T.D. 10/93
Decision rendered on June 11, 1993

THE CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

RODNEY CREMONA
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION
Commission

- and -

WARDAIR CANADA INC.
Respondent

DECISION OF THE TRIBUNAL RELATED TO DAMAGES

TRIBUNAL: Carl E. Fleck, Q.C. - Chairman

APPEARANCES:

René Duval Counsel for the Canadian Human Rights Commission

Ross Ellison Counsel for Wardair Canada Inc.

DATES AND LOCATION
OF HEARING: March 10, 11, 12, 1993
Toronto

Reference: T.D. 1/91
April 5, 1991

In this matter, the Tribunal convened on March 10, 11 and 12, 1993 for the purpose of assessing the damages and relief to be afforded to the Complainant Rodney Cremona as a result of the decision and findings made by the Tribunal in its decision rendered April 5, 1991 [Cremona v

Wardair Canada Inc. 14 C.H.R.R. D/262]. The decision rendered on that date as it relates to this Complainant was appealed by the Respondent Wardair Canada Inc. to the Federal Court of Appeal. The decision of the Federal Court of Appeal upholding this Tribunal's decision was rendered on October 9th, 1992.

The appointment of this Tribunal to complete the question of damages for the Complainant was convened pursuant to the appointment by the President of the Human Rights Tribunal Panel dated November 3rd, 1992 and marked as Exhibit T-3.

At the outset of this hearing, counsel for the Canadian Human Rights Commission sought relief on the following matters:

a. Loss of income from May 1985 to the present date both with respect to a flight attendant and in part as an inflight service director;

b. additional monetary benefits both as a flight attendant and a flight service director;

c. damages for hurt feelings;

d. reinstatement of position to be hired immediately as a flight attendant with seniority as of May 1985;

e. interest on the award pursuant to the Canada Savings Bond rate compounded.

The Complainant was called to testify and reiterated the facts giving rise to this complaint, namely that he had returned from the Middle East working as a flight attendant in October of 1984 and at that time the Respondent was interviewing for flight attendant positions. The Complainant completed an employment application and forwarded same to the Respondent. As previously testified, the Complainant received Exhibit HR-8 which is a letter dated November 19, 1984 from the Respondent. This letter rejected his application since his uncorrected vision was less than the Respondent's requirements. The letter was unsigned.

At this hearing, the Complainant gave an outline again of his work history before and after the application of October 1984. At the time of the application, he had previously been employed as a flight attendant with a leasing company called Chartermaster Cabin Crew Leasing. This was a

company that provided flight attendants on a contractual basis to airlines anywhere in the world. He trained from May 1984 to October 1984 and following his training he started working with Overseas International Airlines. He subsequently was based in Egypt for the balance of a contract doing the Muslim Hajj flights between Cairo and Saudi Arabia. He was trained on a Boeing 747 and in Egypt flew on a 747 and the airbus A-310.

Following his contract work with the airline, he took a position with Parfumes Stern Canada as a promotional fragrance assistant. As a result of the denial of his application by the Respondent, he filed a complaint with the Canadian Human Rights Commission but continued to look for work as a flight attendant which he secured at the end of 1985. This position was with City Express Airlines which was a commuter airline working out of Toronto Island airport. The training with City Express was approximately two to three weeks commencing in December 1985. This airline

operated Dehavilland Dash-7 and 8 to Ottawa and Newark, New Jersey and some individual charter flights in Ontario and Quebec. He stayed with this airline until April of 1988 when he secured a position with Air Transat. In addition to his work with City Express, he did part time work which included some modelling as well as make up artistry work.

He joined Air Transat in April of 1988. Air Transat is basically a charter based airline which flew mostly international flights to Europe, the Caribbean and South America.

He left Air Transat in January 1988 having secured a position with Air Canada and upon joining Air Canada he took a further extensive six week training course. With Air Canada he flew on various planes including a DC-9, Boeing 727, Boeing 767, L1011-100 series, L1011-500 series, 747-100 series and had received training on the 400 series and the airbus 310. He then flew with Air Canada domestic flights across Canada as well as some charter flights to Mexico and Las Vegas.

In March of 1990, the Complainant was suspended by Air Canada as a result of the testimony he had given at the first part of this hearing. In the previous hearing, the Complainant had given evidence on cross-examination by counsel for the Respondent that he had not accurately set out his visual acuity in the application form. It should be noted that a further part of the form had been altered which I found as a fact had indeed been altered by some personnel of Air Canada. Evidence had been led in the previous hearing as to who and why this alteration had been made by somebody other than the Complainant.

In summary, the Complainant testified that he grieved his suspension and ultimate dismissal through the union process which culminated in an arbitration hearing in February of 1992. As a result of representations by his counsel and preliminary discussions with the arbitrator, the Complainant elected to take a financial settlement despite the fact that the decision in this proceeding hereinbefore referred to was still pending before the Federal Court. His settlement agreement was marked as Exhibit HR-19 of this proceeding. Apparently Air Canada paid the Complainant $12,000 which he received January 3, 1993.

The Complainant further testified that he became very upset that the Arbitrator would not await the outcome of the Federal Court of Appeal decision and after his settlement he further appealed to the Canadian Human Rights Commission. Since the matter had been resolved, the Canadian Human Rights Commission did not proceed with the complaint against Air Canada.

Following his suspension with Air Canada in May of 1990, he worked at various positions on a part-time basis until he finally obtained a full-time position with Holt Renfrew in Toronto where he is presently employed. Because of the proceedings before the Canadian Human Rights Commission and the settlement process with Air Canada, he did not apply for a further position as a flight attendant but continued to work at Holt Renfrew. He is quite adamant that he still wants to work as a flight attendant and seeks an order from this Tribunal that he be given a position with Wardair (now known as Canadian) as a flight attendant.

The Complainant's income tax returns from 1984 through to 1992 were filed as Exhibits HR-20 through to HR-28 inclusive. With respect to his 1993 income with Holt Renfrew down to the date of the hearing March 10, 1993, he had earned $6,207.85.

With respect to the benefits he was entitled to as an employee of Air Canada, he testified that he was provided with the following:

A. Whole extensive health and medical coverage;
B. Whole dental plan;
C. Short term and long term disability;
D. Insurance and life insurance;
E. Annual leave for vacation;
F. Sick leave;
G. Free flight passes (8 personal passes per year and one per year for his parents). This included rebate if another airline was used which was known as an

inter-line agreement (ID-19) where in fact you pay only 10% of your economy airfare. The personal passes for shipment of cargo to anyplace in the world;

H. Pension contributions.

The Complainant described his benefit package with Holt Renfrew which was in no way comparable with Air Canada's package. He has with Holt Renfrew some dental coverage but no extended care coverage and limited life insurance if he is killed or injured on the job. He does have pension and annual vacation, sick leave and a short term disability policy. He receives a personal discount of 25% on merchandise purchased. He further testified that he had similar benefits with Air Transat as those of Air Canada, save and except passes for his parents and pension benefits. With respect to City Express, they in fact had a very limited insurance package but no life insurance and no pension.

He described current feelings about the hardship caused him by the denial of employment by the Respondent. There was an obvious hardship with respect to financial remuneration since he was earning less money at the alternate employment he obtained as a flight attendant as well as a lack of better health and medical coverage. He tried to value the cost of passes and he described as an example a vacation to Europe for three weeks from Canada to Paris, France would be free and he would get a reduced rate from 50-70% on hotels.

Throughout the cross-examination of the Complainant, much was made of the fact that the Complainant had resolved the outstanding termination agreement with Air Canada for a sum of money and a release. The Complainant described this set of circumstances wherein faced with the Arbitrator's advice to his counsel that he was not going to award the grievance and at that time an appeal of this decision was pending before the Federal Court of Appeal. The Complainant under cross-examination indicated that he was angry and perplexed at the situation he found himself in since the Arbitration was not about to be adjourned until the appeal was completed and he felt his only option was to resolve the grievance as outlined in the agreement.

It was suggested by counsel for the Respondent that it was really tantamount to a failure to mitigate by abandoning the grievance and withdrawing the complaint against Air Canada with the Canadian Human Rights Commission.

Considering the position the Complainant found himself in, it is my finding that nothing evolved substantially to disentitle the Complainant from compensation by reason of a failure to mitigate under these circumstances.

The Complainant presently earns at Holt Renfrew $10.30 per hour based on 36.35 hours per week.

At p. 1016 of Volume 9, the Complainant clarified the reason for his decision to close his complaint against Air Canada. He testified that it was basically not his decision but that of the Canadian Human Rights

Commission. He indicated that he had petitioned the Commission to go ahead and they chose otherwise because of the decision that was forthcoming from the Federal Court of Appeal and the Complainant's understanding was that one matter would take care of the other.

It should be noted that with respect to Exhibit HR-19 which was the agreement between Air Canada and the airline division of the Canadian Union of Public Employees same was executed without prejudice to the positions of either party, including Mr. Cremona and further that any dispute with respect to the interpretation of the agreement could be remitted to the Arbitrator for determination. I conclude from the language of this agreement that it was executed on the understanding that Mr. Cremona's rights as it relates to this proceeding would not be affected by the execution of this document.

The Commission then called Mervin Witter to testify. Mr. Witter was the regional director for the Ontario Regional Office of the Canadian Human Rights Commission. Through Mr. Witter were filed two exhibits HR-29 and HR-30. HR-29 was a letter addressed to Mr. Cremona signed on behalf of the Canadian Human Rights Commission by Lucy Veillette which was a decision stating that Mr. Cremona's complaint of discrimination against Air Canada would be withdrawn. This decision was made after Mr. Cremona's submission to them dated December 2nd, 1992 had been reviewed. HR-30 was a similar form of letter directed to Mr. Barry Corbett, employee relations of Air Canada and acknowledging a review of submissions made by Air Canada dated November 26, 1992 by one Guy Delisle and confirming that no further proceedings were warranted because of a settlement. Again it was confirmed that Mr. Cremona had not in any way withdrawn the complaint made against Air Canada to the Canadian Human Rights Commission.

Mr. Witter testified that Mr. Cremona indeed had second thoughts about the agreement and advised the Commission that he did not wish to withdraw his complaint against Air Canada. Despite this submission, the Commission decided that they would indeed withdraw the complaint as in Exhibits HR-29 and HR-30. The decision of the Commission was made despite the fact that the Federal Court of Appeal decision had been rendered confirming and upholding the decision in this proceeding. Indeed, filed as Exhibit HR-31 is a letter from Mr. Cremona to the Director of Compliance, Canadian Human Rights Commission setting out the background of his request for reinstatement of the complaint and his request to proceed with same.

Senka Dukovich was called on behalf of the Commission. She is presently executive director and a lawyer for Pay Equity Advocacy and Legal Services. She is on leave from her position with Canadian Airlines where she was a customer service director and flight attendant. She has been with Canadian Airlines since 1973 having started originally with Wardair which merged with Canadian Airlines in May of 1990.

Her background with respect to the air transport division of the C.U.P.E. trade union was extensive. She testified she had held various positions within the union and been on the bargaining team for five of the collective agreements, the most recent of which was the merger between

Canadian Airlines and Wardair. She was the chief spokesperson in negotiating three of the said contracts. In addition, she served as the women's committee representative with C.U.P.E. airline division and did extensive negotiating representation on human rights complaints on behalf of the union.

She testified that in Exhibit HR-45 the calculations were prepared on behalf of Mr. Cremona by the union. Ms. Dukovich reviewed the calculations and increases arising from the various union contracts as well as the question of seniority. She testified to the seniority date through the C.U.P.E. union which is relevant for the calculation of wages. It would be the date when the person started service as a flight attendant. She testified that had Mr. Cremona been hired by the Respondent, his seniority date would have plugged in at May 1985.

The question was then put to her by counsel for the Commission as to whether she knew the Complainant was seeking an order from the Tribunal granting him seniority back to the month of May, 1985. She testified, and I accept her evidence, that the C.U.P.E. position on Mr. Cremona's claim for seniority is that the union does not object to his seniority being

placed as of May 1985. An exhibit was then filed as HR-37 which is a letter written by Ms. Dukovich to the Director of Labour Relations at Canadian Airlines under date of January 5th, 1993. This letter was written by Ms. Dukovich directing on behalf of the Complainant, as his union representative, that he be trained forthwith and that the seniority list be amended accordingly. Apparently the response from the company was that the issue of remedy would be dealt with in due course before this Tribunal.

Finally, Ms. Dukovich testified as to the effect of a "C.S.D. award" dated March 28th, 1990. This dealt with persons who were going to be customer service directors as of May 1st, 1990. She described how C.S.D. positions are awarded and indicated the eligibility to bid was open to flight attendants. The positions are awarded on a seniority basis and the individual flight attendant has to bid for the position which is strictly voluntary on the individual's part. Exhibits HR-38, 39, 40 and 41 were bulletins describing bid documents for each of those years for C.S.D. awards. From the documents filed, Ms. Dukovich clearly indicated that Mr. Cremona would have been awarded a C.S.D. position as early as 1991 as well as subsequent years to date.

The advantages in successfully bidding for a C.S.D. position can result in substantial pay differential and those calculations on the basis of a C.S.D. position for Mr. Cremona were filed as Exhibit HR-45.

Through Ms. Dukovich Exhibit HR-42 was introduced which is the collective agreement between Canadian Airlines and C.U.P.E. In this agreement can be found the rate of pay for a C.S.D. as of May 1990, which was an amount of $41.60. With the collective agreement Ms. Dukovich then testified as to the various level increases through to the present time.

Ms. Dukovich confirmed that with respect to the airline passes they were unlimited for an individual flight attendant as well as there

being an additional number of parents' passes. Additionally, the pass is there as a benefit of being able to fly another airline at a reduced rate of up to 90%. The shipping of cargo is also an additional benefit which is done at normal rates for the employee. She went on to describe the major medical benefits including 80% of dental coverage, drug benefits with a $25.00 deductible as well as a vision care package, group life insurance and employer funded RRSP contribution.

She described accumulated sick leave as well as the effect of having seniority rights and the impact of same on layoffs.

Under cross-examination, Ms. Dukovich outlined the most recent share purchase option which was negotiated by union and management. It apparently provided for a share purchase option through a reduced wage rate which effectively provides for the individual employee to purchase shares in the company. She confirmed for company seniority in terms of service the effective date would be the date of hire. The collective agreement referred to the "C.U.P.E. seniority date" as being the date of line assignment.

In reply, the Respondent called Kenneth Davis, who was a human resources manager for City Express in February of 1986 and he was in that position until October of 1988. During that period of time the Complainant worked for City Express. City Express

was a small airline that flew out of Island Airport in Toronto. It employed in 1988 approximately 350 people.

From the employment records of Mr. Cremona, Mr. Davis outlined various complaints they had of the quality of his work. He recounted numerous complaints from passengers regarding his attitude, specifically with respect to his rudeness. He further outlined that the pilots did not care for him nor did certain of the flight attendants. Through Mr. Davis, Exhibit WA-16 was filed which was an assessment of the Complainant's performance as of December 23rd, 1987. The overall assessment indicated that the Complainant was not a satisfactory employee, describing him as obstinate, discourteous and obnoxious. Exhibit WA-17 was filed as a memorandum prepared by Mr. Davis stating his opinion of the evaluation of the Complainant and concurring with the assessor that Mr. Cremona lacked the qualities to be an inflight supervisor.

Under cross-examination, it became clear that none of the documents in reference to Mr. Cremona's conduct including a complaint by the Ralph Lauren Company were ever discussed with the Complainant. The obvious inference from Mr. Davis' evidence is that if he as the human resources manager was concerned about Mr. Cremona's conduct, he did not at any time take the opportunity to sit down and review this conduct. Indeed, it developed in Mr. Davis' evidence his reluctance to discuss any of the suggested conduct with Mr. Cremona was as a result of the fact that the Complainant was on the negotiating team for organizing the unionization of employees of City Express.

Mr. Davis did indicate in the promotion process for an inflight supervisor Mr. Cremona scored as one of the highest of all the applicants

screened. Mr. Cremona apparently did not reach an interview stage because of the internal assessment by Mr. Davis which was never revealed to the Complainant.

Mr. Davis testified that he never had any request to prepare a reference for the Complainant. Apparently when the Complainant moved on to positions with Air Transat and Air Canada his employment record was not requested from City Express. I am left to infer that despite clear evidence of inappropriate conduct and poor workmanship, City Express was intimidated by unionization to the extent that the Complainant's conduct was never discussed with him since he was part of the union negotiating team. I have some difficulty in accepting this evidence from Mr. Davis in view of the method in which he apparently elected to treat the Complainant.

Mr. Peter Bolton was called as a witness for the Respondent. He had previously testified in the main proceedings with respect to the complaint of visual acuity. Mr. Bolton was hired by the Respondent (Wardair) in 1970 and worked himself up to the position in 1980 as director of cabin services for Wardair. He held this position from 1980 until 1987 when he became Vice-President of Customer Service with Wardair.

Mr. Bolton described during the period of 1984 some of the basic qualifications Wardair was looking for in flight attendants, specifically

fluency in French, German or the Dutch language as well as the ability to relocate. In addition, they wished at least two to three years experience in public contact as well as a sincere and pleasant personality.

Mr. Bolton also described the hiring practices throughout the mid-80's and in particular 1984-5 which is the time in question in this proceeding. He felt that in 1985 they were looking for flight attendants with fluency in Italian, Dutch and German and some French. He testified that throughout the hiring and training process his statistics indicated that they were hiring approximately one in sixty applicants. When he worked through the statistics with respect to language preference, he felt the percentage chance of getting hired would be statistically much more difficult.

A hypothetical question was then put to Mr. Bolton with respect to the resume of Mr. Cremona, Exhibit WA-14. He was to ignore any employment history with any of the previous airlines and commercial fragrance outlets and to assume that Mr. Cremona was seeking a job in April of 1985. Bolton testified when he reviewed that application with that

hypothetical restriction, Mr. Cremona qualified in the minimum education and work experience requirements and that there was a good chance that he would have achieved the first interview stage. He testified that even if Mr. Cremona could have made it through the first interview and got to the second interview only five out of twenty would have received the second interview. Mr. Bolton then speculated that because of evidence given by Mr.

Davis regarding Mr. Cremona's personality that he would probably not have gotten past the second interview.

With respect to becoming a customer service director, Mr. Bolton testified that at Wardair, out of thirty-five people who would be eligible, thirty-two of those persons elected not to apply for this position. This was the choice of the employee not to apply as opposed to not being qualified. Apparently, seniority was the primary determination in the ability to apply for this position.

Under cross-examination, Mr. Bolton conceded that their hiring practice would be similar to that of Air Canada as well as Air Transat.

Mr. Cremona was called in reply and confirmed that he had been tested twice, first with Air Transat then with Air Canada insofar as the French language is concerned. His entire training with Air Transat of both operating and safety procedures including the manuals was in French. He attained a Level 3 status with Air Canada which is the equivalent to full proficiency in the French language.

With respect to the previous evidence of Mr. Davis regarding his poor conduct assessments, Mr. Cremona testified that he was one of twenty-five people who were let go by City Express because of their union involvement to organize a union. The action of City

Express was appealed to the Canada Labour Relations Board and all of the persons let go including Mr. Cremona were reinstated with full benefits and pay.

ISSUES:

A. Should the Complainant be compensated on the basis of being denied a position or a loss of an opportunity to compete for a position?

The counsel for the Commission pointed out in argument and rightly so that the finding of the Tribunal in this matter in their decision reported at C.H.R.R. Volume 14, Decision 36, p. D/282, par. 108 has in fact made the finding that the Complainant was in fact denied a position by reason of the discriminatory act as opposed to the opportunity to compete for a position. The essential findings and question of fact in this case were reviewed by the Federal Court of Appeal and the Tribunal's findings were upheld by the decision of October 9th, 1992.

We were referred to two passages in the decision of Canadian Armed Forces and Morgan, 13 C.H.R.R., p. D/42, par. 14:

"The question of whether the Respondent was denied a position of employment or the opportunity to compete for a position with the Appellant is a question of fact."

The Morgan decision was appealed to the Federal Court of Appeal and reported at 85 D.L.R. (4th) and at p. 479 Justice Marceau says the following with respect

to the identification of the loss to be compensated, i.e. the position or the opportunity to compete for a position:

"...It seems to me that the proof of the existence of a real loss and its connection with the discriminatory act should not be confused with that of its extent. To establish that real damage was actually suffered creating a right to compensation, it was not required to prove that, without the discriminatory practice, the position would certainly have been obtained. Indeed, to establish actual damage, one does not require a probability. In my view, a mere possibility, provided it was a serious one, is sufficient to prove its reality....

...That being said, I nevertheless share the view of my colleague that the Applicant's argument on this point must fail. As I read the judgment of the initial Tribunal, the Chairman concluded, in spite of some equivocal remarks, that there was no uncertainty that Morgan would have been enrolled, regardless of the fact that theoretically other stages remained to be completed in the recruiting process. This was obviously a finding of fact which could not be said to have been reached in complete disregard of the evidence. Having come to the

conclusion that the original Tribunal had not committed in this respect any palpable and overriding error....the review Tribunal was not entitled to intervene. We, in turn, are similarly disentitled."

The findings of fact as referred to herein are nevertheless fortified by the additional evidence heard of the Complainant's successful hiring in three separate positions and the fact that but for the discriminatory act he would at the very minimum have gone to the second level of hiring consideration by the Respondent. Mr. Bolton concedes that the Complainant had the educational and language requirements and when coupled with both his previous experience and the subsequent success of employment as a flight attendant, I have no hesitation in confirming that damages in this case should be assessed on the basis that the Complainant by reason of the discrimination was denied a position.

B. Has the Complainant failed to mitigate his damages?

Considerable evidence was led by the Respondent as to failure of the Complainant to continue on with his grievance arbitration against Air Canada as opposed to settling the issue with them before the Federal Appeal Court of Appeal decision upholding this matter on the question of discrimination. There is no doubt from the evidence that the Complainant may have been ill-advised by his legal advisors and the union at that time to conclude the arbitration in the manner which is set out in the agreement filed herein. I do not however consider this set of circumstances as cogent evidence that the Complainant has failed to mitigate. It is apparent that he was under tremendous pressure from his union and the arbitrator to make a decision regarding an out of court resolution of this matter. That he made a decision perhaps not in his best interests is indicative of the fact he endeavoured to have the Canadian Human Rights Commission reinstate the complaint which they refused to do following the execution of the agreement.

With respect to mitigation, it is of greater importance in my opinion that one consider the work history and record of the Complainant following the discriminatory act of the Respondent in October of 1984. It is not in dispute that from that date to the present the Complainant has availed himself of every employment opportunity both within the airline industry and without as evidenced by his employment at several retail outlets, the last of which is Holt Renfrew. It is my finding in this case that the Complainant has had at every opportunity very diligently and responsibly undertook employment in this area. Indeed, at certain times from October 1984 to the present, the Complainant was employed at two

positions at the same time. I accordingly find as a fact that there was not any failure on the Complainant's part at any relevant time to mitigate his damages.

C. Has there been any loss of benefits?

Evidence was led through Ms. Dukovich that employment with most major airlines affords the employee with unlimited free passes for air flights to various parts of the world along with substantially discounted accommodation and transport of air cargo. In addition, there are a certain number of passes afforded to the employee's family per annum. There is no doubt that the Complainant had through his employment with Air Canada and Air Transat certain of these amenities although no specific evidence was led as to the value and the frequency by which the Complainant enjoyed such amenities. I am satisfied that for those periods of time when he was not employed by an airline from October 1984 to the present he would have availed himself of and enjoyed certain of the bonus amenities afforded by the airline industry to employees.

D. Is his "instatement" or placement to a position with the Respondent along with those accompanying seniority rights a proper remedy in this case?

In my view, "instatement" or placement is appropriate having regard to all of the circumstances in this Complainant's case, in view of

my findings with respect to a discriminatory act resulting in a loss of position.

E. Should there be interest on the damage award?

It is now settled that interest is appropriate on awards given pursuant to the C.H.R.A. and this issue is confirmed as an appropriate remedy and specifically referred to in the Morgan case supra.

F. Can the Complainant have seniority awarded to the date May 1985 as requested where it obviously affects other employees?

It would appear to be without question that s. 53(2)(b) affords jurisdiction to the Tribunal to award seniority. S. 53(2)(b) of the C.H.R.A. is as follows:

"(b) That the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;"

It was the position of the Respondent that seniority could not be awarded in this case because the rights of other workers or employees would be adversely affected and they would not have the opportunity to address their position regarding same. It appears quite clear from the evidence of Ms. Dukovich and filed through exhibits that the granting of seniority to the Complainant in this case would not present a problem for the union membership in general. In this regard, I am referred to the decision of C.H.R.C. v Dalton et al, 1986 2 C.F. p. 149 which states as follows:

"Renegotiation of a term in a collective agreement is prima facie within the authority of the certified bargaining agent without reference to individual employees who may be affected by the amendment. There is an exception. In the present case, the exception would arise if, in respect to employees it represents, the bargaining agent did not, in fact, or could not in the circumstances be seen to comply with the requirements of s. 136.1 of the Canada Labour Code. S. 136.1 states as follows:

"A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

It is my finding that in view of the evidence of Ms. Dukovich the union executive is fully aware of the Complainant's request for seniority as a remedy in these proceedings and concurs with same. There could not be

in my opinion any suggestion that the awarding of seniority in this case would be construed as something beyond the authority of the union nor a breach of s. 136.1 of the Canada Labour Code.

REMEDIES:

Upon a full review of the evidence and the findings made thereon, after reviewing the case law presented by counsel, the Tribunal concludes the following award is appropriate under all circumstances for the Complainant Rodney Cremona.

A. It is ordered that the Complainant is forthwith awarded the first available position as a flight attendant with the Respondent Canadian Airlines (formerly Wardair Canada Inc.) and that this position as a flight attendant shall retroactively carry with it the seniority that this Complainant would have had had he not been denied the position as of May 1985.

B. It is ordered that this Complainant shall receive compensation for lost wages in the sum of $209,104.85 less the sum of $174,245.19 which is the income he earned since May 1985. This results in a net compensation for wage loss in the amount of $34,859.66.

C. It is ordered that he shall receive for the value loss of all employee amenities including free passes and accommodation discount the sum of $10,000.00.

D. It is ordered that the Complainant shall receive for hurt feelings the sum of $1,000.00.

E. It is ordered that this Complainant shall receive interest on all the amounts awarded herein fixed at the prime rate from the date the Complaint was filed herein being 13% per annum.

DATED this 14th day of May, 1993.

CARL E. FLECK, Q.C., Chairman