

T. D. 10/ 88 DECISION RENDERED ON JUNE 8, 1988

THE CANADIAN HUMAN RIGHTS ACT (S. C. 1976- 1977, c. 33 as amended)

HUMAN RIGHTS TRIBUNAL

BEFORE: PERRY W. SCHULMAN, Q. C.

BETWEEN:

EDWARD H. RINN and KEN D. RUSSELL, Complainants, - and KEEWATIN AIR LIMITED,
Respondent.

DECISION OF TRIBUNAL

APPEARANCES: James Hendry and Michael Traynor Robin Kersey Counsel for Edward R.
Rinn Counsel for the Respondent and Ken D. Russell and the Canadian Human Rights
Comission

DATE AND PLACE OF HEARING: January 25- 29, 1988 in Winnipeg, Manitoba

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- 2 INTRODUCTION

On January 21, 1988 I was appointed as a Human Rights Tribunal (Exhibit T- 1) pursuant to subsection 39(1.1) of the Canadian Human Rights Act. The purpose of the appointment was to inquire into the complaints of Edward H. Rinn dated January 16, 1984 (Exhibit C- 3) as amended November 12, 1985 (Exhibit C- 4) and of Ken D. Russell dated February 21, 1984 (Exhibit C- 1)

as amended November 13, 1985 (Exhibit C- 2) against Keewatin Air Limited alleging discrimination in employment on the grounds of marital status and family status.

Pursuant to section 32(4) of the Canadian Human Rights Act the complaints were heard together.

At the outset Counsel for the Respondent moved to quash exhibits C- 2 and C- 4 on the ground of lack of timeliness of the amended complaints. It will be noticed that in each instance the facts set out in the initial complaint are identical to those set out in the amended complaint. The only difference between the complaint and amendment is that the complaint specifies a ground from s. 3 of the Human Rights Act of "marital status", whereas the amended pleading recites, "marital status and family status."

After hearing argument from both sides on the preliminary objection I reserved decision. The hearing proceeded because, whatever the result of the motion, the exhibits C- 1 and C- 3 would have to be heard. The next day just before Counsel

> - 3 for the Complainants closed his clients' case I rejected the preliminary objection and informed Counsel for the Respondent that his client would have to answer the amended complaints. I said that I would provide reasons for my ruling later. After all the evidence was in, Counsel for the Respondent said that after considering the matter further he withdraws his preliminary objection. The need to provide reasons was therefore obviated.

Six witnesses were called at the hearing. Edward Rinn, Andrew Grant and Ken Russell were called by Counsel for the Complainants. Judy Saxby, Frank Robert May and Bernie Gloyn were called by Counsel for the Respondent.

Mr. Rinn was employed by the Respondent as a pilot between June 15 to December 15, 1982 and March 29 to December 13, 1983 (in addition to periods of service June 1, 1976 to September 1, 1977 and April 24 to May

18, 1978). Mr. Russell was employed by the Respondent as a pilot between November 15, 1981 and December 13, 1983. The employment of both was terminated at the same time by virtue of the handing to them of Exhibits C- 12 and C- 21 respectively. These exhibits recite as the reason for the termination

"As you are all too aware our revenues are down significantly due to the present economic restraints and I find this unfortunate action unavoidable."

The issue before me on the question of liability is whether this is the sole reason for termination or whether one of the contributing causes was the marital or family status of one or both Complainants.

> - 4 I have applied the following principles in arriving at my decision: 1. The onus of proof lies on the Complainants. 2. The burden of proof is on a balance of probabilities. 3. In order to

sustain the complaint it need only be proved that one of the reasons why a person's employment was terminated relates to the fact that he was a married person or had a family.

4. It is sufficient for a Complainant to prove that the termination took place because of the particular person to whom the Complainant was married.

5. In assessing credibility I need not accept the whole of the evidence of a witness, but may accept one part and reject another part.

6. In assessing the conduct of the Respondent as it relates to the events of December 1983, care should be taken to recognize the dangers of finding fault against the Respondent with the benefit of hindsight.

I choose to summarize the situation which confronted the parties in December 1983 in the following order:

(a) By giving an overview of the operation of the Company; (b) By reviewing the evidence of the Complainant Rinn; (c) By reviewing the evidence of the Complainant Russell; (d) By reviewing the evidence of the witness Grant; (e) By reviewing the evidence of Ms. Saxby; (f) By reviewing the evidence of Mr. May. > - 5 KEEWATIN AIR LIMITED

The Company has been appropriately described by its counsel as

"the airline equivalent of a mom and pop grocery". The Company was incorporated as a federal corporation in 1970. Its shareholders are Robert May, his wife Ms. Saxby and Mr. May's parents. The directors are Mr. May, Ms. Saxby and Mr. May's father. The Company has been funded by monies advanced by Mr. May's parents and by means of a series of bank loans. Initially it operated from Llford, Manitoba by means of two single engine Cessna 185 aircraft. In about 1974 the Company became active in Rankin Inlet, which is located about 930 miles north of Winnipeg. At first the Company was granted a group A classification by the Canadian Transport Commission and it did what Mr. May described as "off- strip" work. By that he meant during the summer time it serviced areas such as the fish research project and did some camp supply for exploration in a uranium exploration centre. The Company was also engaged by Bell Telephone and the Northern Canada Power Commission to move personnel about. In 1979 the Company was granted a group B classification. At that point it disposed of its Cessna 185 and acquired a DeHaviland Beaver aircraft and continued to do the same work.

Commencing July 1982 the Company entered into an arrangement with one of its pilots, Jim Smith, to operate a Beech 18 aircraft, which he was purchasing. The Company also acquired and put into service in August 1982 a Turbine engine

> - 6 plane, known as the Tradewind, which modernized the Company's operations and permitted it to offer to its customers safer aircraft and year round service. The Beech 18 continued to be operated until October 1983. In the meantime a second Turbine engine plane was acquired by the Company and commencing August 1983 the Company had the use of the plane known as the Westwind.

Austin Airways was bringing freight to Rankin Inlet for the Hudson Bay Company for distribution to its far northern outlets. Commencing the summer of 1983 Keewatin Airlines acquired the business of carrying such freight from Rankin Inlet to other places in the Keewatin area for the Bay. During 1982 and 1983 Keewatin's revenue was generated 90% from government business. Among the government business was the operation of a 24 hour medical evacuation service for the transport of seriously injured or seriously ill persons from any one of seven Keewatin communities to hospitals in Churchill, Thompson or Winnipeg.

In the summer of 1982 Keewatin owned two residences at Rankin Inlet and in addition, a hangar. Jim Smith who had been employed as a pilot with the Company since June of 1978 and his wife, Linda, who had been employed by the Company as a dispatcher since March of 1982, occupied one residence. Immediately adjacent to the Smith residence was the newly built duplex, which had not been completed. When Mr. Rinn was hired the lower level of the duplex was not completed in that the plumbing was not hooked up for flush type toilets. Nor were the kitchen cupboards finished. There were also building materials

> - 7 left on the site. However, a bedroom in the lower level was finished and he was able to move into it. A month or two later the lower level was

finished. In the fall of 1982 a plumber hooked up a Utilidoor system for the plumbing. That left the interior of the duplex finished, but exterior vinyl siding was required. The duplex was 1000 square feet, half on each level. There were two bedrooms in the lower level and three bedrooms in the second floor.

Physical changes were also made to the hangar in 1983. One contractor was engaged to install insulation and aluminum siding on the inside of the hangar. Next, an electrician was engaged to install conduit wiring on top of the aluminum siding in the interior of the hangar. Some local carpenters were engaged to build a walk-in freezer and a refrigeration unit to assist in the loading and unloading of goods which were earmarked for the Bay and brought in by Austin Airways. Also an addition was put on the side of the hangar in which a boiler was installed. Another tradesman was brought in from Winnipeg to install a hot water heating system for the hangar. A further addition was built to provide a pilot's waiting room and an office for the dispatcher at the airport.

During 1982 and 1983 the following is the complement of pilots employed by the Company. Mr. Smith and Mr. Russell were employed throughout the period. Mr. Rinn was employed from June 1982 to December 1983 except for the period when he was laid off from December 1982 until March 1983. Wes White was

> - 8 engaged as a pilot in October 1983. He assumed the position of Chief Pilot in December 1983. More will be said about this appointment later. Other pilots during this two year period were Greg Lamb - March 19th, 1982 to April 11th, 1982, Trevor Kilbourn - April 15th, 1982 to August 15th, 1982, Simon Kugak - April 21, 1982 to May 2, 1982, Mike Gatey - July 14th, 1982 to August 18th, 1982, Dave Lemoine - June 20th, 1983 to September 10th, 1983.

Financial statements for Keewatin for 1982 and 1983 were filed as exhibit R- 5. More will be said later about the financial position of the Company when I review the evidence of Mr. May and Ms. Saxby. Financial information provided also includes documents relating to aircraft hours flown in the respective planes for 1981, 1982 and 1983 and commissions paid to pilots during these years amongst others.

EDWARD H. RINN Mr. Rinn is 34 years old and is presently employed as the Flight Service Station Specialist with Transport Canada. Mr. Rinn had worked for Keewatin at Llford from June 1, 1976 to September 21, 1977 and at Rankin Inlet from April 24th, 1978 until May 18th, 1978. In June of 1982 Mr. Rinn was married and living with his wife in Whitehorse. Having recently been laid off from his job with Lister Outdoor Sports as an outboard motor mechanic, Mr. Rinn telephoned Mr. May regarding chances of

> - 9 employment with Keewatin. Mr. Rinn told Mr. May that he would be interested in taking either summer employment with Keewatin or a permanent position, in which case he would relocate his wife to Rankin Inlet. Mr.

May offered Mr. Rinn the long term position and told him that Keewatin provided as a term of employment, married accommodation at its duplex in Rankin Inlet. Mr. Rinn moved to Rankin by himself and his wife followed about a month later. He moved into the bedroom in the unfinished basement of the duplex. His wife followed and at first they shared a fridge and stove with the occupant of the upstairs suite, Ken Russell and his fiancée, because the kitchen in the lower unit was not yet finished. The upstairs occupant shared the bathroom facility which was provided in the basement. Before long the Company provided the Rinn's with a stove and fridge and they acquired some furniture from friends in Rankin Inlet. Mr. Rinn arrived in Rankin Inlet with a senior commercial pilot's licence and over 3000 hours of flight time. During 1982 Mr. Rinn flew as co-pilot on the Tradewind and captain on the DeHaviland Beaver aircraft.

During the summer of 1982 numerous people arrived from the south to do renovations and construction on various Keewatin projects. Maintenance engineers also arrived from Winnipeg to do work on the aircraft and from time to time they would use the second bedroom in the basement of the duplex. Mr. May approached Mrs. Rinn to provide meals for these visitors. Mr. May said that Keewatin would supply the food and would pay

> - 10 Mrs. Rinn for cooking.

Mr. Rinn was laid off by Keewatin from December 1982 until March 1983. Mrs. Rinn was pregnant at the time and her due date was the middle of February 1983. Their child was born February 17th, 1983 and he was recalled as of March 29th, 1983.

In 1982 Mr. Rinn and Mr. Russell underwent training in Winnipeg on the Tradewind. In 1983 Mr. Rinn served as co-pilot on the Tradewind and captain on the DeHaviland Beaver as he had done in 1982. He was in Winnipeg for some additional training in 1983. The difficulties which he encountered are outlined at pages 38 to 42 of volume 1 of the transcript. In August 1983 Mr. Russell was on leave for the purpose of getting married, so Mr. Rinn served as captain on the Tradewind.

Mrs. Rinn again cooked for the Company visitors during one period in 1983. The arrangement which was made with Mr. May, was similar to the arrangement which had been made the year before. Subsequently Mrs. Rinn acquired a term position with the government, and when asked to provide meals for visitors later in the year, she declined the request. In 1983 the second bedroom in the lower suite was required for the purpose of Mr. Rinn's child. All visitors that year were accommodated on the second floor of the duplex.

On December 12th, 1983 Mr. May handed to Mr. Rinn letter of termination of employment which is exhibit C- 12. The reason given has been recited by me on page 3 of these reasons. Mr. Rinn said that Mr. May had delivered a like letter to Mr.

> - 11 Russell. Mr. May said that he had made the decision after coming up and looking at the overall operation. He had concluded that the revenues were

down to the point "that he would have to let both of us go." Mr. Rinn stated at page 64, lines 26 to page 65, line 7,

"Bob May called Ken Russell and myself upstairs in the duplex and informed us that due to the economic slow down in the industry that he was forced to lay us off. And I said, 'I see, when is our call back date', because with a lay- off one normally associates that There'll be a call back period. And he said there will be no call back, no idea how long these economic conditions would stay the same and he might have to mothball the airplane."

Mr. Rinn said that he is unaware of any complaints having been directed to him as to his performance with the Company. To attest to the adequacy of his performance he secured and filed a letter of reference from the Zone Nursing Officer, Medical Services, Keewatin Zone, Churchill, Manitoba. (Exhibit C- 14).

At the time of termination Mr. May told Mr. Rinn and Mr. Russell that they could still fly with the Company until the end of the month. However, if they were busy packing they would not be expected to fly, but that they would have an opportunity to earn some additional revenues. Their salary would be continued until the end of the month. The next day Mr. May asked Mr. Rinn to fly on a search flight. There were some Inuit people lost in the land near Eskimo Point. Mr. Rinn, like Mr. Russell, did the flight with the R. C. M. P. A day or two later Mr. White approached Mr. Rinn to fly on the Tradewind and Mr.

> - 12 Rinn declined. Mr. White stated "Well we need somebody." Mr. Rinn replied, "well you won't need me in two weeks from now, you don't need me now." (page 68) Mr. White left and returned later saying that he would pay Mr. Rinn captain's wages to fly as co- pilot on the Medivac and Mr. Rinn declined again. At this time Mr. Smith was in Winnipeg with the Westwind. Medical Services' policy is that on a medical evacuation, a minimum of two pilots are required. If it is known that there are not two pilots available, a different airline will be called.

Mr. May left Rankin Inlet on or about December 13th, 1983. On December 14th or December 15th, Mr. Rinn went upstairs in the duplex and noticed some documents. He said:

"... there was some pilot resumes, sort of caught my eye because I'd been just let go and I found it suspicious that someone would be going through resumes when there was a shortage of work... there was three separate piles, in each pile there was a yellow piece of that paper that, the sticky back. One pile said 'yes', one pile said 'no' and the other pile said 'possible'. And in the pile, the 'yes' pile, all the marital status of the applicants was circled, they all happened to be single, and the other thing circled on the application was the number of hours."

(pages 70 to 71) Mr. Russell and Mr. White were residing on the second floor of the duplex at the time. Neither of them was present when Mr. Rinn examined the documents.

On January 16th, 1984 Mr. Rinn filed a complaint with the Canadian Human Rights Commission (exhibit 3).

> - 13 In cross-examination counsel for Keewatin established that when Mr. Rinn saw the three piles of resumes in December 1983 he did not go through the individual resumes in the "maybe" and "no" pile. He saw the top of each of those piles and said that there was a sticker over the top of each pile saying either, "maybe", or "no". What he did was look at the first page of the six to ten resumes which comprised the "yes" pile. He said that he did not mention the pile to Mr. White or Mr. May or Ms. Saxby, although he said that he may have mentioned it to Jim Smith.

It was suggested to Mr. Rinn in cross-examination that after he took part in the December 1983 search with the R. C. M. P. he had abandoned the aircraft, left the controls unlocked, left the engine covers off, did not lock the props and did not even plug in the aircraft. The same suggestion was made to Mr. Russell. Both Mr. Rinn and Mr. Russell denied the allegation. No evidence was led by Keewatin to support this strong allegation.

KENNETH RUSSELL Mr. Russell is 29 years of age and is employed by Air Canada as a Second Officer. When he started to work for Keewatin in November 1981 he had approximately 1900 hours and held a senior commercial licence. In February 1982 he applied for and received his airline transport licence. Mr. Russell

> - 14 was single when hired. At that time Keewatin was renting a house for its staff from Northern Canada Power Commission. At the time the duplex was under construction and he moved into the second floor when it was ready. Mr. Russell was engaged to be married in August 1982. His fiancée acquired a position as a teacher in the school in Rankin Inlet and lived with Mr. Russell on the second floor of the duplex. While the electrical contractor and his helper were in Rankin Inlet during the summer of 1982 they stayed on the second floor of the duplex, while the Russells were there. There were other visitors too. At times Mrs. Rinn cooked for the visitors and at times Mrs. Russell cooked for the visitors. According to Mr. Russell, "It was always my wife and I after they (the visitors) left, and we always ended up cleaning the bathroom and changing the sheets on the beds. She would do the laundry and cleaning up that had to do. So, basically it was us with very little help from any of the other staff in that regard." (page 213).

The Russells were married on August 13, 1983. They were away from Rankin Inlet for two weeks at the time. In October 1983 Mr. White was engaged as a pilot. Insofar as Mr. Russell was

aware Mr. White was single. Mr. White lived on the second floor of the duplex with the Russells and used one of the bedrooms. Mr. Russell informed us that the contractors came up from the south from time to time. They stayed mainly on the second floor of the duplex. They came on short notice, "never more than a week, I

don't think." (page 227). In the summer > - 15 and fall of 1983 they were coming up

"Very regularly. At one point, we had six people there; two in one bedroom, three in the bunk room with a mattress on the floor. Three guys were squashed in there and Mr. May was on the couch, and it was steady, with two fellows doing the siding on the house, and the other workers were quite slow workers. They were there for a long time, and also in that period were maintenance people coming and going for the aircraft." (page 227).

During this period, as earlier, "people came and went and we would, you know, wash the sheets, put new sheets on the bed, vacuum as required, and the place was always kept very clean. The one time when we had so many up there, we were forced to shut the bedroom door, open the back exit and just let it air out for a couple of days because of the smell that was in there." (page 228).

He said that Mr. May came to Rankin Inlet as required. He would stay anywhere from three days to a week at a time and do that maybe once every month. He would also stay on the second floor of the duplex. When asked by Mr. Russell's counsel what effect the coming and going of transient persons had on him and his wife, he replied,

"No effect between us, or anything like that. The biggest problem we thought was that, you know, there was such a grey area as to how responsibilities on these people came up; were we supposed to look after them, they didn't do too much to look after themselves, really.

It also seemed somewhat unfair that they all stayed with us, rather than-- you know, what I thought could have been done was possibly share the load a bit amongst the

> - 16 other downstairs or at Jim and Linda's house. At the time when we had so many up there, when we were out one day, Linda had brought over a mattress and just left it in the other room, and said, that's where the next guy is staying because we've had enough, and they weren't putting people up any more. They had done it for long enough, so, I just thought that was a little unfair." (pages 228 to 229).

Mr. Russell stated that he brought up the subject to Mr. May on one or two occasions.

"Again, I saw it as a problem, and is there anything that could be done about it, that's all. I didn't get a whole lot of response, you know, I asked if there was any solution he could think of and basically, his response was, can you find government housing, with Jane being a teacher, can you move out?" (page 229)

Mr. Russell said that at the time that Jane, his wife, was hired, she was advised that there was no housing available for her and she said that was fine because we had an arrangement at Keewatin

that was satisfactory. When this problem came up, Mr. Russell said that he and his wife enquired again and were told once again that nothing was available.

On December 12th, 1983 Mr. Russell received from Mr. May a notice of termination identical to the one which was received by Mr. Rinn. (exhibit C- 21). Mr. Russell said that he was very surprised on receiving the notice. He remembers Mr. Rinn asking about a recall date and Mr. May replying "no there would not." Mr. Russell said that he had never received any complaints about his performance as a pilot and he produced letters of reference. (exhibit C- 23 and C- 24).
Counsel for

> - 17 Keewatin acknowledged on behalf of his client "that Mr. Russell was at all times during his employment with Keewatin Air, an excellent pilot." (page 233). Mr. Russell was not aware at the time of the presence of the resumes on the second floor of the duplex. The day after his employment was terminated he, like Mr. Rinn, was asked to do a search flight for the R. C. M. P. He took part in that. After that he spoke to Linda Smith and told her that he had been laid off or terminated, that flying "was our option, so I said, please don't call me in the middle of the night for Medivacs." (page 236). As stated, Mr. Russell denied leaving the aircraft unattended after completing the search with the R. C. M. P.

ANDREW GRANT Andrew Grant is employed by Air Ontario as a pilot. The records of Keewatin show that he worked for Keewatin as a co-pilot between February 1, 1984 and May 1, 1984 at which time he quit. (exhibit R- 3). Mr. Grant told us that in the early part of the first week of January 1984 he received a telephone call from one Wes White, who identified himself as a Chief Pilot with Keewatin Air. Mr. White said that he was looking for pilots and was tracking down pilots from resumes previously submitted to Keewatin. About a year before that Mr. Grant had submitted a resume to Keewatin, without being solicited to do so. According to Mr. Grant, Mr. White wanted to know what

> - 18 Mr. Grant was doing and how readily he might be available to take employment with Keewatin. Mr. White said that he was looking for a pilot with between 1200 and 1500 hours. He said that he had had a multi-engine instrument rating that was about to lapse. Mr. Grant asked for information about the Company, in particular as to where their head office and what contact, if any, the Company has with Winnipeg. The answer to that question was of interest to Mr. Grant because he had a girlfriend in Winnipeg. He told us:

"I stated that that would be really convenient because if we were down there with the airplane, I'd be able to visit my girlfriend.

I guess it wasn't the thing to say on the phone because I was

asked right away, 'well, you're not thinking of getting married, are you, because we're looking for single pilots. ' Although I was, I said I wasn't thinking of getting married because I did kind of want to get the job. So, anyway, I just, that just went by and basically, the next thing that was talked about was an interview date and how soon I might be able to get down." (Underlining is mine) (page 182)

The interview took place in Winnipeg on January 6, 1984 and Mr. Grant was interviewed by Mr. May and Mr. White at the Company's head office in Winnipeg. Mr. Grant told us that the discussion touched on qualifications and his expectations as far as the job went. For his part he was looking for good employment. He was looking to gain experience and he did not want to have to keep moving around. He continued

"We discussed the fact that I had to get my own I. F. R. renewal, and I had to have it soon because they needed a pilot right

> - 19 away. They were--... looking for a pilot right away. They were a little short, I guess, I don't know... The subject of marital status-- girlfriend, accommodation in Winnipeg. I remember previously on the telephone that was discussed, it would be in my favour that I actually had a place to stay in Winnipeg, so that would save accommodation, you know, I wouldn't have to be put up when I was down there ... Marital status wasn't delved too greatly in any detail at that point. It was just stated that I was single, that they were looking for single pilots and that married pilots in the past hadn't worked out." (Underlining is mine.) (page 184).

Mr. Grant was told that he would have accommodation in the duplex. He was engaged at a straight salary of \$1,200.00 per month. That salary was slightly less than he had been earning at Big Trout Air Services. Mr. Grant told us that while he was at Rankin Inlet Mr. White did not have any dependants with him. Three other pilots were engaged by Keewatin during that period of time and none of them had dependants with them.

Mr. Grant flew out to Rankin Inlet in order to assume his job and Mr. White was the pilot. He told us that it was made pretty clear to himself within an hour of meeting Wes White that he was replacing someone. He said that Mr. White warned him of the reception which he might receive at Rankin Inlet,

"That it would probably be an unwelcome one. That there were a lot of politics there. It was a small community, people knew what was going on, everybody knew everybody else's business. That there had been a problem with a couple of pilots that were married, you know, and it was elected that they get rid of them; hire guys who were single because of the accommodation, the accommodation problem.

> - 20 -

You know, I was supposed to ignore whatever was said to me regarding, well regarding Wes White himself, you know, and just about anything like that, I was just supposed to disregard it." (page 195) (Underlining is mine).

Mr. Grant also told us that within the first few weeks of his employment Mr. May came to Rankin Inlet from Winnipeg. Mr. Grant had in the meantime become engaged and he told us that he asked Mr. May if his fiancée

"might be able to come up and visit at some point during, you know, during the next while that I was there, and the answer was in the affirmative, and it was also stated to me in no uncertain

terms at that point that I shouldn't even think of getting married while I was in the employ of Keewatin Air because they had had problems in the past, and they couldn't accommodate a married pilot." (page 193) (Underlining is mine).

Mr. Grant told us in cross-examination that his relationship with Mr. White started to be a bad one within the last couple of weeks of his employment. He said that he was not given any indication of displeasure with the services. At one point his fiancée came to visit at Rankin Inlet and stayed in the staff house for two weeks. She enjoyed living conditions at Rankin Inlet. He acknowledged that Mr. May had said that his fiancée could ride up on the Keewatin aircraft and stay at the staff house.

Counsel for Keewatin suggested to Mr. Grant that at the interview Mr. May had said that he could not provide a separate room for Mr. Grant's fiancée, if she decided to live

> - 21 in Rankin. Mr. Grant denied the suggestion. Counsel also suggested that Mr. May had said to Mr. Grant

"I put it to you that he said these precise words, 'don't even ask if you can rent an additional room, we will need that space'",

a suggestion which was denied by Mr. Grant. Counsel for Keewatin then alleged

"I understand that he did tell you that there had been problems previously with Jane Russell. An apparent misunderstanding as to the fact that the duplex was a staff house, and it was not private accommodation." (page 202).

Mr. Grant said that he did not recall Mrs. Russell being mentioned at any time by Mr. May. Neither party led evidence of any kind of confrontation between Mr. May and either Mrs. Russell or Mrs. Rinn concerning accommodations. Mr. Grant also denied that he had quit the job in anticipation of being fired. He said

"well, no, no, I didn't understand that. No, I had heard something about a second chance, but I didn't really feel I needed one. I knew what needed to do." (page 205).

Mr. Grant also denied the suggestion which was made by counsel for Keewatin

"You don't recall telling Mr. May that in view of your girlfriend's religious beliefs you did not intend to cohabit prior to marriage?" (page 206).

> - 22 JUDY SAXBY

I now summarize the evidence which was adduced on the issue of liability on behalf of the Company. Ms. Saxby produced and reviewed for us a number of financial records of the Company. She said inter alia,

"There was some serious concerns with the financial position of the company in 1983, particularly as it drew to a close." (page 311)

There had been several unexpected large expenditures from the cash flow including getting the Westwind aircraft on line. The cost of doing so was more than triple what had been anticipated for the cost. She added that some of the revenue that the Company had hoped to have coming in was not materializing. She said

"Basically, the company had taken a gigantic step to get into turbine aircraft. The costs of turbine aircraft are tremendous, a lot higher than they are with piston aircraft, particularly engines." (page 311).

"We were pretty well fully extended at the bank, and up until this time whenever we've had a problem, we've been able to draw on Bob's folks for funding, but we were past that at this point, way past that.

Revenues were not coming in, I think I've said that. That the costs were going up and the profit for the company was dramatically down by the end of the year to what it had been previously. And quite frankly we were scared, very scared." (page 312).

Ms. Saxby told us that her husband had gone to Pelly Bay and Spence Bay in December 1983 to see what the possibilities

> - 23 were for the aircraft in the next few months, for work. "We were desperately looking for enough work to keep the Company going is what it boiled down to." (page 315).

Referring to the Company's financial statement (exhibit R- 5), Ms. Saxby said that the Company was making a profit but a very small profit compared to what it was the year before. The

concern developed from the fact that in 1983 the Company had taken quite a different approach to the market. It was now flying turbine aircraft which are much more expensive to maintain than piston aircraft. A turbine engine costs anywhere from \$80,000.00 to \$120,000.00 to replace, whereas a piston engine costs about \$8,000.00 to replace. When the November 30th statement was prepared the Company was having engine problems. "We were looking at the winter coming up, we had no reason to suspect there would be anymore flying in January, February, March of 1984 than we had done in 1983, which was a minimal amount of flying." (pages 350).

Ms. Saxby also acknowledged in cross- examination having a conversation in the presence of a Canadian Human Rights Commission Investigator in which the question of the circling or not circling of certain resumes was discussed. She said to the investigator that on at least one occasion she had circled marital status on an application because she recalled that an individual had lied to her about whether he was or was not married. Her explanation for circling the marital status on that occasion was that the applicant had been dishonest.

> - 24 FRANK ROBERT MAY

Mr. May provided details of the financial development of the Company during 1982 and 1983. He told us that in 1982 the Company purchased the Westwind aircraft. The bill of sale is dated December 9th, 1982 (exhibit R- 8) and the consideration was \$124,000.00, Canadian. It was bought "at the right price" from the Receiver of a financially troubled airline.

"... it was evident from their maintenance records to let maintenance slip first. So it was ratty, I think, might be the best description of it.

But it was, it had possibilities to rejuvenate and so we purchased it." (page 366).

The Westwind did not go into service until August of 1983. The Company elected to do some modifications on the airplane. The aircraft had a low and small cabin. The Company contracted with a shop in Cleveland to take the top off the airplane and raise the whole cabin approximately 10 inches in order to increase the freight capacity of it. The Company wanted it repainted, a different heating system installed and a different keel system installed. Unforeseen problems developed.

"when we lifted up the freight floor, we discovered that the airplane had essentially been butchered with the heating system that had been put into it. And it required ... we were farther behind than when we started, because we had to re- engineer the whole floor. We had to get an aeronautical engineer to come and re- design the whole floor of the airplane." (page 370).

Mr. May had been Chief Pilot of the Company and as

> - 25 the Company's operation expanded he considered it desirable to engage a Chief Pilot, rather than carry on with the duties which he felt less suited to carry on. With reference to Mr. Rinn's difficulties in performing, he acknowledged that the Company's training program was on an ad hoc basis and was insufficient.

Mr. May told us that Mr. White is married and his wife came to Rankin Inlet in August of 1984. He described the financial side of the Company as "pretty desperate." (page 377). He said that the maintenance cost on Jim Smith's Beech 18 were astronomical. He said that in the spring of 1983 the Company had to send the Tradewind down to Tuscon to Hamilton Aviation. The Company wanted to upgrade the engines from an older version of the PT6 to a little more modern engine and change the air intake system. The work should have been done in three weeks, but it took over two months. Revenues were severely interrupted.

"We had undertaken a rather ambitious construction program to try and improve our facilities. The costs were, in all cases, over- running. We were having a very difficult time with our bank. I've heard your review of the statements here and I think, I think that they tend to understate the panic that we felt." (page 378).

"As the year grew on, the situation deteriorated." (page 378 to 379).

The business of carrying freight for the Bay tailed off toward the end of 1983.

"I knew on a day- to- day basis what, you know, what we were doing; that is, I was in constant touch with our base. I knew what the revenues were. They were, they

> - 26 weren't really adequate for one airplane let alone two." (page 379).

As late as mid November 1983 the Company was not considering lay offs.

"We were looking to fix the problem, not get out of the business just at the moment. We were looking for solutions and while I was up there, looking for a solution, BLI, the Westwind, came back from a trip with an engine which had-- one propeller was basically uncontrollable, it was stiff. And I called our contract engineer in Winnipeg, that came up immediately, and confirmed my suspicions that we had a serious problem... the obvious thing was that the oil screen was full of metal. And it was obvious that there was internal damage." (page 379).

"... if you've got any kind of a problem, is to see if there's any metal there, and if there is it's-- it automatically, the airplane, is grounded for further investigation." (page 380).

The engineer who came to Rankin Inlet said that the Company would have to pull the engine off and get another one, but the plane could not fly. The engine had been previously overhauled by Aviall in Dallas. Mr. May phoned Aviall and told them that their engine had started making metal. Aviall said that the engine should be sent down and the Company would overhaul it. Mr. May asked for a warranty to cover the work. Aviall loaned Keewatin an engine on a rental basis. The retail value of such an engine is \$85,000.00 U. S. Mr. May shipped the defective engine to Aviall. After examining the engine Aviall denied coverage on the warranty, alleging that the engine had been improperly stored at some time because the propeller shaft bearing

> - 27 was rusty and that had probably caused a failure. The Company produced an estimate of \$90,000.00 U. S. to repair the engine. As Keewatin searched for various alternatives it continued to pay Aviall a rental fee of \$25.00 per hour and \$2,000.00 per month.

Mr. May went with Mr. Rinn and Mr. Russell to Pelly Bay and Spence Bay in December in an attempt to stir up new lines of business. At about that time he received information from Ms. Saxby as to the financial statistics for November and he concluded that "things were in a mess." He decided then that the Company would have to start laying people off. Hence, exhibit C- 12 and C21 were prepared in Winnipeg and flown out to Mr. May in Rankin Inlet. Of the meeting with Mr. Rinn and Mr. Russell, Mr. May stated:

"I just told them, as they were aware, the revenues were down and that I'd looked around and I couldn't see any solution and, unfortunately, I was going to have to let them go ... I suggested to them that since they were going to be paid until the end of the month, that even though the revenue was going to be pretty limited because Christmas time is traditionally a very, very slow time for our business there. Government people are on holidays or they're certainly not looking to go anywhere in the communities in case they get stuck over Christmas and that sort of thing, and so it's generally a very slow period ... Well, Ed asked if-- when they had to be out and I said there's just no urgency whatsoever. And he said, well Jocelyn, that's his wife, had a term

position with the government ... And I said, well fine, you know, there's no urgency so stay on until that jobs finished, you're welcome to stay there.

> - 28 -

Specifically with Ken, I didn't indicate to him that there was any urgency to leave, but it was a little different situation because he indicated that they were going out for holidays and they wouldn't be coming back. And I didn't offer them a place stay beyond-- I didn't tell them to get out, just felt that, for propriety sake, that they would probably prefer to find alternate accommodations for his wife." (pages 386 and 387).

"Now, I remember Ed asking me if this termination was permanent, and I said, yes, in your case you can consider it permanent." (page 388).

Mr. May stated "Well, we really didn't see much prospects for business picking up in 1984 and we were, we were out of sort of a mentality that we were looking to minimize our costs and weather the storm, if you like." (page 392).

He said that a decision was made to hire a pilot for the co-pilot position. It was thought that a young pilot might be hired at a fixed and lesser salary with the carrot being an opportunity to obtain experience on a multi-engine turbine plane. At about the same time the Company was faced with the Tradewind being out of operation for a period of time. It was due for a spar inspection. That involves taking apart the wing.

Mr. May told us that he knows nothing of the resumes which Mr. Rinn says that he saw on a table on the second floor of the duplex. He heard for the first time as Mr. Rinn gave evidence of the circling of certain portions of the resumes. At no time did he instruct anyone in the Company to circle anything.

> - 29 About the hiring of Mr. Grant, Mr. May told us "I recall near the end of December talking with Wes White and he was concerned that we should really have someone to cover, you know, a co-pilot position. And I said, well fine, you know, you're the chief pilot, so find someone.

And he called me ... I think really early in the new year and told me that he had arranged for Andrew Grant to meet us in Winnipeg and he would like me to sit in on the interview, at which I did. (pages 398 to 399)

Mr. May denied giving instructions to Mr. White to advise prospective applicants that Keewatin prefers single pilots. His response was, "Oh that's just silly. I, that is not possible. I certainly never told him that." (page 399). Mr. May said that as he listened to Mr. Grant's evidence he was astounded to hear the account of what Mr. White had told Mr. Grant in the initial telephone call.

Mr. May recalled the interview with Mr. Grant. When

asked what if anything had been said on the subject of marital status he replied,

"Well Andrew had told us that he had a girlfriend in the city and he was really looking forward to working up north and he inquired about how often he could get down to Winnipeg, know how often it came for maintenance, that sort of thing. And in the course of the conversation I think the only thing that was really concerning me was that we had, we had picked a number of \$1,200.00 a month as a flat rate.

We simply, I simply had no idea whether that was a reasonable number in the industry at that time, and so I asked him if that would be a sufficient pay for him and I

> - 30 said, you know-- because we are really concerned that- understand that we're trying to save money, but we want to be fair about it, you know, are you planning on getting married or something? And if you were, would that be enough? And he said no, no, I'm not planning on getting married and that would certainly be just fine." (pages 399 to 400).

Mr. May responded to the allegation which Mr. Grant had made concerning their conversation at Rankin Inlet. He said that he remembers the conversation very well and that he certainly had not said words to the effect that Mr. Grant should not even think of getting married while in the employ of Keewatin. His description of the conversation was this:

"He, Andrew, spent a lot of time talking about his girlfriend and he had told me, on a previous occasion, that his girlfriend's mother was ... a devout Catholic and that they were abstaining... they didn't have a sexual relationship-- I mean he was telling me this. I- but he obviously wanted to talk about his relationship.

So, he told me that his career came first and they couldn't possibly get married for a couple of years and, you know, that it was tough but-- I really don't know what the point of him telling me all this was but I think he was just lonesome, wanting to confide in somebody." (page 400)

"I was there talking to him about something else and he said that his girlfriend, that he would like his girlfriend to come up and visit Rankin, him in Rankin, and would that be okay? And I said sure. And he said that she was-- well, he was wondering if she could possibly get a job up there. And I said, yes, I think probably she could, because he had explained to me on some previous occasion that she had a responsible position with a firm here in Winnipeg-- I don't think it matters, but anyway, that she had some training in one thing and another

> - 31 and those kind of people are always in short supply in Rankin Inlet... But I said the problem, Andrew, is that, most of these positions that are now available in Rankin Inlet are term positions. And they generally don't supply, for that type of position, accommodation for non-Inuit, generally, you know, there was a program and is a program that I understand, giving preference to local people.

And so I saw his eyes light up, because that was obviously a problem and I said, and Andrew, don't even ask me if you can rent a room for your girlfriend here because I'm probably going to need the place in

the next while for another pilot, and we will need it for another pilot. And he said oh, yes I understand." (pages 401 to 402).

Mr. May spoke about other employees who had worked for the company in 1984 and had dependants with them. Mr. May confirmed that it is part of the job of the Chief Pilot to hire and fire personnel. He had hired Mr. White with a view to promoting him to Chief Pilot. In effect he acknowledged that Mr. White, "wasn't confirmed in that role until later officially, but he was doing the duties earlier." (page 424). The official date was around December 15th.

In answer to questions put by the Tribunal Mr. May said that he was concerned about Mr. Rinn's lack of interest and

"he seemed to have a little problem finding the ground and I was concerned perhaps, just not able to handle the speed.

It was a general concern ... His mind was elsewhere." (page 457).

Mr. May said with reference to the evidence of Mr. Rinn and > - 32 Mr. Russell about the visitors who stayed in the duplex,

"I was listening to that and I, it paints it as a sort of hotel lobby. I think that the period of time that it actually happened, there were that many people, was probably a period of not more than five or six days, I think ... but it wasn't as bad as it sounded, you know, it was awkward at times, yes." (pages 460 to 461).

Mr. May could not recall Mr. Russell raising with him the question of the relative unfairness of the situation. He said,

"I recall us discussing it in general at times and I really appreciated the fact that it was at times, you know, when you bring in a complete unknown person, that it's a little difficult. But, that everybody was doing their very best to accommodate and they all understood why it had to be done." (page 461).

I questioned Mr. May closely about the genuineness of his decision not to offer the job of co-pilot to Mr. Russell. I will comment on this portion of the evidence later.

Ms. Saxby and Mr. May were questioned at length both in Examination in Chief and in cross examination about the financial position of the company, particularly toward the end of 1983. The questions dealt with the upturn in the company's fortunes in 1984 but I choose not to give weight to this part of the evidence as it would unduly effect the result with the benefit of hindsight, something which was not available to Mr. May in December of 1983. Let me just say for now that exhibit R- 5 and exhibit C- 5 can be used to paint a pessimistic picture of the fortunes of the company, or alternatively one which is less pessimistic and provides some reason for hope for the future.

> - 33 Mr. May and Ms. Saxby took the pessimistic and gloomy view. However, it should be remembered that they were the people who were making the decisions and paying the bills.

WES WHITE Much has been said in this award and in the course of the evidence about certain events relating to and acts and statements attributed to Wes White. Mr. White was not called as a witness at the hearing. As he is a person who might have thrown light on events in question in the case, I gave consideration to whether or not it is appropriate to draw an inference against either party, in particular the Respondent, by virtue of its failure to call Mr. White as a witness in order to deny or explain evidence as it relates to him. I have refreshed my memory of authorities which indicate when it might be appropriate to draw an inference by virtue of the failure to call a material witness. I have concluded that as Mr. White is no longer employed by the Respondent, as there is no property in a witness, as the Complainants have had the benefit of an investigation conducted by the Human Rights Commission, and as the Complainants had called as a witness Andrew Grant who is also a former employee of the company, no inference is to be drawn against either party by virtue of the failure to call Mr. White as a witness.

> - 34 FINDINGS

The approach of counsel for the Respondent is that there is no question of law to be decided here. The outcome of the case

is to turn on findings of fact. He challenges the credibility of the witnesses who were called by the Complainants on various grounds. He asserted either in argument or in cross-examination that Mr. Rinn's credibility is lessened by difficulty in accurate relating of his flying history in oral evidence as opposed to that given in his flying history. (exhibit R- 1) He points to Mr. Rinn's failure to disclose the damage caused by him to a Cessna 185 on a hard landing on ice in December 1979 resulting in damage of \$3,000.00, when he provided certification on June 15, 1982 as to accidents resulting in injury or damage exceeding \$100.00 (exhibit R- 1). Counsel for the Respondent also criticized Mr. Rinn because of the manner in which he reported expenses in his income tax returns. For example, in his 1982 return (exhibit C- 15) Mr. Rinn wrote off as an expense tuition fees of \$567.90, whereas the Respondent had reimbursed him for the sum of \$354.00 of that item. Notwithstanding matters referred to by counsel for the Respondent I found Mr. Rinn to be a truthful witness who did his utmost to be fair and accurate in his evidence. There were several incidents where he, like Mr. Russell, could have embellished the facts and he did not do so. Moreover, there are several

> - 35 places where Mr. Rinn made a statement in his evidence and subsequently out of a concern that he may have not given a complete picture sought to raise the subject again to ensure that the Tribunal had the whole story. See for example page 130, page 142 and 177- 179. Mr. Rinn did this notwithstanding the fact that the information he wished to provide later might tend to show his capabilities as a pilot in a less favourable light.

I found as well that Mr. Russell is a reliable witness who did his best to accurately describe the events in question.

Counsel for the Respondent also challenged the credibility of Mr. Grant on the basis that he might have a grudge against the company by virtue of the circumstances in which he left his employment. On Mr. Grant's evidence he was not at fault and all that Mr. May could say would be hearsay and of no use to this Tribunal, if considered on the point. I found Mr. Grant to be a truthful, disinterested witness. He did not even meet Mr. Rinn or Mr. Russell until shortly before the hearing.

Subject to one reservation which I have, Mr. May created a very good impression on the witness stand. His concerns for the financial position of the company were, I am certain, genuine. There is to an extent contradiction between the evidence of Mr. May and Mr. Grant on what was said during the interview in early January 1984. I thought that Mr. Grant's account had a lack of clarity on the point and it did not attribute words specifically to Mr. May or Mr. White. Mr. May's account of the

> - 36 conversation is reasonable and while Mr. Grant undoubtedly did his

best to relate the conversation, it is possible that he was interpreting the words which he heard in the context of what Mr. White had told him during the conversation with Mr. White, which had preceded the interview. On the other hand in the subsequent conversation held by Mr. May and Mr. Grant in Rankin Inlet within a few weeks of Mr. Grant's arrival, Mr. May demonstrated at the hearing a total disinterest in the conversation which he had at the time with Mr. Grant. Mr. May's recollection of the conversation is plainly inaccurate. I prefer Mr. Grant's account for that reason.

The real concern which I have about Mr. May's evidence, however, is that when he left the witness stand I had reservations, which I continue to hold after a careful review of all of the evidence, that he did not tell us the whole of the reason why he terminated Mr. Russell's employment. The questions which the Tribunal put to him were about why he did not rehire or offer Mr. Russell the job of co-pilot, once the new position became available. The reasons which Mr. May gave left me unsatisfied with the completeness of his reasons.

I accept the evidence of Ms. Saxby and Mr. May that they did not circle the marital status on the resumes which were found by Mr. Rinn on the second floor of the duplex. As Mr. Russell did not see the documents I infer that Mr. White was going through the resumes, sorted them in three piles and circled the marital status and hours in anticipation of his

> - 37 phone call to Mr. May about hiring a co-pilot, after Mr. Rinn and Mr. Russell declined to fly again for Keewatin.

In deciding whether or not the employment of either Mr. Rinn or Mr. Russell or both was terminated, at least in part because of their marital status or family status, it is important to ascertain how many jobs were genuinely available on December 12th. In most of 1982 and 1983 Keewatin had three fulltime pilots (Smith, Russell and Rinn) in addition to Mr. May who was chief pilot. Mr. Rinn was laid off in December 1982 and was recalled in March 1983. At that time only one turbine aircraft was in service. In the fall of 1983 with two turbine aircraft in service a full or ideal complement of pilots was four, especially to meet Transport Canada

standards in I. F. R. conditions. Prior to Mr. White being hired there were three pilots in active service. (Smith, Rinn and Russell) With Mr. White there were four. The termination of employment of Mr. Russell and Mr. Rinn reduced the staff to two pilots to fly two turbine aircraft.

I accept Mr. May's evidence that until mid November 1983 he had no thought of reducing the complement of pilots employed by the company. It follows that I accept as genuine his statement that he hired Mr. White with the intention of promoting him to Chief Pilot as soon as practicable. When the question of reduction of staff came to mind at the end of November or early December, 1983, I find that it was appropriate, having

> - 38 regard to the financial position of the company and the concerns of its principals, to lay off one pilot. Mr. May tried to support the termination of both and to suggest that the later hiring of Mr. Grant as a co-pilot and at a lesser salary was a later development not anticipated as early as December 12th. I disbelieved that evidence and reject that position. On the evidence there was work for Rinn and Russell both after December 12th. Also on December 17, 1983 Mr. White flew the Tradewind on a Medivac flight unassisted, and on January 26, 1984 he did the same on the Westwind (exhibit R- 7). On January 6, 1984 Mr. Rinn had to serve as co-pilot on his flight to Winnipeg. Mr. Smith's temporary unavailability does not explain the need for both Rinn and Russell's services after December 12th. It is hard for me to believe that an additional pilot was not needed December 12th but was needed literally a few days later when Wes White raised the question with Mr. May. There is no evidence of an upsurge in company business in the interim. There is no suggestion that Mr. May tried to negotiate a reduction in salaries of other pilots or trim costs in any other aspect of the operation. On the contrary, the promotion of Mr. White to Chief Pilot involved a raise in pay to \$1,800.00 plus commissions. I find that Mr. May's excuses for not trying to contact Mr. Russell when the new position became available are unsatisfactory. I am particularly unimpressed with Mr. May's suggestion that he had received information to suggest that Mr. Rinn and Mr. Russell had left an aircraft unattended. Mr. May should have

> - 39 known that any such information was untrue having regard to the faithful service provided to his company by these two pilots. Consequently I have stated and I find that Mr. May has not told the whole story about why he terminated the services of Mr. Russell.

Counsel for the Respondent in his submission dissociates the remarks which Mr. Grant attributes to Mr. White from the company. In response to my question Mr. May said that he does not know where Mr. White could have got that information. He referred to the evidence of cost of training a new pilot and of the negative effects on business of changing personnel as factors which weigh against the Company acting as alleged by the Complainants. Counsel for the Respondent urges too that there is no evidence through Mr. Russell or Mr. Grant or anyone that Mr. May made comments to either of them which might be construed as having a bias against married employees or a confrontation over the subject of the accommodations in the duplex or troubles caused by the presence of untidy company guests in the duplex. In that latter position counsel for the Respondent is correct and if the Complainants' case had closed without additional evidence one would be inclined to dismiss the complaints for lack of evidence, especially since it is obvious that from time to time the company has hired and housed married employees or employees with

dependants and Mr. Grant's fiancée was accommodated during a visit.

However, in this case there is additional evidence. > - 40 Mr. White was hired for the purpose of eventually filling the position of Chief Pilot. Although he did not assume the position until December 15th, he must have been familiar with the reasons why the employment of Mr. Rinn and Russell was terminated and he must have known about Mr. Russell's discussion with Mr. May about the relative unfairness of placement of visitors and distribution of work relating to housing of them. Practically the moment Mr. White assumed the position he sorted resumes which had been received by the Company. From that act we know that he knew from the start that the services of another person was required behind the engine. He sorted the resumes in three piles and those who comprised the yes pile were all single and he circled their marital status. After getting Mr. May's approval to hire a copilot Mr. White contacted Mr. Grant and during

"well, you're not thinking of getting married, are you, because we're looking for single pilots."

About a month later while enroute to Rankin Inlet Mr. White told Mr. Grant that there had been a problem with a couple of pilots that were married and -he Company elected to get rid of them and hire pilots who are single because of the accommodation problem. A few weeks later Mr. May told Mr. Grant in the course of a conversation that he should not even think of getting married while employed at Keewatin because the company had had problems in the past and could not accommodate a married pilot. This evidence taken in the context of the disruption the course of the conversation stated

> - 41 in 1983 in the domestic arrangements of the Russells on the second floor of the duplex, the questions raised as a result by Mr. Russell to Mr. May and my finding that Mr. May did not tell the whole of the reason why he terminated Mr. Russell's employment satisfies me that one of the reasons for such termination relates to either the accommodation required for his wife or friction perceived because of the presence of his wife. The evidence also establishes that of the two Complainants Mr. Russell had at the time the longer period of uninterrupted service and greater ability than Mr. Rinn. The Company at that point in time wanted to downgrade Mr. Russell's position for economic reasons (a change that turned out to be only temporary), but it did not offer him the opportunity of filling the downgraded position. The reason, I find, was because of the perceived disadvantage of continuing to employ a married employee.

In Mr. Rinn's case I find the circumstances were different. The Company wished to eliminate his position entirely

for economic reasons. I am satisfied that his married status and family status were not factors in this decision.

DAMAGES Section 41 of the Canadian Human Rights Act provides as follows:

"41. (1) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry

> - 42 relates is not substantiated, it shall dismiss the complaint. (2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(a) that such person cease such discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

(i) adoption of a special program, plan or arrangement referred to in subsection 15(1), or

(ii) the making of an application for approval and the implementing of a plan pursuant to section 15.1,

in consultation with the Commission on the general purposes of those measures;

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

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

(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

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

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

> - 43 the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

(4) If, at the conclusion of its inquiry into a complaint regarding discrimination based on a disability, the Tribunal finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging or to have engaged in the discriminatory practice require adaptation to meet the needs of a person arising from such a disability,

(a) the Tribunal shall make such order pursuant to this section for that adaptation as it considers appropriate and as it is satisfied will not occasion costs or business inconvenience constituting undue hardship, or

(b) if the Tribunal considers that no such order can be made, it shall make such recommendations as it considers appropriate, and, in the event of such finding, the Tribunal shall not make an order unless required by this subsection. 1976- 77, c. 33, s. 41; 1980- 81- 82- 83, C. 143, s. 20."

It is common ground that it would be inappropriate to make an order under section 41(2)(a). No request is made for an order under section 41(2)(b), nor would it be appropriate to make one in Mr. Russell's favour. Nor is a claim made by Mr. Russell under section 41(2)(d).

Section 41(2)(c) provides with respect to a Tribunal that "it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate: ... (c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of ... as a result of the discriminatory practice". While the section is permissive, it is the Complainant's right to an award in such amount as

> - 44 the evidence warrants. The section is permissive because there may be cases where no wage loss is caused. For the purpose of this assessment damages are to be assessed as in a tort action. As such, loss of wages are to be assessed based on a calculation of all wages lost as a result of the wrongful act, in this case the discriminatory act, subject to the duty of a Complainant to mitigate his loss. 2

The question which arises here is whether or not there is under the Canadian Human Rights Act a cap on the wage loss

which can be awarded to a Complainant. Counsel for the Respondent has argued that there is a cap on the amount which can be awarded and that this Tribunal should not award any amount greater than would be reflected in an award made in a civil action for wrongful dismissal. Under this line of reasoning it might be said that Keewatin could have terminated Mr. Russell's employment without cause on giving to him three months notice. 3 Applying this period of notice, although it may have actually taken Mr. Russell two years or more to find a job which is capable of earning him pay comparable to that earned while at Keewatin, there is a cap on the damages. He is only entitled to an award equal to three months pay. This cap on damages is propounded in several Ontario human rights awards. 4 In my view it would be inappropriate to apply principles relating to wrongful dismissal cases or to keep them in mind in making an award for lost wages under section 41(2)(c) of the Canadian Human Rights Act because those principles relate

> - 45 to an action which is founded in breach of contract, whereas here we are concerned with an action which is akin to damages for tort.

Counsel for the Respondent also urged that there is a cap on damages based on reasonable foreseeability. The question is, he says, on date of termination of employment, how long should

it reasonably take the Complainant to find a comparable job. That estimated date should be a cap on damages. If it actually takes him longer to find a comparable job he should not be entitled to the additional loss in calculating the Complainant's damage award for wages lost. This line of reasoning is said to be based on the principle that there is a cap on damages in tort law based on principles of foreseeability. This position is also urged from several Ontario human rights awards. 5 In my opinion this position is not applicable to the making of an award under the Canadian Human Rights Act. In tort law the principles of foreseeability place a cap on damages only to the extent that the kind of damage must be foreseeable in order to be compensable. However, once the kind of damage is foreseen the full extent of the damage need not be foreseen in order to be compensable. I recognize that in *DeJager v. Department of National Defence*, 6 a tribunal composed of M. Wendy Robson, Paul J. D. Mullin and A. Wayne MacKay said in their reasons that they were placing a cap on damages based on reasonable foreseeability. It seems to me on reading the award that the tribunal there made a full award of wages, but

> - 46 in the event that I am wrong I respectfully disagree with the principle which is stated in the award.

Several awards appear to have been made based on actual loss, as I propose to do in this instance. 7 In *Butterill et al v. Via Rail Canada Inc.* 8 the tribunal comprised of R. Dale Gibson, Daniel G. Hill and J. Francis Leddy, stated at page D238,

paragraph 2059: "In our view the use of the language of 'compensation' by the Canadian Act implies that tribunals are to apply the principles employed by courts when awarding compensatory damages in civil litigation. The root principle of the civil law of damages is 'restitutio in integrum': the injured party should be put back into the position he or she would have enjoyed had the wrong not occurred, to the extent that money is capable of doing so, subject to the injured party's obligation to take reasonable steps to mitigate his or her losses."

With the unrestricted words of s. 41(2)(c) and this principle in mind it is my view that the successful Complainant is entitled to be compensated for his actual loss without any cap being placed on his award by virtue of matters which I have been referring to.

Counsel for the Complainants asked me to award damages to the date of hearing in January 1988. In an appropriate case one can properly do so. In the *Butterill* 8 case the tribunal stated that it could be appropriate to make an award for damages past the date of hearing and up to date of reinstatement. Courts in tort actions certainly assess pecuniary loss past the date of trial. For example, in *Conklin v. Smith et al* 9 the Supreme

> - 47 Court of Canada upheld an award of damages made at trial to a 20 year old person whose leg had been amputated as a result of an accident, including the award for the present value of the difference between what the plaintiff had a reasonable prospect of earning as a pilot less the amount which he could reasonably expect to earn in the vocation which he would now be suited for.

I now proceed to assess Mr. Russell's claim for lost earnings. While with Keewatin he earned \$800.00 per month plus commissions. There was an understanding that he would never receive

less than \$1,200.00 per month. In 1983 his earnings with Keewatin were \$29,111.94, in addition to non-taxable provision of housing accommodation. By agreement of the parties Mr. Russell's potential for earnings with Keewatin are to be taken as his 1983 earnings plus 4% per year on a compounded basis.

Mr. Russell was not out of work long. His intention was to take a holiday at Christmas 1983. His long term plan was to become employed by Air Canada as a pilot, as his father had done. He promptly obtained other employment with Sound Air. In 1984 his earnings with Sound Air Corp. totalled \$20,465.57. In 1985 his earnings with Sound Air totalled \$21,711.32. Toward the end of that year Mr. Russell was hired by Air Canada. I am satisfied that Mr. Russell took reasonable steps to mitigate his loss. Although his earnings with Air Canada have to date been less than he might have earned had he stayed on with the

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- 48 Respondent, I find that his entitlement to compensation came to an end with his engagement with Air Canada and the achievement of his career goal. Accordingly, I find that Mr. Russell should receive compensation for wages of which he was deprived as a result of the discriminatory practice in the sum of which sum is made up as follows:

In 1984 he could have earned \$30,276.42 In 1985 he could have earned

October 24th 1985 \$28,295.59 Gross potential earnings with Keewatin for 1984 and 1985
\$58,572.01

Less actual earnings for 1984 (\$ 20,465.57) \$38,106.44 Less actual earnings to November 24th-
1985 (\$ 21,711.32)

Difference: \$16,395.12 Mr. Russell also claims by way of lost earnings the sum of \$6,600.00 per year for loss of the accommodation in Rankin Inlet to which he was entitled as a term of his employment with the Company. The parties agreed that the accommodation in Rankin Inlet is to be valued at \$550.00 per month. Counsel for Mr. Russell asks me to treat provision of this accommodation and the loss of it as an item of non-taxable earnings the loss of which entitles him to compensation. I look on the accommodation as having two components. Considering the size of the space provided, the fact that Mr. and Mrs. Russell did not have the exclusive use of the second floor of the duplex, Ms. Saxby's evidence as to rent which she and her husband paid for an apartment in Winnipeg, inflation and all relevant factors, I assess the value of the accommodation at \$200.00 per month. I regard

> - 49 the difference between \$200.00 and \$550.00 per month or \$350.00 as a northern allowance which was not paid by Mr. Russell or on behalf of Mr. Russell during 1984 or 1985. In *Scott v. Foster Wheeler Ltd.* 7 the Complainant was hired in Ontario to work as a welder in Jamaica for the duration of a particular project. His employment was terminated early. His claim under the Ontario Human Rights Code was sustained. The evidence showed that persons engaged on the job received a particular weekly expense allowance which they could either spend or bank. The tribunal disallowed the Complainant's claim for loss of the expense

allowance because he did not actually incur the expenses which the allowance was primarily intended to cover. On the same basis I disallow the northern allowance aspect of the claim, but I allow Mr. Russell an additional sum of \$200.00 per month for 22 months and 24 for additional loss of earnings.

If Mr. Russell had on December 13, 1983 suffered a personal injury which prevented him from continuing to work for

Keewatin, in all of the circumstances of this case a court in a tort action would in my view award him lost earnings totalling the sum of 5 which sum is made up as follows:

Earnings lost for 1984 and 1985 \$16,395.12 Loss of housing allowance \$ 4,556.71

Total: \$20,951.83 As the same principles apply to the making of an award under section 41(2)(c) of the Canadian Human Rights Act, Mr. Russell should receive no less in this award.

Mr. Russell also makes a claim for compensation under > - 50 section 41(3)(b) of the Act. I have been referred to several awards where the damages have been awarded under this section as little as \$75.00 and as much as \$4,500.00. It has been held that there should be a presumption in favour of making an award in the sense that if the evidence warrants it, damages should be awarded. In order to justify an award there must be a finding that a Complainant has suffered in respect of feelings or self respect as a result of the discriminatory practice. On this subject Mr. Russell stated at page 256 that he was shocked and surprised at his termination. At page 258 he stated:

"Q. Okay, I'll ask you -- how did you feel about that, that particular understanding that you came to, as a possible reason for dismissal?

A. I thought it really stunk because, you know, he never came to us with any -- like, we just tried to talk to him about, you know, the few little problems that were happening at the company at that time.

We just wanted to, maybe, work out some kind of solution, because we were in a bit of a state of change, and you know, we just came up against a brick wall. Basically, there was no solutions offered, we were just let go, so, I was pretty disillusioned about it.."

It appears from Mr. May's evidence that Mr. Russell was heard to use strong language following his unexpected termination. I take that as evidence of hurt feelings and make an award of \$100.00.

> - 51 PROVISIONAL ASSESSMENT I think it appropriate too, to make a provisional assessment of damages in the case of Mr. Rinn, in the event that an appeal is taken against the dismissal of his complaint. Mr. Rinn would have liked to continue to live at Rankin Inlet until his child was ready to start school. On that basis I assume that

he would seek damages to August 1988. Mr. Rinn was exploring other avenues of employment, for example, the feasibility of establishing a bakery in Rankin Inlet. He said that he would not have given up his position with Keewatin until he had another secure position.

Counsel for the Company urges that in calculating Mr. Rinn's wage loss I should take into account the expenses which he claimed in his 1982 and 1983 income tax returns as costs of earning commissions in those years (Exhibit C- 15 and C- 16). The statutory basis for the award, however, is for wages, not net earnings or any sum less than the whole of the wages. It would be inappropriate to make the arbitrary reduction in income, which is sought by Counsel for the Respondent.

Like Mr. Russell, Mr. Rinn earned a salary of \$800.00 per month, plus commission, with a guarantee of \$1,200.00 per month. For 1983 Mr. Rinn's earnings with Keewatin totalled \$20,748.87. After Mr. Rinn's employment was terminated he telephoned several airlines which operated either out of Rankin Inlet or other northern points, in order to find out whether

> - 52 or not employment was available for him. He learned that a man by the name of Quinn might be looking for a pilot to fly for him between the Magdalen Islands and Charlottetown. Mr. Rinn contacted Mr. Quinn. Mr. Quinn said that he would call Mr. Rinn back. Mr. Rinn then moved with his family to Winnipeg, and with no job prospects on the horizon he made plans to return to Whitehorse. At that point Mr. Quinn phoned Mr. Rinn and offered him a job, but in order to get the job, Mr. Rinn would have to be in Montreal in three days. Having made all of the arrangements to return to Whitehorse, Mr. Rinn declined the opportunity. His wife flew to Whitehorse and Mr. Rinn drove their belongings in his truck and with the benefit of a U- Haul.

Mr. & Mrs. Rinn had lived in Whitehorse prior to moving to Rankin Inlet. They owned a house there and during their sojourn in Rankin Inlet they rented out the house. The house had been on the market in 1983, but they were unable to sell it. When they returned to Whitehorse they had to give the tenant a month's notice and they had some problem collecting one month's rent. When Mr. Rinn arrived back in Whitehorse he contacted his former employer, Lister Motor Sports. Lister had no work immediately available, but he was able to commence working for Lister in March 1984. In late March 1984 Mr. Rinn filled out an application with Transport Canada for a civil aviation inspectors position. He received a call in August of 1985 and started training for a flight service station specialist course in October 1985. That is the position which he obtained and

> - 53 continues to hold to this day.

By agreement of the parties, it has been established that if Mr. Rinn had continued to work for Keewatin his earnings for 1984 would have been \$21,578.82, for 1985, \$22,441.98, for 1986, \$23,339.66, for 1987, \$24,273.24, and for 24 days of January 1988, the sum of \$1,659.89. His actual earnings for 1984 were \$19,737.50, for 1985 \$21,786.69, for 1986 \$25,807.88, for 1987 approximately \$39,500.00.

I am satisfied that Mr. Rinn made a reasonable effort to mitigate his damage. I therefore assess his wage loss claim at the sum of \$7,296.61, which sum is made up as follows:

Amount he could have earned with Keewatin for 1984 \$ 21,578.82 Amount he could have earned with Keewatin for 1985 \$ 22,441.98 Plus: Two years housing allowance at \$200.00 per month \$4,800.00

Total potential earnings \$48,820.80 Less: Actual earnings for 1984 (\$19,737.50) Less: Actual earnings for 1985 (\$21,786.69)

Provisional Wage Loss Award (\$7,296.61) If one were to find that Mr. Rinn would have stayed with Keewatin past 1985, his wage loss claim would not be increased because his actual earnings commencing 1986 exceeded his projected earnings while at Keewatin.

Mr. Rinn also claims the sum of \$2,148.20 for reimbursement for cost of moving himself and his family from Rankin Inlet to Whitehorse, Yukon, following termination of

> - 54 his employment. The claim totals \$3,727.58 as outlined in Exhibit C- 17, reduced by the amount of benefit which Mr. Rinn received by virtue of claiming such expenses in his 1984 income tax return (Exhibit C- 18). These expenses which are claimed have been proved with precision to the extent of \$1,577.58. Beyond that sum they are either estimates or notional allowances taken, for example, for meals, based on per diem allowances given in certain industries. As to the claim, I would be prepared to treat the claim as comprising an expense incurred by Mr. Rinn in order to mitigate his loss. Considering the extent to which the claim was proved and the tax benefit which Mr. Rinn likely received by virtue of it, I would make a provisional allowance of \$1,000.00 for moving expenses.

When asked about his feelings as a result of the termination in relation to marital status Mr. Rinn stated:

"I felt I'd been terminated partly in fact that the Company wanted more space for pilots, to have single pilots rather than married pilots so they'd have more accommodation available for transient people coming up

to their operation, i. e engineers, contractors and seasonal pilots."

In cross- examination Mr. Rinn stated that he did not think anyone was ever happy with that termination. His reaction was no worse than anyone else. He had been laid off without recall date by another Company. In the absence of other evidence I would disallow this portion of the claim.

> - 55 AWARD

1 . Having found that the Respondent on December 13, 1983 terminated the employment of the Complainant, Russell, on a ground proscribed by section 3(1) of the Canadian Human Rights Act I order the Respondent to pay to him compensation in the sum of \$21,051.83., comprised of lost earnings of \$20,951.83 and general damages of \$100.00.

2. Having found that the Respondent on December 13, 1983 terminated the employment of the Complainant, Rinn, on grounds other than a ground proscribed by section 3(1) of the Canadian Human Rights Act, I dismiss his complaint.

I wish to acknowledge the assistance which I have had from counsel for the parties. They presented their cases thoughtfully, thoroughly, and efficiently. Through their efforts my difficult task has been simplified.

SIGNED in Winnipeg, Manitoba, this 6th day of MAY, 1988.

Tribunal >

FOOTNOTES

1. Keelan v. Norray Distributing Ltd. et al, 1967, 62 D. L. R. (2d) 466 and the cases cited in Sopinda and Lederman, "The Law of Evidence in Civil Cases", pages 535-37.

2. The difference between the Judgments of the Tribunal in Pelletier v. Brazeau Transport Inc., delivered February 20, (Claude D. Marleau, Chairman) and the Review Tribunal, rendered April 6, 1988 (Pierrette Sinclair, Henriette Guerin and Jacques Chiasson) provides a good example of the way the doctrine of mitigation operates to reduce an award.

3. There are at least two schools of thought as to what factors are to be taken into account in assessing the period of notice. Bardal v. Globe & Mail Ltd., 1960, O. W. N. 253 refers to the terms of the employment and the character of the services to be rendered ... the length of service of the employee, the age of the employee, and the availability of similar employment, taking into consideration the training, experience and qualifications of the employee. In Yosyk et al Westfair Foods Ltd. et al, unreported, February 18, 1988, Man. C. A. the test was described as determined by the intention of the parties when the contract was last changed.

4. Mark v. Porcul) in General HosT) ital and Arthur Moyle, 1984, 6 C. H. R. R. D/ 2538; Olarte et al v. De Phillipis and Commodore Business Machines Ltd., 1983, 4 C. H. R. R., D/ 1705, at D/ 1736, paragraphs 14813 - 14815 and Mears et al v. Ontario Hydro et al, 1984, 5 C. H. R. R. D/ 1927 at D/ 1941, paragraphs 16603.

5. Rand v. Sealy Eastern Limited (1982), 3 C. H. R. R. D/ 938 at D/ 957, paragraph 8507. Cameron v. Nel- Gor Castle Nursing Home, 1984, 5 C. H. R. R., D/ 2170; Torres v. Royalty Kitchenware Limited et al, 1982, C. H. R. R. D858.

6. 1987, 8 C. H. R. R. D/ 3963. 7. Funk v. Stowe - Woodward Inc., (1987) 8 C. H. R. R. D/ 4337 and the awards referred to on page D/ 4338, paragraph 33966; Scott v. Foster Wheeler Ltd., 1986, 7 C. H. R. R. D/ 3193; varied 8 C. H. R. R. D/ 4179.

8. 1980, 1 C. H. R. R. D/ 233; reversed on other grounds 1982, 2 F. C. 830.

9. 1978, 88 D. L. R. (3d) 317.