T. D. 12/ 87 Decision rendered on November 6, 1987

Version française à suivre French version to follow

HUMAN RIGHTS TRIBUNAL IN THE CASE OF:

LUCIE CHAPDELAINE and FRANCE GRAVEL Complainants

and

AIR CANADA Respondent

and

THE CANADIAN AIRLINE PILOTS ASSOCIATION Intervenant

JUDGMENT

This Tribunal was appointed on April 16, 1986 pursuant to Section 39 of the Canadian Human Rights Act (the "Act"):

"To enquire into the complaints of Lucie Chapdelaine dated September 19, 1979 and France Gravel dated February 26, 1980 against Air Canada, and to determine whether the action complained of constitutes a discriminatory practice on the ground of sex in a matter related to employment under Sections 7 and 10 of the Act."

Both complaints are virtually identical. The Complainants are both pilots. They both applied for employment with the Respondent as pilots. They were both refused employment by the Respondent for the stated reason that they did not meet Respondant's minimum height requirements for pilots (Exhibits C- 1 and C- 2). They both claim that the application of the Respondant's minimum height requirement policy amounted to a discriminatory practice on the ground of sex and that they have suffered damages in the result. Accordingly, these two complaints were joined for proof and hearing before this Tribunal pursuant to subsection 32(4) of the Act.

The parties to this inquiry are the two Complainants, the Respondent and, by the consent of these parties and the order of this Trubunal, the Intervenant.

A. PRE TRIAL PROCEDURES

Following several pre hearing conferences with counsel for the Complainants and the Respondent, the complaints were to have been heard commencing September 17, 1986. On this date, counsel for the Commission and the Complainants advised the Tribunal that:

"J'ai l'intention à l'heure actuelle, dans le cas de France Gravel, de faire une demande afin qu'une ordonnance soit rendue pour que l'ancienneté qu'elle aurait si elle avait été engagée à la date o elle a été refusée lui soit octroyée." (Case, Vol. 1 at page 4).

and that: "Si une telle ordonnance était rendue cela serait susceptible d'affecter les droits d'une association syndicate qui s'appelle la CALPA (Canadian Air Line Pilots Association), ... je soumets que vu l'importance de la question il y aurait lieu que ce Tribunal donne avis à la CALPA que la Plaignante France Gravel demandera qu'on lui octroie l'ancienneté et offre à la CALPA la possibilité d'être entendue ... un avis qui énoncerait clairement que la Plaignante France Gravel va faire une demande afin qu'une ordonnance soit rendue lui octroyant l'ancienneté." (Case, Vol. 1 at pages 5, 6 and 7).

This application was granted with the consent of the respondent. Accordingly, the hearing was postponed to early December 1986 and a notice was sent to the Canadian Air Line Pilots Association. The Association appeared in these proceedings through counsel by letter of October 28, 1986 advising that the Association wished to make proof and representations at the Hearing but that counsel would not be available on the dates fixed for the Hearing in early December 1986.

At a pre trial conference conducted by telephone on November 7, 1986, it was agreed by all parties that the Hearing fixed for December 1, 1986 would be further postponed and fixed for February 2 to February 6, 1987. There was to be no simultaneous translation services provided at the Hearing. The parties agreed to file with the Tribunal Statements of Claim, Defense and Intervention together with Lists of Exhibits and Exhibits. This was all done by December 31, 1986.

By their amended declaration, the Complainants seek the following conclusions:

1. Déclarer que l'intimée Air Canada a commis un acte discriminatoire contrairement a l'article 7 de la Loi canadienne sur les droits de la personne.

2. Déclarer que l'intimée Air Canada a commis un acte discriminatoire contrairement à l'article 10 de la Loi canadienne sur les droits de la personne.

3. Condamner l'intimée Air Canada à payer à la plaignante France Gravel la somme $65 418.

4. Condamner l'intimée Air Canada a payer à la plaignante Lucie Chapdelaine la somme $96 054.

5. Ordonner à l'intimée Air Canada de permettre à la plaignante France Gravel à la première occasion raisonnable d'être soumise aux étapes du processus d'embauche de l'intimde dont l'acte discriminatoire l'a privée.

6. Ordonner à l'intimée Air Canada de permettre à la plaignante Lucie Chapdelaine d'être soumise aux étapes du processus d'embauche d'Air Canada dont l'acte discriminatoire l'a privée et ce à la prochaine occasion raisonnable.

7. Ordonner, si elle réussit les autres étapes du processus d'embauche, que France Gravel soit engagée comme pilote d'avion avec ancienneté remontant au 7 décembre 1978.

8. Ordonner, si elle réussit les étapes subséquentes du processus d'embauche de l'intimée, que Lucie Chapdelaine soit embauchée comme pilote à la prochaine occasion raisonnable avec ancienneté remontant au 26 octobre 1979.

9. Déclarer l'ordonnance sur l'ancienneté opposable a l'intimée Association Canadienne des pilotes de lignes aériennes et comme ayant préséance sur toute convention collective pouvant lier les intimées.

The Respondent's Statement of Defense seeks the dismissal of the Complainants' complaints. It was accompanied by a Cross- Demand concluding, in effect, that the Commission be ordered to indemnify the Respondent from and against all damages that may be assessed against it in favour of the Complainants. The Commission, through counsel and by a Motion to Strike dated December 22, 1986, sought to strike the allegations of the Respondant's Defense and Cross-Demand supporting its indemnification conclusion against the Commission. All the parties were heard through their attorneys on this motion on January 15, 1987 and by judgment of this Tribunal rendered on January 20, 1987, it was held that:

... the order sought by the Respondent to be indemnified in the event of any condemnation in favour of the Complainants cannot be granted by the Tribunal.

However, this is not to say that the impugned allegations are necessarily irrelevant in the context of the inquiry into the complaints of the Complainants. The Respondent advised the Tribunal that it has proof to show that if the Complainants have suffered damages, such damages are due to the acts or omissions of the Commission and not those of the Respondent. In this context and having regard to section 41 of the Act, the Tribunal is of the view that the impugned allegations should be permitted to stand. THEREFORE, the Motion to Strike paragraphs 25, 26 and 29 of the Defense and Cross- Demand of the Respondent is dismissed.

The Intervenants' Statement of Intervention asks that the complaints be dismissed "insofar as they request that the Tribunal grant orders of retroactive seniority for the Complainants". The complaints were heard on February 2nd, 3rd and 4th, March 13th and April lst, 1987 at which time they were taken under advisement.

B. THE FACTS

The Complainant Chapdelaine made out a complaint to the Commission in September 1980, alleging as follows:

"Ayant envoyé mon application en ao t l'an passé (79) avec qualifications j'ai été refusé à cause de ma grandeur. Air Canada exige la même grandeur qu'un

homme soit 5'6". En espérant d'avoir de vos nouvelles." (Exhibit C- 4; case 3, page 149).

Chapdelaine was advised by Air Canada in its letter of October 26, 1979 that it could not pursue her August, 1979 request for employment for the stated reason that in order to easily accomplish the divers tasks in aircraft cockpits, pilots must be at least 5'6" tall (Exhibit C- 2). It is this action on the part of the Respondent that Chapdelaine claims amounts to a discriminatory practice on the ground of sex.

Similarly, on February 26, 1980 the Complainant, Gravel, made out a complaint to the Commission alleging as follows:

" J'ai fait application à plusieurs reprises depuis 1976 et j'ai finalement passé une entrevue avec un représentant d'Air Canada en octobre 1978. Le processus d'embauche est le suivant: A) une première entrevue, B) un comité de sélection et finalement l'examen médical. En ce qui me concerne, le tout s'est terminé après la première entrevue sous prétexte que je ne rencontrais pas les normes de grandeur de la société qui est de 5'6" tout en soulignant que je possédais les qualifications requises et une très bonne expérience de travail.

Par la suite, par l'intermédiaire de la revue Aviation Québec, j'ai appris que la compagnie Boeing exige une taille entre 5'2" et 6' pour piloter leurs appareils. Les normes de la compagnie McDonnel Douglas sont sensiblement les mêmes.

Si j'en réfère à vous, c'est que je considére qu'il y a discrimination envers les femmes lorsque Air Canada exige de celles- ci qu'elles aient la même moyenne de taille que les hommes, ce qui à mon avis est irréaliste et par consequent élimine beaucoup de femmes comme moi- même, sans raison valable." (Exhibit C- 3).

By letter of December 7, 1978 from the Respondent (Pilot Inspector G. Plourde), Gravel was informed that her October, 1978 application could not be considered as she did not meet the minimum height required by the (Respondent's) medical department (Exhibit C- 1). Gravel claims that this action amounts to a discriminatory practice on the ground of sex.

The Complainant Chapdeleine applied for employment as a pilot with the Respondent in August, 1979. She made her complaint to the Commission in September 1980, almost a year after the Respondent turned down her application. The Commission only informed the Respondent of such complaint some eight months later, in May 1981 (Exhibit D- 3; case 2, page 35).

The Complainant Gravel first applied for employment as a pilot with the Respondent in June 1976. She reapplied in August of 1978 (Exhibit D- 1, en liasse). Her complaint was made to the Commission in February 1980, some 14 months after the Respondent turned down her application (Exhibit C- 1). The Respondent was not informed by the Commission of Gravel's complaint until May 1981 (Case 2, page 36), some fifteen months later.

Between 1977 and 1983, Gravel flew a variety of single and multi engine aircraft for a variety of employers. In January, 1983 she began flying for Nordair as a first officer on a Fairchild 227 (Exhibit C- 14, en liasse). In March 1985, Gravel was promoted to first officer on a Boeing 737. She is presently employed as a first officer on a Boeing 737 for Canadian Airlines International, the successor to Nordair.

Chapdelaine's situation is similar. She began flying when only 15 years old, obtained her pilot's licence before her 17th birthday and had completed all of the examinations for her airline pilot's licence before her 21st birthday. By 1983, Chapdelaine was also flying for Nordair and is presently a first officer on a Boeing 737 with Canadian Airlines International.

The Respondent acknowledged at the Hearing that both Complainants possessed all of the qualifications necessary to be a pilot for Air Canada at the times they applied save only that they failed to meet the minimum height requirement of 5'6" (Case 2, page 74 and 3, page 138). Further, it was admitted that "le standard minimum de grandeur était de 5'6" au moment ou les candidates (Complainants) ont fait application" (Case 2, page 27; see also Case 4, pages 202 - 203 and Exhibit C- 9).

Captain Carl Pigeon, an experienced pilot employed by the Respondent since 1969, explained that the reason for the minimum height standard was that:

"in the 1960's and into the 1970's (the Respondent) had been informed by certain manufacturers that the minimum requirement to fly their aircraft was 5'6" and, accepting what they said, we proceeded on that basis." (Case 4, at page 204)

He acknowledged, however, that the Respondent never received any .. written confirmation from any of the manufacturers in the ... 60's or the 70's to support the position (Case 4, page 204). Captain Pigeon further explained that:

"... things were far less formal in those days, we could pick up the phone and call Douglas or call Boeing or call Lockheed and ask them a question and they would give us an answer and we would proceed along those lines" (Case 4, page 204).

After receiving the complaints of the Complainants, they were referred by the Commission to an investigation officer, Mr. André Dumaine. According to Mr. Dumaine, he received his mandate in the case of Chapdelaine on July 14, 1980 (Case 2, page 34). This seems strange. According to the testimony of Chapdelaine, she only made her complaint to the Commission in September 1980 (Case 3, page 149) notwithstanding that the date mentioned on her complaint is September 1979 (Exhibit C- 4).

In any event, Mr. Dumaine investigated both complaints and made his reports thereon on February 19th, 1982 (Exhibits C- 10 and C- 11). These reports concluded that the Respondents' minimum height policy could not be justified, the complaints of the Complainants alleging discrimination in employment on the ground of sex were substantiated and that conciliators be appointed for the purpose of attempting to bring about a settlement of the complaints. The findings leading to these conclusions may be summarized as follows:

(a) In Canada, in 1970, the percentage of men measuring 5'6" or less was 31.6% as compared to 92.2% for women;

(b) The Complainants were less than 5'6" tall;

(c) Manufacturers of aircraft used by Air Canada do not require a minimum height of 5’6" to fly them;

(d) The hiring policies of some airline companies examined emphasize the ability to manoeuvre aircraft controls rather than on a given height standard;

(e) The United States’ Federal Air Regulations require that the cockpit of commercial aircraft accommodate pilots measuring 5’2" to 6’3";

(f) The Air Canada hiring policy as regards the minimum height for pilots has not been applied in a consistent fashion as in at least one case a candidate, now a captain, was hired despite the fact that he was only 5’5 1/4" tall.

The witness, Wayne Millar, a bio statistician with Health and Welfare Canada, testified that based upon data compiled from surveys conducted by his department between 1978 and 1981 he has determined that over 82% of all females in Canada between 20 and 29 years of age in 1978 were less than 5’6" in height whereas only 11% of all men in the same age category were shorter than 5’6" (Case 3, at pages 124 to 134). Thus, one may conclude that the Respondents’ minimum height policy in effect between 1978 and 1982 operated to disqualify 82% of all such women and 11% of all such men from ever becoming an Air Canada pilot. As if to confirm the effect of this policy, of 525 pilots hired by the Respondent between 1978 and 1980, only 5 were women (Case 4, at pages 201, 223). The Respondent was not able to lead any evidence as to the number or ratio of male and female pilot applicants during this period (Case 4, at pages 261 and 262). Chapdelaine is 5’4" tall and Gravel is 5’3" tall (Exhibit C-10) . All aircraft comprised in the Air Canada fleet in 1976, 1978 and 1980 were manufactured in the United States (Exhibit C-10; Case 4, page 215). All such aircraft had to meet airworthiness standards established by the United States Federal Air Regulations. Effective after February 1, 1977, these Regulations provided that cockpit controls of transport category airplanes had to meet the following standard:

"25.777 Cockpit Controls (c) The controls must be located and arranged, with respect to the pilots’ seats, so that there is full and unrestricted movement of each control without interference from the cockpit structure or the clothing of the minimum flight crew (established under 25.1523) when any member of this flight crew, from 5’2" to 6’0" in height, is seated with the seat belt fastened. (Exhibit C-5)

This standard was modified with effect from December 1, 1978 by increasing the maximum height mentioned in 25.777(c) from 6’ to 6’3". The witness, Captain Carl Pigeon, testified that to his knowledge the Transport Canada minimum requirement was also 5’2" under this head at about the same time (Case 4, at pages 233 and 237).

Of all the airlines checked by Mr. Dumaine during his investigation, only one other airline had a minimum height requirement for its pilots during the period 1978 to 1980. Nordair had a minimum height requirement of 5’7" but exceptions could be made for candidates with special qualifications and experience (Exhibit C-10). Both Complainants would seem to be two such exceptions. They were both hired as pilots by Nordair in 1983 (Case 2, page 63 and 3, page 139). By this time, the Respondent had also relaxed its minimum height requirement.

In the Spring of 1982, about one year after learning of the complaints, the Respondent lowered its minimum height requirement from 5'6" to 5'2" with the proviso that an applicant be able with complete safety to operate, manoeuvre and pilot all aircraft of the Respondent with ease and without any difficulty (see also Case 4, at pages 205 to 207 and 237). Accordingly, in the Spring of 1982 the Respondent invited the Complainants to resubmit their applications, which they did.

Both Gravel and Chapdelaine were invited to submit to interviews by the Respondent in 1985. In Gravel's case, she only learned in Toronto on September 26, 1985 that Air Canada was conducting interviews in Montreal during the week commencing September 23, 1985. She did not respond to this invitation. Chapdelaine was interviewed by a panel of three pilots, including Captain Carl Pigeon. Following this interview, Chapdelaine advised Captain Pigeon that she was no longer interested in pursuing her application for employment with Air Canada (Exhibit D- 8; Case 3, page 154 and 4, page 227). The Tribunal infers from this and from their testimony that the Complainants are not prepared to accept employment with the Respondent unless hired with seniority retroactive to the dates they were first refused employment (Case 2, at pages 82 & 83; Case 3, at page 146).

Captain Nicholas Servos, a sixteen year pilot with Air Canada and a vice- president and director of the Canadian Air Line Pilots Association (" CALPA") was called by the Intervenant to testify in connection with the issue of seniority (Case 3, pages 156 to 186). CALPA represents pilots employed by Air Canada, Air Ontario, Canadian Pacific Airlines, Nordair, Pacific Western Airlines, Eastern Provincial Airways and Québecair (Case 3, at page 158). All of the pilots employed by these airlines are subject to collective agreements negotiated for them by CALPA (see for example Exhibits I- 2, I- 4 and I- 5).

According to Captain Servos, the seniority date of a pilot with an airline will determine the time such pilot becomes eligible for promotion (or demotion as the case may be), for example, from second officer to first officer; from first officer to captain; from one aircraft in a fleet to another; from one base assignment to another; from one flight schedule to another (Case 3, at pages 160 to 162). Generally, the seniority date of a pilot is the date on which he or she is designated and receives remuneration as a pilot officer. A pilot's seniority date, once established, cannot be lost except by termination of employment as a pilot with the company or in certain cases where a pilot transfers to non- flying or supervisory duties (see Articles 21 and 22 of the Air Canada Collective Agreement, Exhibit I- 1, Articles 20 and 21 of the Canadian Pacific Collective Agreement, Exhibit I- 5 and Article 7 of the Nordair Collective Agreement, Exhibit I- 4).

Based on the collective agreements, a pilot who switches from Air Canada to Nordair will lose his or her seniority date with Air Canada and acquire a new seniority date with Nordair at the bottom of the Nordair list (Case 3, at pages 175 and 185). It is for this reason that few pilots voluntarily change airlines.

A merger of airlines or acquisition by one airline of another presents a different result. In these situations, CALPA has a merger policy whereby it merges the seniority lists of the airlines affected. Implementation of the merger policy has not always been accomplished without objections that have led to arbitration and the courts (Case 3, at pages 172 to 175).

The positions of Gravel and Chapdelaine on the Nordair seniority list are 147 and 149 respectively out of a total list of 174 pilots. If Gravel had been hired by the Respondent on the date her application was refused (December 7, 1978), her seniority would place her about 1,377 on the Air Canada pilots' System Seniority List of 1,850 pilots (Exhibit I- 3). Similarly, if Chapdelaine had been hired on the date her application was refused (October 26, 1979), her seniority would place her about 1,684 on the said Air Canada list (Exhibit I- 3).

Hypothetically, if Air Canada and Nordair were to merge, CALPA's merger policy might operate to place Gravel and Chapdelaine at about 1,946 and 1,948 respectively on a merged list of 2,024 pilots (Exhibits I- 3 and I- 6). Had the Complainants been hired by the Respondent following the invitations for an interview in September of 1985, they may have been placed at 1,799 and 1,800 on a list of 1,852 pilots.

Gravel was refused employment by the Respondent in December 1978. This was early in a period when the Respondent had embarked on a hiring program that lasted into 1980. Chapdelaine was refused employment by the Respondent towards the middle of this hiring period. No pilots were hired by the Respondent after 1980 until December 1985 (Exhibit I- 3).

C. THE ISSUES

From the foregoing facts, the following issues have been raised by the parties, as noted above:

1. Do the refusals by the Respondent to consider the Complainants' applications (by the implementation of its minimum height requirement policy) amount to a discriminatory practice on a prohibited ground of discrimination within the meaning of either or both Sections 7 and 10 of the Act?

2. If so, were the Respondent's refusals based on a bona fide occupational requirement within the meaning of Section 14(a) of the Act?

3. If not, have the Complainants suffered any damages as a result of the refusals?

4. If so, what is the measure of such damages? Do they include loss of seniority rights? If so, can this Tribunal do anything to redress such loss of seniority rights?

D. THE LAW

The purpose of the Act is to give effect to the principles of equal opportunity for all individuals without hindrance from any prohibited grounds of discrimination. Section 2 of the Act provides as follows:

2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from

doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. 1976- 77, c. 33, s. 2; 1980- 81- 82- 83, c. 143, ss. 1,28. The Act provides that it is a discriminatory practice for an employer to refuse to employ any individual or to pursue a policy that tends to deprive an individual of any employment opportunities on a prohibited ground of discrimination. Sex is one such prohibited ground. The relevant portions of sections 3, 7 and 10 of the Act provide as follows:

3. (1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

7. It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, ... on a prohibited ground of discrimination.

10. It is a discriminatory practice for an employer, employee organization or organization of employers

(a) to establish or pursue a policy or practice, ... that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination 1976- 77, c. 33, s. 10; 1980- 81- 82- 83, c. 143, s. 5.

It is now settled law that an intention to discriminate is not a necessary element of the discrimination prohibited by the Act (semble, Ontario Human Rights Commission vs Simpsons-Sears, (1985) 2 S. C. R. 536, at pages 547 to 550 and the cases there cited). Further:

"...(i) t is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the Community, it is discriminatory." ibid, at page 546).

Mr. Justice McIntyre in the Simpsons- Sears case, supra, explained and then applied the concept of adverse effect discrimination in these words:

"... adverse effect discrimination ... arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply. From the foregoing I therefore conclude that the appellant showed a prima facie case of

discrimination based on creed before the Board of Inquiry. ... I do not on the other hand accept the proposition that on a showing of adverse effect discrimination on the basis of religion the right to a remedy is automatic (at pages 551 and 552).

As the Tribunal has already observed above (at page 10) the effect of the Respondent's height policy, although perhaps "on its face neutral" in its application, operated to deprive 82% of all Canadian women and 11% of all Canadian men between the ages of 20 and 29 from the opportunity for employment as a pilot. Considerably more women than men were adversely affected by the Respondent's height policy. In this context, it may be said that the policy affected women "differently from" men (semble, Griggs v. Duke Power Co., 401 U. S. 424 (1971), approved in the Simpsons- Sears case, supra, at page 549).

The Tribunal concludes therefore that the Complainants have established a prima facie case of discrimination based on sex. Accepting this, the next question to determine is whether or not the Respondent was justified in imposing its height policy to pilot applicants between 1978 and 1980. Section 14(a) of the Act provides as follows:

14. It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

As for the Ontario Human Rights Code, R. S. O. 1970, c. 318, as amended, the

"only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities." (per Mr. Justice McIntyre in Ontario Human Rights Commission et al v. Etobicoke, (1982) 1 S. C. R. 202 at page 208).

These instructions apply as well to an employer's defense under Section 14(a) of the Act (see Bhinder vs CN, (1985) 2 S. C. R. 561 at pages 571 and 572).

To succeed in establishing a bona fide occupational requirement, the Respondent must satisfy both a subjective and objective test. These tests are summarized in the Etobicoke case as follows:

"To be a bona fide occupational qualification and requirement a (discriminatory practice), such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such (practice) is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." (at page 208, emphasis added)

Captain Pigeon explained that the Respondent's minimum height standard was based on verbal information received from aircraft manufacturers in the 1960's and the 1970's to the effect that the minimum height requirement to fly their aircraft was 5'6" (see pages 8 and 9 above). Physical strength is not required to fly the Respondent's aircraft as they are all "power assisted" (Case 4, at pages 254 and 255). While at the controls (left hand seat) in a DC- 9 Simulator, Captain Pigeon demonstrated that reach and not strength was the crucial feature. Hence, the proviso attached to the Respondent's new minimum height requirement of 5'2" implemented in the Spring of 1982 and described at page 12 above. The documentary evidence reveals that at least from February 1977 the United States Federal Air Regulations provided that the cockpit controls of transport category airplanes had to be within easy reach of pilots from 5'2" to 6' in height (see page 11 above).

No documentary or expert evidence was adduced to establish that a pilot must be at least 5'6" tall to perform his or her duties for the Respondent "without endangering ... the general public" (Etobicoke case, supra, at page 208), apart from the fact that one other airline imposed a similar minimum height standard to that of the Respondent (see page 11 above). Indeed, counsel for the Respondent acknowledged that no attempt was made to make a defence under Section 14 (Case 5, at page 382).

Exceptions to the general rule must be construed narrowly. The Tribunal concludes on the evidence adduced at the trial and discussed above that the Respondent has not discharged the burden of proof incumbent upon it to satisfy the objective test laid down in the Etobicoke case. If either test is not satisfied, a defence under Section 14(a) must fail. As if to confirm that there was no valid occupational requirement for pilots to be at least 5'6" tall, the Respondent modified its standards in the Spring of 1982.

E. DAMAGES

Both Complainants seek compensation from the Respondent for amounts representing the difference between what they might have earned as a pilot for the Respondent from the dates their applications were refused and what they actually earned from such dates plus an amount to compensate for the loss of "droits, chances et avantages" (the "Monetary Claims") . The Monetary Claims are based on the provisions of Sections 4 and 41(2)(c) of the Act. They also ask that the Respondent hire them on the first reasonable occasion with seniority retroactive to the dates their applications were refused pursuant to the provisions of sections 4 and 41 (2) (b) of the Act (the "Seniority Claims"). Finally, they seek moral damages pursuant to Section 41(3)(b) of the Act (the "Moral Claims").

Sections 4, 41(2)(b) and (c) and 41(3)(b) of the Act provide as follows: "4. A discriminatory practice, as described in sections 5 to 13.1, may be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 41 and 42. 1976- 77, c. 33, s. 4; 1980- 81- 82- 83, c. 143, s. 2.

41.(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the

person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(b) that such 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;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice."

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(b) the victim of the discriminatory practice has suffered in respect of feelings or self- respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

1.) The Monetary Claims

The process by which pilots were accepted for employment by the Respondent in 1979 and 1980 was complex. Exhibit C- 9 (effective after April, 1977) describes the basic requirements, personal qualities and preparation necessary to be considered for employment as a pilot with Air Canada and concludes:

"Competition among candidates is expected to be very keen during the next few years. Preference is given to more experienced pilots and those with minimum flying experience should have more advanced education."

Captain Pigeon explained the hiring process. The Respondent maintained files of all pilot applicants. On a regular basis these files were reviewed and the most competitive applicants were invited to submit to a "one on one" interview. The purpose of this interview was primarily to verify that a pilot's licences, documentation and school certificates were all in order.

This interview was followed by a board interview comprising three to six pilots. If the applicant passed this interview, he or she was referred for a medical. Then the candidate was assessed on the basis of his or her application, the interviews and the medical. If the assessment was favourable, an applicant's name would be added to the bank of "qualified people" available for employment as the need arose (Case 4, at pages 199 to 202 inclusive).

Between 1977 and 1980, the Respondent hired a large number of pilots. During this period Captain Pigeon estimated that the Respondent interviewed between 1,100 and 1,200 people.

Some 525 were hired as pilots (Case 4, at page 201). Captain Pigeon conceded that most of the people whose names were added to the bank of "qualified people" in the early part of this hiring period became pilots for the Respondent. This was not so with those whose names were added to

the bank after the middle of 1979. Neither of the Complainants is included in the Respondent's bank of "qualified people" although both their files were reinstated in 1982 and both were invited for interviews in 1985 (see page 12 above).

The Complainant Gravel claims loss of earnings of $52,418 for the years 1980 to 1984 inclusive and $10,000 for loss of opportunities. The Complainant Chapdelaine claims loss of earnings aggregating $83,054 during the period 1979 to 1984 inclusive and $10,000 for loss of opportunities. The aggregate differential of the earnings of Gravel for the years 1980 to 1984 inclusive and what she might have earned had she been hired by the Respondent at the end of 1979 is approximately $71,500 (Exhibits C- 7 and D- 11). The differential in the case of Chapdelaine for the years 1981 to 1984 inclusive, assuming she would have been hired by the Respondent in late 1980, is approximately $51,200 (Case 3, at page 147 and Exhibit D- 9). According to the evidence, Chapdelaine earned marginally more in 1985 with Nordair than she would have earned with the Respondent.

Although it is by no means certain that the Complainants would have been hired by the Respondent, absent the height requirement, the Tribunal is of the view that, given their qualifications and the Respondent's need for pilots between 1978 and 1980, they would likely have been hired within a year to eighteen months of their respective applications. Gravel applied in September 1978 (Exhibit D- 1) and Chapdelaine applied in October 1979 (Exhibit D- 2). This would support the basis for the calculation of the Complainants' loss of earnings during the periods they have claimed by their Amended Declaration, save that 1980 should be excluded from Chapdelaine's claims.

The Complainants' damages may have been aggravated by a number of factors, not all of which were within the purview of the Respondent. In particular, the Respondent contends that the Complainants' damages have been caused or aggravated by the delays in bringing their complaints and by the delays of the Commission in investigating such complaints and notifying the Respondent. As noted above, the Respondent changed its height policy and invited the Complainants to reapply about one year after it was notified of the complaints. Unfortunately, the Respondent did not hire any new pilots in 1982. By late 1980, its need for pilots had evaporated.

Had the complaints been made shortly after the discriminatory acts and had the Respondent been notified of such complaints promptly thereafter, it would at least have been in a position to remedy such acts much sooner. The Respondent may even have been in a position to hire the Complainants before its need for pilots evaporated in late 1980. At all events, had the Respondent learned of Gravel's complaint in early or mid 1979 and had it modified its height requirement within a year of such notice, it might have hired her in mid or late 1980. Admittedly, this is conjecture, but it is a reasonable inference to draw from the Respondent's behavior after learning of the complaints in May 1981.

In Chapdelaine's case the complaint was made some six months after the discriminatory act. This is well within the one year limit imposed by Section 33(b)(iv) of the Act. But the Respondent was not notified until more than one year later, or, nineteen months after the discriminatory act. In Gravel's case, her complaint was only made some fifteen months after her

application was refused. This is beyond the one year period. The Respondent never learned of Gravel's complaint until thirty- one months after the discriminatory act. These delays are far too long and, in the opinion of the Tribunal, have contributed to the Complainants' damages.

Parenthetically, the Tribunal notes that the Act was amended in 1985 to permit the Commission to initiate a complaint without having to substantiate it. Hopefully this amendment will permit the Commission in its discretion to notify a Respondent without delay following reception of a complaint.

In all the circumstances of this case and considering the possibility of lay- offs between 1980 and 1984 and other aléa de la vie, the Tribunal believes it is not unreasonable to assess the Respondent for forty per cent (40%) of the Complainants' potential monetary claims. In Gravel's case, this amounts to $32,600. The amount for Chapdelaine is $24,480.

2.) The Seniority Claims

It will be observed at once that the Tribunal may only make an order under Sections 4 and 41 "against the person found to ... have engaged in the discriminatory practice". It was for this reason that the Tribunal concluded in its Interlocutory Judgment of January 20, 1987 (see page 5 above) that an order of indemnification against the Commission could not be made. The Tribunal lacks the power or jurisdiction to make any order under Section 41 against anyone other than the person found to have engaged in a discriminatory practice. In this case, that means the Respondent.

Similarly, any order of this Tribunal requiring the Respondent to hire the Complainants with seniority rights retroactive to the dates their applications were refused will certainly affect both CALPA and its pilot members (see page 13 above). To the extent that CALPA and its pilot members are adversely affected, such an order may be said to be against them (semble, Greyhound Lines of Canada Limited et al vs McCreary et al, 1986 CHRR, volume 7, paragraphs 25911- 25959 at paragraph 25953). Every pilot on the Air Canada seniority list below number 1376 would be adversely affected by conferring on the Complainant Gravel retroactive seniority rights (see page 14 above). Every such pilot below number 1683 would likewise be adversely affected given similar treatment to the Complainant Chapdelaine. Initially, a claim for retroactive seniority rights was only advanced on behalf of Gravel (see page 2 above). Moreover, such an order would necessarily interfere with the contractual and bargaining rights and obligations of CALPA and its pilot members on the one hand and of CALPA and the Respondent on the other hand.

The question of jurisdiction aside, factors such as the passage of time, the different equipment used by the Respondent compared to Nordair, the different training techniques adopted by different airlines, the time it would necessarily take to familiarize the Complainants with the Respondent's procedures and equipment and generally to integrate them into the Air Canada system, all militate against the granting of an order to rehire with seniority retroactive to the dates of the discriminatory acts. Even if the Tribunal has the jurisdiction to make such an order, and it does not think it has, it would be imprudent and perhaps detrimental to the safety of the Complainants and the general public to make such an order in all the circumstances of this case.

The Respondent undertook in 1982 and 1985 to consider the Complainants' applications for employment (see page 12 above). Having done so, the Tribunal will make no order requiring the Respondent to repeat this exercise at this time. As mentioned above (at page 12), the Tribunal is satisfied that neither Complainant will accept employment with the Respondent unless retroactive seniority rights are included.

3.) The Moral Claims

Both Complainants expressed feelings of humiliation upon being refused by the Respondent. Yet both must have known of the Respondent's height requirement before they applied for employment (see Exhibit C- 9). Both therefore took a calculated risk in applying for a position with the Respondent. Moreover, in reporting their height in their applications for employment, they both stretched the truth (no pun intended). In the circumstances, the Tribunal is disposed to adopt the suggestion of counsel for the Respondent and award each Complainant an amount of $1,000 under this head of claim.

F. ORDER

For the foregoing reasons, the Tribunal:

I. DECLARES that the Complainants' complaints are substantiated;

II. DECLARES that the Respondent engaged in discriminatory practices in that it refused to employ the Complainants on a prohibited ground of discrimination, namely, sex;

III. ORDERS the Respondent to pay the Complainant Gravel the sum of Thirty- Three Thousand Six Hundred Dollars ($ 33,600) and the Complainant Chapdelaine the sum of Twenty- Five Thousand Four Hundred and Eighty Dollars ($ 25,480) with interest on such amounts from the date this Tribunal was appointed, namely, April 16, 1986 at the prime lending rate of the Respondent's principal bankers; and

IV. MAINTAINS the intervention of the Intervenant and makes no order as regards seniority rights.

MONTRÉAL, QUÉBEC, this 23rd day of October, 1987.

Daniel H. Tingley Tribunal Chairman

Counsel for the Complainants Me Réné Duval, Me Anne Trottier

Counsel for the Respondent Me Victor Marchand

Counsel for the Intervenant Me Lila Stermer

AUTHORITIES AND CASES CITED

a) By the Complainants:

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b) By the Respondent:

O'Malley (Vincent) et al v. Simpsons- Sears Limited (1985) 2 S. C. R. 536; Labelle and Claveau v. Air Canada (1983) C. H. R. R. D/ 266; Seneca College v. Bhadauria (1981) 2 R. C. S. 181; Greyhound Lines of Canada Ltd. et al v. McCreary et al (1986) C. H. R. R. D/ 515; c) By the Intervenant: Labelle and Claveau v. Air Canada (1983) C. H. R. R. D/ 266; Greyhound Lines of Canada Ltd. et al v. McCreary et al (1986) C. H. R. R. D/ 3250; Black's Law Dictionary Rev. Fourth Ed., 1968, - "Compensation" at 354; Construction of Statutes, Second Edition, 1983, Elmer A. Driedger, pages 119 to 185; Re United Electrical Workers, Local 512 and Tung- Sol of Canada Ltd. 15 LAC 161; Toronto Printing Pressmen Assistants' Union No. 10 et al v. Council of Printing Industries of Canada 83 CLLC 14050; Canadian Human Rights Commission V. Dalton (1986) 2 F. C. 141; Saskatchewan Human Rights Commission and Huck v. Canadian Odeon Theatres Limited (1985) C. H. R. R. D/ 432; Bhinder et al v. Canadian National Railway Company (1985) 2 S. C. R. 561; Canada Labour Code, S. 189; Eastern Provincial v. CLRB and CALPA (1984) 1 F. C. 732; Clifford Renaud et al v. United Steelworkers of America Local 2471 and Hawker Industries Limited et al (1976) 2 Canadian LRBR 28; Butterill et al v. Via Rail (1980) C. H. R. R. D/ 44; Canada Safeway Limited v. Retail Store Employees Union Local No. 832 (1974) CLLR 14,257; Canadian Labour Arbitration, Second Edition, 1984, Donald J. M. Brown and David M. Beatty at page 64; Gary Hopkins v. International Union et al (1985) OLRB rep. May 684; Kodellas et al v. Saskatchewan Human Rights Commission et al (1986) 87 CLLC 17,006.

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