TD-5/83
Decision rendered on March 1, 1983

CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS TRIBUNAL

BETWEEN:
ANGIE SCHAEPSMEYER
Complainant
-and-
WARDAIR CANADA (1975) LTD.
Respondents

DECISION OF THE TRIBUNAL
BEFORE: L. David Wilkins, Tribunal Member
COUNSEL FOR CANADIAN
HUMAN RIGHTS
COMMISSION: R. Juriansz

REPRESENTATIVE OF
THE COMPLAINANT: Max Jamernik, Vice-President C.A.L.F.A.A. and
Larry Leblanc, President, C.A.L.F.A.A.

REPRESENTATIVE OF
THE RESPONDENT: Linda J. Wendel, Base Manager, Cabin Services
Department.

DATE: October 13th, 1982, Vancouver, British Columbia
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The complaint expressed by Angie Schaepsmeyer alleges
that:

'She was temporarily suspended without pay from her
position as an airline stewardess with the Respondent, by
reason of her physical handicap, being her need to wear
eyeglasses and was therefore discriminated against by her
employer by reason of such physical handicap, and was
therefore guilty of a discriminatory practice, pursuant
to Section 20 of the Canadian Human Rights Act.'

Neither party to the Hearing was represented by legal
counsel, although towards the conclusion of the Hearing, the
Respondent, through it's Representative, submitted for reference to

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the Tribunal, a Brief stated to be prepared by legal counsel for
the Respondent for consideration of the Tribunal.

The parties by their representatives, were able to agree
to a basic statement of facts, which are as follows:

1. Prior to June, 1981, Wardair Canada had a policy
that precluded a flight attendant from correcting
vision deificencies through the use of eyeglasses.

2. Miss Angela Schaepsmeyer was employed at all relevant times by Wardair Canada as a flight attendant. She has a visual impediment that requires correction by either eyeglasses or contact lenses.

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3. In August of 1980, Miss Schaepsmeyer experienced difficulties with a torn contact lens and advised Wardair Canada she would have to wear eyeglasses.

4. The director of cabin services, on August 27th, 1980, removed Miss Schaepsmeyer from flight service from August the 27th, 1980, until September the 5th, 1980, when she obtained a new contact lens.

5. On June 17th, 1981, the company changed its policy and permitted the wearing of eyeglasses by flight attendants. The company agreed, in principle, that Miss Schaepsmeyer should be compensated for the pay she lost due to the eyeglasses book-off.

On the basis of the agreed statement of facts, I find that the circumstances surrounding the booking-off of Miss Schaepsmeyer, constitued discriminatory practice in employment, based on her physical handicap, contrary to the provisions of the Human Rights Act.

Unfortunately, nowtithstanding the acceptance by the Respondent of their responsibility to compensate Miss Schaepsmeyer as a result of the discriminatory practice, the parties were unable to agree as to the extent of compensation payable to her.

In relation to the question of compensation, Miss Schaepsmeyer alleged that she would be entitled to have been paid for a total of 33.95 hours additional time. On behalf of the Respondent, Linda Wendel indicated that the

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company was prepared to pay her for compensation of an additional 18.55 hours, based on their interpretation of the Collective Agreement between the company and it’s employee. A copy of the

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Collective Agreement was filed as Exhibit R 1 to these proceedings and considerable reference was made to the terms of that Agreement by Miss Wendel on behalf of the Respondent and by Mr. LeBlanc and Miss Schaepsmeyer.

The Respondent’s position is set out at Page 2 of the Brief submitted as R. 2, Paragraph 6 and alleges a credit to the

company of 19.35 hours arising out of time worked by Miss Schaepsmeyer on re-assignment to a flight known as Pairing 700. Miss Schaepsmeyer, through her representative, alleges that the only credit which should have been allowed to the company, is in the amount of 4 hours, being the length of time involving her flight from Montreal to Toronto, to make up the re-assigned Pairing 700.

Throughout the Brief submitted on behalf of the Respondent, reference is made to a book-off by Miss Schaepsmeyer. It is the finding of this Tribunal that Miss Schaepsmeyer did not book off, but as a result of the discriminatory practice by the Respondent based on her physical handicap, was removed from the service she would normally have rendered to the Respondent.

In addition, the Respondent refers to Miss Schaepsmeyer being ineligible to complete the portion of Flight Pairing 700 on September 5th, had she been permitted to work her original flight booking. The Respondent bases that argument upon the provisions of the Collection Agreement which would prevent Wardair from assigning her after scheduled flight, without forty-eight hours notice. The evidence presented before the Tribunal indicates that she

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- 4 was re-assigned to that flight to fill a scheduling deficiency being experienced by the Respondent. The date of that Pairing occured on the Labor Day week-end where there was undisputed evidence that the company experienced substantially higher voluntary and sick-leave booking-offs. The uncontradicted testimony of Miss Schaepsmeyer was to the effect that she was called in on that flight sequence to replace a company supervisor who had taken the first leg of the flight and it was admitted by Ms Wendel that it was not a company policy to have a supervisor operating that flight. The Tribunal is drawn to the conclusion that Miss Schaepsmeyer was called to serve on that flight to solve a booking problem by the company and in accepting that assignment which was not obligatory, was solving that provlem. It is the finding of this Tribunal that the argument advanced by the Respondent to claim credit for the remaining portion of that flight sequence, is unsupportable.

That argument is based upon the company's interpretation of the Collective Agreement by which it is alleged that they would not have been able to ask Miss Schaepsmeyer to take that portion of the flight had she taken the previous flight at the end of August, from which she was suspended. On that reasoning the company argues that by assigning her to that flight, they permitted her to make up the extra hours which should be credited against the time she lost

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as a result of the company's suspension. It is the finding of this Tribunal that that argument cannot be supported and that in calling on Miss Schaepsmeyer to

fill a scheduling problem they had experienced, the company is not entitled to offset the time earned by Miss Schaepsmeyer against the compensation she should be entitled to as a result of the wrongful discriminatory practice of the Respondent.

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It is the finding of this Tribunal that Miss Schaepsmeyer is entitled to be compensated by the Respondent for a total of 33.9 hours, arising out of the disciminatory practice of the Respondent, after reflecting the admitted credit of the four hours flight time from Montreal to Toronto, to make up the September 700 Pairing. The Respondent is therefore hereby ordered to pay compensation to Miss Schaepsmeyer for a total of an additional 33.9 hours flight time, at the rate and in accordance with the terms of her employment during August and September of 1980.

The Tribunal has also considered the provisions of Section 41(3) of the Act, in relation to a special compensation, and it is the finding of this Tribunal that the circumstances of the case do not support a finding for special compensation pursuant to these provisions and accordingly no further order of compensation under these provisions is made against the Respondent.

Similarly, as the Hearing in this matter was held at the home of the Respondent and she was unrepresented by counsel, no order is hereby made for additional expenses incurred by Miss Schaepsmeyer as a result of discriminatory practice.

Prior to concluding this decision, it is necessary to deal with Paragraphs 9, 10 and 11 of the Brief of the Respondent filed in these proceedings.

In Paragraph 10, the Respondent alleged a deficiency in notice in relation to a complaint filed by the complainant Sanka Dukovitch. The complaint of Sanka Dukovitch was not before the Tribunal in view of the settlement and withdrawal of the same, as set out by the Respondent and was not in any way considered by the Tribunal.

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In Paragraph 11, the Respondent submitted that the complainant ought not to have had reference to the remedial provisions of the Canadian Human Rights Act, until such time as she had exhausted her grievance procedure under the Collective Agreement. No authority was submitted in support of this proposition. The submission is tantamount to suggesting that the

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jurisdiction provided in the Canadian Human Rights Act may be excluded by the term of an employment agreement between employer and employee. This Tribunal cannot accept that argument, although

no such provision was contained in the Collective Agreement, covering the relationship of the Complainant and Respondent, in this case. It is the view of this Tribunal that even a contractural provision specifically purporting to exclude the jurisdiction afforded to this Tribunal, under the Canadian Human Rights Act in such an agreement, pending conclusion of a grievance procedure, would be unenforceable as against a public policy.

Finally, it is alleged in Paragraph 9 that the company failed to receive proper notice with respect to the complaint of Angie Shaepsmeyer and therefore a condition precedent to the exercise of the Tribunal's jurisdiction was lacking. It is of great concern to this Tribunal that the Respondent would, through it's representative, advance such a representation and then fail to adduce any evidence or argument as to the Tribunal's jurisdiction at it's inception. The Brief alleges a failure to give notice to the Respondent by the

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- 7 Commission,
of a disposition it makes under Section 36 (4) of the Act. By letter dated September 16, 1981 directed to Mr. Barry Corbett, Director, Industrial Relations, Wardair Canada (1975) Limited, and introduced as Exhibit C-4 in these proceedings, Notice was given by the Canadian Human Rights Commission of the actions taken by the Commission pursuant to Section 36 (4) of the Act. No evidence was introduced to the hearing that the respondent had not received this notification. Accordingly, therefore, the Tribunal is satisfied that the Commission has met its statutory obligation under Section 36 (4) of the Act.

The evidence and exhibits introduced to these proceedings clearly indicated that the Respondent received the statutory notice required of the appointment of the Tribunal and Notice of Hearing by the Tribunal, the latter which was acknowledge on behalf of the Respondent under Exhibit C (5) in these proceedings. Accordingly, the argument in relation to jurisdiction of the Tribunal is denied and it is the finding of this Tribunal that it's jurisdiction was validly and properly established by the steps taken prior to the Hearing itself.

Accordingly, it is the finding of this Tribunal that:
a) The Respondent was guilty of a discriminatory practice in its booking-off procedure of Angie Schaepsmeyer in August of 1980.

b) Angie Schaepsmeyer is entitled to compensation equal to payment in accordance with the terms of her employment agreement for a total of 33.9 additional hours for the periods August and September, 1980.

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(c) That the arguments relating to the jurisdiction of the Tribunal in a Brief submitted by the Respondent, are hereby denied.

L. DAVID WILKINS