

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

AND IN THE MATTER of a Hearing before a  
Human Rights Tribunal appointed pursuant to the Act

BETWEEN:

ELENA FOLCH

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

- and -

Commission

CANADIAN AIRLINES INTERNATIONAL

Respondent

TRIBUNAL:

Lyman R. Robinson, c.r.

C. Joan Block

Gulzar A. Samji

DECISION

APPEARANCES: M.R. Jamieson, counsel for the Commission  
W. G. Baker, Q.C., W.R. Ellison and R.A. Sider, counsel  
for the Respondent  
G. Brodksy and M. P. Doherty, counsel for the  
Complainant

DATES AND PLACE

OF HEARING: October 28 and 29, 1992  
November 25 - 30, 1991  
December 2, 1991  
Vancouver, B.C.

## MAJORITY

DECISION BY: Lyman R. Robinson, Q.C.  
(with C. Joan Block concurring)

## CONCURRING

REASONS BY: Gulzar A. Samji

## INTRODUCTION

This is the Decision of Lyman R. Robinson and C. Joan Block. The members of the Tribunal have reached a unanimous decision with respect to the ultimate disposition of the Complaint, but the third member of the Tribunal, Gulzar Samji, has written a separate Decision.

## THE COMPLAINT

Elena Folch, signed a complaint dated February 19, 1988 which alleges that the Respondent, Canadian Airlines International engaged in a discriminatory practice on or about January 28, 1988 on the grounds of sex, age and national or ethnic origin in contravention of section 7(a) of the Canadian Human Rights Act. The particulars set forth in the Complaint Form state:

Canadian Airlines International discriminated against me by refusing to employ me on the basis of my sex, age and national or ethnic origin in violation of Section 7(a) of the Canadian Human Rights Act.

I am a 43 year old female born in Mexico. I am a Canadian trained and certified airline pilot, and have 10 years experience with Mexican (sic) Airlines. I applied to Canadian Airlines International for a pilot's job in 1987. The interviewing panel's response to my credentials seemed very positive.

Nonetheless, I was notified by letter dated January 28, 1988 that I was not a successful applicant.

During the time when my application was being considered, Canadian Airlines International employed a number of new pilots, some of whom are less qualified

than me.

## THE COMPLAINANT'S BACKGROUND AND EXPERIENCE

The Complainant, Elena Folch, was born in Mexico on May 9, 1944. She came to Canada with her family in 1968. She enrolled in Loyola University and she subsequently obtained a Bachelor of Science degree in May, 1972. In 1972, she commenced her training as a pilot with the Liche Lyle Limited flying school in the Province of Quebec and she obtained a Canadian private pilot license in 1973. She became a Canadian citizen in 1975.

The Complainant returned to Mexico where she obtained her commercial pilot licence in March, 1975.

In June, 1976, the Complainant commenced employment with Mexicana Airlines. She began her career with Mexicana Airlines as a flight engineer. This position is sometimes

called the Second Officer position. In December, 1977, she qualified as a First Officer on a Boeing 727, a 165 passenger jet aircraft, following training by American Airlines in Fort Worth, Texas. In February 1983, she qualified as a First Officer on Mexicana's DC-10 aircraft, a 315 passenger jet aircraft, following training by United Airlines in Denver, Colorado.

During her career with Mexicana Airlines as a First Officer, the Complainant flew on Mexicana's routes in Mexico as well as on flights to the United States, Central America and South America. The practice at Mexicana Airlines was that the Captain of a flight would decide the portions of the flight when the First Officer would be responsible for flying the aircraft including take-offs and landings. The Captain would fly approximately fifty percent of the flight and the First Officer would fly the remaining portion.

During her career as a First Officer, the Complainant's performance was evaluated every six months. The evaluation used a rating system of "Satisfactory" (being the highest rating), "Acceptable" and "Not Satisfactory". The Complainant testified that most of her ratings were "Satisfactory", however, some were "Acceptable".

In early 1986, by virtue of the Mexicana Airlines pilot seniority list, the pilots holding seniority numbers 302 to 307 had the opportunity to qualify as a Captain on Boeing 727 aircraft. The Complainant's seniority number at that time was 306 and consequently she had the opportunity to qualify as a Captain. To qualify as a Captain, an applicant had to successfully complete each step of a four step process. These steps were:

- (1) Ground School Training Program;
- (2) Flight Simulator Program;
- (3) A Flight Test without passengers; and,
- (4) Line-Indoctrination where the candidate flies the aircraft in the Captain's chair with paying passengers but under the observation of a fully qualified Captain who is in the cockpit of the aircraft.

Each of these steps must be successfully completed in sequence before moving to the next step.

If a pilot successfully completes all four of the above mentioned steps of the Captain's training program, the Captain will begin "flying on the line". This latter term means that the Captain is in command of the aircraft with paying passengers without another Captain on board the aircraft. This is distinct from "line indoctrination", which is part of the training program, where there is another Captain on board the aircraft.

In the case of the Complainant, she successfully completed the first two steps of the training program, namely, ground school and her training in a flight simulator. The third step was a flight test without passengers. Prior to taking the flight test, she had three practice flights on a Boeing 727 aircraft. She took the flight test on February 8, 1986 but she did not pass the flight test. Consequently, she was not entitled to proceed any farther in her Captain's training program. In her testimony before the Tribunal, the Complainant acknowledged that she did not proceed to the fourth step in the training program and that she never flew "line indoctrination".

The Complainant was cross-examined with respect to the reasons that she was given for failing the flight test at Mexicana Airlines (Transcript Volume 3, page 199, lines 2-20):

"Q. Now, what reasons were you given for failing the flight test?

A. I was not given any reasons because when I finished my test, the instructor in chief who was doing my test wanted to talk to me and I said that whatever he wanted to tell me, he would say in front of a union representative.

Q. An did you take advantage of that offer?

A. He must have talked to the union representatives.

Q. All right. And what reasons did you learn had resulted in your failing the test?

A. I didn't learn of any reasons because I resigned, so I never talked to these gentlemen again.

Q. So you made no inquiries to determine why it was that you had failed the flight test?

A. The inquiries I made was through the union and the union told me that the instructor said that he thought that I couldn't make a proper approach with raw data and I couldn't make -- I was lacking of commandment and several things..."

Under continuing cross-examination, at page 200, lines 8-17, she disclosed some of the reasons that she was given for failing her flight test notwithstanding that she had initially testified that she was not given any reasons. She testified:

"Q. And did you learn that one of the reasons was that you lacked judgment when exercising your authority on your crew?

A. Yes.

Q. Were you told that was a reason?

A. Yes.

Q. And were you told that you did not use or

interpret correctly the flight director in any of your flight procedures? Were you given that reason through your union?

Q. Yes."

It was clarified in the testimony that the term "flight director" is a flight instrument.

The Complainant testified that after she failed the flight test, she had the opportunity, in accordance with the pilots' collective agreement with Mexicana Airlines to attempt to successfully complete the flight test on three more occasions. The Complainant testified that pursuant to the collective agreement, the re-test would have been done under the observation of a "technical committee" consisting of three Captains, one selected by employer, one selected by the pilots' union and a third who would be selected by the first two. The Complainant testified that she did not request a re-test under the observation of a technical committee. Her reason for not requesting a re-test was that she was "totally devastated of something that I find so unfair". When asked, in examination in chief, what she decided to do at this point, she responded:

"I'm a Canadian citizen and all my family lives in Canada: my mother, my brothers, my nephews, everybody lives in Canada. And, my husband and me were talking a little before of returning to Canada, and I was also hearing that Canadian Airlines were doing very well -- that was in 1986, the beginning of 1986."

"We decided to come to Canada and after this failure that I had with that, that made up more my point and we start doing the procedures and we came to Canada."

The Complainant subsequently added several other reasons for deciding to come to Canada including crime in Mexico and the erosion of her salary by a high rate of inflation in Mexico.

Consequently, the Complainant advised the pilots' union that she wished to resign from Mexicana Airlines. The union worked out a severance agreement with Mexicana Airlines which was signed and dated March 11, 1986. Notwithstanding that the severance agreement was dated March 11, 1986, the Complainant chose to continue to fly on Mexicana flights during March, 1986 but, according to her own testimony, she flew only as an observer on these flights.

The Complainant returned to Canada in July, 1986. She did not immediately seek employment in Canada. She took a four month holiday and travelled in Europe with her husband.

In December, 1986, she began the process of becoming qualified as a airline pilot in Canada. This process involved passing a number of tests. On March 9, 1987, the Canadian Department of Transport issued a temporary Airline Transport Rating licence to the Complainant after she satisfied all of the Department's requirements. A permanent Airline Transport Rating licence was issued to the Complainant on April 22, 1987. On October 18, 1988, the Complainant's Airline Transport Rating licence was endorsed for a Boeing 727 aircraft which meant that she was qualified to fly that type of aircraft in Canada.

The Complainant has a Airline Transport Licence issued by Transport Canada that is valid until May 1, 1992 but she does not hold a current Instrument Flight Rating. In her testimony, the Complainant expressed the opinion that, if she is employed by an airline, she could easily obtain an Instrument Flight Rating and thereby obtain her Airline Transport Rating.

#### APPLICATION FOR EMPLOYMENT AS SIMULATOR INSTRUCTOR

In December, 1986, the Complainant, after seeing an advertisement, applied to the Respondent for a position as an instructor on a DC-10 simulator. She had an interview for this position with Mr. David Roberts and Captain McNee.

She was not selected as the successful candidate for this position. Her complaint under the Canadian Human Rights Act does not include any complaint with respect to her

application for that position.

## APPLICATION FOR EMPLOYMENT WITH RESPONDENT AS A PILOT

The Complainant testified that in late 1986 or early 1987 she sent a resume to the Respondent seeking a position as a pilot. At about the same time, she testified that she also sent resumes to Air Canada and Wardair. In June, 1987 she also sent an application to Air B.C.

## COMPLAINANT'S APPLICATION, RESUMES and Letters of Reference

The Complainant sent several resumes to the Respondent.

Exhibit HRC-3, Tab 14 is a copy of the resume that she sent to the Respondent in March, 1987. The first page of this resume under the heading "Experience" is reproduced below:

### Experience

1976-1986 Compania Mexicana de Aviacion  
(Mexican Airlines).

Captain - Boeing 727

\* Completed training March 1986.

First Officer - DC10

\* September 1982 to December 1985

\* 1,425 hours

\* All Mexicana routes: United States,  
Mexico, Central America, Caribbean.

First Officer - Boeing 727

\* June 1976 to September 1982

\* 3,767 hours

\* All Mexicana routes

1972-1976 Private Flights and instruction

Various Small Aircraft

\* 360 hours

Total Hours:Total Flight Hours: 5,552

Total Simulator Hours:

- 120 in DC10's

- 241 in 727's

The balance of the resume included information about the Complainant's education, licences, personal information, hobbies and citizenship.

The Complainant sent updated versions of this resume to the Respondent on July 3, 1987 (Exhibit R-1, Tab 2) and October 6, 1987 (Exhibit HRC-3, Tab 17). The first page of each of these resumes is exactly the same as the portion of the resume reproduced above. In particular, that portion of her resume that related to her experience with Mexicana Airlines and which stated:

"Captain - Boeing 727"

"Completed training March 1986."

Remained constant throughout all of the resumes that were sent to the Respondent. The later versions of these resumes included a statement of her flying experience since the date of the last resume.

In a letter dated October 6, 1987, addressed to the Respondent and directed to the attention of Captain McNee, the Complainant enclosed a copy of her resume and copies of two letters of reference. One of the reference letters was written by J.J. Silva Jimenez, the Assistant Director of Human Resources, Mexicana Airlines, dated March 18, 1986. This letter and a translation of the letter from Spanish into English was tendered as Exhibit HRC-3, Tab 17. The letter is addressed to "TO WHOM IT MAY CONCERN" and states:

"This is to inform you that Flight Captain Elena Ana Maria Folch Serra worked for this Company from June 9, 1976 to March 11, 1986, when she voluntarily resigned.

At the time of her resignation she was employed as a co-pilot on DC-10/15s, reporting to our Operations Office."

"Captain Folch Serra's file indicates that during the time she worked for the Company she was never absent

from work without justification, and that she always performed her duties with the necessary dedication and care."

"Issued at the request of Captain Serra, for her purposes."

The other letter of reference was written by Capt. Rodolfo Fierro Lozano, Flight Operations Manager of Mexicana Airlines, dated September 30, 1987. This letter states:

"TO WHOM IT MAY CONCERN:

The bearer of this letter ELENA FOLCH SERRA, has worked for Mexicana Airlines since June 9th, 1976 to March 11, 1986. During this time, she flew as First Officer of Boeing 727 - and DC-10.

Thanking you in advance for all your assistance that you -- could extend to her, I remain."

By a separate letter dated October 6, 1987, addressed to the Respondent and directed to the attention of Captain Archibald, the Complainant enclosed a copy of her resume and copies of the same two letters of reference.

In the Spring of 1987, the Respondent requested the Complainant to complete a form showing her pilot flight time. She completed the form, dated the form April 28, 1987, signed the form and returned the form to the Respondent. A copy of the this form was admitted as Exhibit HRC-3, Tab 17. Under the heading "Fixed Wing - Multi-Engine" and beside the entry B-727 she entered the following data:

In Command	Dual-2nd Pilot	3rd Pilot
Aircraft Type	Prop	JetProp
B-727	67	2900708

The form also included additional data with respect to other types of aircraft. It should be noted that the Complainant has indicated on this form that she has 67 hours of flight time being "In Command" of a B-727 aircraft.

THE RESPONDENT'S PROCESS FOR HIRING PILOTS IN 1987-88

In July, 1987, the Respondent's Flight Operations Department determined that Respondent would need to hire as many as one hundred additional pilots during the forthcoming one year period. It had not hired any new pilots for several years due to a recession in the airline industry. During the period when the Respondent had not been hiring pilots, it continued to accept applications or resumes from pilots who were interested in obtaining a position with the Respondent when it began to hire pilots again. By July, 1987, the Respondent had accumulated approximately 1,200 pilot applications including the application of the Complainant. Some of these applications had been on file since 1982 and had been kept current during this interval by the applicants filing updated resumes every six months.

The Respondent embarked upon a multi-stage selection process that involved the following stages:

1. The applications on file were screened by the Respondent's Personnel Department to determine whether applicants met the minimum qualifications and preferred qualifications for the pilot position. Approximately 200 applications were selected, including the Complainant's application, based on the qualifications stated in their resumes. These applications were forwarded to the Flight Operations Department for review.
2. A senior management pilot in the Flight Operations Department reviewed the 200 applications, which had been provided by the Personnel Department, and selected those applicants, including the Complainant, who would be invited to an initial interview.
3. INITIAL SCREENING INTERVIEW  
151 candidates, including the Complainant, were interviewed at the Initial Screening Interview stage. The Initial Screening interview was conducted by a two member team.

The purpose of the Initial Screening Interview was to make a preliminary assessment of whether applicant met the minimum and preferred qualifications for the pilot position and to inform the applicants about the nature of the

available positions, the required training program, the fact successful candidates may remain at an entry level position for as long as ten years before obtaining an opportunity for promotion, and to ascertain the applicant's willingness to relocate.

117 of the 151 candidates who were interviewed at the Initial Screening Interview, including the Complainant, were recommended for an interview before an Interview Board.

#### 4. INTERVIEW BOARD

If an applicant was recommended by the initial screening panel, the applicant was invited to an interview by an Interview Board that usually consisted of three members. This step was regarded by the Respondent as a very important stage in the selection process. The Interview Boards consisted of three or members and was chaired by Bill Forbes who, at that time, held the position of Manager of Recruitment and Placement

Services for the Respondent. In the case of the Complainant, the Interview Board consisted of Bill Forbes, Dave Roberts from Flight Operations and Captain Gilliland who was a senior Captain of a DC-10 aircraft.

Although these qualifications and the quality of a candidate's experience were examined by the Interview Board, the more important function of the Interview Board was to assess the personal attributes of each candidate and particularly to evaluate the "command potential" of each candidate.

Only 67 of the 117 candidates who were granted a Board interview were recommended by the Interview Board to progress to the next stage of the hiring process. The Interview Board did not recommend that the Complainant's application proceed any farther in the selection process.

## 5. MEDICAL EXAMINATION and REFERENCE CHECK

If the Interview Board recommended that a candidate's application proceed;

(a) the applicant would be requested to undergo a medical examination; and

(b) a reference check of the applicant's previous employers would be conducted.

## 6. FINAL INTERVIEW

If an applicant was recommended by the Interview Board and the applicant passed the medical examination and the reference checks did not reveal any problems, the applicant was invited to a final interview with Vice-President of Flight Operations and the Director of Human Resources.

## 7. OFFER OF EMPLOYMENT

At the conclusion of this multi-stage process, 52 pilots were hired during the period extending from September, 1987 until March 1988.

The minimum qualifications established by the Respondent for the position of a pilot were:

Grade XII education;

A Transport Canada "Airline Transport Rating" licence issued by the Canadian Department of Transport;

An Instrument Flight Rating; and,

2,000 hours of commercial pilot flying time.

The Respondent's preferred qualifications for the position of pilot were:

Two years of post-secondary education; and,

Heavy Aircraft (over 12,500 pounds) experience.

In addition, applicants, who satisfied the minimum and preferred qualifications and who were interviewed, were evaluated according to "Rating Factors" that were listed on an assessment form was used by the Respondent's interviewers. This single page form was contained several sections. The top line of the form

provided a space for the candidate's name and the date of the interview. Immediately below the candidate's name was a heading "Licenses". On this portion of the form, a record was made of whether the candidate held the following:

Airline Transport Rating (VRA);  
Senior Commercial (VRS);  
Commercial (VRC);  
Instrument Flight Rating; and,  
Class #1\_\_ Class #2\_\_ Class #3\_\_

The senior management pilot at the interview, was responsible for gathering the information for this portion of the form.

The next portion of the form was entitled "Endorsements"  
"Aircraft Type(s)/Pilot Proficiency Checks:"

The senior management pilot at the interview was responsible for gathering the information for this portion of the form and would transmit the information to the other interviewers who recorded the information on their respective forms.

After a line for "MEDICAL PROFILE" and a line for "ECG DATE" the next heading was entitled "RATING FACTORS". Underneath this heading, the following factors were listed:

"EXPERIENCE"

"High Density Traffic Routes"  
"Parallel Routes (eg. Couriers, etc)"  
"IFR Time (Right or Left Hand Seat)"  
"High Performance Aircraft"

Bill Forbes testified that this portion of the form would be filled out by the members of the Interview Board in conjunction with the senior management pilot at the interview.

"EDUCATION"

"PERSONAL ATTRIBUTES:"

"Leadership: Ability to command respect; develop credibility; mature, self-confident individual."

"Interpersonal Skills"

"Motivation"

"Loyalty"

"Ability to Learn"

"Ambition"

"Reliability"

"Public Relations"

Each of these factors was evaluated by the interviewer on a scale of 1 to 5 with 5 being the highest rating. With respect to "Experience", the Complainant was assigned a rating of "5" on each of the four sub-headings except "IFR Time" on which she was assigned a rating of "4" because she had spent most of her years flying as a First Officer.

The form purports to assign a weight to each of these factors by which the rating of the factor was multiplied by the assigned weight. If these calculations were made, an aggregate point score for each candidate could be calculated. Mr. Forbes testified that the weighting system was not being used in 1987. Mr. Forbes did not calculate a weighted score for each factor and he did not calculate an aggregate of the weighted points for a candidate. Furthermore, he testified that the Interview Board never based its decision to hire a candidate based on a calculation of the aggregate point score of a candidate. Nevertheless, other members of the Interview Board did compute an aggregate point score for many of the candidates including the Complainant.

At the bottom of the form, there is a space for "GENERAL COMMENTS". Each member of the Interview Board made comments on this portion of the form.

Mr. Forbes testified that at the level of the Interview Board in the hiring process, "PERSONAL ATTRIBUTES" were much more important than "EXPERIENCE" and "EDUCATION" in the evaluation of candidates. Among the important "Personal Attributes" was "Leadership" which included the "ability to command". A number of synonyms for the phrase "ability to command" were used by the witnesses. They included "command potential", "command ability", "potential command ability" and "command presence". All of the members of the Interview

Board testified that "ability to command" was a very important criterion in the decision to hire a pilot. There are at least two reasons why command ability was regarded as being such an important criterion. First, although an entry level pilot will not usually be in a command position for many years, if the Captain of a flight becomes disabled, the First Officer would be required to assume command. Secondly, and more importantly, the seniority system dictated by the collective agreement negotiated between the

Respondent and its pilots means that entry level pilots are the Respondent's only source of future Captains. The Respondent cannot hire qualified Captains from another airline as Captains. Any pilots that the Respondent hires must start at the bottom of the seniority list.

Various witnesses were asked to define what they meant by "ability to command". The definition given by Mr. Forbes included such characteristics as cockpit management skills, decision making skills, and interpersonal skills. Mr. Cranston was called by the Commission an expert witness. His qualifications included service as an air carrier inspector for Transport Canada. He also served for 12 years as a Captain including 5 or 6 years as chief pilot of the Executive Flight Unit maintained by Transport Canada. He gave several examples of air plane crashes that have occurred where, in his opinion, "command ability" or "command potential" appeared to be lacking.

#### INITIAL SCREENING INTERVIEW WITH THE COMPLAINANT

The Complainant's interview at the Initial Screening stage was conducted by Janice Ferguson from the Personnel Department and Captain Tony Archibald from the Flight Operations Department. They recommended that the Complainant's application proceed to the next level, namely an interview by an Interview Board.

#### INTERVIEW BOARD - INTERVIEW WITH THE COMPLAINANT

The Complainant was interviewed by an Interview Board on November 9, 1987. The Interview Board consisted of Bill Forbes, David Roberts and Captain Gilliland.

The Complainant's perception of her Interview with the Interview Board:

At the beginning of the interview with the Complainant, the Interview Board asked to examine her pilot licences and her Pilot's Log Book. The Complainant presented her Canadian Pilot Log Book to the Interview Board for examination.

The Complainant testified that she never told the Interview Board that she was a Captain of 727 for Mexicana Airlines.

Toward the end of her interview, the Interview Board asked the Complainant if she had any questions. The Complainant perceived that she had made a favourable impression on the Interview Board and the Complainant testified that she responded by asking the following question:

"Yes, I'd like to know for when would you need me?"

She testified that Mr. Forbes responded by saying:

"...very soon, that there was a position to be filled very, very soon."

She testified that after Mr. Forbes escorted her out of the interview room, he asked her if she would mind waiting for a minute. She testified that the reason that Mr. Forbes gave for asking her to wait for a minute was because he wanted to book her for a medical. After leaving for a few minutes, Mr. Forbes returned to advise her that:

"the doctor is all booked but we will contact you, very, very soon."

The Complainant interpreted these events as "the most positive indication that you're hired by an airline."

The Interview Board's Assessment of the Complainant:  
Each of the members of the Interview Board evaluated the Complainant using the assessment form in the manner described above. Each of these assessment forms was entered as an exhibit. The conclusion of each member of the Interview Board was that he would not recommend that the Complainant's application proceed any further in the hiring process. It was, therefore, a unanimous decision of the

Interview Board that the Complainant not be hired. Each member of the Interview Board testified before the Tribunal.

The three primary reasons that members of the Interview Board gave for rejecting the Complainant's application were:

- (i) Lack of command ability;
- (ii) Lack of recent flying time; and,
- (iii) Low flying time for years of experience.

Each of these three reasons will be examined and discussed later in this decision.

Mr. Forbes, who was the chairman of the Interview Board, testified with respect to his recollection of the conclusion of the Complainant's interview. He testified that it was always his practice at the end of the interview, as Chairman of the Interview Board, to describe for each candidate the future stages of the hiring process, should the Interview Board recommend that the candidate's application proceed any further. When asked in examination in chief why he did this in cases where in his mind he was not going to recommend that the candidate progress, he replied:

"Well, first off, regardless of what I thought about the applicant, I couldn't even begin to tell you what my counterparts were thinking about the applicant.

Besides that, in my mind, there's no reason not to explain the process, and in a lot of cases the applicants would ask what was the process."

There are several conflicts between the testimony of the Complainant on the one hand and the members of the Interview Board on the other hand with respect to what occurred at the Complainant's interview with the Interview Board and immediately after the interview. It will be necessary to resolve some of these conflicts later in this Decision.

## LETTER REJECTING THE COMPLAINANT'S APPLICATION

A letter dated January 28, 1988, was sent to the Complainant by Bill Forbes rejecting the Complainant's application for

employment as a pilot. Mr. Forbes explained the delay between the Complainant's interview with the Interview Board and the date of the letter of rejection by the volume of personnel decisions that were being made at that time.

## PURPOSE OF THE CANADIAN HUMAN RIGHTS ACT

Section 2 of the Canadian Human Rights Act sets out the purpose of the Act namely:

"...to extend the laws in Canada to give effect...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."

## ONUS AND BURDENS OF PROOF

The onus of proof with respect to a complaint under the Act has been described in the case *Basi v. Canadian National Railway* (1984), 9 C.H.R.R.4. D/5029 (C.H.R.Tribunal) at page D/5037, paragraph 38474:

"The burden, and order, of proof in discrimination cases involving refusal of employment appears clear and constant through all Canadian jurisdictions: a complainant must first establish a prima facie case of discrimination; once that is done the burden shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behavior. Thereafter, assuming the employer has provided an explanation, the complainant has the eventual burden of showing that the explanation provided was merely 'pretext' and that the true motivation behind the employer's actions was in fact discriminatory."

And at paragraph 38475:

"It is therefore incumbent on the complainant, in this case, to first establish a prima facie case: *Shakes v. Rex Pak Ltd.* (1982), 3 C.H.R.R. D/1001 at 1002:

`In an employment complaint, the Commission usually establishes a prima facie case by proving:

- a) that the Complainant was qualified for the particular employment;
- b) that the complainant was not hired; and,
- c) that someone no better qualified but lacking

the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.'

If these elements are proved, there is an evidentiary onus on the Respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation of what occurred."

See also *Israeli v. Canadian Human Rights Commission and Public Service Commission* (1983), 4 C.H.R.R. D/1616 (C.H.R. Rev. Tribunal).

In *Blake v. Ministry of Correctional Services and Mimico Correctional Institute* (1984), 5 C.H.R.R. D/2417 (Ontario) the Board stated at paragraph 20090:

"Should the Respondent lead evidence of a non-discriminatory reason for refusing to employ the Complainant, the Complainant and the Commission can still establish that the reason advanced for non-employment is in fact a pretext, and that discrimination on an unlawful ground was one of the operative reasons for the Respondent's actions."

The ultimate onus of proof to establish the complaint on a balance of probabilities lies with the Complainant and the Commission: See *Blake v. Ministry of Correctional Services and Mimico Correctional Institute* (1984), 5 C.H.R.R. D/2417 (Ontario) at paragraph 20090.

It is also clear that it is not necessary to find that the Respondent intended to discriminate against the Complainant. It is sufficient to establish the complaint if it is found, on the balance of probabilities, that the Respondent in fact

discriminated against the Complainant on one of the grounds alleged in her complaint. See Ontario Human Rights Commission v. Simpsons-Sears Ltd. [1985] S.C.R. 536 at 547 and 549.

#### Circumstantial Evidence:

In *Blake v. Ministry of Correctional Services and Mimico Correctional Institute* (1984), 5 C.H.R.R. D/2417 (Ontario), it was stated, at paragraph 20091:

"Discrimination can be established by direct evidence or by circumstantial evidence...."

Circumstantial evidence is evidence that is consistent with the fact that is sought to be proven and inconsistent with any other rational conclusion.

#### Statistical Evidence

In *Blake v. Ministry of Correctional Services and Mimico Correctional Institute* (1984), 5 C.H.R.R. D/2417 (Ontario), it was stated, at paragraph 20092:

"A prima facie case of discrimination can be established by the Complainant and Commission showing either simply through witnesses that there was discrimination...or alternatively showing through statistical evidence...that there was discrimination, or through adducing both oral testimony and statistical evidence together to establish a prima facie case of discrimination."

And further at paragraph 20096:

"Statistics represent a form of circumstantial evidence from which inferences of discriminatory conduct may be drawn."

And further at paragraph 20098:

"It must be kept in mind that statistical evidence can be used on behalf of both complainants and respondents. A respondent employer may use statistics in its defence to show that it did not discriminate... ."

## MULTIPLE ALLEGATIONS OF DISCRIMINATION

The allegations of the Complainant are that she has been discriminated against by the Respondent on the basis of her sex, age, and national or ethnic origin. The Complainant is entitled to succeed if discrimination on any one of these grounds is established in accordance with the onus and burdens of proof described above. Therefore, it is necessary to examine the evidence in relation to each of the alleged grounds of discrimination.

## CREDIBILITY

The Complainant's testimony of what transpired at the interview with the Interview Board and immediately thereafter conflicts in several material respects with the testimony of the members of the Interview Board. There are also conflicts between the testimony of the Complainant and the testimony of other witnesses with respect to what transpired at other times that are material to the complaint. Where such conflicts in testimony cannot be resolved, it is necessary to make findings with respect to the credibility of witnesses. Enumerated below are several instances where the Complainant has either made misrepresentations or she has not been totally candid:

### (a) The Complainant's Resume:

Each resume that was tendered in evidence, which the Complainant had sent to the Respondent, had the same statement under the heading of "Experience":

"Captain - Boeing 727

\* Completed training March 1986."

The Complainant was cross-examined about why she put this on her resume (Volume 3, page 239, lines 13 -16):

Q. Well, why did you refer to "Captain - Boeing 727" at all, Ms. Folch? Why did you put it in your resume?

A. Because it's an asset, it's a marvellous asset.

And further on page 240, beginning at line 4:

Q. Why didn't you say "completed stages one and two of training?"

A. Because I find -- the way the people who made my resume find that was the proper way and I thought it was okay. I didn't think it was nothing harmful since nobody will give me a job without talking to me.

Q. I see. And are you saying that at the interview with Canadian Airlines, you told them you had failed your Captaincy flight test at Mexicana?

A. They never asked me.

Q. They never asked you and you never happened to mention it, isn't that correct?

A. No, I don't think so it would be proper to mention those things.

Q. So you put "Captain - Boeing 727, completed training March 1986" because you thought that would be a considerable asset in your favour?

A. I think the training is a considerable asset, it's a very hard training and it adds to your experience. So, it's an asset, yes, for me, it's an asset.

On the basis of the resume that was submitted by the Complainant to the Respondent and on the basis of the above quoted cross-examination of the Complainant, we find that the Complainant was prepared to diverge from the truth when it is in her interest to do so.

Counsel for the Complainant submitted that the fact that the Complainant submitted letters of reference from Mexicana Airlines in support of her application, which were confined to commenting on her performance as a First Officer, demonstrates that there was no intention to mislead the Respondent as to her qualifications.

The fact that the letters of reference do not make any

reference to the Complainant's performance as a Captain does not remove the misrepresentation in the Complainant's resume. She represented in her resume that she had completed her Captain's training. The Respondent would have no reason to expect letters of reference from Mexicana to comment on her performance as a Captain when, according to her resume, she had just completed her Captain's training but had not flown "on the line" as the sole Captain in command.

Furthermore, the letter of reference from J. J. Silva Jimenez dated March 18, 1986 (Exhibit HRC-3, Tab 17) refers to the Complainant as "Captain". This would more likely lead the members of the Respondent's staff to accept the Complainant's assertion on her resume that she had completed her Captain's training.

There is a conflict in the testimony between the Complainant and the members of the Interview Board with respect to whether the Complainant expressly told the members of the Interview Board that she had qualified as a Captain with Mexicana Airlines. In her testimony, the Complainant denied that she told the Interview Board that she had flown as a Captain. By the Complainant's own testimony (Volume 3, page 150, line 3), she acknowledged that the Interview Board asked her whether she had ever flown as a Captain. Therefore, it must have been apparent to her that the members of the Interview Board were acting under the assumption, based on the statement in her resume or based on her resume and statements that she made at the interview, that she had qualified as a Captain with Mexicana Airlines. Nevertheless, the Complainant did nothing to correct the mistaken assumption that she had created in the minds of members of the Interview Board.

(b) The Canadian Pilot Log of the Complainant (Exhibit HRC-3, Tab 18);

When the Complainant came to Canada in 1986 and when she applied for a Canadian Airline Transport Rating licence, Transport Canada required her to record her flying hours in a Canadian Pilot Log Book. After she failed the Captain's test at Mexicana Airlines, she flew on fourteen flights during the month of March, 1986 as an observer. She was seated in a seat that

does not have any pilot controls. Nevertheless, she recorded these hours in her Canadian Pilot Log Book under the "Dual" Column. Under cross-examination, she admitted (Volume 3, page 215, lines. 8 - 11):

Q. So none of the hours you've recorded for those flights should count as log book time, should they?

A. As a experience they could be, but as hours

probably not.

Captain Gilliland testified that these entries have been entered in a manner that would be consistent with the entries that would have been made if she had passed her Captain's test and was flying "line indoctrination" with Mexicana Airlines with another Captain on board.

In other words, the aircraft would be under the dual command of the pilot who was completing line indoctrination and the full Captain who was also in the cockpit of the aircraft.

The Complainant testified that she did not know how to record the March, 1986 flights in her Canadian Pilot Log Book. The simple answer is that she was not a pilot on those flights and those flights should not

have been recorded in her Canadian Pilot Log Book at all and it was a misrepresentation to have done so.

The Complainant's Mexican Log Book (Exhibit HRC-5) also recorded these same flights notwithstanding that she was only flying as an observer.

(c) In the record of "Pilot Flight Time" that the Complainant submitted to the Respondent marked as Exhibit HRC-3, Tab 17, under the heading "Fixed Wing - Multi-Engine" and beside the entry "B-727 she entered the following data:

In Command Dual-2nd Pilot 3rd Pilot  
Aircraft Type Prop JetProp JetProp Jet  
B-727 67 2900708

There is no evidence that the Complainant was ever in command of a B-727 aircraft.

(d) In her letter to Mr. Murray Sigler, President of the Respondent dated February 9, 1988 (Exhibit HRC-3, Tab 21, she stated):

"I was interviewed on Oct. 14th and Nov. 9th for the position of airline pilot and led to believe that I was a successful candidate. The result of these interviews was a tentative appointment for a medical examination as arranged by Mr. Forbes."

In fact, even by the Complainant's own testimony before the Tribunal, there had never been a tentative appointment for a medical examination. No date, tentative or otherwise, had ever been set for a medical examination. It was the Complainant's perception that she would receive a telephone call to make an appointment for a medical examination.

(e) The Complainant did not initially inform Penny Goldrick, the investigator of the Canadian Human Rights Commission, that she had not completed her Captain's training with Mexicana Airlines. Penny Goldrick testified that it was not until approximately seven months after the complaint had been signed by the Complainant when, as a consequence of Ms. Goldrick's own investigations, she learned that the Complainant had not completed her Captain's training with Mexicana Airlines as the Complainant had represented on the resumes that the Complainant had submitted to the Respondent. In spite of learning this information, the Commission decided to continue with its investigation and proceed to a Tribunal Hearing.

While none of these misrepresentations were known to the members of the Respondent's Interview Board at the time when they made their decision, nevertheless the Tribunal is entitled to take all of these instances into account in

assessing the Complainant's credibility. They all reflect adversely on the credibility of the Complainant.

Consequently, where the testimony of the Complainant is in conflict with other witnesses, we have accepted the testimony of the other witnesses.

Section 2 of the Act has been previously quoted in this decision. It provides that every individual should have an equal opportunity to make for herself the life that she desires consistent with his or her duties and obligations as a member of society. One of the obligations of a member of society is to deal honestly and with integrity with people. In this case, the Complainant has not dealt with either the Respondent or the Commission honestly and with integrity but rather she has either deliberately misled or she has failed to correct innocent misrepresentations that she knew the Respondent or the Commission were relying upon.

#### FINDINGS WITH RESPECT TO WHAT OCCURRED DURING AND IMMEDIATELY AFTER THE INTERVIEW BEFORE THE INTERVIEW BOARD

Counsel for the Complainant and counsel for the Commission placed significant emphasis on the discussions that occurred during the Complainant's interview with the Interview Board and the events that occurred immediately after the interview. It is necessary to make some findings of fact with respect to these matters prior to considering the specific allegations of discrimination. The Complainant testified that it was her perception when she left the Respondent's premises after her interview by the Interview Board that she had received a positive indication from the Interview Board and that she would be hired by the Respondent.

The Complainant based her perception on several factors. She testified that she interpreted courteous and friendly manner in which she was treated at the interview and especially at the end of the interview as indication that she would be hired. The fact that the interview was conducted in a friendly and courteous manner is a credit to the Respondent's interviewers but it is not a justifiable basis for the Complainant making the assumption that she would be hired.

The Complainant based her perception, in part, on what she alleges that she understood from Mr. Forbes response to her question as to when the Respondent would be needing her. We do not have any doubt that the Complainant addressed a

question of this nature to the Interview Board. It would be a logical question for a candidate to ask. She testified that the Mr. Forbes responded by saying:

"very soon, that there was a position to be filled very, very soon."

We do not have any doubt that Mr. Forbes responded by saying that Canadian Airlines would be needing pilots very soon but we reject the Complainant's assertion that Mr. Forbes indicated that the Respondent would need the Complainant's services very soon. At the time when the Complainant asked that question and when Mr. Forbes responded, he would not have had any way of knowing the recommendation of the other members of the Interview Board. Even if the recommendation of the Interview Board was positive, there were still several additional steps in the hiring process that had to be completed before any decision to hire an applicant would be made including a medical examination, reference checks and a final interview with the Vice-President. There is no doubt that the Complainant was made aware of these additional steps.

The Complainant testified that she based her perception that she would be hired, in part, on her understanding that arrangements would be made for her to take a medical examination. Mr. Forbes testified that he concluded all of his interviews by describing the future steps in the hiring process. This would have included the necessity of successful candidates undergoing a medical examination.

Again, at the time that the Complainant believed that Mr. Forbes attempted to arrange a medical examination for her, Mr. Forbes would not yet have ascertained whether the Interview Board was going to recommend that her application proceed. Jennifer Rowland, the Respondent's senior employment clerk, testified that she was responsible for scheduling medical examinations for pilot candidates who were recommended by the Interview Board. She gave the

following testimony with respect to the practice (Volume 8, page 1283, line 18-25):

"A. ... On occasion, he would come out after the interview and tell me that this person was successful and would I please set them up for a medical, but more usually it was at the end of the day and he would give me a list of the people who had been successful during the day."

Jennifer Rowland testified that she never received instructions to set up a medical for the Complainant.

There is no doubt that, after Mr. Forbes escorted the Complainant out of the interview room, he left her in the reception area and returned a few minutes later. All three of the interviewers testified that it was standard practice at the conclusion of the interview for the Interview Board

to examine the candidate's Canadian Pilot Log Book in private for a few minutes and then to return it to the candidate. Notwithstanding the Complainant's testimony that she took her Canadian Pilot Log Book with her when she left the interview room, we find that the Pilot Log Book was left in the interview room. Mr. Forbes returned to the interview room and after the examination of the Complainant's Pilot Log Book had been completed, he returned the Pilot Log Book to the Complainant before saying good-bye to the Complainant.

We find that Mr. Forbes never gave any instructions to his staff to make arrangements to have the Complainant undergo a medical examination. If the Complainant understood that an appointment would be arranged for her to undergo a medical examination, she misunderstood what Mr. Forbes said when he outlined what the future steps in the hiring process would be if she was recommended by the Interview Board.

When she was not invited to undergo a medical examination, the Complainant testified that she thought that something must be wrong. She spoke to Mr. Forbes by telephone on one or two occasions. She did not allege that Mr. Forbes, during these telephone conversations, had given her any indication that she would be hired.

We find that a reasonable person would not, in these circumstances, have formed the perception that she or he would be hired and that the Complainant's perception that she would be hired by the Respondent was not justified.

#### THE PARAMETERS OF THE CANDIDATE POOL

A question was raised with respect to the parameters of the candidate pool that should be examined to determine whether a candidate who was no better qualified than the Complainant was hired. Counsel for the Complainant and the Commission argued that the pool should consist of all the applicants who were considered for a pilot position in 1987-88 notwithstanding that they were hired after the Complainant had been notified that her application had been unsuccessful. Counsel for the Respondent argued that the pool should not include those pilots who were hired after the Complainant had been notified that her application had not been successful. We find that the relevant pool of candidates should include all the candidates with whom the Complainant was competing for a position. This would include all candidates who had applied for a pilot position prior to the Complainant being notified that her application was unsuccessful.

#### SEX: ALLEGED DISCRIMINATION ON THE BASIS OF SEX

The Complainant is a woman and her complaint alleges that the Respondent discriminated against her by refusing to employ her on the basis of her sex.

Is there direct evidence of discrimination based on sex?

The decision not to proceed any further with the Complainant's application was made by the members of the Interview Board. None of the comments made by the members of the Interview Board on their respective assessment forms make any reference to the gender or sex of the applicant. None of the testimony of any of the members of the Interview Board made any negative observations about the Complainant that relate to the Complainant's gender or sex.

In her testimony, the Complainant alleged that during the course of her interview with the Interview Board, Mr. Forbes asked her whether she had ever had any problems with male

pilots and what she would do if a male pilot refused to fly with her. Mr. Forbes testified that he did not recall any questions or discussions of this nature. Ms. Ferguson, who was a member of the Initial Screening Panel testified that she did ask a question of that nature. The discussion of this issue at the Initial Screening Interview cannot be regarded as evidence of discrimination based on sex because the Initial Screening Panel recommended that the Complainant's application proceed to the next stage. We find that the Complainant was mistaken in her recollection of the interview at which this discussion took place. We find that there was no discussion at the Interview Board of whether the Complainant had ever had any problems with male pilots or what she would do if a male pilot refused to fly with her.

We find that there is no direct evidence of discrimination based on sex.

Is there circumstantial evidence of discrimination based on sex?

(i) Statistical data:

Counsel for the Complainant and the Commission invited the Tribunal to draw an inference that the Respondent had discriminated against the Complainant on the basis of sex because the Respondent had interviewed and hired very few women pilots during the relevant hiring period. The number of pilots hired by the Respondent must be examined in the context of the number of women pilots in Canada, who held a current Airline Transport Rating (ATR) issued by Transport Canada during 1987-88. An Airline Transport Rating was one of the minimum qualifications for the position. The number

of women who held an Airline Transport Rating in Canada in 1987 and 1988 compared to the total number of pilots in Canada who held an Airline Transport Rating is set forth below:

1987: Of 6755 ATR pilots, 84 (1.2%) were women.  
(Exhibit R-3)

1988: Of 7035 ATR pilots, 95 (1.3%) were women.  
(Exhibit R-4)

Evidence was tendered before the Tribunal that 12 of the 95 women who held an ATR in 1988, were already flying in 1988 as pilots for the Respondent (Exhibit HRC-4, Tab 4 a). Some of the women who held an ATR were presumably flying as pilots for Canada's other major airlines and would be unlikely to submit applications to the Respondent because they would lose their seniority. Some of the women who held an ATR may not have met the minimum requirements for the pilot position under consideration, namely 2,000 flying hours. Nevertheless, 21 (25%) of the 84 women with an ATR rating in 1987 did apply for the pilot position under consideration. Eighteen percent of those 21 were interviewed by an Interview Board and 25% of those interviewed were hired. The statistical data, expressed in terms of percentages is set forth below:

The percentage of women in the Respondent's pilot applicant pool was (22 of 1121)1.9%.

The percentage of women among those applicants who were granted an interview with the Initial Screening Panel (4 of 151) was 2.6%.

The percentage of women among those applicants who were granted an interview with the Interview Board (4 of 117) was 3.4%.

The percentage of women who were hired from among those who were interviewed by the Interview Board (1 of 52) was 1.9%.

All of these percentages exceeded percentage of women (1.3%) among all Canadian pilots that held an ATR rating at the material time.

We do not find that the statistical data provides circumstantial evidence of discrimination based on sex.

(ii) Assessment of Personal Attributes:

Counsel for the Complainant and the Commission invited the Tribunal to draw an inference that the Respondent had discriminated against the Complainant on the basis of sex

because of various assessments of the Complainant's personal attributes that were made by the members of the Interview Board. None of these assessments expressly refer to gender. Nevertheless it was submitted that the nature of the assessments is such that they are circumstantial evidence of discrimination based on sex. The assessments of personal attributes included:

(a) Timidity and Shyness:

Counsel for the Complainant and the Commission argued that comments made by members of the Interview Board that the Complainant was:

- a) quite timid (Forbes);
- b) meek and mild (Gilliland); and,
- c) very quiet spoken, shy (Roberts).

were circumstantial evidence of discrimination based on sex. An examination of the comments made by these interviewers reveals that each of these interviewers made similar comments about male candidates. The following examples of similar comments made by these interviewers about male candidates are drawn from Exhibit R-7:

DEAKIN, Ian  
Roberts: "quiet"  
Gilliland: "comes across as a timid person";

MOLSTAD, Michael  
Roberts: "shy; quiet personality";

HANNA, Brendon  
Forbes: "quite shy/nervous...fairly quiet/shy";

CAMPBELL, Lawrence  
Roberts: "seem shy";

O'NEIL, David  
Forbes: "appears quiet/reserved but gears (?) up after he relaxes";

MACKELVIE, David  
Roberts: "soft spoken";

PUSCH, Rod  
Forbes: "fairly quiet";

RYAN, James:  
Roberts: "somewhat quiet";

WEBBER, Lance  
Gilliland: "quiet personality";

WILLIAMS, Doug  
Gilliland: "quiet person";

WALLACE, David  
Forbes: "fairly quiet"; and,

DROHAN, Dave  
Roberts: "quiet".

We find that the comments made by the interviewers with respect to the above mentioned personal attributes of the

Complainant do not constitute circumstantial evidence of discrimination based on sex.

(b) Appearance (Attire and Grooming):

Counsel on behalf of the Complainant argued that comments made by Mr. Roberts about the appearance, attire and grooming of the Complainant were circumstantial evidence of discrimination based on sex.

In her examination in chief, the Complainant gave the following testimony with respect to her attire and grooming at the time of the interview:

"Therefore I was very careful of choosing what I would wear and I chose a silk blouse, a cashmere sweater, a pure wool skirt and leather boots, all matching. I had groomed my hair and my person the best I could to cause a good impression to these persons."

An examination of Mr. Roberts evaluation of other candidates reveals that he made an assessment of the appearance of both male and female candidates. Examples of male candidates whose appearance was assessed by Mr. Roberts but who were not hired include (refer to exhibit R-7):

STEVENSON, Howard

Roberts: "average appearance; average candidate; feel that we can do better"

WEBBER, Lance

Roberts: "average appearance"

DEAKIN, Ian

Roberts: "average appearance"

CAMPBELL, Lawrence

Roberts: "average appearance"

WILLIAMS, Doug

Roberts: "good appearance"

MOLSTAD, Michael

Roberts: "good grooming"

FISHER, Robert

Roberts: "good appearance"

GIRAND, Dennis

Roberts: "excellent appearance"

DUKE, Grace

Roberts: "good appearance"

An example of candidate who was hired and whose appearance was assessed by Mr. Roberts includes (refer to Exhibit R-6):

BARTH, Patrick

Roberts: "good experience and grooming"

A candidate's appearance in terms of attire and grooming is not per se a prohibited ground of discrimination among candidates for employment. Where an employee is in a position such as that of a pilot, where the employee will be

seen by the public as representing the employer, appearance and grooming can be relevant criteria in the selection process. The use of appearance and grooming as a criteria for hiring may, in some circumstances, be circumstantial evidence of discrimination based on gender or another prohibited ground of discrimination where the assessments of

appearance and grooming relate to characteristics that pertain to one gender but not the other or to one ethnic or racial group but not to other ethnic or racial groups.

On the facts of this case, we find that neither Mr. Roberts nor other representatives of the Respondent used the assessment of grooming and appearance in a manner that can be considered as circumstantial evidence of discrimination based on sex or other prohibited ground of discrimination.

Counsel for the Commission, Ms. Jamieson, submitted that Mr. Robert's inability, under cross-examination, to articulate the type of attire that he thought would have been more appropriate for the Complainant to have worn to the interview should be taken by the Tribunal as circumstantial evidence of discrimination. We do not accept Ms. Jamieson's submission. There is no onus on Mr. Roberts or the Respondent to articulate an appropriate standard of attire to be worn by candidates at an interview.

(c) Giggles

On Mr. Forbes' assessment form of the Complainant, he wrote "giggles quite a bit". Counsel for the Commission submitted that this was circumstantial evidence of discrimination based on sex. She submitted that women "giggle" and that men "guffaw". No evidence was led by the Commission or the Complainant that the traits of "giggling" and "guffawing" are peculiar to one sex or the other. We are not prepared to take "official notice" that these traits are associated with only one sex. There are circumstances where an administrative tribunal may take "official notice" of a fact without the necessity of requiring formal proof of the fact.

The concept of "official notice" in administrative tribunals is akin to but somewhat broader than the concept of taking "judicial notice" facts in the courts. An excellent review of the scope of "official notice" is found in an article by Lemieux and Clocchiatti entitled "Official Notice and Specialized Knowledge" 46 Administrative Law Reports 26. In order to take "official notice" of a fact, the fact must be either a matter of common knowledge, or be within the specialized knowledge of the members of the Tribunal, or be recorded in a source of indisputable accuracy. The Tribunal was not referred to any sources of indisputable accuracy with respect to whether these traits are gender specific.

We are not prepared to find that it is common knowledge that the trait of giggling is exclusively associated with the

female gender. The personal knowledge of the Members of the Tribunal cannot be taken into account unless it is specialized knowledge that they have gained in the execution of their duties or as specialists in their respective fields. None of the members of the Tribunal have any specialized expertise with respect to these traits however some Members of the Tribunal have known men who giggle and women who guffaw.

(d) Command Potential

Submissions were made on behalf of the Complainant, that in making their assessment of "command potential" the interviewers had male images of "command potential" and that the negative assessments of the Complainant's command potential was circumstantial evidence of discrimination based on gender or sex.

The subject of command potential will be dealt with extensively later in this Decision. It will suffice to observe at this point that both Mr. Forbes and Mr. Roberts were members of the Interview Board that recommended Paula Strilesky be hired from the same pool of candidates and that Captain Gilliland testified that he has flown with several women pilots who were serving as First Officers.

Furthermore, testimony was adduced that the Respondent has one Captain who is a woman and who is presumably known by all members of the Interview Board. Therefore, members of the Interview Board had several female role models to draw from when making their assessment of command potential.

We do not find that there is any circumstantial evidence of discrimination based on or in relation to sex.

**AGE: ALLEGED DISCRIMINATION ON THE BASIS OF AGE**

The Complainant was 42 years of age when her application for employment as a pilot was considered by the Respondent.

Is there any direct evidence of discrimination based on age? None of the forms that the Complainant was asked to complete by the Respondent requested her to provide her age. The Complainant's age was not stated on any of the documentation that she submitted in support of her application. None of the interviewers asked for her age. They testified that they did not ask her age because age was not a factor in the selection process. The members of the Interview Board testified that they did not know the precise age of the Complainant. Mr. Forbes testified (Transcript Volume 3, page 983):

"Q. So, late thirties, perhaps early forties?

A. I didn't even think that. I thought maybe around her late thirties"

Mr. Roberts testified (Transcript Volume 7, page 1165, lines 19-24):

"Q. During this process of meeting Ms. Folch and interviewing her for that position, did you find out how old she was?

A. I can't recall if her age was on her original resume. But I would have known that she was in her late thirties or early forties."

Captain Gilliland testified (Volume 8, page 1414, lines 1 - 9):

"A. We knew how old Ms. Folch was in round terms before she came to the interview. In fact, during the selection process of her application to go to the first stage, personally, I knew that she would be probably at least in her late thirties...and I was certain that she was up in her late thirties."

The estimates by the interviewers about the Complainant's age were formed on the basis of the year when she obtained her University degree and the number of years of flying experience that she had with Mexicana Airlines.

On behalf of the Complainant, it was submitted that comments were made by members of the Interview Board that the

Complainant's "time is low for age" (Captain Gilliland), and that the Complainant had "low time considering age" (Forbes) and that these comments were direct evidence of discrimination based on age.

Both Captain Gilliland and Mr. Forbes testified that the reference to the Complainant's time being low for her age meant that her total hours of commercial flying was low with respect to the number of years she had been engaged in commercial flying. Counsel for Complainant and the Commission submitted that since the Complainant did not start her commercial flying career until she was 22 years of age, that referring her number of flying hours to her age rather than her years of experience was discriminatory.

An examination of the comments made by Captain Gilliland and Mr. Forbes reveals that each of them made similar comments about other younger candidates. The following examples of similar comments made about younger candidates are drawn from Exhibit R-7:

WILLIAMS, Doug (28 years old)

Gilliland: "experience is not that good considering his age (28)"

DROHAN, Dave(34 years old)

Roberts: "very little flying time considering his age"

SAUNDERS, Bob (38 years old)

Gilliland: "relatively low flight time compared to his age (38)"

Roberts: "not a lot of hours (2,800) for his age"

We find that when Captain Gilliland and Mr. Forbes used the term "age" in this context, they meant "years of experience" and that the use of the term "age" was merely a shorthand expression for "years of experience". Therefore, the use of the term "age" in this context is not evidence of discrimination.

Is there any circumstantial evidence of discrimination based on age?

On behalf of the Complainant, it was argued that the fact that the Respondent did not hire any pilots over the age of 36 years was circumstantial evidence that the Complainant had been discriminated against on the basis of age.

Four candidates from this candidate pool, who were over the age of 35 years at the time, were hired including:

STRILESKEY (35)

VIDEL (36)

THOMAS (36)

LABELLE, Joseph (35)

The members of the Interview Board did not know the age of the Complainant. Two members of the Interview Board thought that the Complainant was in her late thirties and one thought that she was in her late thirties or early forties.

From a statistical perspective, of 117 candidates who were interviewed by an Interview Board, nine (7.6%) were 35 years of age or older. Of the 9 candidates over the age of 35 years who were interviewed by an Interview Board, four (44.4%) were hired the Respondent.

An examination of the qualifications and characteristics of the other candidates, who were over the age of 36 years, reveals that there were rational reasons for not hiring these candidates based that did not relate to age:

Qualifications or Characteristics  
that justify not hiring

Name, Age

Girand, Dennis (40)

Forbes: "has not flown a lot since 1982"

Roberts: "almost no flying time in the past five years due to attending university; not confident that he would fit into cockpit environment"

(This assessment is similar to the assessment of Elena Folch)

SAUNDERS, J.R. (Bob) (38)

Only had 2,800 hours of commercial flying.

Garand, Leonard (40)

Roberts: "Very difficult to draw out, almost painful."

Gilliland: "most flying experience has been single engine instructional time...cannot run two sentences together to complete a thought..."

Green, Barbara (38)

Forbes: "Very difficult to draw out"

Gilliland: "did not answer a number of questions, either because she did not understand or chose to ignore the thrust of the question"

Roberts: "hard to draw out, quiet, at times didn't answer the questions"

WENGER, Dan (38)

Minimal Educational Qualification

Forbes: "May have a problem adjusting to R/H (right hand) seat for a long time"

The following candidates who were over the age of 36 did not progress to the Interview Board stage.

Pretty (38) "Gruff"

Davidson, Nes (40) Lacking exp.- flying time & equipment not enough IFR or experience to match age

Sinclair (37) "Looking for guarantees - can't offer"  
"quite settled"

JOHNSON, Brian (36) 2,215 hours  
(Exhibit HRC-4, page 16 c)

Two additional candidates who did not progress to the Interview Board stage and who may have been over the

age of 36, but for whom the Tribunal does not have specific ages, are:

Johnston Not outstanding candidate

Boardman, Gary Mostly flying in arctic  
Average at best

We find that the Respondent had rational reasons for not hiring all of the candidates who were over the age of 36 years including the Complainant.

In order for circumstantial evidence to be used as a basis for a finding, it must be consistent with the propounded fact (discrimination on the basis of age) and inconsistent with any other rational conclusion. An examination of the reasons for not hiring those candidates who were over 36

reveals a rational basis for not hiring each of those candidates.

The mere fact that the Complainant was, in fact, the oldest candidate and she was not hired, is not circumstantial evidence of discrimination on the basis of age.

Consequently, we find that there is no circumstantial evidence of discrimination based on age.

#### NATIONAL OR ETHNIC ORIGIN: ALLEGATION OF DISCRIMINATION

The Complainant was born in Mexico and her national and ethnic origin may be described as Mexican. The complaint alleges that the Respondent discriminated against her by refusing to employ her on the basis of her national or ethnic origin.

Is there any direct evidence of discrimination based on national or ethnic origin?

There is no direct evidence that any of the interviewers based their decision on the national or ethnic origin of the Complainant. It was not alleged that any of the interviewers did or said anything that could be regarded as

discrimination on the basis of the Complainant's national or ethnic origin.

Is there any circumstantial evidence of discrimination based on national or ethnic origin?

It was submitted on behalf of the Complainant that observations made by the members of the Interview Board that the Complainant was quiet or soft spoken could be interpreted as circumstantial evidence of discrimination based on national or ethnic origin. No evidence was led that being quiet or soft spoken was a trait of people whose national or ethnic origin is Mexican and we are not prepared to take official notice that this is a trait of people whose national or ethnic origin is Mexican. Furthermore, members of the Interview Board used these terms to describe other candidates who do not appear to be related to any distinct national or ethnic origin other than Canadian. The names of other candidates, who were described as being quiet but who were not hired, are listed in the section of this Decision that deals with the allegation of discrimination based on sex. The following examples of persons who were described as quiet and soft spoken and who were hired are drawn from Exhibit R-6:

PARK, Donovan

Roberts: "very quiet, soft spoken"

Forbes:"very quiet - shy"

HEMSTOCK, John

Roberts: "fairly quiet, not outstanding but

acceptable"

SMITH, G. Edward

Roberts: "an impressive candidate, fairly quiet"

SARETSKY, Kirk

Forbes: "quiet individual"

CAMPBELL, Kirk

Forbes: "quiet, fairly calm"

SARGEANT, Gregory  
Forbes: "quiet"

It was submitted on behalf of the Complainant that observations made by the members of the Interview Board that the Complainant was nervous and that she moved her upper body a lot during the interview could be interpreted as circumstantial evidence of discrimination based on national or ethnic origin. No evidence was led that nervousness was a trait of people whose national or ethnic origin is Mexican and we are not prepared to take official notice that this is a trait of people whose national or ethnic origin is Mexican. Furthermore, members of the Interview Board made similar observations about other candidates who do not appear to be related to a distinct national or ethnic origin other than Canadian. The following examples of persons who were described as nervous and who were not hired are drawn from Exhibit R-7:

O'NEIL, David  
Roberts: "very nervous"

MACKELVIE, David  
Roberts: "extremely nervous"  
Gilliland: "nervous"

PAUL, Tim  
Gilliland: "nervous applicant"  
Roberts: "extremely nervous"

SEEHAGEL, Tim  
Gilliland: "nervous"

STEVENSON, Howard  
Gilliland: "nervous"

WEBBER, Lance  
Gilliland: "some nervousness"

KLIMENT, Frank  
Gilliland: "quite nervous"

JOHNSTON, Curt  
Roberts: "very nervous"

WALLACE, David

Forbes: "somewhat nervous"

The following is an example of a person who was described as nervous and who was hired, drawn from Exhibit R-6:

KOCH, Brian

Roberts: "Quiet, nervous..."

It was submitted on behalf of the Complainant that observations made by the members of the Interview Board that the Complainant was "difficult to draw out" could be interpreted as circumstantial evidence of discrimination based on national or ethnic origin. No evidence was led that being "difficult to draw out" was a trait of people whose national or ethnic origin is Mexican and we are not prepared to take official notice that this is a trait of people whose national or ethnic origin is Mexican. Furthermore, members of the Interview Board made similar observations about other candidates who do not appear to be related to a distinct national or ethnic origin other than Canadian. The following are examples drawn from Exhibit R-7:

GREEN, Barbara

Forbes: "very difficult to draw out."

Roberts: "hard to draw out, quiet at times didn't answer the questions"

MACKELVIE, David

Roberts: "short answers"

Gilliland: "his answers were short"

O'NEIL, David

Roberts: "short one-word answers"

PAUL, Tim

Roberts: "...did not answer questions fully -- one word answers"

The following is an example of a person who was described as being difficult to draw out and who was hired, drawn from Exhibit R-6:

CAMPBELL, Kirk

Forbes: "fairly difficult to draw out, very short answers"

The interviewers testified that they did not have any difficulty understanding the Complainant's english.

We do not find any circumstantial evidence of discrimination on the basis of or related to national or ethnic origin.

### DOES THE EVIDENCE ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION ?

In *Shakes v. Rex Pak Ltd.* (1982), 3 C.H.R.R. D/1001 at 1002 it was said that in an employment complaint, a prima facie case is usually established by proving:

- "a) that the complainant was qualified for the particular employment;
- b) that the complainant was not hired; and,
- c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position."

The first element of a prima facie case:

The first element of proving a prima facie case is establishing that the complainant was qualified for the particular employment. The Respondent was hiring pilots who would initially serve either as a Second Officer on a DC-10 aircraft or as a First Officer on a Boeing 737 aircraft. If proving the first element of a prima facie case only requires proof that the Complainant possessed the following minimum and preferred qualifications for the position, namely:

An Airline Transport Rating issued by Transport Canada;  
An Instrument Flight Rating;

A Grade XII Education;

2000 hours of commercial pilot flying time;

Two years of post-secondary education; and,

Heavy aircraft, (over 12,500 pounds) experience, then the first element has been proven.

If proving the first element of a prima facie case requires proof that the Complainant not only possessed the minimum and preferred qualifications quoted in the preceding paragraph but also requires proof that the Complainant had the personal attributes and qualifications described on the assessment form such as leadership, command ability and credibility, we find that the first element of a prima facie case has not been proven. The Respondent was not merely seeking to hire pilots who were capable of serving out their respective careers as First Officers. The effect of the pilot seniority system that is part of the collective agreement between the Respondent and its pilots means that it cannot recruit Captains from other airlines who can immediately begin to serve as Captains on the Respondent's aircraft. The entry level pilots that are hired by the Respondent are its only source of future Captains.

Therefore, command ability is a bona fide occupational requirement for the hiring of entry level pilots. All three members of the Respondent's Interview Board independently came to the conclusion that the Complainant was lacking potential command ability. We find that there was evidence in the Complainant's interview upon which the Respondent's Interview Board could reasonably conclude that the Complainant did not have potential command ability. We find that members of the Interview Board made their assessment of the Complainant honestly and in good faith. In this respect, the words of the Board of Inquiry in *Offierski v. Peterborough Board of Education* (1980), 1 C.H.R.R. D/33 (Ontario Bd) at p. D/41 are apt:

"On the totality of the evidence, I cannot question the motives of any of the Committee members...in my view their decision was an honest one."

Although it was not known to the members of the Respondent's Interview Board at the time when they interviewed the

Complainant, the Complainant had failed to qualify as a Captain on Boeing 727 aircraft while she was employed by Mexicana Airlines. According to the Complainant's own testimony, one of the reasons that she was given for failing her Captaincy test at Mexicana Airlines was "lack of commandment". Notwithstanding the Complainant's testimony that her flight test for her Captaincy at Mexicana was unfair, the assessment that she lacked "commandment" was consistent with previous assessments by Mexicana Airlines that were tendered by the Commission as part of Exhibit HRC-9.

Credibility is another element of the Personal Attribute of Leadership on the Respondent's assessment form. Credibility includes honesty and integrity. Mr. Cranston, the expert witness called by the Commission, who is a former Captain and a former air carrier inspector for Transport Canada, was asked by a member of the Tribunal what he felt should be at the top of the list of criteria for selecting pilots. He responded by identifying experience and versatility and then added (Volume 6, page 762, lines 1-3):

"Those two things off the top of my head and, of course, as for any job applicant, maturity and honesty and general suitability as an employee."

At the time of their interview with the Complainant, the members of the Respondent's Interview Board were not aware of the Complainant's misrepresentations in her resume, her Canadian Pilot Log Book and the Respondent's Pilot Flight Time form which the Complainant had filled in and returned to the Respondent. Nevertheless, it could be argued that the Complainant did not satisfy this qualification for the position.

We found above that there was evidence upon which the Respondent's Interview Board could reasonably conclude that the Complainant lacked potential command ability.

Therefore, it has not been proven that the Complainant was qualified for the particular employment as a pilot and the first element of a prima facie case has not been proven.

Notwithstanding our finding that the Complainant was not qualified for the particular position, we shall proceed with

the analysis of the other elements of a prima facie case in case an appellate court disagrees with our conclusion on the first element of a prima facie case.

The second element of a prima facie case:

The second element of proving a prima facie case is establishing that the Complainant was not hired by the Respondent. The second element of a prima facie case has clearly been proven.

The third element of a prima facie case:

The third essential element of a prima facie case requires proof that someone obtained the position who was no better qualified than the Complainant but who lacked the distinguishing features that are the gravamen of the complaint. The third element must be examined in relation to each of the alleged grounds of discrimination.

The third element in relation to allegation of discrimination on the basis of sex:

With respect to the allegation of discrimination on the basis of sex, the question with respect to the third element becomes whether a male pilot in the candidate pool, who was no better qualified than the Complainant, obtained a pilot position. This requires an examination of qualifications of the male pilots in the candidate pool who obtained pilot positions. If any male candidate from this pool was hired whose qualifications were no better than the Complainant, the third element of a prima facie case would be satisfied.

What qualifications should be taken into account at this stage to determine whether one of the male candidates, who was hired, was no better qualified? If the comparison is restricted to only the minimum and preferred qualifications, namely:

An Airline Transport Rating issued by Transport Canada;

An Instrument Flight Rating;

A Grade XII Education;

2000 hours of commercial pilot flying time;

Two years of post-secondary education; and,

Heavy aircraft, (over 12,500 pounds) experience.

We would find that male candidates, who were no better qualified than the Complainant, were hired. Two examples taken from Exhibit R-6 are:

KOCH, Brian: Did not have experience on aircraft over 12,500 pounds  
No post secondary education

PARK, Donovan: Did not have any post-secondary education

However, we find that qualifications such as potential command ability must also be taken into account together with the minimum and preferred qualifications when comparing the Complainant with the male candidates who were hired.

When potential command ability is taken into account, we find that all of the pilots, who were hired, were better qualified because of the determination of the Interview Board, made in good faith, that the Complainant did not have potential command ability whereas those who were hired did.

Therefore, the third element of a prima facie case has not been proven in relation to the allegation of discrimination based on sex.

The third element in relation to the allegation of discrimination based on age:

With respect to the allegation of discrimination on the basis of age, the question with respect to the third element becomes whether a younger pilot in the candidate pool obtained a pilot position who was no better qualified than the Complainant. This requires an examination of the qualifications of all of the other pilots in the candidate pool who obtained pilot position because they were all younger than the Complainant.

What qualifications should be taken into account at this stage to determine whether one of the younger candidates, who was hired, was no better qualified? If the comparison is restricted to only the minimum and preferred qualifications, namely:

An Airline Transport Rating issued by Transport Canada;

An Instrument Flight Rating;

A Grade XII Education;

2000 hours of commercial pilot flying time;

Two years of post-secondary education; and,

Heavy aircraft, (over 12,500 pounds) experience.

We find that younger candidates, who were no better qualified than the Complainant, were hired. Examples taken from Exhibit R-6 include:

KOCH, Brian: Did not have experience on aircraft over 12,500 pounds

PARK, Donovan: Did not have any post-secondary education

However, we find that qualifications such as potential command ability must also be taken into account together with the minimum and preferred qualifications when comparing the Complainant with younger candidates who were hired.

When potential command ability is taken into account, we find that all of the pilots, who were hired, were better qualified because of the determination of the Interview Board, made in good faith, that the Complainant did not have potential command ability whereas those who were hired did.

Therefore, the third element of a prima facie case has not been proven in relation to the allegation of discrimination based on age.

The third element in relation to the allegation of discrimination based on national or ethnic origin:

With respect to the allegation of discrimination on the basis of national or ethnic origin, the question with respect to the third element becomes whether a non-ethnic candidate in the candidate pool, who was no better qualified than the Complainant, obtained a pilot position. This requires an examination of qualifications of all the other pilot in the candidate pool.

What qualifications should be taken into account at this stage to determine whether one of the non-ethnic candidates, who was hired, was no better qualified? If the comparison is restricted to only the minimum and preferred qualifications, namely,:

An Airline Transport Rating issued by Transport Canada;

An Instrument Flight Rating;

A Grade XII Education;

2000 hours of commercial pilot flying time;

Two years of post-secondary education; and,

Heavy aircraft, (over 12,500 pounds) experience.

We find that non-ethnic candidates, who were no better qualified than the Complainant, were hired. Examples taken from Exhibit R-6 include:

KOCH, Brian: Did not have experience on aircraft over 12,500 pounds

PARK, Donovan: Did not have any post-secondary education

However, we find that qualifications such as potential command ability must also be taken into account together with the minimum and preferred qualifications when comparing the Complainant with other candidates who were hired. When potential command ability is taken into account, we find that all of the pilots, who were hired, were better qualified because of the determination of the Interview Board, made in good faith, that the Complainant did not have potential command ability whereas those who were hired did.

Therefore, the third element of a prima facie case has not been proven in relation to the alleged discrimination on the basis of national or ethnic origin.

Therefore, because the first and third elements of a prima facie case of discrimination have not been proven in relation to any of the alleged grounds of discrimination, we find that a prima facie case of discrimination has not been established.

Notwithstanding our conclusion that a prima facie case has not been made out on any of the alleged grounds of discrimination, we shall proceed with the analysis of the other issues in case an appellate court disagrees with our finding that a prima facie case has not been made out.

HAS THE RESPONDENT PROVIDED AN EXPLANATION FOR NOT HIRING THE COMPLAINANT THAT IS EQUALLY CONSISTENT WITH THE CONCLUSION THAT DISCRIMINATION ON THE BASIS OF SEX, AGE, NATIONAL OR ETHNIC ORIGIN IS NOT THE CORRECT EXPLANATION OF WHAT OCCURRED?

If we had found that a prima facie case of discrimination had been established, then adopting the language of *Basi v. Canadian National Railway* (1984), 9 C.H.R.R. D/5029 (C.H.R. Tribunal) at paragraph 38475 we find that the Respondent has provided an explanation for not hiring the Complainant that is equally consistent with the conclusion that discrimination is not the correct explanation of what occurred. Indeed, we find that the Respondent has established on a balance of probabilities that decision to reject the Complainant's application was not in any way based on or related to any of the alleged grounds of discrimination.

There were at least three major reasons that were prevalent in the minds of the members of the Interview Board when they decided against recommending the Complainant for employment.

#### Lack of Potential Command Ability

The first reason was the Complainant's lack of potential command ability. Each member of the Interview Board made a negative assessment of the Complainant's potential command ability. On his assessment form, Mr. Forbes noted that the

Complainant was "lacking in command potential". Mr. Roberts made a notation on Complainant's assessment form that "command presence was not there yet she has been a 727 Captain". Captain Gilliland made a notation that the Complainant's "command ability is a little suspect".

The assessment of potential command ability was made on the basis of a candidate's responses to questions addressed to the candidate by members of the Interview Board. In some instances, these questions may have taken the form of hypothetical operating emergencies that may occur during the operation of an aircraft. In their testimony, members of the Interview Board candidly acknowledged that they could not remember the specific questions that were addressed to the Complainant during an interview which had taken place four years prior to their testimony.

Each member of the Interview Board was examined and cross-examined on his definition of command potential and whether their respective images of captain were those of a male captain. Each member of the Interview Board clearly stated that his definition of a captain or a person who had the command potential to become a captain was not based on any gender characteristics.

It is clear that applications of other candidates were also rejected, at least in part, on the basis of the Interview Board's negative assessment of the candidate's command potential. Examples drawn from Exhibit R-7 include:

WILLIAMS, Doug  
Gilliland: "command potential is questionable"

DUKE, Grace  
Gilliland: "not a strong personality and I believe lacks command potential; not recommended"

With respect to this candidate the assessments also note that most of her flying time was in the

flying/training field and that she had a minimum of institutional experience.

DEAKIN, Ian

Gilliland: "question his command ability;  
questionable candidate"

VAN LUYK, Stephen

Roberts: "does not possess the command  
potential of others"

We find that the members of the Interview Board evaluated the Complainant's potential command ability in good faith and without reference to the gender of the Complainant and without reference to any prohibited ground of discrimination.

Lack of Significant Recent Flying Time:

Another major reason for deciding against recommending the Complainant for employment was her lack of significant flying time in the 18 months preceding her interview with the Interview Board. Mr. Roberts made a notation on the Complainant's assessment form that she had "not flown much in past 18 months". Mr. Forbes made a notation on the assessment form that he completed, that the Complainant had "not flown for approx. 18 months". In the minds of the interviewers, they interpreted a lack of significant recent flying time as an indication of a lack of initiative in achieving the Complainant's career objectives. Similar comments were made about other rejected candidates. The following examples are drawn from Exhibit R-7:

KLOTZ, Fred

Gilliland: "However, due to his lack of

initiative in pursuing a flying  
career over the past three  
years...I do not recommend him."

Roberts: "has not flown recently; while I  
liked the individual, I don't feel  
he is what we are looking for"

HANNA, Brendon

Forbes: "only applied at Time Air/Air  
Atlantic...flying on weekends;"

Roberts: "has flown less than 200 hours in  
past year...flown on weekends...my

concern is his lack of recent flying experience"

GIRAND, Dennis

Forbes: "has not flown a lot since 1982"

FISHER, Robert

Roberts: "for the last two years has done very little flying; do not recommend"

DUKE, Grace

Roberts: "very little flying in the past two or three years"

CZICH, Myron

Roberts: "left the armed forces in May 1986 and has only worked three months since"

One male candidate, who was hired, did not have significant flying time in the two years prior to his employment by the Respondent. He had ceased flying as a commercial pilot when there had been a downturn in the economy. He had either been laid off or had resigned his pilot's position in contemplation of being laid off. During the two years that he had not been flying as a commercial pilot, he had served as a police officer. In his case, the Interview Board did not interpret his explanation for lack of significant recent flying time as indicating any lack of interest in flying or pursuing a career as a commercial pilot.

The Complainant, arrived in Canada with her husband in July 1986. She did not immediately seek to obtain her qualification as a commercial pilot with the Department of Transport but rather she went on a four month holiday in Europe. In December 1986, she wrote a series of qualifying examinations and she was granted a temporary licence by Transport Canada on March 9, 1987. The Interview Board interpreted these facts as indicating a lack of interest in pursuing her career as an airline pilot.

Low Flying Hours for Years of Experience:

A third reason that was given by members of the Interview Board for rejecting the Complainant's application for

employment was that she had relatively low flying hours for her years of experience.

## IS THE RESPONDENT'S EXPLANATION A PRETEXT FOR DISCRIMINATION?

Even if the Respondent provides an explanation for not hiring the Complainant, it may be found that the explanation is just a pretext for discrimination. We do not find that to be the case here.

Evaluation of the Respondent's Explanation in relation to the allegation of discrimination based on sex:

As of 1988, the Respondent had 12 women pilots in its employment (Exhibit HRC-4, Tab 4 a). This represented over 12 per cent of all ATR rated women pilots in Canada in that year. Some of the remaining ATR qualified women were employed by Air Canada and others would not have met the minimum and preferred qualifications for the position.

We find, on a review of the evidence before the Tribunal, that the sex of the Complainant was not a factor in the decision to reject the Complainant's application and that the Respondent did not discriminate against the Complainant on the basis of sex.

Evaluation of the Respondent's Explanation in relation to the allegation of discrimination based on age:

(i) The seniority system in the airline industry:

A pilot's seniority in the airline industry is determined by the date of commencement of employment with the airline.

Eligibility to compete for promotions is determined by the seniority list at the airline. Seniority can only be achieved by length of service with a particular airline. If a Captain or senior First Officer moves from one airline to another, that pilot must start at the bottom of the seniority list with the new airline. When a pilot starts at the bottom of the seniority list, the pilot also starts at the bottom of the pay scale. Consequently, senior pilots with major airlines don't usually apply for a position with another carrier because they will lose the seniority they have established with their current employer and they will

usually suffer a substantial reduction in salary. This phenomena was acknowledged by Mr. Cranston, a former Captain, who was called by Commission.

Therefore, it is unusual to receive applications from well qualified older pilots who have seniority with a major airline and who have experience flying heavy equipment. The older pilots who do apply will not usually have experience on heavy equipment with a major airline.

(ii) Cost of training pilots:

On behalf of the Complainant, it was submitted that the Respondent did not hire the Complainant because of the cost of training her in relation to the number of years of service she could provide to the airline before retirement.

Mr. Forbes testified on behalf of the Respondent that the Respondent's cost of training a pilot of the Complainant's age in relation to the years of service the pilot could provide to the airline would be lower than the cost of training younger pilots over the course of a career. The cost of retraining pilots as they are promoted from one aircraft to another is substantial. The frequency of these promotions increase at the high end of the seniority list.

A pilot who is hired at the age of 42 years would be unlikely to rise to the higher levels of the seniority list.

Such a pilot might not become eligible for his or her first promotion for ten years and thereafter might only become eligible for one or two promotions prior to retirement.

Mr. Delisle, the senior solicitor from Air Canada, who was called as a witness by the Respondent, testified, under cross-examination by counsel for the Complainant, with respect to the cost of training pilots (Volume 6, page, 924, lines 21 - 22):

"A. It means that if we hire pilots that are too old, we will go out of business."

And further, on page 925, lines. 18-25:

"Q. And how about in the case of Mrs. Folch's age at the time of her application, how would that figure in with other complex factors?

A. Mrs. Folch's age at the time was not a significant factor, it would have not precluded her from gaining employment with Air Canada."

We find that the cost of training was not a factor in the decision to reject the Complainant's application.

Evaluation of the Respondent's Explanation in relation to national and ethnic origin:

The Complainant had lived in Canada from 1968 until 1976. The Complainant has received her University degree in Canada. She was trained as a First Officer on Boeing 727 aircraft by American Airlines in Fort Worth, Texas. She was trained as a First Officer on DC-10 aircraft by United Airlines in Denver. As a crew member on Mexicana Airlines flights, she had flown into the United States on many occasions.

There was evidence that the interviewers did not have difficulty understanding the Complainant. Furthermore, they did not have any concerns about the Complainant's capability to communicate in the English language with others in cockpit or the control tower.

There was evidence testimony by employees of the Respondent that they held Mexicana Airlines and its pilots in high regard and that Mexicana Airlines had one of the best safety records among major North American carriers.

The Respondent does not have to establish that its interviewers have training or experience in interviewing people from different national or ethnic origins but in fact, Mr. Forbes did have such training. Mr. Forbes testified that he had received training in interviewing persons from different national and ethnic origins and that he was aware that people from different national and ethnic origins have different mannerisms and that he took these into account when evaluating the Complainant's interview.

Captain Gilliland had been based in Peru for two years and he was familiar with the Latin-American culture.

The Respondent, subsequent to this hiring competition, hired a woman as pilot who is a Japanese Canadian.

#### OTHER MATTERS

It was submitted on behalf of the Complainant that the following comments, which were made about the Complainant, were evidence of discrimination:

Mr. Forbes: "impressive background but not an impressive candidate"

Mr. Roberts: "experience was more impressive than the individual"

A review of the evaluation of other candidates by these interviewers reveals that they made similar comments about other candidates who were not hired. Some examples taken from Exhibit R-7 include:

RYAN, James

Roberts: "doesn't overly impress although his qualifications on paper are very good"

CAMPBELL, Lawrence

Roberts: "I wasn't impressed by the applicant himself, only his experience; would not recommend"

It was submitted on behalf of the Complainant that the fact that the Complainant was rated as "acceptable" or "good" but was not hired is evidence of discrimination. A review of the evaluation of other candidates by members of the Interview Board reveals that similar assessments were made of other candidates who were not hired. Some examples taken from Exhibit R-7 include:

SHEARS, Ross

Roberts: "very well qualified"

EMERY, Douglas (Captain on Air B.C. Dash 8 aircraft)

Forbes: "very good flying background"

PAUL, Tim

Gilliland: "I believe that he would make a good employee and a steady pilot; recommend; B737"

PUSCH, Rod

Roberts: "excellent experience"

MILSOM, Robert

Forbes: "good candidate"

Gilliland: "acceptable"

SCOTT, Douglas

Gilliland: "good applicant; presently Worldways F/O"

Roberts: "has excellent qualifications"

It was submitted on behalf of the Complainant that the fact that the Complainant was not hired when she had experience with regularly scheduled commercial passenger carrier using heavy aircraft was evidence of discrimination. However an examination of the experience of other candidates reveals that there were other candidates who had experience that was similar to the Complainant and who were not hired. Examples drawn from Exhibit R-7 include:

EMERY, Douglas: Captain on Air B.C. Dash 8 aircraft

WENGER, Dan:

Forbes: "currently working for Air B.C. -- Captain of Dash 7-8; also does line indoc. training"

SHEARS, Ross

Roberts: "over 9,000 hours, load of time on the Dash 7"

SCOTT, Douglas "First Officer on Worldways"

Counsel on behalf of the Complainant submitted that evidence of discrimination was to be found in the fact that two members of the Interview Board gave the Complainant a higher aggregate numerical rating on the interview assessment forms than some of the candidates who were hired. The Complainant

was accorded an aggregate numerical rating of 870 by one member of the Interview Board and a numerical rating of 830 by another member of the Interview Board. Mr. Forbes testified that he did not compute aggregate numerical ratings and that aggregate numerical ratings were not used to make hiring decisions. Mr. Forbes testimony is borne out by an examination of the aggregate numerical ratings of other candidates who were not hired and whose aggregate numerical ratings were higher than the Complainants. The examples below are drawn from Exhibit R-7:

Name Numerical ratings

MACKELVIE, David Range from 995 to 1070

SCOTT, Douglas Range from 985 to 1100

SAUNDERS, J.R.(Bob) Range from 950 to 980

JAMIESON, Tony 945

DROHAN, Dave Range from 885 to 920

CZICH, Myron Range from 790 to 885

We accept Mr. Forbes testimony that hiring decisions were not made on the basis of aggregate numerical ratings. We find that the evidence that the Complainant had higher

aggregate numerical ratings on the Interview Assessment forms than some of the candidates who were hired is not circumstantial evidence of discrimination on a prohibited ground.

## CONCLUSION

It was submitted on behalf of the Complainant that the Respondent should have used more objective criteria including the use of flight simulators in the process of selecting successful candidates and that the failure to use more objective criteria constituted a discriminatory practice. It may be that a better system for hiring pilots could be devised but that is not the issue that is before the Tribunal. There is no doubt that assessment of criteria

such as potential command ability involves subjective judgment. But even Captain Cranston, who was called as an expert witness by the Commission, acknowledged that it was necessary to make an evaluation of potential command ability of pilot candidates and that this necessarily involved a subjective judgment. The fact that the Respondent used subjective criteria in its evaluation of the applicants does not in itself render their hiring decisions subject to attack. Where subjective criteria are used, it may be necessary to scrutinize the hiring decisions more carefully to ensure that subjective assessments are not being used to mask discrimination. We have conducted a careful scrutiny of the hiring decisions with respect to the pilot candidates in this pool of candidates including the application of the Complainant. It is not the function of the Tribunal to determine whether it agrees with each of the hiring decisions made by the Respondent during the relevant period.

It is the function of the Tribunal to determine whether the Complainant was discriminated against on any of the alleged grounds of discrimination. We are satisfied on a balance of probabilities that the Complainant's application for employment as a pilot was fairly considered by the Respondent and that the Complainant was not discriminated against by the Respondent on any of the grounds alleged in her complaint.

For all of the foregoing reasons, the Complaint herein is dismissed.

#### ALTERNATIVE FINDINGS:

Our finding is that there has not been any discrimination on any of the grounds alleged in the complaint and our decision is that the complaint is dismissed. Nevertheless, we recognize that if there is an appeal, an appellate court may make a finding of discrimination. Therefore, we shall proceed to consider the issues that would require findings of fact if an appellate court finds that there has been discrimination on a prohibited ground.

#### LOSS OF AN OPPORTUNITY TO COMPETE FOR A POSITION

If an appellate court finds that there was discrimination with respect to the Complainant, discrimination could only have occurred at the Interview Board stage of the hiring process. Therefore, at most, the Complainant lost the opportunity of having her application for employment as a pilot proceed to the next stage of the hiring process, which included the checking of references. The Respondent's practice, when it was hiring pilots, was to make a reference check with a candidate's previous employers. There is no doubt, based on the evidence, that the Respondent would have checked with Mexicana Airlines who had been the Complainant's only airline employer during her ten year career in the airline industry.

At the time when the Complainant's application was rejected, the Respondent did not conduct a reference check because there was no need to make a check. After the Complainant filed a complaint with the Canadian Human Rights Commission, the Respondent did conduct a reference check. This reference check was conducted by Carlos Acheves, the General Manager of the Respondent in Mexico. The Respondent tendered in evidence two letters that were received from Mexicana Airlines in response to these inquiries. Exhibit R-1, Tab 12 is a letter from J. J. Silva Jimenez, the Assistant to the Director of Human Resources of Mexicana Airlines dated October 12, 1988 and a translation thereof from Spanish into English. The relevant portion of this letter states:

"...this will confirm that Miss Elena Maria Folch Serra worked in our Company, reporting to The Flight Operations Management, from June 9th, 1976 to March 10, 1986, date when she resigned her position of DC10/15 Copilot."

Exhibit R-1, Tab 13 is a letter from Captain Rodolfo Fierro Lozano, Flight Operations Manager dated October 18, 1988 and a translation thereof from Spanish into English. This letter enclosed a document entitled "Information on Copilot Elena Folch Serra. The pertinent paragraph in this document states:

"On February 8, 1986, she failed promotion to Captain B-727. Among others, some of the cause for failure

were: Lack of leadership for command, lack of operating awareness."

The Complainant disagrees that these were the reasons that she failed her promotion to Captain at Mexicana and alleges that she failed her promotion at Mexicana Airlines because of discrimination based on sex. Nevertheless, this is the information that would have been provided to the Respondent by Mexicana Airlines. It would have revealed that the Complainant had not completed her Captaincy training with Mexicana Airlines as the Complainant had stated on the resumes that she had submitted to the Respondent and upon which the Interview Board conducted its interview. Furthermore, the information from Mexicana Airlines would have revealed that the Complainant had not flown "line

indoctrination" with another Captain on a Boeing 727 on fourteen flights recorded in her Canadian Pilot Log Book (Exhibit HRC-3, Tab 18) from March 3, 1986 to March 28, 1986. The reference check would have revealed that the Complainant had not flown "in command" of a B-727 jet as she had represented on the Pilot Flight Time form (Exhibit HRC-3, Tab 17) that the Complainant had sent to the Respondent.

The clear evidence of members of the Interview Board was that the discovery of these misrepresentations on a reference check carried out by the Respondent would have disqualified the Complainant from further consideration as a candidate for a pilot position. It was their testimony that honesty and integrity are essential with respect to a pilot position because of self reporting responsibility that pilots have with respect to matters that may be against their self-interest to report such as a near miss with another aircraft.

Therefore, if there was discrimination at the Interview Board stage of the hiring process (we have found that there was not any discrimination), it is clear that the Complainant's application would not have proceeded beyond the reference check. Consequently, even if we had found that there had been a loss of an opportunity to have the Complainant's application proceed beyond the Interview Board, we would not have ordered the Respondent to make available to the Complainant any further opportunity to

compete for a position as a pilot with the Respondent.

#### LOSS OF A POSITION:

If we had found that there had been discrimination and that the Complainant had lost a position of employment as a pilot as distinct from the loss of an opportunity to compete for a position, we would have dealt with the Complainant's claims in the following manner:

#### Claim for INSTATEMENT:

We would not have ordered "instatement". The evidence adduced by the Respondent makes it clear that self-reporting is an important responsibility of a pilot. We find that the incidents of misrepresentation by the Complainant that have been detailed earlier in this Decision disqualify her from the remedy of instatement.

#### Claim for Loss of Wages:

The Respondent hired six new pilots on January 20, 1988. This was the last significant hiring of pilots prior to the date when the Respondent sent the letter of rejection to the Complainant. Therefore, an inference can be drawn that if the Complainant had been hired, she would have been included in the group that was hired on January 20, 1988. The Complainant was not hired.

Even if there had been a finding of discrimination, there is still a duty of mitigation on a Complainant. On August 23, 1988, the Complainant was offered and accepted a position as

a First Officer with Bradley Air Services (First Air) on a B-727 aircraft based in Ottawa. She was laid off by Bradley Air Services (First Air) in March of 1989. After being laid off by Bradley Air Services (First Air), the Complainant testified that she sent applications for employment to Cathay Pacific Airlines and to Singapore Airlines but they did not meet with a positive response. She also mentioned Mandarin Airlines but did not expressly state that she had sent an application to Mandarin. She apparently did not

apply to any of the regional air carriers such as Time Air and Air B.C. In August 1989, she and her husband opened a small restaurant.

Therefore, if we had found discrimination, we would have limited the claim for the loss of wages to the period extending from January 20, 1988 (being the date of the last significant hiring of pilots prior to the rejection letter being sent to the Complainant) to August 23, 1988 (being the date that the Complainant commenced employment with Bradley Air Services).

If she had been employed by the Respondent during that period, we find that the Complainant would have been hired as a First Officer on a B-737 aircraft. The Complainant tendered Exhibit C-7 showing the pay scale in accordance with which the Complainant would have been paid. The Tribunal was advised that the accuracy of the information recorded on this Exhibit had been confirmed by Mr. Roberts on behalf of the Respondent. This Exhibit was prepared on the basis that if the Complainant had been hired, she would have been hired as of January 20, 1988. On the basis of this Exhibit, the Complainant's claim for loss of wages would have been limited to:

20/1/88 to 20/4/88 \$1,228 x 3\$ 3,684  
20/4/88 to 20/8/88 \$1,950 x 4\$ 7,800  
20/8/88 to 22/8/88 \$1,950 x 3/30 \$195

\$11,679

Evidence was tendered with respect to the annual earnings of pilots who were hired by the Respondent in 1987 and 1988. The annual earnings of 17 of the 28 pilots whose salary

information was tendered (on an anonymous basis) exceeded the amount that would be generated by monthly salary rate described above. Some of the differences between the monthly salary rate and annual earning became significant in 1989 and later years. The Tribunal was not presented with any evidence upon which we could find a significant difference between the monthly salary rate and the actual amounts earned by other pilots employed during 1988.

According to the copy of the Complainant's 1988 Canadian Tax Return and supporting T-4 slips (Exhibit C-1, Tab 2), the only employment income (other than interest income) that she earned in 1988 was from her employment with Bradley Air Services (First Air). Therefore, no adjustment would need to be made in the above calculation of the Complainant's wage loss with respect to income earned during the period from January 20, 1988 to August 23, 1988.

#### CLAIM FOR LOSS OF FRINGE BENEFITS:

The Complainant claimed compensation for the loss of several fringe benefits that she would have received if she had been employed by Canadian Airlines. These benefits included:

##### Medical Insurance Expenses:

If the Complainant had been hired by the Respondent as of January 20, 1988, she would have enjoyed the fringe benefit of having medical insurance coverage provided by the Respondent until August 23, 1988, being the date that she commenced employment with First Air. The Complainant claimed reimbursement for the expense that she incurred in maintaining private medical insurance coverage during this period. We find that the Complainant's cost of private medical insurance coverage for that period was \$37 per month until April 30, 1988 and \$52 per month thereafter.

Therefore, any claim for loss of this fringe benefit would have been limited to:

20/1/88 to 31/1/88 \$37 x 12/31 \$ 14.32  
1/2/88 to 30/4/88 \$37 x 3 \$111.00  
1/5/88 to 31/7/88 \$52 x 3 \$156.00  
1/8/88 to 22/8/88 \$52 x 22/31 \$ 36.90

\$318.22

##### Dental Expenses:

If the Complainant had been hired by the Respondent as of January 20, 1988, she would have enjoyed the fringe benefit of having dental coverage provided by the Respondent until August 23, 1988, being the date she commenced employment

with First Air. The Complainant claimed reimbursement for the cost of two dental expenses that she incurred in 1988. Copies of the receipts for these expenses were tendered as Exhibit C-1, Tab 4. One receipt is for an expenditure of \$287.62 on January 19th, 1988. That expenditure was on the day before the date on which we find that the Complainant would have been hired if the Respondent had decided to hire the Complainant. That expenditure is disallowed. The Complainant's portion of the other dental expense was \$1,543.20. The date upon which this service was performed

is not clear on the receipt and the date was not clarified by the Complainant in her testimony. The Complainant did testify that neither of these expenses were incurred by her while she was employed by First Air. We have resolved the doubt as to when this expense was incurred in favour of the Complainant and we find that the Complainant incurred this expense during the period of January 20, 1988 to August 23, 1988.

#### Vacation Expenses

The Complainant claimed reimbursement for expenses that she incurred on several vacations that she took. The basis of her claim for these expenses was that if she had been employed by Canadian Airlines, she would have been able to travel on the Respondent's planes or affiliated air carriers at substantially reduced fares and that as an airline employee she would have been entitled to substantial discounts at various hotels. It was submitted on behalf of the Complainant that the Complainant lost this fringe benefit when she was not hired by the Respondent.

The claims made by the Complainant were summarized by counsel for the Complainant as follows:

1988

Hawaii \$ 1,043.42

Toronto/Montreal \$938.60

25 days hotel \$ 2,500.00

1989

Montreal \$629.50

17 days hotel \$ 1,700.00

1990

Beijing/Shanghai \$ 3,214.00

Cancun (includes hotel) \$ 1,660.00

26 days hotel \$ 2,600.00

1991

London \$ 1,278.00

Madrid \$614.00

18 days hotel \$ 1,800.00

Mr. Roberts testified that a new employee is not entitled to receive a reduced fare on flights on Canadian Airlines International or other air carriers for the first six months of employment. Mr. Roberts also testified that entitlement to vacation by pilots is based on the vacation entitlement earned during the period January 31st to the following January 30th. The vacation that is earned during the entitlement period is taken in the following year.

Therefore, if the Complainant had been hired by the Respondent on January 20, 1988, she would have earned one day's vacation which she would have been entitled to take in the period beginning January 31, 1988 and concluding on January 30, 1989. Therefore, she would only have been

entitled to one day of vacation time prior to the commencement of her employment with Bradley Air Services (First Air) on August 23, 1988.

It was submitted on behalf of the Complainant that she could still have enjoyed the fringe benefit of reduced travel expenses by arranging her days off in a manner to accommodate personal travel. Mr. Roberts testified that a pilot at the bottom of the seniority list is entitled to eleven or twelve days off per month, but these would not be consecutive days off. Therefore, it would have been impossible for the Complainant to take any of the vacations for which the Complainant was claiming compensation.

Consequently, even if there had been a finding of discrimination and a finding that the Complainant had lost a position, we would not have ordered payment of any compensation to the Complainant for vacation expenses.

## EXPENSES ASSOCIATED WITH THE COMPLAINANT'S EMPLOYMENT WITH FIRST AIR:

The Complainant claimed compensation for various expenses that she incurred while she was employed by First Air including:

- 1) The cost of commuting between her home in Vancouver and First Air's base in Ottawa;
- 2) The cost of accommodation at First Air's base in Ottawa; and,
- 3) The cost of telephone calls incurred in communicating with her husband.

We would have denied any claim for compensation for these costs on two bases. First, we have found that any claim to compensation by the Respondent ended with her employment by First Air. Second, even if the Complainant had been employed by the Respondent, she may have been assigned to one of the Respondent's bases outside of Vancouver and she would have had to incur similar costs on her own account.

## COMPENSATION FOR HURT FEELINGS:

If there had been a finding of discrimination with respect to the Complainant (we have found that there was no discrimination on any of the alleged grounds), we would have the power under section 53(3)(b) of the Act to order the payment of compensation if we found that the Complainant had suffered in respect of hurt feelings or loss self-respect as a result of the discrimination. The Complainant testified with respect to her hurt feelings and testified that she had sought and obtained counselling with respect to those feelings.

Section 53(3)(b) provides a Tribunal with a discretion to make an order for the payment of compensation for hurt feelings. There is no mandatory requirement that a Tribunal

must make an order for compensation under section 53 (3)(b) whenever it finds that a Complainant has suffered hurt feelings as a result of a discriminatory practice. In most

cases where there was a finding of discrimination and a finding of hurt feelings or loss of self respect, the Tribunal has made an order for compensation under section 53(3)(b). The circumstances with respect to this complaint are different. The Complainant has made serious misrepresentations about her qualifications for the position for which she was applying. Furthermore, the Complainant did not reveal the fact she had failed her captaincy training at Mexicana to the Commission until she was confronted with the evidence by the investigator for the Commission. In all of these circumstances, we find that the Complainant should not benefit from an order made under section 53(3)(b) and that we would not have made any award for hurt feelings or loss of self-respect had there been a finding of discrimination against the Respondent.

FOR ALL OF THE FOREGOING REASONS, WE DISMISS THE COMPLAINT.

Dated at Victoria,  
British Columbia  
this 28th day of March, 1992

Lyman R. Robinson, Q.C.

Dated at Delta,  
British Columbia  
this day of , 1992

C. Joan Block