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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

RODNEY CREMONA

Complainant

- and -

TINA (HUBBERT) RADFORD

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

WARDAIR CANADA INC.

Respondent

- and -

WORLDWAYS CANADA LTD.

Respondent

DECISION OF THE TRIBUNAL

TRIBUNAL:

Carl E. Fleck, Q.C. - Chairman
Dudley Campbell - Member
Judith Dohnberg - Member

APPEARANCES:

Rene Duval
Counsel for the Canadian Human Rights Commission

Bruce Pollock
S. Ducoffe
Counsel for Worldways Canada Ltd.

Ross Ellison
K. Smith Counsel for Wardair Canada Inc.

DATES AND LOCATION
OF HEARING: October 27th, 1989
February 26th, 27th, 28th, March 1st
and March 2nd, 1990
April 26th and 27th, 1990
Toronto, Ontario

BACKGROUND

This Tribunal was appointed on October 6th, 1988 and February 22nd, 1989 pursuant to the provisions of section 49(1.1) of the Canadian Human Rights Act, R.S.C., 1985 c. H-6 as amended (hereinafter referred to as "C.H.R.A.") to inquire into two commonly related complaints filed against the Respondents Worldways Canada Ltd. and Wardair Canada Inc.

The Complaint of Tina (Hubbert) Radford dated July 18, 1985 against Worldways Canada Ltd. is particularized as follows:

I have reasonable ground for believing that I was discriminated against by the above-named respondent on the basis of my disability (vision) as I was refused employment as a flight attendant. This practice, I allege, is in contravention of Section 7(a) of the Canadian Human Rights Act.

I further allege that the respondent has established and pursued a policy and practice of refusing employment to individuals who do not meet their minimum vision requirements. This practice, I allege, is in contravention of Section 10(a) of the Canadian Human Rights Act.

I was aware that the respondent was seeking applicants for the position of flight attendant. I met the basic requirements for the position as were set out in the information booklet accompanying the application form. I completed the application and informed the respondent in writing that my vision was 20/200 uncorrected in both eyes and 20/20 corrected in both eyes.

I was summoned to an interview at which time I was informed of the minimum vision requirements (20/50, 20/80). I was not interviewed for the position and thus deprived of an employment opportunity.

The Complaint of Rodney Cremona dated September 6, 1985 against Wardair Canada Inc. is particularized as follows:

I, Rodney Cremona, believe that I was discriminated against by Wardair Canada Inc. on the basis of my disability (vision) as I was refused employment as a flight attendant.

In October of 1984, I became aware that the respondent would be considering applicants for the position of flight attendant. As I met the basic requirements for the position, I was mailed an application form. I completed the application form which included providing information about my visual acuity and returned it to Wardair Canada Inc., sometime in October of 1984.

On November 19, 1984, I was advised by the respondent that I could not be considered for the position because my uncorrected vision is less than their requirement of 20/80. Although my uncorrected vision is approximately 20/400 in each eye, it is 20/20 in each eye with corrective lenses.

I allege that the respondent's practice is in contravention of Section 7(a) and 10(a) of the Canadian Human Rights Act.

Since these complaints dealt with substantially the same issues of fact and law, on consent of all parties the complaints were heard in one hearing with evidence being called for both complainants and respondents without the necessity of separate

hearings. The general power to deal with complaints in this manner arises out of s. 40(4) of the C.H.R.A.

On consent of all parties, the respondents brought a preliminary motion for the consideration of this Tribunal prior to the calling of any evidence which was heard on October 27th, 1989. The Respondents took the position that since two complainants had a visual acuity corrected when wearing corrective lenses to 20/20 they in fact did not suffer from a disability as that term was used both within the C.H.R.A and as commonly

and ordinarily understood in the usage of the English language. In short, since the complainants' vision could be corrected to 20/20, they did not suffer any incapacity nor was any portion of life's normal activities unavailable to them.

The relevant sections of the C.H.R.A. referred to in this preliminary motion were as follows: s. 3, ss. 1 sets out the prescribed grounds of discrimination as follows:

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

S. 7 sets out:

"It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual; or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."

S. 10 sets out:

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

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

S. 15 sets out:

"It is not a discriminatory practice if:

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by any employer to be based on a bona fide occupational requirement;"

S. 25 sets out:

" In this Act,

"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."

At the conclusion of argument on this preliminary point, the Tribunal ruled that pursuant to s. 50(1) of the C.H.R.A., its mandatory duties require a full inquiry into the complaints with an opportunity for all interested parties to be given a full and ample opportunity to appear, present evidence and make representations. Accordingly, the preliminary motion was adjourned to be dealt with in the context of a full hearing with opportunity for the respondents to again argue the merits of the motion, which in fact was done at the subsequent hearing.

The Tribunal again convened on February 26th, 27th, 28th, March 1st and 2nd, 1990 at which time all parties called oral testimony and filed as exhibits document briefs and reports. At the conclusion of calling all oral testimony and filing all documentary evidence, it was agreed on consent of all parties to

adjourn the hearing for final argument which was completed on April 26th and 27th, 1990.

THE ISSUES

For both the preliminary motion argument and the positions taken in the final argument, the Tribunal perceives the following issues fall to be decided:

A. Did the uncorrected visual acuity of the complainants corrected to 20/20 by corrective lenses constitute a disability sufficient to bring the said complaints within purview of the C.H.R.A. ?

B. Did the complainants discharge the onus of making out a prima facie case of discrimination as set out in s. 3, 7 and 10 of the C.H.R.A. ?

C. In the event the complainants established a prima facie case of discrimination, are the standards of visual acuity set by the respondents' company reasonable standards sufficient to discharge their onus of proving a bona fide occupational requirement pursuant to s. 15(a) of the C.H.R.A. ?

D. Did the respondents discharge the onus of showing why they could not reasonably accommodate the applicants without undue hardship?

REVIEW OF EVIDENCE

COMPLAINANTS' EVIDENCE

DR. B.J. MacINNIS

The complainants called as their expert witness Dr. B.J. MacInnis, a specialist in occupational health and ophthalmology as

well as in optics and refraction. His curriculum vitae was marked as Exhibit HR-1 and his qualifications were not disputed by the respondents. He explained basic measurement of visual acuity such as 20/20 as a recognized international standard known as the Snellen fraction or the Snellen acuity. This simply recognizes the degree of visual acuity people have. He indicated that the primary corrective form to improve visual acuity was either spectacles or contact lenses which could include either hard, soft, gas, permeable or disposable lenses. He also referred to the recent technology of refractive surgery which could be performed on the cornea to alter its shape.

With respect to contact lenses, he outlined the main advantage of wearing same as having the correction right on the surface of the eye which normalizes the eye and minimizes the magnification one gets from spectacles. He indicated you have a feeling that vision is greater and closer to normal than with spectacle correction.

Dr. MacInnis referred to a clinical study entitled "Survey on Eye Comfort in Aircraft: Flight Attendants" which was marked as Exhibit HR-2. This was a study of 774 flight attendants over a three month period in

1978. He indicated the results of the survey wherein there was relatively no difference in comfort level in individuals wearing no correction versus glass or spectacle correction versus hard contact or soft contact lenses with the single exception of napping. The soft contact lens wearers taking a nap were slightly more uncomfortable. There were no eye symptoms of any significant difference between the four categories.

He then referred to a clinical study entitled "Low Atmospheric Pressure Effects on Wearing Soft Contact Lenses" which was marked as Exhibit HR-3. This was a test to ascertain if there were any effects of altitude and low atmospheric pressures on the wearing of soft contact lenses with respect to visual acuity and further investigated whether there were any adverse findings with respect to refracture of the interior segment of the eye specifically the cornea. These tests were conducted in a hypobaric chamber. The findings of the test indicated that at 20,000 feet and 30,000 feet there was no change in visual acuity, no change in refraction, no significant changes in curvature or keratometry readings and no changes under the microscope with respect to bubbles or decentration. There was some degree of redness at those altitudes.

The next study referred to by Dr. MacInnis was entitled "The Suitability of Soft Contact Lenses for Aircrew" which was marked as Exhibit HR-4. This was a particularly important study as it relates to the issue in this case. 17 officer aircrew of the Royal Air Force wearing soft contact lenses were, as the study indicates, subjected to extreme conditions including hypoxia, rapid decompression, pressure breathing, vibration, climatic extremes, G Forces and the prolonged wearing of an aircrew respirator. It concluded that the visual performance of wearing contact lenses under stress did not differ significantly from the control values; either when wearing corrective flying spectacles or contact lenses when not under stress. The study concluded that from an environmental standpoint, soft contact lenses were suitable for the aircrew.

This study pointed to the greatest advantage of contact lenses as their ease of integration with optical sights of limited eye relief and their freedom from misting. The greatest disadvantage were the variable tolerance, corneal moulding, variance of lens hygiene in battlefield conditions and a possibility of ocular pathology. One of the subjects in this study suffered an infection resulting in corneal ulceration which necessitated a keratoplasty. Another subject suffered an ulceration at his

limbus resulting in a small nebula without consequence to vision. It was considered therefore that the use of soft contact lenses should be restricted to aircrew who would gain the maximum advantage.

Dr. MacInnis testified that the study referred to in Exhibit HR-4 provided important data relating to the situation of dislodgement of contact lenses under extremes of acceleration and deceleration. He indicated that the conditions tested up to a six G Force and at that extreme the maximum movement of a soft contact lens was approximately 1 1/2 millimetres. He indicated that retinal hypoxia from reduced blood flow and blackouts occurred before any of the pilots lost their contact lenses.

The next study referred to was a "Functional Investigation of Corneal Type Contact Lenses" done by the Institute of Aviation Medicine and marked as Exhibit HR-5. This study used 22 RCAF personnel who were selected for fitting with corneal type contact lenses. The subjects went through various extreme tests and pressure breathing wearing an oxygen mask, putting on and taking off a full pressure helmet and conducting tests within a

decompression chamber at various altitudes up to 27,000 feet. The overall results of these tests indicated that with the exception of swimming, the functional trials performed indicated that contact lenses could be worn under extreme conditions. The study recommended that in order to afford protection from the loss of lenses when swimming, the eyes should be kept closed when water is breaking over the face. It indicated that provided such precautions were taken, swimming could be undertaken with little risk of loss.

Dr. MacInnis was of the opinion that if you were not wearing contact lenses then there should be an uncorrected acuity of some level. He indicated that the uncorrected acuity in the aviation industry had varied from 20/200 with United Airlines all the way to 20/20 with some airline with no specification. He indicated that some airlines allow glasses, some allow contacts and that he chose an acuity level for uncorrected acuity at 20/200. He said that at that level you would be afforded some degree of vision, albeit blurred for the performance of tasks on near point but at the same time it would afford enough safety for the individual or other members of the crew and the passengers.

With respect to a flight attendant wearing contact lenses, he is of the opinion that there would be no need for an uncorrected standard as there appeared to be next to a zero chance of dislodgement under cabin

conditions. On the matter of down time from infections or foreign bodies underneath the contact lenses, he testified that 80% of the people studied in various studies experienced little or no down time.

With respect to the question of smoke and fire on board an aircraft, he felt there was a bit of an advantage conferred on contact lens wearers in that the corneal sensation was reduced. As a secondary matter, he felt that the contact lens served as a protective area between the eye itself and the environment. His overall conclusion was that the contact lens technology has advanced rapidly and the improvements have been substantial since 1978.

Under cross-examination, Dr. MacInnis conceded some of the studies indicated that soft contact wearers complained about blurring of vision, typically more than other persons within the study. He did not feel however that the amount of blurring was at a significant level and he set this at a difference between 20/20 to 20/25. That was with respect to the study conducted in Exhibit HR-2. He further conceded that there was a need for minimum uncorrected standard for glass or spectacle wearers. With respect to contact lens wearers, he did not feel that there was a need for an uncorrected standard. He felt from a safety standpoint that there was no chance of bilateral simultaneous dislodgement and accordingly no need to have an uncorrected standard for somebody who would never be without both lenses under flight conditions. He conceded that a standard of 20/20 was just as reasonable as a standard of 20/200.

Under cross-examination he was referred to the visual acuity study entitled "Uncorrected Visual Standards for Police Applicants" by Good and Augsburger. The basic recommendation of this report was that no special consideration should be given to

contact lens wearers involving the uncorrected visual acuity standard. In the event that an individual police department decided to waive the standard, it was recommended that they should adopt certain standards contained in the American Optometric Association's Commission on Ophthalmic Standards. The main concern was that officers might not wear their lenses every day. Activities such as critical visual performance and possibility of physical contact through violence and the possibility of dislodgement were factors for these recommendations.

Further on his cross-examination, Dr. MacInnis was questioned with respect to concerns over a tear problem which will arise by reason of the atmospheric conditions inside an aircraft. His opinion was that such concerns could be easily overcome by the use of an ultra-thin lens which is so thin that it has a much lower tear requirement than any other type of soft extended-wear lens. He further indicated that an ultra-thin lens does not have any significant lens ripple or loss of optic properties.

Dr. MacInnis was further questioned as to the terminology of explosive decompression and was referred to the Aloha Airlines 737 crash when part of the structure of the plane came off necessitating a severe drop in altitude in a matter of seconds. A video of this crash was referred to in the evidence of the respondents and the report of same is contained in Exhibit WA-9 Tab 5. When questioned as to whether or not there would be a propensity for contact lenses to dislodge under circumstances such as the Aloha crash, Dr. MacInnis referred counsel to the I.A.M. report number 626 wherein reference of a rapid decompression from

8,000 to 38,000 feet concluded that visual acuity of all the subjects involved after decompression was considered satisfactory with only minor decrements in two subjects.

It is of interest to note that in the Aloha crash report referred to at WA-9 Tab 5, p. 11, the first officer was a corrective lens wearer. Unfortunately, no data was gathered in this report concerning the question of dislodgement of lenses or distortion of visual acuity.

On re-examination, Dr. MacInnis was questioned about problems with cigarette smoke. His opinion was that there was no difference with respect to cigarette and irritation caused therein as between contact lens wearers and non contact lens wearers.

RODNEY CREMONA

The complainant Rodney Cremona at the time of the hearing was thirty years of age and testified that he first became aware of the availability of a job with the respondent Wardair when he inquired at their office in Toronto. He completed an employment application form which included on the back of it an ophthalmologist report questionnaire. This was signed by his ophthalmologist and the application was submitted in October of 1984.

At the time of his application, he had already been wearing contact lenses referred to as the "high-water content extended wear lenses" since 1977. He testified that he did not experience any problem with the contact lenses and did not experience any down time with his employment.

He received a letter which is marked as Exhibit HR-8 from the respondent Wardair and dated November 19th, 1984 wherein he was advised that his application could not be considered because his uncorrected vision was less than the requirement of Wardair, which was 20/80. The letter indicates that it was from the employment office but it was unsigned and it is difficult for that reason to ascertain what if any individual person or persons in the personnel department reviewed his application and gave any individual consideration to its merits.

He went on to testify that since his application to Wardair in 1984 he has not had any problems with eye infections. He indicated that the position he applied for at Wardair was that of a flight attendant. At the time of his application, he had been flying as a flight attendant on a six month contract with National Airlines in conjunction with Egypt Air. Mr. Duval questioned the complainant Cremona carefully with respect to various environmental concerns within the aircraft. He indicated that at times he experienced slight irritation from cigarette smoke and some slight drying of his eyes with the air conditioning which affects the humidity in the aircraft. Neither impaired his ability to see. He testified that with respect to the question of napping, a flight attendant is not allowed to nap and that wing reflection had not been a problem for him.

Mr. Cremona elaborated on his training as a flight attendant and in particular the requirements of the Department of Transport. These requirements included that all cabin baggage be stowed before take off and landing and he had encountered no

difficulty in handling this aspect of the job as well as insuring that seat backs and tray tables were in the upright and locked position for take off and landing. Both of these requirements were done by visual check. The same requirement of no smoking prior to take off and landing was done by visual check. He indicated that his responsibility for passengers was approximately forty passengers per flight attendant which includes approximately six to eight rows.

With respect to equipment on board, he is required to do a check of emergency equipment such as fire extinguishers, portable oxygen bottles and fire fighting kit. He is only required to check the equipment near his jump seat or in his area or exit location. With respect to fastening of seat belts, this is confirmed by a visual check and the distances involved in these various visual checks were no more than three to five feet. His additional duties included service of meals and beverages and patrolling the cabin to attend to passengers' needs in his assigned section. He testified that he had received an involved training course to be a flight attendant and had been trained in the emergency evacuation procedures on both land and water. He received training for fire fighting, first aid, security measures on board the aircraft and on board service customer care.

He described in detail his training and background as to how to handle emergency landings which included preparation for crash landing, briefing passengers on the impact position and appointing an able bodied passenger in the event that he would become incapacitated or injured during the landing. He would

instruct the passenger how to operate the door, inflate the slide and what to do if any exit was blocked and how to direct passengers to another exit. The direction of passengers on how to evacuate the aircraft would be done through an oral shout of commands.

He described his responsibilities upon an emergency landing as it related to insuring the accessibility of the emergency entrances, ensuring the slide inflates and a passenger check to ensure that everyone has evacuated. The direction to evacuate again he says would be done by oral commands as well as showing them how to evacuate through the exit and prepare themselves to go down the slide.

Mr. Cremona outlined the training he had had with respect to decompression including affixing his oxygen mask and securing himself to the nearest seat. He outlined in detail procedure for handling fires on board, including the chain of command to be alerted and his use of fire safety equipment. He further testified that he had been trained to evacuate on water and outlined the differences on an emergency landing. Mr. Cremona was cross-examined as to his visual acuity and testified that his uncorrected vision without lenses was 20/400. He further testified that he was presently employed by Air Canada and he was aware that their standard of visual acuity was 20/100 uncorrected. He was questioned carefully as to his application for employment with Air Canada and in particular some of the information relating to his uncorrected

vision that he put into the application form. He admitted under cross-examination that in order to obtain employment, he had incorrectly put in his

uncorrected visual acuity as 20/100 when in fact it was 20/400. He said he did this because of the hearing before this tribunal and because he knew it would cause a problem with his employment with Air Canada. What was not resolved with respect to this question is the additional alteration on his application of his visual acuity from "20/100 to 20/20". Mr. Cremona testified that he did not make the change to 20/20 and it was not his writing that had made such a change. We accept his evidence in this regard. No one was called from Air Canada to verify the actual propriety or lack of same of these alterations. In any event, the status of this application does not have significant bearing on the issues to be decided in these hearings save and except it is open for this Tribunal to weigh Mr. Cremona's admission against the overall credibility of his testimony.

Mr. Ellison reviewed in detail Mr. Cremona's evidence relating to previous problems with his lenses. His only problem he conceded was the tearing of a lens in October of 1986 which was not done while the lens was in his eye but in the lens container. He says he always carries a second pair of lenses. At the time he had this problem, he was working with Air Transat and they had no visual acuity standard so that he could substitute his eyeglasses if he had a problem with lenses.

TINA (HUBBERT) RADFORD

The complainant Tina (Hubbert) Radford testified that she applied for employment with the respondent Worldways Canada Ltd. in June of 1985. She learned of the employment opportunity either

through a newspaper or a friend. She went to the company and obtained an application and mailed it in and had applied for the position of flight attendant. She provided along with her application a report from her ophthalmologist which set out her uncorrected visual acuity which was 20/200. She wore soft contact lenses and had been doing so since 1978. She testified that she had encountered a problem in 1980 which was an eye infection and wore glasses. Ms. Radford testified that she had been in a motor vehicle accident in 1984 when she was crossing the street and was struck by a car. She was wearing her contact lenses at that time

and as the result of the impact, she flew over the hood of the car and landed on a traffic island. She was momentarily unconscious but when she regained consciousness, she still had her contact lenses intact.

She went on to testify as a result of her application to the respondent Worldways she received a telephone call to arrange an interview.

The interview was conducted by a woman and had only commenced for a brief period of time when she was advised that there was no sense in conducting any further part of the interview because her uncorrected eyesight did not meet the requirements of Worldways. When asked why she had been called in for an interview, she was advised that it was an oversight on the part of Worldways. She did not have any previous experience as a flight attendant.

She received a form letter subsequent to the interview from a person other than the person that interviewed her stating that she does not meet the company's visual acuity standards. The letter was unsigned.

EVIDENCE OF RESPONDENTS WARDAIR AND WORLDWAYS

PETER BOLTON

The respondent Wardair called as a witness Peter Bolton, presently a Vice President of Inflight Services for Canadian Airlines. He had previously been with Wardair since 1970 and held various positions within the Wardair Administration. He was called basically to testify about the hiring and training of flight attendants and the duties they had to perform. He testified that Wardair had a high reputation for service and safety and had received a rating as one of the top three airlines in the world operating into Britain with high safety standards.

He outlined the concept of "tombstone technology" which simply stated calls for the lowering of standards until a disaster happens. With respect to the primary focus of a flight attendant, he testified that his position was that akin to being a guardian of the passengers' safety on board the airplane. He felt the main responsibility of a flight attendant was to ensure the maximum survivability of passengers in the event of a catastrophe. It was his position that when an evacuation situation took place on the ground after an air disaster it was the flight attendant who was in charge of the airplane. He testified that in 95% of all crashes there are survivors and accordingly a flight attendant would have to be involved in dealing with the safety of passengers.

Mr. Bolton outlined in detail various safety steps required which are contained in Exhibit WA-4, Tab 4. He outlined in this exhibit six main duties of a flight attendant in the event of a crash and I do not intend to outline in detail these

requirements, save and except that they are detailed as being the requirements for evacuating within 90 seconds as mandated by the Department of Transport. In synopsis, these various duties have requirements for visual acuity such as seeing the bottom of the inflatable slide, giving hand signals, searching for survivors as well as insuring all passengers have left the plane.

In Exhibit WA-4, Tab 5, the uncorrected vision standard of Wardair is outlined from 1967 through to 1990. It is to be noted the uncorrected vision standard has been upgraded from 20/40 to 20/100 over the space of 23 years. From 1976 through to 1981, a flight attendant could wear contact lenses but not glasses. In 1981, this was changed to allow glasses and at the same time the standard was changed to 20/100. Mr. Bolton testified as to the report of Dr. J.R. Hilliard found at Tab 7 of Exhibit WA-4, which resulted in a change for uncorrected visual acuity to 20/100. In addition, the change allowed flight attendants to wear either contact lenses or glasses.

Mr. Bolton was questioned as to why there was a requirement for an uncorrected standard for people wearing glasses and contact lenses. With respect to glasses, he was of the opinion that there was a very high likelihood of a flight attendant losing their glasses. In the case of contact lenses, Mr. Bolton did not make any reference to a concern about dislodgement in the event of an air crash but rather referred to his company's concern as to the down time arising out of the wearing of contacts. He felt that to have no standard for contacts with the knowledge that there is down time would mean testing people every time they came to work as to whether or not they were wearing their contacts.

Under cross-examination, Mr. Bolton conceded that the Department of Transport does not have any visual requirements for flight attendants. He further testified that the International Organization of Civil Aviation does not have requirements for flight attendants. Indeed, he testified that the minimum standard for uncorrected visual acuity is 20/200 for pilots and they are allowed to fly with contact lenses.

Mr. Bolton further conceded that there were airlines that did not have uncorrected visual requirements for flight attendants, one of which was Air Transat, the previous employer of Mr. Cremona. On the question of evacuating an airplane within 90 seconds, Mr. Bolton conceded that this was possibly not a requirement of the Department of Transport but rather an accepted standard within the industry.

Mr. Bolton was examined as to the process where screening would have occurred for Mr. Cremona's application. Mr. Bolton testified that Mr. Cremona's application would be screened because of his uncorrected visual acuity of 20/400 and that no other preliminary inquiry would be made as to the status of his vision or sight other than that as contained in Exhibit WA-3. In other words, there is no inquiry after the application form as to whether or not a person could wear successfully contact lenses, his visual field or colour discrimination. Further there are no questions directed as to the type of correction they use either glasses or contact lenses. On the question of dislodgement of lenses and eye glasses, Mr. Bolton admitted that no testing had been done with respect to this question and that he relied upon the advice given to him by others.

Mr. Bolton was asked directly as to why he felt there would be increased risk in the event of lowering the standards for uncorrected visual acuity. He could not point to any study or research that would demonstrate an increased risk to the safety of passengers.
In questioning from the Tribunal, Mr. Bolton clarified that probably the letter sent out to Mr. Cremona was in error as it relates to the minimum standard at that time. The form letter to Mr. Cremona refers to a standard of 20/80 when in fact the standard of Wardair at that time, namely November 18th, 1984, was in fact 20/100.

JIM STEWART

Mr. Jim Stewart, Manager for Flight Attendant Training at Wardair was called to testify on behalf of the respondent Wardair. He gave his background as being employed as a flight attendant for approximately ten years and for five of those years he flew as a flight attendant. In 1985 he became an inflight service manager and as well he developed training programmes for the airline and gave training seminars for flight attendants.

His evidence was that flight attendants were trained for the unexpected. They are to be prepared for something that they hope should never happen such as an emergency situation requiring evacuation of an

aircraft, fighting fires as well as some passenger service. Mr. Stewart described the role of the Air Transport Association of Canada (A.T.A.C.). This organization is comprised

of members of the airline industry in various airlines in Canada along with government representatives from Transport Canada. This association is designed to work towards consensus of minimum requirements, training, security and other related minimum standards.

Mr. Stewart described in detail the training programme of a flight attendant which is detailed at volume 2, pp. 222, 223 and 224 of the evidence. Of importance, he outlined the practical training relating to ditching an aircraft. He described a wet ditching exercise wherein they get into a swimming pool fully clothed and rescue each other. In addition, they do rescue work which is jumping down slides, first aid, evacuating people, opening exits and related emergency procedures.

Mr. Stewart went through Exhibit WA-5 and outlined in detail the various duties of a flight attendant which require good visual acuity under an emergency situation. This involved location of doors, placement of slides, hand signals and evacuation of passengers.

He then provided commentary on the videos of several aircraft crashes. Mr. Stewart was asked to comment on his opinion as to whether or not a flight attendant after one of the air crashes depicted would in fact retain his eye glasses and his contact lenses. Mr. Stewart's opinion was that they would probably lose both glasses and contact lenses as a result of the impact of force. Throughout the various videos, Mr. Stewart pointed out the requirements of excellent eyesight for each emergency situation.

Mr. Stewart was cross examined as to his own personal visual acuity. When he joined Wardair in 1980 he had received an eye examination. He had not been required to take any further visual examination. It was his understanding that after initial employment, flight attendants are not required to take any further testing.

Mr. Stewart conceded that in the several videos viewed that none indicated that flight attendants used hand signals.

Mr. Stewart conceded that the organization known as A.T.A.C. does not have an uncorrected visual standard for flight attendants. He was further questioned as to his conclusions about the dislodging of contact lenses or losing glasses upon impact. He advised that he had been involved in a cabin trainer simulation exercise in California which consisted of a cabin trainer that had motion based simulators. The jarring motion was extensive however he was not wearing contacts nor was he wearing glasses. Neither the evidence of Mr. Stewart nor the video air crash reenactments were of any great assistance in providing any reasonable data on the question of dislodgement of glasses or contact lenses.

ANDREW TRIOLAIRE

Andrew Triolaire, the Director of Occupational Safety for Canadian Airlines testified that he had been in that position for six and a half years. His department was responsible for all aspects of safety within Canadian Airlines. Mr. Triolaire is trained in both the position of an airline pilot as well as a flight attendant.

Mr. Triolaire outlined the ongoing training of a flight attendant. He testified that once a year a flight attendant will be required to take an "emergency procedures" course which is a one day course covering emergency evacuation situations.

Mr. Triolaire reviewed Exhibit WA-9 and in particular the I.A.T.A. (International Air Transport Association) report at Tab 2. He reviewed extensively the reports of several air crashes but again much of the information contained in these reports did not provide any significant assistance with the process of understanding the reasonableness of the respondent's visual acuity standards or the necessity of same.

Mr. Triolaire was asked a question regarding the concern of smoke entering the cabin. He was of the opinion that smoke would irritate the eyes. When questioned further as to whether or not his company had ever conducted studies, he said that their training simulators could place non-toxic smoke into the cabin simulator to create the environment of a smoke-filled cabin. Such a test however has never been conducted to determine the effects of non-toxic smoke or any form of smoke as it relates to the question of irritation of the eyes. When questioned about the use of air ways and smoke masks, it appears that such safety devices are only now coming into regulation for flight attendants.

On cross-examination, Mr. Triolaire was asked if there was a universal or international standard for visual acuity for flight attendants. He advised that there was not and could not give a reason why such was not in existence. Indeed, he testified that he had examined the subject at length in preparation for this

hearing and confirmed that neither the International Civil Aviation Organization nor the Department of Transport in Canada addressed the question of visual acuity for flight attendants. He further confirmed that the Air Transport Association does not recommend a visual acuity standard requirement for flight attendants.

He was questioned as to possible conditions that could be created within a cabin simulator relative to adverse flight conditions. He testified that you could recreate a smoke-filled environment, noise of an airplane operating and some of the circumstances that would occur in an emergency evacuation. At no time have they conducted tests to ascertain how easily glasses or contact lenses would be dislodged within the environment created by a cabin simulator. He further testified as a result of the Cincinnati air crash all main airlines have had floor path emergency lights installed and that the use of a megaphone is now part of the emergency evacuation procedure.

Mr. Triolaire confirmed that for commercial air pilots the minimum uncorrected visual acuity standard set by the International Civil Aviation Organization was 20/200. He further confirmed that the Department of Transport permits pilots to fly wearing contact lenses. His opinion was that pilots have very complex visual tasks to complete.

In re-examination, Mr. Triolaire testified that the fact that no accidents had occurred as a result of flight attendant errors would be no reason to lower the standards.

LYLE GIBSON

The respondent Worldways called as a witness Lyle Gibson, the Vice-President of Inflight Services for Worldways. His work history included responsibility for cabin services, catering, recruiting and training of flight attendants and the scheduling and hiring of same. He described the business of Worldways as primarily a charter airline in the

business of leasing aircraft to tour operators. The lease includes providing a crew, insurance, maintenance and all other related in-cabin services.

He testified that most of their flights were transatlantic flights with an average flight time of at least six hours. He further testified that the maximum duty that you can schedule a flight attendant for is up to a maximum of 15 hours with 1 additional hour in the event of a delay situation. In extreme situations, the absolute limitation period for flight attendants is 18 hours.

Mr. Gibson stressed that safety was a priority with Worldways and he described various safety related programmes instituted by this company. He outlined a recurrent training programme which includes examinations and sets minimum pass requirements. He described in detail the training programme for recruits which is five weeks in duration and included various forms of safety drills and emergency evacuation procedures.

Mr. Gibson testified that when he took over re-writing of the flight attendant emergency manual he involved the Ministry of Transport (M.O.T.) to review his standards. He testified that his assistant Umberto DaSilva was invited to Ottawa to review the

training syllabuses of Air Canada, Canadian and Wardair. It is not certain if minimum visual acuity standards were reviewed at that time.

With respect to visual acuity, Mr. Gibson testified the standard had changed from 20/50 through to 20/100 which has been the standard for the last five years. The standard was based upon the recommendation of Dr. Carroll who had been the consulting physician for Worldways at least since 1980. Dr. Carroll is now deceased however his specialty when he practised was that of aviation medicine. It was on his recommendation that the standard of 20/100 was set for minimum uncorrected visual acuity.

Mr. Gibson indicated that he did not waiver from the standard in hiring new recruits and is now in the process of revising the policy of Worldways as it relates to annual medical re-testing. With respect to visual acuity re-testing, the policy has not been completely decided upon as to whether it should be done on a three year or a five year basis. He confirmed flight attendants employed by Worldways can wear both glasses and contact lenses.

On cross-examination, Mr. Gibson was unable to testify as to how Dr. Carroll arrived at the standard for minimum visual acuity. He testified that for the last ten years Worldways has not conducted any tests to review the minimum uncorrected visual acuity standard as it relates to the various environmental factors within the cabin. He testified that there is no screening process for an applicant in the position of flight attendant once his visual acuity is lower than 20/100. For the individual applicant, once

his visual acuity is beyond the 20/100 standard, he is automatically rejected without any further individual testing or personnel processing.

DR. MURRAY McFADDEN

The respondent Wardair called as an expert witness Dr. Murray McFadden, an ophthalmic surgeon and consulting ophthalmologist. He is a specialist in the field of ophthalmology and is a clinical professor at the University of British Columbia. His credentials were not disputed in any way by the complainants.

At the request of Wardair, Dr. McFadden prepared a report on visual requirements for flight attendants. He was given the scenario that the Wardair requirement was 20/100 and that a person had applied for a position with an uncorrected visual acuity of 20/400 and this person had been rejected. He himself was a contact lens wearer with a visual acuity similar to 20/400 which is the uncorrected visual acuity of Mr. Cremona.

The report he produced is contained in Exhibit WA-12, Tab 1. Dr. McFadden outlined general comments as to the preparation for this experiment. He blurred his eye glasses at various levels of visual acuity and walked about his environment to get a feeling for the problems of vision at these various acuity levels. He felt it was impractical to perform any tests of an emergency situation which he felt would be to crash an airplane. Such a situation has already been referred to in this decision as "tombstone technology". It is to state the obvious that the mechanics of such technology would be both impractical and unacceptable. Dr. McFadden did not suggest any form of testing

that could be utilized in order to test the tolerance of contact lenses. He described the general visual function as the act of seeing and interpreting what is happening in your environment. He described that vision had a number of aspects. Central vision is that vision tested by Snellen Acuity and is what a person sees when they look straight ahead and what they use for reading. Another aspect is side vision (or peripheral vision).

Dr. McFadden explained the meaning of the terms of vision such as 20/20 as it relates to the Snellen Test Chart. The top number of 20 signifies the distance at which the test was done and the bottom number signifies the distance at which a normal person would see the same test object. Therefore 20/200 would be what a person with normal vision would see at 200 feet.

With respect to deterioration of eyesight, he testified that after adolescence 95 to 98% of all people will not have a deterioration in their uncorrected visual acuity until they get much older and develop such things as cataracts.

He then described simulated tests using flight attendants at various levels of acuity ranging from normal 20/20 up to 20/400 and greater. He concluded that there was a safety risk factor during an evacuation situation which would be substantially increased by any visual acuity less than 20/100. It should be noted that the test situation he described was done under normal emergency situations without any other environmental factors such as smoke, debris or factors of hysterical people in a panic.

On the question of dislodgement of glasses and contact lenses, he was of the opinion that glasses would probably be dislodged. With respect to contact lenses, he felt that with an explosive decompression situation that a person might be knocked out and lose their contact lenses.

He described the results of a study done by Dr. Corboy which is contained in Exhibit WA-12, Tab 9. This study explores the condition known as "overwear syndrome". He described the result of the study as persons developing eye problems and infections shortly after take off on long flights which he attributed to a difference in altitude and cabin pressure and lowered amounts of oxygen. He stated that oxygen was necessary for the front of the eye to function normally. He then referred to a study done by Dr. Eng which concluded that contact lens wearers have a worse time within the aviation environment than people who do not wear contact lenses.

Dr. McFadden concluded that the uncorrected visual acuity standard would be the same for those persons wearing glasses as those wearing contact lenses because of all the difficulties inherent in the use of contact lenses in general and in specific the problems related to contact lenses in the flying environment. He concluded that his opinion in this regard did not differ from that of Dr. MacInnis, the expert called by the complainants.

Under cross-examination, Dr. McFadden conceded that his study did not select subjects as to age, sex, previous eye pathology or motivation to wear contact lenses. He endeavoured however to point out that that was not the purpose of his test.

With respect to the previous evidence given of a detection of fire inside of the airplane, he was asked if observing an orange glow would be the result of visual acuity and testified that such was not the case but rather one of colour perception.

Dr. McFadden clarified the question of 20/200 as it relates to being legally blind. The expression "legal blindness" as we understand his evidence relates to a situation of corrected vision.

Dr. McFadden testified that airline pilots are entitled to fly wearing contact lenses as long as they had another pair of contact lenses or a pair of glasses.

Dr. McFadden testified that in some cases soft lenses would afford protection against smoke. He also conceded that with respect to the tasks performed for example by police officers there are additional visual complexities involved in their tasks, such as firing a firearm and identifying suspects and licence plate numbers.

He also testified that there were numerous professional athletes who were successfully engaged in contact sports such as hockey and football utilizing contact lenses.

Dr. McFadden was examined in detail by Mr. Duval with respect to the overall results of various tests and studies contained in Exhibit WA-l2. Exhibit WA-l2, Tab ll is a study on the concern regarding sub-contact lens bubble formation. This study confirmed that with soft lenses bubbles were detected in 24% of the eyes but were only located at the limbus and were without sequela division or corneal epithelial integrity.

The study contained at Tab l3 of the same Exhibit concluded that the change in the fit of contact lenses was more closely related to the reduction of cabin humidity than to the reduction of atmospheric pressure. The study recommended that further investigation should be done into comparing the effects of low humidity in aircraft on subjects with and without contact lenses as well as testing of such factors as air conditioning and cigarette smoke.

At Exhibit WA-l2, Tab l4 is a study on the effects of hypoxia on soft contact lens wearers. Part of the study tested l0 subjects under similar non-pressurized conditions that would be encountered by jet fighters. Apparently none of the ten subjects wearing contact lenses reported any subjective change in their vision nor any discomfort from the exposure to low atmospheric pressure. It was conceded by Dr. McFadden that the conditions encountered in this test which simulated the experience of a jet fighter would be much harsher than the conditions a flight attendant would be exposed to.

Page 48 of the Flynn study contained in Exhibit WA-l2, Tab l4 includes as follows:

"The lack of visual degradation and significant symptoms with soft contact lens wear during exposure to low atmospheric pressure even when combined with dry air as in this study, suggests that soft contact lenses can be worn during flying".

Dr. McFadden agreed with this conclusion and confirmed that lots of people wore soft contact lenses during flying. Dr. McFadden further referred to the study contained at Exhibit WA-l2, Tab l5 which has been previously referred to in these Reasons.

This study was entitled 'The Flight Acceptability of Soft Contact Lenses: An Environmental Trial". As previously discussed the subjects in this test were exposed to severe environmental conditions which would be encountered by a military air crew in flight. The study concludes that the visual performance of air crew wearing contact lenses was not significantly different than the visual performance of the air crew wearing corrective flying spectacles. Dr. McFadden pointed out however he had some concern about the possibility of serious eye infection that could result in surgery to correct the problem.

DR. ARTHUR KEENEY

Dr. Arthur Keeney testified on behalf of the Respondent Worldways as an expert in Ophthalmology. His impressive credentials were not disputed by the Complainants. Dr. Keeney was of the opinion that there should be an uncorrected visual acuity standard for flight attendants. His reasoning was that they were obliged to operate under diverse and unexpected emergency conditions as well as being able to recognize and read call buttons and signal lights during evacuation of the aircraft. He also outlined in detail the various steps he felt would require good visual acuity during the evacuation process. He felt personally that the standard of 20/l00 was a generous standard for individual candidates for employment.

He felt that eye glasses were not a viable substitute for minimum standard of visual acuity. The possibility of dislodging the glasses was too great during the activities of a flight

attendant. He felt that flight attendants should be able to cope with emergencies without the assistance of spectacles.

He also felt that the wearer of contact lens should be subjected to a minimal acuity standard because of various problems encountered with contacts. He detailed the various problems such as infection, dehydration, irritation from changes in altitude. Further he testified that there were some people that had a type of psychological orientation which prevented them from wearing lenses and indeed there were people who had corneas that were so sensitive that they could not tolerate the presence of a lens. With respect to down time his opinion was that there was always a certain down time with every contact lens wearer.

Dr. Keeney is the author of a study referred to in Exhibit WO-6. This article dealt with serious medical conditions of the eye such as corneal ulcers and infections. He described a condition when the pupil dilates to a point larger than the focusing part of the contact lens. A phenomena occurs which is described as a transitional blur or flair of lights which he calls parachutes. He further described a dehydration blur and a condition called spectacle blur which occurs when a person changes from contacts to glasses. This may last five or ten minutes up to a period of two to three hours. In this state there is substantial interference with visual acuity. Dr. Keeney was of the opinion that contact lenses could be dislodged during a period of physical activity premising a stare or sudden turn. He felt the hard lens was easier to dislodge than the soft

contact lens.

Under cross-examination Dr. Keeney advised that in the United States flight attendants were under the jurisdiction of the Federal Aviation Administration. He testified that this Administration has not set any visual acuity standards or requirements for flight attendants. With respect to licensed pilots of commercial aircraft the minimum visual acuity standard is 20/200. Commercial pilots are allowed to fly with contact lenses. Indeed, he testified that there are commercial pilots in the U.S. flying with only one eye. He felt, however, that pilots do not have to move about as much as flight attendants but conceded that the humidity in the cockpit is the same as in the passenger cabin.

ROBERTO DASILVA

The final witnesses called for the Respondent Worldways was Roberto DaSilva, an eight year employee with the Company. His preliminary training was that of an inflight service manager and he is presently the manager of recruiting and training. These duties include the training of qualified flight attendants to ensure that they are trained in accordance with the Ministry of Transport requirements.

He testified that when he first started with the Company he was required to take an annual physical medical examination from Dr. Caroll. This policy now, however, has been abandoned for flight attendants and the policy is presently under review. The reason for review at this time is as a result of the death of Dr. Caroll. When the policy was under review Worldways made enquiries of other airlines to discuss their procedure on annual medicals for

flight attendants and found that they were probably the only airline with an annual physical test for flight attendants.

He outlined in detail the recruiting process including the manner in which applicants are screened through qualifications such as language, first aid experience, etc. Thereafter two additional interviews are conducted along with a medical examination.

Mr. DaSilva then outlined in detail the five week training program for flight attendants which was similar in detail to the training

program described by the training representative for the respondent Wardair. This training program normally covers passenger service, safety, evacuation of passengers and first aid.

He went into some particular detail regarding the exercise of simulated decompression. He described the training of a flight attendant under the decompression situation. He described the M.O.T. instruction in a decompression emergency as having the flight attendant take the first available mask and secure themselves in the cabin. He also described how they train flight attendants through a simulated ditching exercise into a swimming pool. He testified that trainees were not allowed to wear glasses yet he had not given any consideration to the situation of them wearing contact lenses. He described in detail the cabin preparation duties for assisting passengers to survive an impact.

FINDINGS OF FACT AND THE LAW

The first issue raised in this proceeding is hereinbefore defined as follows:

a) Did the uncorrected visual acuity of the Complainants corrected to 20/20 by lenses constitute a "disability" sufficient to bring the said complaints within the purview of the C.H.R.A?

It is not in dispute that both complainants applied for employment with the respondent companies and in each case employment was refused by reason of the failure of the complainants to meet the visual acuity requirements of the respondents. Filed as Exhibits to this proceeding are response letters of the respondents which both confirm the failure of the complainants to meet their respective visual acuity requirements.

It was urged upon us in argument by the respondent that because the complainants in their ordinary course of human activities did not consider themselves disabled therefore visual acuity that could be corrected to 20/20 is accordingly not a disability sufficient to bring the complainants within the spirit of the C.H.R.A. The Tribunal has considerable difficultly in understanding the merit of the Respondents' argument on this point having regard to the current case law.

Beginning with the decision of Foreman et al vs. Via Rail, failure to pass the visual standards of Via was found to be without

question a disability within the meaning of the C.H.R.A. Each of the applicants in that decision had visual acuity deficiencies far below the standards as set by Via Rail. At page l0 of the decision of the Tribunal we note the following passage:

"It was common ground that there has been, in the words of Section 2 of the Canadian Human Rights Act "discriminatory employment practices based on physical handicap" in the present factual situation."

This decision was later confirmed by the Federal Court of Appeal on December l4th, l98l.

In the decision of Seguin et al vs. R.C.M.P., two applicants were refused an opportunity to apply for the position of Special Constable static guard with the R.C.M.P. on the basis that their uncorrected visual acuity standards did not meet the standards as set by the R.C.M.P. Both applicants had corrected vision of 20/20 in each eye. In that instance the fact that the complainants had a "disability" and had made out a prima facie case of discrimination was admitted by the respondents.

The facts of the decision of Schaepsmeyer vs. Wardair Canada (l975) Ltd., has particular relevance to all of the issues raised in this proceeding. The facts as summarized were that Wardair prior to June l98l had a policy precluding flight attendants from correcting vision deficiencies through the use of eyeglasses. Ms. Schaepsmeyer, a flight attendant, had a visual impediment requiring corrective eyeglasses or contact lenses and in August l980 tore a lens and advised Wardair that she would have to wear glasses. She was suspended from flight service as a result of this problem.

On June 7th, l98l the Company changed its policy and permitted the wearing of eyeglasses by flight attendants and it was agreed by Wardair that Ms. Schaepsmeyer should be compensated.

The Tribunal in Schaepsmeyer made the following finding:
"On the basis of the agreed statement of facts, I find that the circumstances surrounding the booking-off of Miss Schaepsmeyer constituted practice in employment, based on her physical handicap, contrary to the provisions of the Human Rights Act."

The Schaepsmeyer decision was not appealed or at least if an appeal was launched the decision of same was not brought to the attention of this Tribunal. Important before this proceeding in the Schaepsmeyer decision was the finding that her visual impediment requiring correction was found to be a "physical handicap" and that the circumstances of her booking-off constituted a discriminatory practice contrary to the C.H.R.A. The Tribunal finds further it is now settled law that these complainants' perception of their physical handicap is irrelevant and the principle to be considered as clearly enunciated in the decision of Brideau v. Air Canada wherein the Tribunal in paragraph ll4ll states as follows:

"Before answering this question, the Tribunal wishes to reiterate and emphasize the principle that it is the "perception" an employer has of the future employee's physical condition that must be considered, not the physical handicap itself."

The above principle was also referred to in the case of Foucault v. Canadian National Railways and Biggs and Cole v. Charles Hudson. In the Biggs and Cole decision reference is made to a decision of Doe vs. New York Hospital wherein the New York Commission on Human Rights recited as follows:

"Courts have repeatedly held that people who are falsely perceived as suffering a physical handicap should be viewed as handicapped even without specific statutory language to that effect, since they are victims of the same prescribed attitudes as people who truly suffer the same physical handicap...it would completely undermine the intent and purpose of the human rights law to exclude from the law's protection those persons who suffer discrimination because they are perceived by respondents to be handicapped...."

based upon the present authorities as recited the Tribunal has no difficultly in finding that the visual acuity deficiencies of the complainants represent a disability within the meaning of the C.H.R.A.

(b) Did the complainants discharge the onus in making out a prima facie case of discrimination as set out in ss. 3, 7 and 10 of the C.H.R.A.?

As previously indicated, this Tribunal finds as a fact that both complainants were refused employment as a result of their visual acuity deficiencies. This fact is not in serious dispute in this proceeding. The decision of Ontario Human Rights Commission v Simpsons Sears [1985] 2

S.C.R. p. 536 at 558 Mr. Justice McIntyre confirms the burden of proof of showing a prima facie case of discrimination rests upon the complainants.

This Tribunal accepts the evidence of the complainants and makes the following findings:

A. The complainant Radford applied for employment with the respondent Worldways in June of 1985 and duly completed an application accompanied by a medical certificate of an ophthalmologist outlining her visual acuity particulars. She was granted an interview which was terminated when it was ascertained by the interviewer that she did not meet Worldways' visual acuity standards.

B. The complainant Cremona applied for employment with the respondent Wardair in October of 1984 and his application was accompanied by an ophthalmologist's certificate setting out his visual acuity particulars. He was not granted an interview nor any other form of pre-employment testing.

C. The Tribunal finds as a fact that there were no other forms of pre-employment testing for either complainant.

D. In each case the complainant received from the prospective employer an unsigned form letter stating that they could not be considered for employment by reason of their failure to meet visual acuity standards. Both of these letter have been marked as Exhibits in this proceeding.

E. This Tribunal finds that both complainants duly completed and filed complaints in accordance with the provisions of the C.H.R.A.

F. This Tribunal finds that the complainants have discharged the burden of proof and have established a prima facie case of discrimination as against their respective respondents.

(c) The third issue of this Tribunal is set out as follows:

In the event the complainants established a prima facie case of discrimination are the standards of visual acuity set by the respondent companies reasonable standards sufficient to discharge their onus of proving a bona fide occupational requirement pursuant to s. 15(a) of the C.H.R.A.?

This issue naturally prevailed as the main defence of the respondents. The bulk of their evidence both oral and documentary was filed to establish a bona fide occupational requirement defence (hereinafter referred to as a b.f.o.r) pursuant to s. 15(a) of the C.H.R.A. The general approach and rule of law pertaining to the establishment of a b.f.o.r. has unquestionably been articulated in the decision of Ontario Human Rights Commission v Etobicoke [1982] 1 S.C.R. p. 202 and at p. 208 McIntyre J. states the following:

"Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities.

Two questions must be considered by the Court. Firstly, what is a bona fide occupational qualification and requirement within s. 4(6) of the Code and, secondly, was it shown by the employer that the mandatory retirement provisions complained of could so qualify? In my opinion, there is no significant difference in the approaches taken by Professors Dunlop and McKay in this matter and I do not find any serious objection to their characterization of the subjective element of the test to be applied in answering the first question. To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

At p. 209 McIntyre J. states the following:

"In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a bona fide occupational qualification and requirement has been shown the board of inquiry and the court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large."

The facts of this case establish that both complainants at the time of their applications were experienced contact lens wearers. It is not in dispute that their corrected visual acuity by either glasses or contact lenses is 20/20. In the case of Cremona, he of course had experience as a flight attendant and at

the time of these proceedings was employed by Air Canada as a flight attendant. We find as a fact that both complainants were experienced contact lens wearers and had not suffered any significant down time. We further find that in the case of Cremona he has during his employment as a flight attendant been able to function adequately to the standards prescribed by the airlines that provided employment for him. No evidence was called by the respondent Wardair to dispute in any way the evidence of Cremona that he was aware of the safety standards and evacuation procedures and had duly qualified and passed all such tests and had functioned adequately on a daily work basis within the environment of a flight attendant. We accept his evidence as he testified that he has not encountered any significant difficulty with performing duties of a flight attendant.

The main thrust of the respondents' case evolved around demonstrating that the standards set by them were reasonably necessary to assure efficient and safe performance of the job without endangering the general public. Both respondents testified that they are safety oriented and maintained very high standards.

It is not in dispute by all of the experts called for both complainants and the respondents that there are no minimum visual acuity standards for flight attendants within the air industry of Canada or the United States. None of the regulatory bodies such as the Department of Transport (D.O.T.), the Air Transport Association of Canada (A.T.A.C.), the International Civil Aviation Organization (I.C.A.C.) and the Federal Aviation Agency (F.A.A.) in the United States in any way prescribe minimum

acuity standards for flight attendants. These are the main regulatory

agencies established to ensure that adequate standards prevail within the airline industry to ensure amongst other things the safety of the general public utilizing air transportation. Indeed, the evidence of Mr. Bolton, Mr. Stewart, Mr. Triolaire, Mr. Gibson and Mr. Da Silva all clearly indicated that the safety standards relating to air safety and emergency evacuation were prescribed and approved by the Department of Transportation. This Tribunal concludes and finds as a fact that minimum visual acuity standards for flight attendants both in the United States and Canada have either been overlooked or found to be not of sufficient importance or concern insofar as the safety of the general public.

The respondents have taken the position that simply because minimum standards are not regulated should not be a reason for setting standards and the medical evidence called by both respondents through Dr. McFadden and Dr. Keeney was to the effect that 20/100 was a reasonable standard for flight attendants. The evidence, however, establishes that both in the United States and Canada the minimum visual acuity standard for an airline pilot is 20/200.Indeed, Dr. Keeney testified that there are fully licenced commercial airline pilots flying commercial airplanes with only one eye. The uncorrected visual acuity of Tina (Hubbert) Radford is 20/200 which means she could successfully meet the standards for an airline pilot in Canada but not according to the respondents meet their standards for flight attendants.

It should be noted that commercial airline pilots are required to have a medical examination, including visual acuity tests at least once a year. The respondents do not presently have

a requirement for a re-testing on an annual basis the visual acuity of flight attendants. This Tribunal can only conclude that visual acuity standards are an important safety factor when considering hiring of a flight attendant but such standards appear to be unimportant to maintain once employment is secured. Indeed, Mr. Stewart testifying for Wardair indicated that he had been employed as a flight attendant for over ten years without any form of retesting for his visual acuity.

There appears to be little doubt that the technology surrounding the use particularly of soft contact lenses has changed remarkably in the

last decade. Both complainants testified as to their success in wearing contact lenses. The complainant Radford had been involved in a motor vehicle accident when she was struck by a car as a pedestrian and thrown several feet on to a traffic median. Her contact lenses remained intact.

The complainant Cremona testified as to his success with wearing contact lenses without significant down time.

In order to establish the reasonableness of the minimum standards of the respondents, the respondents each led evidence designed to demonstrate the following:

A. The safety concern of dislodging glasses or contact lenses;

B. The safety concern for the general public in the event of an airplane crash resulting in the dislodgement of glasses or contact lenses of a flight attendant with less than their minimum standard;

C. Down time which arises from use of contact lenses having regard to the environment of an airplane above ground level.

The Tribunal is not satisfied on the balance of probabilities that the issue of dislodgement of glasses and in particular contact lenses was sufficiently proven in order to justify the minimum visual acuity standards of the respondents. Indeed, the studies filed both by the complainants and the respondents and in particular Exhibit HR-4 appear to dispel considerably the theory that contact lenses are easily dislodged under extreme conditions. Further, there is testimony that athletes wearing contact lenses successfully participate in contact sports such as football and hockey.

Although the evidence contained in the air crash video tapes emphatically emphasizes the need for safety in the air industry, it was of little assistance in establishing any factual basis for a concern about dislodgement of contact lenses. In the Aloha crash, one flight attendant was a contact lens wearer. The respondents asked this Tribunal to assume that because a crash occurs it must reasonably infer that dislodgement of contact lenses will occur and if minimal visual acuity standards are not maintained, the flight attendant will jeopardize the safety of passengers in the event of an evacuation. We are not satisfied that the evidence of dislodgement sufficiently satisfies this Tribunal on the balance of probabilities that such conclusion necessarily follows. The documentary studies filed show that with respect to the airplane cabin environment

contact lenses at different levels of the atmosphere are not subject to substantial visual distortion nor are they necessarily affected by such factors as smoke, air conditioning and oxygen deficiency.

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We therefore conclude from the facts on the issue of bona fide occupational requirement the following:

A. There is no existing regulatory standards for minimum visual acuity of flight attendants;

B. The only existing minimum visual acuity standards of significance to these proceedings set by the Department of Transport is that for an airline pilot which is 20/200 uncorrected;

C. The complainants Radford and Cremona are both successful contact lens wearers. In the case of Cremona he has a successful job experience record as a flight attendant.

D. The evidence in this proceeding on the balance of probabilities does not establish any satisfactory basis for the rejection of the use of contact lenses on the questions of dislodgement or safety and cabin environment.

After weighing all of the evidence, this Tribunal finds that on a balance of probabilities the respondents have not discharged the onus of proving their minimum visual acuity standards are a bona fide occupational requirement pursuant to s. 15(a) of the C.H.R.A.

One further issue remains to be discussed in the context of the b.f.o.r. defence raised by the respondents. That is the further onus on the respondents of showing that they could not accommodate the complainants without undue hardship.

It has now been established in a series of cases as decided by the Supreme Court of Canada that such a duty is an additional consideration and onus placed upon the respondent

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employer when endeavouring to establish the b.f.o.r. within s. 15(a) of the C.H.R.A.

In the decision of Commission des droits de la personne du Quebec v Town of Brossard and Line Laurin [1988] 2 R.C.S. p. 312, Beetz J. states as follows:

"2. Is the rule properly designed to ensure the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer uses to test for the presence of the requirement for the employment in question."

In the decision of Saskatchewan Human Rights Commission v Saskatoon (City) [1989] 2 S.C.R. p. 1297, the court stated:

"While it is not an absolute requirement that employees be individually tested, an employer may not satisfy the burden of proof of establishing the reasonableness of the requirement if he fails to deal satisfactorily with the question as to why it was not possible to deal with the employees on an individual basis by 'inter alia' individual testing. If there is a practical alternative to the adoption of discriminatory rule, this may lead to a determination that the employer did not act reasonably in not adopting it."

In the case of Alberta Human Rights Commission v Central Alberta Dairy Pool S.C.R. p. 9 (Judgment released September 13th, 1990), Sopinka J. states the following:

"An employer who wishes to avail himself of a general rule having a discriminatory effect on the basis of religion, must show that the impact on religious practices of those subject to the rule was considered, and that there was no reasonable alternative short of causing undue hardship to the employer. What is reasonable in these terms is a question of fact. If the employer fails to provide an explanation as to why individual accommodation cannot be accomplished without undue hardship, this will ordinarily result in a finding that the duty to accommodate has not been discharged and that the b.f.o.q. has not been established."

Again at p. 11 of the decision, Sopinka J. states:

"As indicated above the employer must establish that it could not accommodate the appellant without undue hardship."

In this particular case, the complainant Cremona did not

proceed beyond the application stage with the respondent Wardair. With respect to the complainant Radford, she received an opportunity for an interview which was terminated abruptly when the interviewer examined her visual acuity test. It is the common evidence from both respondents that neither of the complainants' applications were seriously considered once they did not meet the visual acuity standards and both complainants were advised in writing to this effect. There was no evidence led as to any particular accommodation of either of these complainants through individual testing, interviews, medical examinations or any other form of employment screening. We find on the authority of the cases decided in the Supreme Court of Canada that there is an onus on the respondents to demonstrate to the satisfaction of this Tribunal that they could not accommodate the complainants without undue hardship. We cannot find upon a review of the evidence that there was any evidence led to demonstrate that the respondents had in any way discharged this onus.

In the result, the Tribunal finds that the complainants have satisfactorily established a case of discrimination and the respondents have failed to discharge the onus under s. 15(a) of the C.H.R.A. as outlined above. There now remains in this hearing the question of remedies. It was agreed by all counsel at the commencement of these proceedings that we would proceed to hear evidence on the question of discrimination and in the event such a finding was made that a Tribunal would convene to deal with the question of remedies. Having arrived at this point, by reason of our decision, the matter will now be referred back to the Registrar to convene a Tribunal for the balance of the hearing.

Dated this 20th day of March, 1991.

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Carl E. Fleck Q.C., Chairman

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Dudley Campbell, Member

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Judith Dohnberg, Member