim Mr. Priest advanced was summarized earlier; this includes his application letter, his Request for Accommodation, and his Individual Feedback request. All of these are consistent in that they each set out his concerns regarding the adverse effect of the education standard, and they make clear this is grounded in his claim of age discrimination under the *CHRA*.

[82] These references are important because they emphasize two things: first, Mr. Priest had advanced a specific, detailed argument about how the education requirement discriminated against him based on age, as well as a specific request for accommodation to relieve him from the impact of this rule; and second, this was not the usual type of Individual Feedback discussion.

[83] Considering all of these elements, and despite the able submissions of Respondent's counsel, I am unable to conclude that the decision is reasonable. Taking into account the considerable deference that is owed to the hiring manager in this situation, and the relatively flexible approach to reviewing the decision, I find that the reasons do not satisfy the minimum requirement of responsiveness under *Vavilov*.

[84] I do not accept the Respondent's explanation that the hiring manager implicitly found that Mr. Priest had not demonstrated a nexus between his age and the education requirement and thus had not established adverse effect discrimination. In my view, the Respondent is asking the Court to read too much into the decision. The notes of the Individual Feedback decision, as well as the evidence of prior discussions and an earlier grievance that Mr. Priest had filed with Mr. Kearney, are not consistent with this conclusion.

[85] This is not to say that I accept Mr. Priest's contention that the rule amounts to adverse effect discrimination. That is not my role, and I underline here that this decision should not be interpreted as resting on any such finding. Rather, in light of the evidence about the detailed nature of Mr. Priest's claim, and the specific discussion reflected in the notes from the Individual Feedback meeting, I am not persuaded that the decision rests on an implicit finding of a lack of a nexus between the protected ground and the adverse effect. If that was the basis for the decision,

it needed to be stated in clearer terms both in order to explain the outcome and to demonstrate that Mr. Priest's arguments and evidence were examined.

[86] Furthermore, I find that the reference in the decision to the fact that the education requirement does not discriminate, and that it was applied to all employees at the CO-03 level does not provide comfort that the concept of adverse effect discrimination – which lies at the heart of Mr. Priest's complaint – was actually considered by the decision-maker.

[87] It bears repeating that *Vavilov* teaches that reasonableness review puts the reasons for the decision first, and this applies both to the judicial or quasi-judicial and the administrative contexts. Among the many functions of reasons in decision-making, *Vavilov* emphasizes the importance of justifying the outcome to the parties affected (para 79), encouraging administrative decision makers to more carefully examine their own thinking and to better articulate their analysis (para 80), and facilitating judicial review by shedding light on the rationale for a decision (para 81).

[88] Applying these considerations leads to the conclusion that the decision in this case falls short of reasonable. While a formalistic or legalistic discussion of Mr. Priest's complaint was not required, the decision, amplified by the record, needed to demonstrate that the hiring manager considered his claim of adverse effect discrimination based on age and examined his request for accommodation to eliminate the unjust treatment. If the evidence of discrimination was found to be lacking, or otherwise insufficient, that needed to be stated. Instead, the decision mentions that the rule was applied to everyone, and repeats the blanket statement attributed to the expert at DHCE that education rules do not discriminate based on age. That does not justify the outcome, as *Vavilov* requires.

[89] For these reasons, I find the decision to be unreasonable. This finding is grounded in the particular facts of this case, and any future challenge to an Individual Feedback decision will rest on the particular facts in those circumstances. I emphasize that this decision should not be understood as imposing an elevated standard for such decisions; in most cases, a summary of the discussion and an indication why the outcome was reached will suffice. It bears repeating that this was an unusual situation because of the way in which Mr. Priest framed and explained his arguments, which called for a correspondingly detailed and specific explanation of the outcome.

[90] The application for judicial review is granted. The Individual Feedback decision is quashed, and the matter is remitted back for reconsideration.

[91] In sending the matter back, and recognizing the passage of time, I would simply underline the core requirement – someone in authority at the CRA must examine Mr. Priest's complaint that he has experienced adverse effect discrimination based on his age, by being screened out of the CO-03 competition because he did not meet the education requirements. If that contention is accepted, the question of how to accommodate Mr. Priest, and whether any other redress is required, is a matter for the CRA to consider, in light of all of the circumstances, Mr. Priest's requests, and the relevant jurisprudence on those questions.

[92] Mr. Priest represented himself, and did not seek costs, and so none are awarded.

JUDGMENT in T-234-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The Individual Feedback decision is quashed, and the matter is remitted back for reconsideration, in a manner that is consistent with the reasons.

3. There is no award of costs.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-234-21
STYLE OF CAUSE:	PRIEST V CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	JANUARY 25, 2022
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	NOVEMBER 22, 2022

APPEARANCES:

Christopher Priest	FOR THE APPLICANT
Amanda Bergmann	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Christopher Priest On his own behalf	FOR THE APPLICANT
Labour and Employment Law Group Department of Justice Ottawa, Ontario	FOR THE RESPONDENT