

**Canadian Human Rights Tribunal**

**Tribunal canadien des droits de la  
personne**

**BETWEEN:**

**KANAGS PREMAKUMAR**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**AIR CANADA**

**Respondent**

**REASONS FOR DECISION**

**T.D. 03/02**

**2002/02/04**

**PANEL: Anne Mactavish, Chairperson**

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## **VI. ORDER**

[1] Kanagasabapathy Premakumar is a Tamil, originally from Sri Lanka. In the Spring of 1998, Mr. Premakumar applied for a job with Canadian Airlines International.<sup>(1)</sup> He was not hired. Mr. Premakumar alleges that his race, his color and his national or ethnic origin were factors in Canadian's decision not to hire him.

### **I. BACKGROUND**

[2] Mr. Premakumar has had a longstanding involvement in the aviation industry. Prior to coming to Canada, Mr. Premakumar worked in the finance department of an airline in Sri Lanka, and as a traffic services supervisor at an airport. His involvement with airlines continued after he came to Canada: in August of 1986, Mr. Premakumar began working for City Express as an Accounts Assistant / Reservations Agent. Since then, he has held a number of other positions with airlines, including a part-time position as a Sales and Passenger Services Agent for Hudson General Aviation Services, and a two-year stint as a "Groomer", performing cabin maintenance for Air Canada, between 1989 and 1991.

[3] In 1995, Canadian required additional assistance with its ramp operations throughout North America. The airline was in some financial difficulty, however, and in order to allow Canadian to meet its operational needs within the financial constraints on it, the airline entered into an agreement with the International Association of Machinists and Aerospace Workers, the union representing ramp workers. This agreement allowed Canadian to hire temporary employees for

the summer months. In April of 1995, Mr. Premakumar was hired by Canadian as a temporary Reduced Time Station Attendant at Pearson Airport as part of this initiative. This was a contract position, and came to an end on October 28, 1995.

[4] There was some disagreement in the evidence as to the scope of the duties of a temporary Reduced Time Station Attendant at Canadian in the Summer of 1995. It is, however, common ground that, at a minimum, Mr. Premakumar would have been required to do considerable heavy lifting, as his duties included the sorting of baggage in the baggage room. Through his work with Canadian, Mr. Premakumar would also have become well aware of the time pressures associated with the position of Station Attendant, and the importance of timely service.

[5] Mr. Premakumar testified that he performed his duties as a temporary Reduced Time Station Attendant in a competent and conscientious fashion. There is nothing before me to suggest that Mr. Premakumar performed his duties as a temporary Reduced Time Station Attendant in other than a fully satisfactory manner.

## **II. CANADIAN'S 1998 HIRING CAMPAIGN**

[6] Mr. Premakumar says that after his contract with Canadian was terminated in the fall of 1995, he applied for positions with Canadian on several occasions, but was never called for an interview. In early 1998, Canadian was involved in a campaign to hire a number of Reduced Time Station Attendants for Pearson Airport. Mr. Premakumar became aware that Canadian was hiring, and submitted an application. After again receiving no response from Canadian, Mr. Premakumar called Lynne Raglan, Canadian's Employment Manager for Eastern Canada. An interview was then arranged for Mr. Premakumar for the position of permanent Reduced Time Station Attendant.

### **A. Qualifications for the 1998 Reduced Time Station Attendant Position**

[7] Lynne Raglan was responsible for Recruitment for Canadian in Eastern Canada, between 1995 and 1998. Ms. Raglan testified that Canadian required that individuals employed as Station Attendants have a Grade 12 education, or equivalent, that they possess a full "G" class Ontario driver's licence, and that they be able to lift weights of up to 70 pounds. In addition, candidates had to be able to work in confined spaces and at heights, and to work outdoors. Candidates had to be able to speak, read and write English fluently, and be available to work a variety of shifts. Finally, candidates had to be able to attend a mandatory two to three week training program.

[8] According to Ms. Raglan, the skills that the company was seeking for Reduced Time Station Attendants in 1998 were similar to those it looked for when it hired temporary Reduced Time Station Attendants in 1995. In contrast, Rick Chiappetta (who was one of the Canadian representatives who interviewed Mr. Premakumar in March of 1998) testified that Canadian was looking for totally different skills in 1998 than what it had looked for in 1995. According to Mr. Chiappetta, Canadian was hiring permanent employees in 1998, and therefore wanted people who could grow with the company. This was unlike the situation in 1995, when individuals were

being hired on a temporary basis. I prefer the testimony of Lynne Raglan on this point. Ms. Raglan was a more disinterested witness, in that her conduct was not directly in issue in this case. This was demonstrated in her testimony, which I found to be more balanced than that of Mr. Chiappetta.

[9] It was acknowledged that Mr. Premakumar met the basic requirements for the position. This was reflected in the fact that Mr. Premakumar was granted an interview.

### **C. The Hiring Process**

[10] According to Ms. Raglan, after receiving an application, her assistant would contact the candidate by telephone, and would ask a series of questions based upon a 'Prescreen' questionnaire. These questions were intended to determine whether the candidate met the basic requirements for the job, such as the requirement of a Grade 12 education, or equivalent, the valid Ontario "G" class driver's licence, and whether the candidate was lawfully entitled to work in Canada. Additional questions were designed to eliminate manifestly unsuitable candidates, such as those unwilling to work for the hourly rate associated with the position or those unable to do shift work.

[11] Assuming that the candidate successfully cleared the pre-screening process, he or she would then be brought in for an interview. Interviews were generally held with two Canadian representatives, one from Human Resources, with experience in recruiting, and a second individual from the ramp area, who had familiarity with the Station Attendant position.

[12] Candidates were asked to write a brief paragraph explaining why they wanted to work for Canadian. They were also asked to read a paragraph out loud, which was intended to determine if the candidate was able to read and communicate in English. A series of questions was then asked from a prepared list of questions. The same questions were posed to every candidate. Each question had an equal weight, and no question was any more or less important than any of the others. The company did not have pre-determined desirable answers for the questions. However, the interview form indicates that the interviewers were to listen for certain things in relation to specific questions.

[13] Immediately after the interview was completed, the interviewing team would make a preliminary determination of the candidate's suitability. If the team decided that the candidate was not suited for the position, that was the end of the process, and the candidate would subsequently be provided with a rejection letter. Those who were successful in the interview were asked to undergo a driving test, a security check and a medical examination, before commencing a training program.

[14] I was not told how many people applied for positions as Reduced Time Station Attendants, but it appears that several hundred candidates were interviewed in the Spring of 1998. Three or four teams of people conducted interviews, and interviewers saw anywhere from eight to fifteen candidates a day, over a period of several weeks. Ultimately, approximately fifty-seven people were hired. <sup>(2)</sup>

### C. Mr. Premakumar's Job Interview

[15] Mr. Premakumar was interviewed on March 30, 1998 by Kerry Demeda and Rick Chiappetta. Ms. Demeda was a Recruitment Co-ordinator, reporting to Lynne Raglan. Ms. Demeda acted as one of the recruitment specialists on the interview teams involved in the hiring process. Rick Chiappetta participated in the Station Attendant interview process as one of the individuals with ramp experience.

[16] According to Ms. Demeda, the interview was designed to assess whether candidates had the 'soft skills' necessary to allow them to do the job. She described 'soft skills' as: "... skills that you can't train somebody on. It's the willingness to work, being able to co-operate and work as part of a team, being motivated, enthusiastic, having a good work ethic." <sup>(3)</sup> Ms. Demeda assessed the candidate's 'soft skills' by the way the candidate answered questions, the way in which the candidate spoke about his or her current position, their attitude and whether they demonstrated that they were able to work as part of a team. Mr. Chiappetta testified that he was looking for leadership, explaining that "... if people are motivated to move up in the company, leadership skills would help them in achieving that". <sup>(4)</sup> He was also looking for candidates with good communication skills, who had the ability to work under time constraints. In assessing the candidate's suitability for the position, Mr. Chiappetta would consider factors such as the way the person spoke when answering questions, as well as the individual's body language.

[17] Although it appears that Mr. Premakumar stretched the truth somewhat in subsequent job applications as it related to the level he had attained in his CGA certification, nevertheless, on balance, I found Mr. Premakumar to be a credible witness. Mr. Premakumar testified at some length with respect to his interview. His testimony was delivered in a forthright manner, it was consistent and unwavering, and it was largely unshaken on cross-examination. <sup>(5)</sup> Given Mr. Premakumar's longstanding interest in the aviation industry, this interview was obviously of some considerable importance to him, and his recollection was detailed and specific. According to Mr. Premakumar, both Ms. Demeda and Mr. Chiappetta asked him questions, and both took notes with respect to his responses. He stated that he answered all of their questions fully and completely. Throughout the interview he received positive feedback from Ms. Demeda and Mr. Chiappetta. Mr. Premakumar says that Ms. Demeda and Mr. Chiappetta would nod their heads affirmatively as he answered questions, and that they would make comments such as 'good' and 'very good' in response to his answers. Mr. Premakumar left the interview feeling confident that he had gotten the job.

[18] Although Lynne Raglan testified that it was Canadian's policy not to provide candidates with any kind of feedback during the interview process, Kerry Demeda acknowledged that she would try to provide encouragement to candidates by nodding her head, and saying things such as "Great. Thank you. Let's go on to the next question...". <sup>(6)</sup> Rick Chiappetta also confirmed that he would nod 'yes' in response to answers given during interviews.

[19] Mr. Premakumar was asked to indicate in writing why he had applied to work with Canadian, and was asked to read a paragraph in English. Mr. Chiappetta acknowledged that Mr. Premakumar's English language skills were satisfactory. The interview then proceeded to the pre-scripted questions.

[20] As previously noted, Mr. Premakumar has a clear recollection of the interview. In contrast, neither Ms. Demeda nor Mr. Chiappetta have any recollection whatsoever of Mr. Premakumar or his interview. This is not at all surprising, given the number of interviews that each conducted during this time period, and I accept their testimony in this regard. The absence of any independent recollection of the interview does, however, mean that both Ms. Demeda and Mr. Chiappetta were entirely dependant on notes of the interview in their attempts to reconstruct what went on with respect to Mr. Premakumar. From these notes, Ms. Demeda and Mr. Chiappetta surmise that Mr. Premakumar's interview must have gone very badly, and this was why he was not hired.

[21] It is common ground that the only notes before the Tribunal with respect to Mr. Premakumar's interview were those taken by Mr. Chiappetta. Mr. Premakumar testified that Ms. Demeda had a paper in front of her, and wrote things down in the course of the interview. According to both Mr. Chiappetta and Ms. Demeda, during this phase of the process, they took turns running interviews. One would ask most of the questions and also record the answers in one interview, and the other would then do the same in the next interview. Ms. Demeda corroborates Mr. Premakumar's recollection, however, acknowledging that even when Mr. Chiappetta was running an interview, she would have a pad of paper in front of her, and would make the odd note of things that she wanted to follow up on. According to Ms. Demeda, these notes were intended as more of an 'aide memoire' than a record of the interview itself, and did not even record the name of the candidate. Ms. Demeda's notes appear to have been destroyed after the interview. While it would certainly have been preferable to have all of the notes of the interview before the Tribunal, given Ms. Demeda's description of the purpose of the notes, I am not prepared to draw any kind of inference from their destruction.

[22] Mr. Premakumar's recollection that both Ms. Demeda and Mr. Chiappetta asked questions during the interview is also corroborated by Ms. Demeda. Although it appears that this interview was largely run by Mr. Chiappetta, Ms. Demeda acknowledged that she would ask questions during Mr. Chiappetta's interviews, when she felt it necessary to probe more deeply into a candidate's answer.

[23] The first question that Mr. Premakumar was asked was "What is motivating you to apply for the Station Attendant ... position?" Mr. Premakumar testified that he reviewed his experience in the airline industry, referring to his prior experience with both Air Canada and Canadian, as well as his work with smaller airlines. Mr. Chiappetta's notes record Mr. Premakumar's answer as "has worked temp. with Cdn."

[24] Mr. Chiappetta testified with respect to his note-taking and initially suggested that although he did not take down answers word for word, he would record anything that was said by a candidate. A review of the record suggests that this is very unlikely. Mr. Chiappetta and Ms. Demeda agreed that interviews lasted somewhere between 20 and 30 minutes. There were 12 main questions for each candidate. In Mr. Premakumar's case, Mr. Chiappetta's record of the answers consist of as few as two words per question. There are no answers recorded for three questions. Although it was suggested that this is reflective of how poor Mr. Premakumar's interview must have been, the quality of the record kept by Mr. Chiappetta with respect to Mr. Premakumar's interview is not materially different from the quality of his notes of interviews

with other, successful, candidates. Not only is it hard to imagine how interviews involving two word answers could take between 20 and 30 minutes, a review of the answers themselves suggests that Mr. Chiappetta's subsequent description of his notes as representing "Something of what happened" [\(7\)](#) is more accurate.

[25] I prefer Mr. Premakumar's description of his answer to that recorded by Mr. Chiappetta. Mr. Premakumar had a longstanding interest in the airline industry, and had significant and varied experience in the business. It makes sense that he would have discussed this in his interview.

[26] Ms. Demeda and Mr. Chiappetta's assessment of the significance of Mr. Premakumar's prior experience with Canadian is telling, and really sets the tone for the balance of their testimony regarding Mr. Premakumar's candidacy. Although Lynne Raglan was of the view that prior experience with Canadian would be a strong asset, both Ms. Demeda and Mr. Chiappetta played down the value of Mr. Premakumar's prior experience in what was, at the very least, a somewhat reduced version of the very job that they were seeking to fill. At one point in her cross-examination Ms. Demeda went so far as to seemingly suggest that far from operating in his favour, Mr. Premakumar's prior experience with Canadian was actually a negative:

**Q.** When a candidate has already worked in a similar job, you would agree that in relation to the description in the passage you have just read you would have a candidate who is a good asset for the position in question?

**A.** They would have the basic skills. That doesn't mean that they do the job well or not.

**Q.** At the start they would have somewhat of an upper hand because they already have prior experience. Correct?

**A.** Anybody with general labour experience would probably have a better knowledge.

**Q.** Are you telling me that somebody with general labour experience would be preferable to somebody who has had the job exactly the same as this?

**A.** Probably. [\(8\)](#)

Although Ms. Demeda went on to retreat somewhat from this position, she remained reluctant to acknowledge the obvious significance of Mr. Premakumar's prior experience with the company. For example, at one point Ms. Demeda tried to diminish the value of Mr. Premakumar's experience with Canadian by observing that the experience was three years old. However, when assessing the qualifications of another candidate, Ms. Demeda was impressed by the candidate's ramp experience in the freight business with another company, even though the candidate had not worked in that position for some seven years before his interview. [\(9\)](#)

[27] According to Mr. Chiappetta, this was an entry level position, and prior experience was not required. In cross-examination, Mr. Chiappetta agreed with the proposition that Mr. Premakumar's prior experience as a temporary Reduced Time Station Attendant with Canadian was "totally unimportant". <sup>(10)</sup> Mr. Chiappetta also had little regard for Mr. Premakumar's past experience as a Groomer with Air Canada. According to Mr. Chiappetta, this experience was of little relevance because the experience was in a different job to that of Station Attendant. On the other hand, Mr. Chiappetta was favorably impressed with other candidates' experience in other airline jobs such as airline maintenance <sup>(11)</sup> and aircraft mechanics. <sup>(12)</sup>

[28] No effort was made to check with Mr. Premakumar's previous supervisors regarding the quality of his work as a Station Attendant in 1995. According to Ms. Raglan and Ms. Demeda, such an inquiry would only have been made after Mr. Premakumar had successfully completed his interview.

[29] The second question Mr. Premakumar was asked was "Tell us what you know about Canadian Airlines?" This question was designed to determine if the candidate had done any research. Mr. Premakumar testified that he said that Canadian was a subsidiary of PWA Corporation, and had been doing well until its merger with Wardair, at which time it began losing money. Mr. Chiappetta did not make any note of Mr. Premakumar's answer, as the form does not provide for the recording of the candidate's answer, but rather gives four possible ratings "Excellent", "Good", "Fair", or "Poor". Mr. Chiappetta circled "Fair" for Mr. Premakumar's answer. In and of itself, this is unremarkable, although it is worth noting that many of the successful candidates were noted as having a poor knowledge of Canadian. What is remarkable is Mr. Chiappetta's assertion that having a "Fair" knowledge of Canadian Airlines is not necessarily better than having a "Poor" knowledge of the company.

[30] Mr. Premakumar was then asked "What can you offer Canadian Airlines Int'l?" The interview form indicates that interviewers were to listen for "transferable skills, people skills, tack [sic], explanation of his/her perceived strengths". According to Mr. Premakumar, he again referred to his previous experience in the airline industry, and mentioned that he was hardworking and trustworthy. He also mentioned having strong interpersonal skills. Mr. Chiappetta records his answer as "energy / experience". Mr. Chiappetta grudgingly conceded that both energy and experience were positive attributes in a candidate.

[31] Being a team player was frequently mentioned as an important skill for Station Attendants. Although not recorded by Mr. Chiappetta, Mr. Premakumar says that he described himself as a team player in the interview. Mr. Chiappetta's own record of Mr. Premakumar's answer to the twelfth question refers to Mr. Premakumar's desire to be part of "a winning team". Mr. Premakumar's résumé also mentions his interest in social service. Lynne Raglan noted that another candidate's résumé indicated that he had volunteer experience, observing that this was viewed as a very good thing as it indicated that the candidate was a team player. <sup>(13)</sup> No such recognition appears to have been given to Mr. Premakumar's interest in volunteer work. Similarly, Ms. Demeda was prepared to give credit to another candidate's involvement in recreational physical activities, stating that this demonstrated the candidate's ability to work as part of a team. <sup>(14)</sup> No similar consideration appears to have been given, however, to Mr. Premakumar's interest in soccer - a team sport - which was clearly referred to on his résumé.

[32] The next two questions ask the candidate to identify what they liked most and least about their current position. There is nothing particularly significant about either Mr. Premakumar's version of his answers or Mr. Chiappetta and Ms. Demeda's comments with respect to the answers.

[33] Mr. Premakumar's response to the sixth question is the most controversial one of the interview. The question asks the candidate to "Give us an example of when you have worked under time constraints?" According to the form, interviewers were to listen for the candidate's ability to manage stress. Lynne Raglan explained that Station Attendants work under time constraints imposed by flight schedules. With candidates who had done this type of job before, Ms. Raglan would look for interview answers that provided examples of situations where the candidate had found him or herself working under time constraints.

[34] Mr. Premakumar says that he gave a specific example of a situation that had arisen in the course of his previous employment as a Station Attendant with Canadian, and described actions that he had taken that enabled a flight to leave on time. According to Mr. Premakumar, it had been necessary to work very hard to meet the departure time, but employee safety had remained a priority. Mr. Premakumar said that he had been complimented by the lead hand for his actions in this situation.

[35] Mr. Chiappetta records Mr. Premakumar as saying "Just do the job take my time!!!"

[36] As with the rest of the interview, Ms. Demeda does not recall Mr. Premakumar's answer to this question. Mr. Chiappetta says that if this is what he wrote down, this is what Mr. Premakumar must have said. I do not accept Mr. Chiappetta's evidence in this regard, and prefer the evidence of Mr. Premakumar. As Ms. Demeda noted in her testimony, anyone who had done the Station Attendant job would be aware of the time pressures associated with the position. Mr. Premakumar had previously worked for Canadian as a Reduced Time Station Attendant, and was well aware of the importance of timely service. He is clearly an intelligent man, one who very much wanted this job. In this context, it is simply not credible that he would answer a question about working under time constraints by saying that he would just do the job and take his time.

[37] As the complainant, Mr. Premakumar testified first, giving his description of his answer before either Ms. Raglan or Ms. Demeda took the stand, and thus had no opportunity to tailor his evidence to meet their description of what they were looking for. Ms. Raglan stated that her expectation was that a candidate would give a specific example of working under time constraints, based upon past experience. Mr. Premakumar did exactly that. Ms. Demeda testified that reference to safety was something that the interviewers were looking for. Mr. Premakumar was clear that he mentioned keeping safety as a priority.

[38] Mr. Chiappetta testified that both a candidate's résumé and their performance in the interview were considered as part of a total package. In this context, it is noteworthy that Mr. Premakumar's résumé makes specific reference to his skill in setting priorities and meeting deadlines, as well as his ability to work quickly and competently under pressure.

[39] Mr. Premakumar was next asked "Tell us about a time you found a way to make your job easier or more rewarding" There is nothing particularly significant about Mr. Premakumar's version of his answer, and neither Mr. Chiappetta nor Ms. Demeda had much to say in this regard.

[40] There are no answers recorded for the next three questions. Mr. Premakumar testified that he answered all three of the questions, and described the answers he says he provided. These appear to be perfectly reasonable answers.

[41] According to both Ms. Raglan and Ms. Demeda, if a candidate provided an answer to a question, that answer should be recorded. Ms. Raglan did say that in situations where an interview was going very badly, the interviewers might stop asking questions, so as to avoid humiliating the candidate. In such cases, Ms. Raglan would sometimes note on the form why the person was not hired.

[42] Mr. Chiappetta explained the gaps in his notes by saying that either Mr. Premakumar did not provide any answers to the questions, or his answers were so far-fetched that Mr. Chiappetta did not bother writing them down. When confronted with interview notes for other, successful, candidates that had no answers recorded for one or more questions, Ms. Demeda and Mr. Chiappetta testified that these candidates may have already covered the subject area with a previous answer. However, a review of each of the candidates' earlier answers does not always bear this out.

[43] As I have previously indicated, I am not at all satisfied that Mr. Chiappetta's notes represent a reliable record of what went on in Mr. Premakumar's interview. A review of the notes kept by Mr. Chiappetta, as well as those kept by other interviewers with respect to the successful candidates reveal numerous cases where no answer is recorded for one or more of the questions. A fair number of successful candidates have no answers recorded for several questions. In one case, there are no answers recorded for seven out of the twelve main questions. <sup>(15)</sup> I accept the testimony of Mr. Premakumar that he was asked and provided reasonable answers to each of these questions.

[44] There is nothing particularly significant about Mr. Premakumar's answers to the last two questions, and neither Mr. Chiappetta nor Ms. Demeda had much to say about them. Mr. Premakumar was then asked to provide the name of a reference, which he did, and was also asked a couple of questions with respect to his attendance history. Mr. Premakumar was invited to ask any questions that he might have about the job, and is recorded as asking when the training program would start.

[45] The last entry on the interview form is a note from Mr. Chiappetta that reads: "Why did we hire this guy in the first place!!" Mr. Chiappetta explained that he obviously did not think that Mr. Premakumar was an employee that he would want to hire, and that he did not possess the leadership, communications and team player qualities that they were looking for. He further testified that he was not in the habit of making this type of comment. According to Mr. Chiappetta, the comment must have resulted from frustration on his part, and that Mr. Premakumar's interview must have been very bad for him to have made such a notation. Mr.

Chiappetta was, however, unable to identify what it was about Mr. Premakumar's interview that was so frustrating.

[46] Ms. Raglan agreed that it was very unusual for Mr. Chiappetta to make a comment of this nature. Both Ms. Raglan and Ms. Demeda surmised that Mr. Premakumar must have had a really awful interview for Mr. Chiappetta to have written such a note. In Ms. Raglan's opinion, Mr. Chiappetta must have been very frustrated when he wrote the comment. Ms. Raglan went on to say that she would not make a comment of this nature, and that it was not acceptable to her.

[47] Mr. Premakumar speculated that Mr. Chiappetta may have harbored some animosity towards him as a result of an incident that occurred during Mr. Premakumar's 1995 employment with Canadian, and that this might have been behind Mr. Chiappetta's actions. Mr. Premakumar's evidence on this point was not entirely clear, and I am not persuaded that this was the case.

[48] What then to make of Mr. Chiappetta's comment? In my view, the comment suggests a certain lack of respect for Mr. Premakumar as an individual. There is nothing in the evidence before me that would warrant such an opinion. Neither Mr. Chiappetta nor Ms. Demeda were able to offer any kind of an explanation for the comment beyond speculation, and there is nothing in Mr. Chiappetta's notes that would suggest that Mr. Premakumar had a really awful interview. While the answer attributed to Mr. Premakumar with respect to question six is problematic, both Mr. Chiappetta and Ms. Demeda testified that one bad answer would not disqualify a candidate.

[49] Ms. Demeda and Mr. Chiappetta made the decision to reject Mr. Premakumar immediately after his interview. Although neither has any specific recollection of the interview, both speculated as to their rationale for their decision not to allow Mr. Premakumar to proceed to the next stage in the hiring process. Ms. Demeda noted that there simply wasn't very much recorded with respect to the interview, that "There is just not enough information to go on to make a decision to say 'yes' to the candidate."<sup>(16)</sup> A review of the interview notes for the successful candidates discloses no more information for a number of those hired than was recorded with respect to Mr. Premakumar's interview.

[50] As noted previously, Mr. Chiappetta testified that Mr. Premakumar just did not have some of the leadership, communication and team player qualities they were looking for. He came to this conclusion based upon the answers provided by Mr. Premakumar, as well as the way in which Mr. Premakumar answered the questions, including factors such as body language.

[51] Both Mr. Chiappetta and Ms. Demeda denied that Mr. Premakumar's colour had anything to do with the decision not to hire him. Mr. Chiappetta also stated that he did not even know that Mr. Premakumar was Sri Lankan.

[52] On April 1, 1998, Mr. Premakumar was sent a letter advising him that he was not being hired. Mr. Premakumar then called Ms. Raglan to find out why he had been rejected. According to Mr. Premakumar, Ms. Raglan told him that the company's reasons were confidential, and that she could not discuss the matter with him. Ms. Raglan does not recall the call, but does not dispute that it may have happened. She confirms that it was Canadian policy not to discuss hiring

decisions with unsuccessful candidates. Having no explanation from Canadian, Mr. Premakumar elected to file a human rights complaint.

#### **D. Qualifications of those Hired**

[53] I was provided with three large binders of material containing the résumés and interview notes for the successful candidates. Unfortunately, the interview notes for many of the candidates are as sketchy and uninformative as those relating to Mr. Premakumar's interview. I have already alluded to certain aspects of the qualifications of a number of candidates, and do not intend to repeat my observations in this regard. A review of the material relating to the successful candidates discloses that only one of these candidates had any prior experience working with Canadian.<sup>(17)</sup> Many, if not most, of the candidates appear to be no better qualified for the position of temporary Reduced Time Station Attendant than Mr. Premakumar, and several appear to be less well qualified.

[54] By way of example, Ms. Demeda conceded that Mr. Premakumar had experience that was more closely related to the position of Reduced Time Station Attendant than did candidate 133/AK. When it was pointed out to Ms. Demeda that this candidate's résumé disclosed virtually no experience relevant to the position in issue, Ms. Demeda stated that this candidate was given an interview because he had been referred by someone within the company, but that this connection had nothing to do with the decision to hire the candidate.

[55] The interview notes for candidate 133/AK have no answers recorded for four out of twelve of the interview questions, including question six - "Give us an example of when you have worked under time constraints?" Several of the answers for the remaining questions are not particularly informative. Ms. Demeda (who was not involved in hiring this candidate) was unable to say why this individual was hired over Mr. Premakumar.

[56] Ms. Demeda also agreed that Mr. Premakumar had more relevant experience for the position than did candidate 152/GG, who was interviewed by Ms. Demeda and Mr. Chiappetta. The notes of this interview record the candidate as having a poor knowledge of Canadian. The answer recorded for question six is "Stressful but managed", which is not entirely responsive to the question. No answers are recorded for two other questions, and the remaining answers are unremarkable.

[57] Mr. Chiappetta was the only Canadian representative involved in interviewing candidate 154/VN. This candidate had prior employment as a school bus driver, and thus certainly met the requirement of driving experience. There is nothing in the file, however, to indicate any experience with heavy lifting or outdoor work. Mr. Chiappetta's interview notes for this candidate reveal that the candidate had a poor knowledge of the company. No answers are recorded for two questions. The answer recorded by Mr. Chiappetta for question six is "No problem". The candidate's remaining answers appear unremarkable.

[58] Candidate 141/RN was interviewed by Rick Chiappetta and Lynne Raglan. This candidate had prior employment experience as a real estate agent, an office administrator and as a property

manager. While the candidate is noted as anticipating that the position would be physically demanding, there is no record in the file of any past experience as a labourer or with outdoor work, nor is there any reference to previous work involving heavy lifting. Once again, the interview notes for this candidate are sketchy. No answers are recorded for three of the questions, including question six.

[59] In light of the foregoing, I am satisfied that Mr. Premakumar was at least as well qualified as many of the candidates that were ultimately hired, and better qualified than some.

### **E. Race and Ethnicity of those Hired**

[60] Although both Mr. Chiappetta and Ms. Demeda testified that they had each hired members of visible minorities over the course of their careers with Canadian, I was not provided with any information with respect to the race, the colour or the national or ethnic origin of any of the individuals hired as Reduced Time Station Attendants in the Spring of 1998. Counsel for the Commission and Mr. Premakumar submit that I should draw conclusions about the ethnicity of the successful candidates by looking at their names. In my view, this is a remarkable submission in a human rights hearing, and I am not prepared to make any such assumptions. Not only would assumptions of this nature be totally antithetical to the philosophy underlying human rights legislation - they would also be unreliable.

[61] The unreliability of surnames as an indicator of ethnicity is graphically illustrated by just two examples. Mr. Bagambiire suggested that we could safely assume that a candidate with the last name "McKinnon" was white. One need look no further than recent Ontario human rights jurisprudence to realize that this is not necessarily so.<sup>(18)</sup> In his cross-examination of Mr. Chiappetta, Mr. Vigna suggested, again based on the candidate's name, that one individual was likely of Italian or Spanish descent. A review of the candidate's résumé discloses that the candidate in issue spoke neither Italian nor Spanish, but did speak Filipino.<sup>(19)</sup>

### **F. Statistical Evidence**

[62] While I do not have any reliable evidence before me with respect to the race, colour or ethnicity of any of the individuals hired as Reduced Time Station Attendants in early 1998, I do have statistical evidence regarding the extent to which visible minorities were represented within Canadian's workforce in the period from 1995 to 1998.

[63] This evidence was largely introduced through Darlene Dean, who is Canadian's Manager of Policy Research and Development, with responsibility for employment equity. In her testimony, Ms. Dean described Canadian's efforts to bring the company into compliance with its obligations under the *Employment Equity Act*. She also reviewed the level of visible minority representation within Canadian's workforce over a four year period.

[64] According to Ms. Dean, Canadian steadily increased the percentage of visible minority employees within the company between 1995 and 1998. Ms. Dean described the representation level for visible minorities with the company as a whole, as well as for Canadian's operation in

Toronto. She also provided statistical information with respect to the occupational group which included Station Attendants, both on a national basis as well as for the Toronto operation. [\(20\)](#)

[65] Ms. Dean testified that the representation of visible minorities within Canadian's workforce has increased steadily over time, and that in 1998, 23.6% of employees hired by Canadian across the country were members of visible minorities. This increase in visible minority representation is illustrated by the following table:

	1995	1996	1997	1998
Representation Level for Canadian Employees (National)	6.1%	6.6%	7.3%	8.8%

[66] Ms. Dean also stated that the level of visible minority representation within the occupational groups to which Station Attendants belong has also steadily increased on a company-wide basis over the same period:

	1995	1996	1997	1998
Representation Level for Other Manual/Semi-Skilled Workers (National - Full and Part-time)	4.93%	5.19%	7.23%	8.75%

The probative value of this evidence is, however, somewhat diminished by the fact that I have no information regarding the availability of visible minority employees on a nation-wide basis.

[67] Mr. Premakumar applied to work as a Station Attendant in Canadian's Toronto operation. In my view, it is the representation levels within this population that are of the greatest significance in this case. Ms. Dean indicated that in Canadian's Toronto operation, the representation levels of visible minorities within the occupational groups to which Station Attendants belong were as follows:

	1995	1996	1997	1998
Representation Level for Other Manual/Semi-Skilled Workers (Toronto - Full and Part-time)	10.71%	9.1%	6.24%	6.97%

[68] The Commission filed an extract of a Human Resources Development Canada Report which appears to be a document designed to provide information to employers regarding their obligations under federal employment equity legislation. The Commission made particular reference to a table in the document which indicates that 23.1% of the Ramp Attendants in the Toronto workforce were visible minorities.

[69] As I understand it, Canadian does not dispute the accuracy of the information contained in the report, although Ms. Dean noted that the data appeared to relate to 1990. In addition, Ms. Dean stated that not everyone employed as a Ramp Attendant in the Toronto area would, of

necessity be qualified to work as a Station Attendant at Canadian. Those employed with smaller air transport companies may well not have the skills necessary to perform as a Station Attendant with a company of the size and sophistication of Canadian.

[70] This report was filed on consent, and thus there was no explanation accompanying its introduction, nor any explanation as to the age of the data contained in the table. The document itself is dated December, 1998. It is entitled "1996 Employment Equity Data Report (Release No.1)". There is a reference to "1990 NOC", although it is unclear if that reference is to the age of the data, or the type of occupational category in use. <sup>(22)</sup> These uncertainties cause me to approach this evidence with some caution.

[71] We do know that in 1997, 7% of Canadian's workforce in Toronto were members of visible minorities. <sup>(23)</sup> The percentage of visible minorities in the Semi-Skilled Worker population in Canadian's Toronto operation for the same period was 6.24%.

### III. LAW

[72] Section 7 of the *Canadian Human Rights Act* makes it a discriminatory practice to refuse to employ an individual because of a prohibited ground of discrimination. Race, color and national or ethnic origin are all prohibited grounds of discrimination.

[73] In a case of this nature, the burden of proof is on Mr. Premakumar to establish a *prima facie* case of discrimination. Once that is done, the burden shifts to the respondent to provide a reasonable explanation for the conduct in issue. <sup>(24)</sup>

[74] A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in Mr. Premakumar's favour, in the absence of an answer from the respondent. <sup>(25)</sup>

[75] In the employment context, a *prima facie* case has been described as requiring proof of the following elements:

- a) that the complainant was qualified for the particular employment;
- b) that the complainant was not hired; and
- c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (ie: race, colour etc.) subsequently obtained the position. <sup>(26)</sup>

[76] This multi-part test has been modified to address situations where the complainant is not hired and the respondent continues to look for suitable candidates. In such cases, the establishment of a *prima facie* case requires proof:

- a) that the complainant belongs to one of the groups which are subject to discrimination under the Act, e.g. religious, handicapped or racial groups;
- b) that the complainant applied and was qualified for a job that the employer wished to fill;
- c) that, although qualified, the complainant was rejected; and
- d) that, thereafter, the employer continued to seek applicants with the complainant's qualifications. [\(27\)](#)

[77] While both the *Shakes* and the *Israeli* tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every hiring case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether Mr. Premakumar has satisfied the *O'Malley* test, that is: if believed, is the evidence before me complete and sufficient to justify a verdict in Mr. Premakumar's favour, in the absence of an answer from the respondent? [\(28\)](#)

[78] If the respondent does provide a reasonable explanation for the otherwise discriminatory behaviour, Mr. Premakumar then has the burden of demonstrating that the explanation was pretextual, and that the true motivation behind the respondent's actions was, in fact, discriminatory. [\(29\)](#)

[79] The jurisprudence recognizes the difficulty in proving allegations of discrimination by way of direct evidence. As was noted in *Basi*:

Discrimination is not a practice which one would expect to see displayed overtly, in fact, there are rarely cases where one can show by direct evidence that discrimination is purposely practiced. [\(30\)](#)

Rather, it is the task of the Tribunal to consider all of the circumstances to determine if there exists what was described in the *Basi* case as the "subtle scent of discrimination".

[80] Statistical evidence regarding systemic issues in a workplace may constitute circumstantial evidence from which it may be inferred that discrimination probably occurred in an individual case. [\(31\)](#)

[81] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In cases of circumstantial evidence, the test may be formulated as follows:

An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses. <sup>(32)</sup>

[82] It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient if Mr. Premakumar's race, his color or his national or ethnic origin were factors in the decision not to hire him. <sup>(33)</sup>

## IV. ANALYSIS

### A. Is There a *Prima Facie* Case of Discrimination?

[83] The first step in my analysis is to determine if the Commission and Mr. Premakumar have established a *prima facie* case of discrimination. In my view, they have met this burden.

[84] Kanags Premakumar is a member of a visible minority. He was hired by Canadian in 1995, to perform what was, at a minimum, a limited version of the Reduced Time Station Attendant position in issue in this case. Mr. Premakumar says that he performed well in this job, and there is no evidence before me of any problems related to his performance. In early 1998, Canadian was again looking for people with the same skills that it had sought in 1995. Mr. Premakumar had the basic qualifications for the job, but was not hired. He was at least as well qualified for the position as were many of those who were ultimately hired, and better qualified than some.

[85] The statistical evidence before me demonstrates that while Canadian has succeeded in increasing the level of visible minority representation within the company as a whole, the percentage of visible minorities employed in Toronto in the occupational category in issue in this case declined fairly dramatically between 1995 and 1997, and increased only slightly in 1998. In the 1997-1998 period, when a large number of Reduced Time Station Attendants were hired, the representation level of visible minorities in the Station Attendant occupational group was below the average level of visible minority representation for Canadian's Toronto operation. Although I have previously noted the questions relating to the age of the data contained in the 1996 Employment Equity Data Report, it is nevertheless worth recalling that at the time the data contained in the table was compiled, 23.1% of the Ramp Attendants in the Toronto workforce were visible minorities. In 1998, 6.97% of Canadian's Semi-Skilled workers in Toronto had self-identified as members of visible minorities.

[86] The Commission and Mr. Premakumar chose not to lead any evidence with respect to the race, colour or ethnicity of any of the individual successful candidates. I am nevertheless satisfied that the evidence before me is complete and sufficient to justify a verdict in Mr. Premakumar's favour, in the absence of an answer from the respondent.

### B. Has Air Canada Provided a Reasonable Explanation for the Decision not to Hire Mr. Premakumar?

[87] The crux of the respondent's explanation for its decision not to hire Mr. Premakumar is that, as a result of his interview, it was determined that Mr. Premakumar did not possess the soft skills necessary to do the job. Referring to decisions such as *Folch v. Canadian Airlines International* <sup>(34)</sup>, the respondent submits that the use of subjective criteria in the assessment of candidates is appropriate, and that it is not for me to second-guess that assessment. Further, it is not my function to determine whether I agree or disagree with the decision not to hire Mr. Premakumar, but rather to determine if discrimination played a role in that decision.

[88] The Tribunal in *Folch* did observe that it was not the task of a human rights tribunal to pass judgment on the adequacy of the respondent's hiring procedures. The Tribunal further recognized that it may well be necessary to have an element of subjectivity in the process, stating that "The fact that the Respondent used subjective criteria in its evaluation of the applicants does not in itself render their hiring decisions subject to attack." <sup>(35)</sup> The Tribunal went on, however, to say that:

Where subjective criteria are used, it may be necessary to scrutinize the hiring decision more carefully to ensure that subjective assessments are not being used to mask discrimination. <sup>(36)</sup>

[89] In *Folch*, the notes and comments of each member of the interview board were produced, which clearly demonstrated the basis on which candidates were being assessed, and the precise reasons why the complainant was deemed to lack the necessary qualities and skills for the position. With this information, the Tribunal was able to carefully scrutinize the hiring decision, and to determine that Ms. Folch's application had been fairly considered by the interview board. In contrast, in this case, neither Mr. Chiappetta nor Ms. Demeda had any specific recollection of Mr. Premakumar's interview. The notes of the various interviews are not particularly helpful. Most importantly, Mr. Chiappetta and Ms. Demeda's explanation for their conclusion that Mr. Premakumar lacked the necessary soft skills for the position was almost entirely speculative and quite unsatisfactory.

[90] For the reasons previously cited, I am not satisfied that Mr. Chiappetta's notes fairly reflect Mr. Premakumar's responses to the interview questions. The notes do, however, contain a comment regarding Mr. Premakumar that I have found demonstrates an unjustified lack of respect for Mr. Premakumar as an individual.

[91] Considering the evidence as a whole, I am not persuaded that the respondent has provided a reasonable explanation for the decision not to hire Mr. Premakumar. Accordingly, the complaint is sustained.

## **V. REMEDY**

[92] Having found liability on the part of Air Canada, it remains to be determined what, if any, remedy should properly be provided to Mr. Premakumar. In fashioning a remedy, the Tribunal's jurisdiction is governed by section 53 of the *Act*. The goal of compensation in cases of

discrimination is to make whole the victim of the discriminatory practice, taking into account principles of mitigation, reasonable foreseeability and remoteness.<sup>(37)</sup>

### **A. Lost Wages**

[93] Mr. Premakumar asks for compensation for the wages that he says that he lost as a consequence of Canadian's refusal to hire him. Air Canada submits that Mr. Premakumar was not denied a job, but only the opportunity to compete for a job. In any event, Air Canada says, Mr. Premakumar has not sustained any financial loss.

[94] Air Canada points out that even if Ms. Demeda and Mr. Chiappetta had approved hiring Mr. Premakumar, he would still have had to undergo a medical examination, a driving test, a security clearance, and complete the training program. As I understand Air Canada's argument, there is no assurance that Mr. Premakumar would have successfully cleared all of these hurdles.

[95] It is true that a successful interview with Ms. Demeda and Mr. Chiappetta would not have guaranteed Mr. Premakumar employment with Canadian. Nevertheless, on the evidence before me, I am more than satisfied that there was a serious possibility that Mr. Premakumar would have succeeded in obtaining a Station Attendant position.<sup>(38)</sup>

[96] Any award of damages under the *Canadian Human Rights Act* must take into account the sufficiency of the complainant's efforts to mitigate his damages.<sup>(39)</sup> Mr. Premakumar filed a book of letters he sent to prospective employers in the period following his rejection by Canadian. He also described his efforts to obtain alternate employment in his testimony. In my view, Mr. Premakumar has satisfied the duty on him to try to mitigate his losses.

[97] The quantification of Mr. Premakumar's financial losses is a more difficult issue. Counsel for Air Canada reviewed Mr. Premakumar's earnings in the period after March of 1998, and what Mr. Premakumar could have been expected to earn had he been hired as a Station Attendant. According to Air Canada, Mr. Premakumar earned more in the intervening period than he would have earned had he been hired by Canadian. Air Canada's submission in this regard is premised on the assumption that Mr. Premakumar would have either worked for Canadian, or pursued his other employment opportunities, but not both.

[98] Mr. Premakumar says that the Station Attendant position was only part-time, and that he would have kept his other job while working for Canadian. As Mr. Premakumar explained it, he was a new immigrant with a family to support, and he was quite prepared to work two jobs to do so.

[99] A review of Mr. Premakumar's employment history discloses that he held two jobs simultaneously for a total of forty-nine months out of the twelve years preceding his 1998 application for employment with Canadian. What is perhaps most telling, however, is that Mr. Premakumar was able to hold a second job throughout the period that he was employed by Canadian as a temporary Reduced Time Station Attendant in 1995. Mr. Premakumar continued to pursue a second job after he was rejected by Canadian in 1998. At the time that he testified,

Mr. Premakumar was working for Air Canada, as well as for the provincial Ministry of Transport.

[100] Mr. Premakumar impressed me as an industrious and ambitious individual, one who is working very hard to make a life for himself and his family in his new country. While he has not always succeeded in doing so, a review of the record discloses that Mr. Premakumar has endeavoured to hold down more than one job, where possible. The Reduced Time Station Attendant position with Canadian was part-time employment. Randy Dallinger, Air Canada's Manager of Labour Relations, Airport and Cargo Operations acknowledged that it was common for Reduced Time Station Attendants to hold a second job. On all of the evidence, I am satisfied that had Mr. Premakumar been hired by Canadian in April of 1998, he would have endeavoured to obtain a second job, and that, with one exception, no deduction need be made for his post-rejection earnings. The exception relates to the period between late February of 2001 and July 31 of 2001 when Mr. Premakumar actually held two jobs and thus would in all likelihood have been unable to hold a third job as well. Mr. Premakumar would have probably chosen to give up the less lucrative of the two positions that he held in this period. A deduction should therefore be made to the lost wages payable to Mr. Premakumar in an amount equal to the wages actually paid to him in this period by either Air Canada or the Ministry of Transport, whichever is the lesser.

[101] Having a second job while working for Canadian, could, however, have had an impact on Mr. Premakumar's availability for work, and should be considered in the quantification of his losses. Mr. Premakumar testified that when he worked for Canadian as a temporary Reduced Time Station Attendant in 1995, he worked between 25 and 30 hours a week. According to Mr. Dallinger, Reduced Time Station Attendants average around 20 hours a week. I note that Mr. Dallinger is a long time Air Canada employee, and was not at Canadian in 1998. Indeed, I understood Mr. Dallinger's testimony to relate to the situation at Air Canada over the last five years, and not to what Mr. Premakumar could have reasonably anticipated at Canadian in 1998. I therefore prefer Mr. Premakumar's estimate to that of Mr. Dallinger. That said, I do think that some adjustment has to be made for the fact that Mr. Premakumar's second job may have affected his availability for work at Canadian. The calculation of Mr. Premakumar's losses should therefore be based upon a 20 hour work week, at the wage rate in effect from time to time.

[102] It appears that the successful candidates interviewed in March of 1998 started working for Canadian on April 13, 1998. Mr. Premakumar is therefore entitled to damages for lost wages for the period from April 13, 1998 until July 31, 2001. Mr. Dallinger explained that anyone who had been simultaneously employed by both Canadian and Air Canada was required to elect to keep one position and to resign from the other by July 31, 2001. It is common ground that Mr. Premakumar would have elected to keep his Groomer position with Air Canada because his seniority in that position went back to 1989, whereas he would have only had a 1998 seniority date with his Station Attendant position.

[103] Air Canada submits that I should also take into account the fact that the Reduced Time Station Attendants hired by Canadian in the Spring of 1998 were laid off, effective October 19, 2001. If Mr. Premakumar had elected in July of 2001 to keep the Groomer position, with its 1989

seniority date, however, he would not have been affected by this lay-off. Further, given that I have already determined that Mr. Premakumar's entitlement to lost wages ceased as of July 31, 2001, I see no need to take this into account.

[104] Mr. Premakumar is also entitled to compensation for his loss of employment benefits. In the event that the parties are unable to come to an agreement with respect to the value of this loss, I may be spoken to.

### **B. Gross-up**

[105] Mr. Premakumar will now be entitled to a lump sum payment on account of wages that he would have otherwise earned over a period of several years. This will obviously have negative income tax consequences for him. In my view, it would unfairly penalize Mr. Premakumar if he were to suffer a more onerous income tax burden by reason of receiving several years' worth of income in a lump sum than he would have incurred had the monies been paid to him as salary over the intervening period. This would be inconsistent with the remedial goal of making Mr. Premakumar whole. Accordingly, Air Canada shall pay to Mr. Premakumar an additional amount sufficient to cover the additional income tax liability that he will incur as a consequence of receiving payment in this fashion.

### **C. Apology**

[106] Mr. Premakumar asks that the Tribunal order that Rick Chiappetta apologize to him for his conduct. It is apparent that the decision not to hire Mr. Premakumar was made jointly by Mr. Chiappetta and Ms. Demeda. Although Mr. Premakumar would, in my view, be entitled to an apology from Ms. Demeda, he appears to view Mr. Chiappetta as the individual responsible for his rejection, and only seeks an apology from him. I therefore order that the respondent provide a written apology to Mr. Premakumar, signed by Mr. Chiappetta, within thirty days of this decision.

### **D. Non-Pecuniary Damages**

[107] Mr. Premakumar seeks damages for his pain and suffering in the amount of \$5,000. This is the maximum payable under the legislation as it stood at the time of the discriminatory practice. Although Mr. Premakumar did not specifically address the effect that Canadian's actions had on him in his evidence, it is evident from his testimony that Mr. Premakumar is a proud individual, and that he was hurt by his rejection by Canadian. Without in any way minimizing this affront to Mr. Premakumar's dignity, it must be recognized that there will be a range of cases warranting awards of special compensation under the *Canadian Human Rights Act*, and that the \$5,000 maximum award must be reserved for the very worst cases. In all of the circumstances, I award Mr. Premakumar \$4,000 as special compensation.

### **E. Interest**

[108] Interest is payable on awards of special compensation as well as on lost wages. <sup>(40)</sup>I order interest be paid on the monies awarded pursuant to this decision, in accordance with Rule 9 (12)

of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest on the award for lost wages should start to run from April 13, 1998, and be calculated as the wages would have become payable to Mr. Premakumar. Interest on the special compensation should run from March 30, 1998; that is, the date of the decision not to hire Mr. Premakumar. In no case, however, should the total amount payable on account of special compensation, including interest, exceed \$5,000. <sup>(41)</sup>

## **F. Costs**

[109] Mr. Premakumar seeks an order compensating him for the expense of retaining Mr. Bagambiire to represent him in this proceeding. Air Canada was not provided with any advance notice that such a remedy was being sought, and thus had no opportunity to prepare submissions, either with respect to my jurisdiction to make such an order, or with respect to whether such an order was appropriate in the circumstances of this case. Counsel for Air Canada shall therefore have fifteen days from the release of this decision to provide written submissions on the issue of costs. Mr. Premakumar and the Commission will then have seven days to reply.

## **G. Other Out of Pocket Expenses**

[110] Mr. Premakumar led evidence with respect to certain other expenses, which I understood were being claimed as expenses incurred as a result of Canadian's refusal to hire him. These expenses relate primarily to courses that Mr. Premakumar took after March 30, 1998.

[111] This claim was not addressed in final argument, and it is unclear if the claim is being pursued. In any event, I am not persuaded that these expenses can be said to flow from Canadian's decision not to hire Mr. Premakumar, and I decline to make any order in this regard.

## **H. Systemic Remedies**

[112] The Commission and Mr. Premakumar ask for an order that the respondent review its hiring practices and provide interviewers with training in cross-cultural issues. Because of the particular circumstances of this case, I am not disposed to make such an order. The discriminatory practice in issue in this case was committed by Canadian Airlines - an entity that no longer exists. Any future hiring will be carried out by Air Canada. There is no evidence before me of any deficiencies in Air Canada's hiring practices. While Air Canada may have acquired all of the liabilities of Canadian, it does not follow that it shares Canadian's hiring practices. For this reason, I decline to make the order requested.

## **I. Retention of Jurisdiction**

[113] I will retain jurisdiction in the event that the parties are unable to agree with respect to the quantification or implementation of any of the remedies awarded under this decision.

## **VI. ORDER**

[114] For the foregoing reasons, I declare that Mr. Premakumar's rights under the *Canadian Human Rights Act* have been contravened by the respondent, and order that:

- i) Mr. Premakumar shall be awarded compensation for lost wages and employment benefits, calculated in accordance with this decision;
- ii) Air Canada shall pay to Mr. Premakumar an additional amount sufficient to cover the additional income tax liability that he will incur as a consequence of receiving the monies referred to above in this fashion;
- iii) Air Canada shall provide a written apology to Mr. Premakumar signed by Rick Chiappetta within thirty days of this decision;
- iv) Air Canada shall pay \$4,000 to Mr. Premakumar as special compensation;
- v) Interest shall be paid on the lost wages and special compensation awarded pursuant to this decision, in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest on the lost wages should run from April 13, 1998, calculated as the wages would have become payable to Mr. Premakumar. Interest on the special compensation shall run from March 30, 1998; and
- vi) Air Canada shall file written submissions with respect to the issue of costs within fifteen days of the release of this decision. Mr. Premakumar and the Commission shall then have seven days to file reply submissions.

ORIGINAL SIGNED BY

Anne L. Mactavish, Chairperson

OTTAWA, Ontario

February 4, 2002

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**COUNSEL OF RECORD**

TRIBUNAL FILE NO.: T622/1001

STYLE OF CAUSE: Kanags Premakumar v. Air Canada

PLACE OF HEARING: Toronto, Ontario

(September 19 and 20, 2001;

December 13, 14, 19 and 20, 2001)

DECISION OF THE TRIBUNAL DATED: February 4, 2002

APPEARANCES:

Davies Bagambiire For the Complainant

Giacomo Vigna For the Canadian Human Rights Commission

Maryse Tremblay For Air Canada

1. <sup>1</sup> Canadian Airlines International ceased to exist as a legal entity on January 1, 2001. Counsel has advised that Air Canada is the successor to all of Canadian's legal liabilities. As a result, on consent, the style of cause of this proceeding has been amended to identify Air Canada as the respondent. However, because Mr. Premakumar has been employed by both Canadian and Air Canada at various times over the years, I will continue to refer to each as a separate entity in this decision.

2. <sup>2</sup> During the Commission investigation, Canadian produced a list of fifty-nine individuals who were successful in their interviews for the Reduced Time Station Attendant positions. It appears that one individual on the list did not pass her driving test (candidate 174/WS), and two others did not complete the training program (candidates 186/LH and 129/AF). It also appears that an individual whose name was not on the list was in fact hired at this time (candidate 139/LS). This would suggest that fifty-seven individuals were actually hired as a result of the competition.

3. <sup>3</sup> Transcript, pp. 707-8

4. <sup>4</sup> Transcript, p. 1004

5. <sup>5</sup> Much was made in cross-examination of the fact that Mr. Premakumar was employed at Air Canada as 'Premakumar Kanagasabapathy', whereas he was known as 'Kanags Premakumar' at

Canadian. In cross-examination, it was suggested to Mr. Premakumar that he had reversed his names to conceal the fact that he had been discharged from Air Canada. (Mr. Premakumar grieved his discharge, and was subsequently reinstated pursuant to a negotiated settlement.) I do not accept that the reversal of Mr. Premakumar's names was done with any intent to deceive, given the sequence of events. Mr. Premakumar was first employed by Air Canada as Premakumar Kanagasabapathy in 1989. He applied to Canadian as Kanags Premakumar in 1995. He was not discharged by Air Canada until 1996. Mr. Premakumar described the custom regarding the use of names by Hindus in Sri Lanka. He noted that individuals do not have a first and last name in the same way that they do in Canada, and that he had used his names more or less interchangeably. In the absence of any apparent intent to deceive, or any advantage to be gained by the change of name, I have no reason not to accept Mr. Premakumar's testimony in this regard.

Mr. Premakumar has also used the name 'Prem Kumar' on certain job applications. He testified that he used the name 'Prem Kumar' on the advice of an employment consultant, who suggested that his name was somewhat unwieldy by Canadian standards, and that it would be to his advantage to abbreviate it. Once again, I see no reason not to accept Mr. Premakumar's evidence in this regard.

6. <sup>6</sup> Transcript, p. 579

7. <sup>7</sup> Transcript, p. 932

8. <sup>8</sup> Transcript, pp. 604-5

9. <sup>9</sup> See candidate 172/RM. In order to respect the privacy of the successful candidates, I will identify each of them by the number assigned to them in the three binders marked as Exhibit HR-6, together with the candidate's initials.

10. <sup>10</sup> Transcript, p. 895

11. <sup>11</sup> Candidate 149/FS

12. <sup>12</sup> Candidate 181/HZ

13. <sup>13</sup> Candidate 151/HG

14. <sup>14</sup> Candidate 133/AK

15. <sup>15</sup> 177 / GM. Mr. Chiappetta was one of the interviewers for this candidate, although it appears that the notes of the interview may have been recorded by Lynne Raglan.

16. <sup>16</sup> Transcript, p. 586

17. <sup>17</sup> Candidate 161/DW. It should be noted that this candidate's previous experience was with aircraft maintenance mechanics. None of the successful candidates had previous experience as a Station Attendant.

18. <sup>18</sup> See *McKinnon v. Ontario (Ministry of Correctional Services)*, (1998) 32 C.H.R.R. D/1

19. <sup>19</sup> Candidate 136/BF

20. <sup>20</sup> Station Attendants were classified in the "Other Manual Workers" category in 1995 and 1996. From 1997 on, Station Attendants were included in the "Semi-Skilled Workers" occupational group. Ms. Dean was unsure if other types of employees, apart from Station Attendants, were included in these occupational groups. However, a review of the Executive summary of Canadian's 1998 Employment Equity Report discloses that, at a minimum, "Semi-Skilled Workers" included Station Attendants as well as Groomers. (See Ex. R-17, p. 8)

21. <sup>21</sup> Ms. Dean initially testified that visible minorities constituted 6.24% of the Semi-Skilled workers in Toronto in 1997. She later stated that the percentage was 6.61%. A review of Ms. Dean's methodology discloses that her initial calculation was for both full and part-time employees, whereas her second calculation included only the full-time employees.

22. <sup>22</sup> Indeed, Exhibit HR-11 suggests that "NOC" refers to the type of occupational classification system.

23. <sup>23</sup> Exhibit HR-9, p. 5

24. <sup>24</sup> *Israeli v. Canadian Human Rights Commission*, 4 C.H.R.R. D/1616 at p. 1617 (aff'd 5 C.H.R.R. D/2147), and *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029

25. <sup>25</sup> *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985], 2 S.C.R. 536 at 558

26. <sup>26</sup> *Shakes v. Rex Pak Limited* (1982), 3 C.H.R.R. D/1001 at p. D/1002

27. <sup>27</sup> *Israeli v. Canadian Human Rights Commission and Public Service Commission* (1983), 4 C.H.R.R. D/1616 at p. 1618

28. <sup>28</sup> *Chander and Joshi v. Department of National Health and Welfare*, T.D. 16/95, at p. 25, aff'd [1997] F.C.J. No. 692, (1997) 131 F.T.R. 301. See also *Singh v. Canada (Statistics Canada)* (1998), 34 C.H.R.R. D/203 (CHRT), aff'd *Canada A.G. v. Singh*, (April 14, 2000) T-2116-98 (F.C.T.D.), *Morris v. Canadian Armed Forces*, T.D. 17/01 and *Crouse v. Canada Steamship Lines Inc.*, T.D. 7/01

29. <sup>29</sup> *Israeli*, supra., and *Basi*, supra.

30. <sup>30</sup> At p. D/5038

31. <sup>31</sup> *Chopra v. Department of National Health and Welfare*, [1998] F.C.J. No. 432.
32. <sup>32</sup> B. Vizkelety, *Proving Discrimination in Canada*, (Toronto), Carswell, 1987 at p. 142.
33. <sup>33</sup> *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 at p. D/15.
34. <sup>34</sup> (1992) 17 C.H.R.R. D/261
35. <sup>35</sup> At p. D/303
36. <sup>36</sup> *Ibid.*
37. <sup>37</sup> See *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401, and *Canada (Attorney General) v. McAlpine*, [1989] 3 F.C. 530
38. <sup>38</sup> For the 'serious possibility' test see *Morgan*, *supra.*, and *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 (T.D.)
39. <sup>39</sup> *Morgan*, *supra.*
40. <sup>40</sup> *Morgan*, *supra.*
41. <sup>41</sup> See *Hebert v. Canada (Canadian Armed Forces)*, (1993), 23 C.H.R.R. D/ 107