Macan v. Strongco, 2013 HRTO 841 (CanLII)

Date: 2013-05-16
Docket: 2011-07832-I
Citation: Macan v. Strongco, 2013 HRTO 841 (CanLII), <http://canlii.ca/t/fxj48>, retrieved on 2017-01-19

HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Michele Macan

Applicant

-and-

Strongco Limited Partnership

Respondent

DECISION

Adjudicator: Alison Renton

Date: May 16, 2013

File Number: 2011-07832-I

Citation: 2013 HRTO 841

Indexed as: **Macan v. Strongco**

APPEARANCES

Michele Macan, Applicant	)	Matthew Fisher, Counsel
Strongco Limited Partnership, Respondent	)	Kristin Taylor, Counsel

INTRODUCTION

[1] This is an Application filed under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to employment because of disability.

[2] A hearing was held over three days between June and September 2012. At the beginning of the hearing, the Tribunal amended the respondent's name from Strongco Equipment to Strongco Limited Partnership, as indicated in the Response. The applicant did not oppose this amendment. Accordingly, the style of cause is amended to reflect this change.

[3] The Tribunal heard testimony from the applicant and then five witnesses for the respondent. They were Chris Forbes, Vice-President of Human Resources; Andrea Paric, then National Warranty Manager; Steve Jeffrey, Mississauga Branch Manager; Anna Sgro, then Vice-President of Sales and Marketing; and Audrey Huot, Human Resources Manager. Ms. Paric testified on her last day of employment. At the time of her testimony, Ms. Sgro was no longer an employee of the respondent. Apart from Mr. Forbes, who was the respondent's instructing client, there was an exclusion of witnesses such that the remaining respondent witnesses did not hear the evidence of the applicant or any of the respondent's witnesses who preceded them. Mr. Forbes testified before the respondent's other witnesses.

[4] The parties submitted a Joint Document Book as an exhibit. Other documentation, including medical documentation, was submitted as exhibits.

BACKGROUND

[5] The respondent is a publicly-traded company and is listed on the Toronto Stock Exchange. It sells and rents heavy industrial equipment which is used in a number of industries, including the residential and commercial construction industries. This equipment is supported by warranties. The respondent operates at

branches across Canada. Its head office is located in Mississauga.

[6] The applicant commenced employment with the respondent on November 24, 2008, in the position of warranty administrator at the respondent's head office. This position is a sedentary one. The respondent acknowledges that the applicant was a good employee. The applicant held this position until she terminated on January 6, 2011.

[7] The respondent has an exception payroll system. This means that unless an absence is specifically entered into the system, the employee is paid for a full work week, that being 40 hours.

[8] For some of 2010, the applicant reported to Mr. Jeffrey, who was the service manager but is now the Mississauga Branch Manager. Later in 2010, the applicant reported to Ms. Paric.

[9] In late 2010 there were four warranty administrators working at the respondent's head office. One was the applicant. I will identify the other three only by their initials. P.D. was a long-term employee with extensive warranty experience, not just working with the respondent but also working for one of the equipment companies itself. G.A. and V.D. had been hired in March 2010. None of these employees was bilingual. These warranty administrators reported to Ms. Paric, who is bilingual, who was promoted to the position of national warranty manager. An announcement of her promotion was issued March 30, 2010, effective August 2010 at the time she returned from pregnancy leave. Ms. Paric reported to Ms. Sgro.

[10] In 2010 to 2011, the respondent restructured and centralized its warranty division across Canada with the goal of having the warranty division operate out of the respondent's head office. Not only did this involve hiring Ms. Paric into the manager position, but it involved eliminating employees from warranty administrator positions in other locations, including Alberta, Northern Ontario, Quebec and Nova Scotia. Some employees were terminated and others were given new positions.

[11] In 2010 to 2011, the respondent decided that it required two warranty administrators at its head office to be bilingual to service, amongst other areas, Quebec, and it determined that two of the four current warranty administrators working at its head office would be terminated. The applicant and G.A. were terminated on January 6, 2011. P.D. and V.D. continue to work for the respondent. Two new warranty administrators, who are bilingual, were subsequently hired, one in January and the other in February 2011.

[12] The applicant has a chronic medical condition, Lupus, which requires ongoing and frequent medical appointments to monitor and assess her condition and secondary issues. The respondent does not dispute that the applicant has a disability within the meaning of the *Code*.

[13] The respondent is self-insured but uses a third party company, Morneau Shepell, for its short-term and long-term disability claims.

[14] The respondent has a Workplace Violence and Harassment Policy signed by the respondent's President and Chief Executive Officer dated June 20, 2010 ("the harassment policy"). There have been previous versions before this one.

THE PARTIES' POSITIONS

[15] The applicant alleges that during the course of her employment, she was subjected to four comments made by Mr. Jeffrey, which are contrary to the *Code* and about which the respondent failed to investigate when she brought them to its attention. She alleges that she required some accommodation, which was denied by the respondent. Further, she alleges that her disability was a factor in the respondent's decision to terminate her.

[16] The respondent denies the applicant's allegations. It denies that Mr. Jeffrey made discriminatory comments to her, although he admits to making one comment which is not *Code*-related, and denies that the applicant brought Mr. Jeffrey's comments to its attention for investigation. It denies that the applicant made accommodation requests. It submits that the applicant's disability was not a reason, a factor, or even considered in its decision to terminate the applicant. The four warranty administrators were assessed based upon their skills, abilities and experience and the two who were retained had the best skills, abilities and experience.

ISSUES

[17] The facts in this case give rise to the following issues:

1. Was the applicant subjected to harassing comments by Steve Jeffrey and did the respondent fail to investigate into those comments?

2. Did the respondent fail to accommodate the applicant's accommodation requests?

3. Was the applicant's disability a factor in the respondent's decision to terminate the applicant?

4. If the applicant's disability was a factor in the respondent's decision to terminate her, what are the appropriate remedies to award?

THE EVIDENCE

[18] I am setting out the facts that are relevant to my determination of whether or not the applicant's *Code*-protected rights were infringed. I note, where applicable, where there are factual disputes that are relevant to the issues as credibility findings are made on some of the disputed information. As G.R.'s termination is not an issue before me, I have not set out the respondent's evidence in support of why G.R. was selected to be terminated.

[19] Prior to commencing employment with the respondent, the applicant had 18 years of work experience in warranty administration positions.

[20] She was first diagnosed with Lupus in or around 2004 to 2005. The applicant testified that this is a chronic condition for which there is no cure. The applicant also has a number of secondary medical conditions, including skin lesions, fibromyalgia, rheumatoid arthritis and difficulties walking. The applicant did not tell the respondent about her disability when she commenced employment.

Mr. Jeffrey's alleged comments

[21] The applicant testified that when Mr. Jeffrey was her supervisor, he was aware of her medical condition. Mr. Jeffrey testified that while he was her supervisor, he was aware that "something was wrong" because of the applicant's ongoing medical appointments, which were approximately once per week. The applicant told Mr. Jeffrey that the doctors were investigating into her medical condition, which she did not disclose, which was why she attended so many medical appointments. Mr. Jeffrey testified that the applicant continued to do her job, and that he did not notice any symptoms, apart from the applicant walking with a cane and the applicant being constantly cold. He was not sure if the applicant had an illness or injury which required her to use the cane. He denied, during cross-examination, seeing lesions on the applicant's skin. He did not know that the applicant had Lupus until after she was terminated. Mr. Jeffrey testified that he did not tell anyone about the applicant's medical appointments and did not input all her absences into the respondent's payroll system. The applicant did not joke about her medical condition, he testified.

[22] The applicant alleges that once when she required time off for an appointment, Mr. Jeffrey told her that she should be "shot like a horse" meaning that because she was not healthy, she was "not good anymore". She testified that the whole department was present. In cross-examination, she testified that he said this on several occasions. She denied, in cross-examination, that Mr. Jeffrey made this comment about his own grandmother. Initially Mr. Jeffrey testified that he did not recall saying this. Then he denied making this comment. He was not asked if he made this comment about his grandmother.

[23] The applicant testified that her grandmother was sick and in the hospital, which required the applicant to attend a number of trips to the hospital, Mr. Jeffrey, who was not her supervisor at the time, asked her "isn't she dead yet?". Her grandmother subsequently passed away. Ms. Paric testified that the applicant told her about certain scenarios with Mr. Jeffrey, but only specifically about the grandmother comment. Ms. Paric testified that the applicant laughed about it and was not too upset. Ms. Paric was not questioned about the other comments allegedly made by Mr. Jeffrey. Mr. Jeffrey admitted, during his examination-in-chief, to making this comment and testified, during cross-examination, that it was an inappropriate comment to make.

[24] The applicant testified that Mr. Jeffrey noticed the lesions on her arms, commented that they were "disgusting", and asked if they were contagious. After

this, she started wearing longer sleeves to work. Mr. Jeffrey denied noticing any lesions on the applicant's arms and denied making these comments. During Mr. Jeffrey's evidence, the applicant was crying.

[25] Finally, the applicant alleges that several unidentified employees were discussing health issues and Mr. Jeffrey said, "ask Michele, she probably has it". Mr. Jeffrey denied making this comment. He testified during his cross-examination that the applicant did not joke about her medical condition.

[26] The applicant testified that she told Mr. Jeffrey to stop making these comments as it was "not nice". He denied that the applicant told him this.

[27] The applicant testified that she told Mr. Forbes about the comments Mr. Jeffrey made to her during a meeting they held in October 2010 about this and other issues which are set out below. Mr. Forbes denied, in his testimony, that the applicant raised concerns about Mr. Jeffrey. If such concerns had been raised, he testified, then he would have conducted an investigation in accordance with the harassment policy.

The Applicant's Accommodation Requests

[28] The applicant testified that she required an ergonomic chair and footstool and told Mr. Jeffrey, Ms. Paric, and Mr. Forbes about these accommodations requests. She did not put her requests in writing. She did not receive these items. Mr. Jeffrey told her, she testified, to turn over her recycling bin and put her feet on it. On the date of her termination, she testified, others went out to buy new chairs for the department and the applicant believed that one was for her. She was subsequently terminated that day. The applicant confirmed, during her cross-examination, that she had an flip chart arm attached to her computer which was quite expensive. She testified that she had not requested this. She did not know the cost of a footstool, she testified, but she knew that expensive items required her supervisor's approval.

[29] Ms. Paric denied that the applicant requested these accommodations in the workplace. She thought that the applicant had a footstool. Ms. Paric testified that there was no real process for ordering supplies, but that an employee in another department, whom she identified, had a Staples catalogue from which orders were made.

[30] Mr. Jeffrey also denied these allegations. He also testified about the Staples catalogue and confirmed that an employee required a manager's approval before ordering from it.

[31] Mr. Forbes denied that the applicant told him that her accommodation needs were not met.

The Applicant's Attendance

[32] In 2010, the applicant attended a number of medical appointments with her family physician and specialists to manage her Lupus and address her secondary conditions. A number of the medical appointments occurred during the applicant's work day, which required her to come into work late or leave early. The applicant testified that she worked through her lunch to make up the time.

[33] When Mr. Jeffrey was the applicant's supervisor, Mr. Jeffrey testified that he did not always record her late arrivals or early departures into the payroll exception system.

[34] Similarly, Ms. Paric did not enter all the applicant's late arrivals or early departures into the payroll exception system. About a week before the September 29, 2010 meeting, which is detailed below, Ms. Paric asked the applicant about how she was planning to make up the work time that she was missing.

[35] In September 2010, Ms. Sgro attended a senior executive meeting, which Mr. Forbes also attended, and the executives were given a chart showing the attendance rates for all employees across the country. Ms. Sgro was told that the applicant had the highest absenteeism rate across the company.

[36] A copy of a chart showing only the applicant's absences was entered as an exhibit.

The September 29, 2010 meeting

[37] On or about September 29, 2010, the applicant was called into a meeting with Ms. Paric and Ms. Sgro in Ms. Paric's office to address her attendance issues. Ms. Sgro attended to assist Ms. Paric as a new manager. Ms. Sgro did most of the talking.

[38] The applicant testified that there was no privacy during this meeting as Ms. Paric's office had no ceiling and the work cubicles of other employees were outside of Ms. Paric's office. However, she did not object to the location of the meeting.

[39] During her examination-in-chief, the applicant testified that Ms. Sgro told the applicant that she was concerned that the applicant was taking too much time off work, which she identified as 28 days, which was a burden on the department and unfair to other employees in the department as they were picking up her workload. Ms. Paric testified that the applicant was shown the attendance report and requested a copy of it. As the copy during the meeting showed everyone's absences, Ms. Paric asked Mr. Forbes for a copy showing just the applicant's absences. This was subsequently given to the applicant. The applicant disputes the 28 day calculation.

[40] Ms. Paric denied that Ms. Sgro told the applicant that she was a burden on the department. She testified that Ms. Sgro showed the applicant the attendance report and they said that they were trying to understand why her absences were so

high. According to Ms. Paric, Ms. Sgro told the applicant that if she needed time off, that was okay, but that Ms. Sgro needed to be "fair to everyone" and if the applicant needed time off there needed to be both "give and take". Ms. Paric testified that Ms. Sgro said that a schedule would be worked out which was fair for both the applicant and the respondent.

[41] Ms. Sgro testified that she discussed the effect that the applicant's absences were having on "the team", that the applicant would need to make up the time, and that the applicant was willing to make up the time. Ms. Sgro testified that inefficiencies in work were starting to occur, that others were being leaned upon to get work done which imposed additional work upon other employees. Some "girls", including V.D., were staying until 6:00 p.m. or 6:30 p.m. to get the work done and coming in at 7:00 a.m.

[42] The applicant testified that she disclosed for the first time her medical condition. She told Ms. Sgro and Ms. Paric that she had Lupus for which she required frequent medical appointments for various medical tests and treatments. Ms. Paric confirmed during her evidence that the applicant disclosed her medical condition. Ms. Sgro testified that the applicant did not discuss her medical condition stating that it was personal. During her cross-examination, Ms. Sgro testified that she knew that the applicant was attending medical appointments and having blood work taken and she may have mentioned Lupus during the meeting.

[43] The parties agree that the applicant abruptly left Ms. Paric's office. The applicant and Ms. Paric testified that the applicant broke down and cried. Ms. Sgro did not recall the applicant crying; instead she recalled the applicant getting upset, thought that they were picking on her, and stormed out of Ms. Paric's office. Ms. Sgro retrieved the applicant because she thought that the applicant needed to show respect to Ms. Paric and Ms. Sgro and not storm out of their meeting.

[44] The parties agree that Ms. Sgro left Ms. Paric's office to talk to her and have her return to Ms. Paric's office. The applicant testified that Ms. Sgro called her a "shining star", an expression that Ms. Paric recalled Ms. Sgro saying, but Ms. Sgro did not recall saying it. Ms. Sgro recalled that they discussed "each girl" pulling their own weight because of the backlog. It was arranged that the applicant would give Ms. Paric advance notice of her subsequent absences for medical appointments and Ms. Paric would record them in her electronic calendar. Ms. Sgro testified that she did not know until this meeting that the applicant had been regularly leaving work or coming in late. The applicant testified that she continued to take time off work to attend medical appointments, was not told that she could not attend her appointments, and that her pay was not deducted. The dates of the applicant's absence after this meeting were not identified or introduced as an exhibit.

October 2010 meeting with Mr. Forbes

[45] On October 5, 2010, the applicant contacted Mr. Forbes and asked if she could meet him. They met. This is the same meeting at which the applicant alleged that she told Mr. Forbes about Mr. Jeffrey's comments and her accommodation

requests. The applicant testified that during the meeting she also told Mr. Forbes that she felt threatened by the meeting with Ms. Sgro and Ms. Paric, that she has Lupus, that he did not know what Lupus was, and he told her about Morneau Shepell, the respondent's third party insurance carrier. Mr. Forbes told her, the applicant testified, that he was sure that Ms. Sgro and Ms. Paric did not mean it and he would look into it. She did not hear from him again.

[46] Mr. Forbes testified that when they met, the applicant was upset about her meeting with Ms. Sgro and Ms. Paric. He told her that there was not a concern about her attending ongoing medical appointments, but she would have to make up the time. He did not recall if the applicant told him about Lupus on this date, although he did learn that she has Lupus. Mr. Forbes testified that he told the applicant that if she needed time off work that short term disability ("STD") coverage was available through Morneau Shepell, the respondent's third party insurance carrier. He testified that Morneau Shepell adjudicates the medical claims because "a) we're not medical experts and b) we should not see that private medical information". Further he testified that "[the respondent] had gone to the length of purging medical information from files including those from the 1970's as we shouldn't have that". He did not ask her to provide any medical documentation. The applicant asked for a copy of the attendance report, and he told her "no problem".

Requests for Medical Information

[47] The applicant testified that she was not very comfortable with what happened during the meeting with Ms. Paric and Ms. Sgro and that, in her opinion, it was not warranted. On October 4, 2010, the applicant sent a letter to her doctor, Dr. Ashley, requesting that he provide her with a letter stating her illnesses. She wrote:

> I would like to obtain a letter of some sort from you stating my illness (primary and second diseases) if possible. I need this confirmation because my Employer questioned me in a meeting last week (Sept 29th, 2010), in regards to my time off work and all my Dr and Specialist's appointments. They did question me extensively to the point I broke down upset and told them detailed information about my medications symptoms and About Lupus. In that respect, I don't think that there is much that needs to be kept from the letter considering I have already told them in detail. Also any other pertinent information you could in include would be greatly appreciated. (I.e. reports from bone scans, my hip etc.) For my own piece of mind and protection I would like the letter so that I may hand it in to the Human Resources office because I feel they are trying to use my illness against me.

[48] Dr. Ashley provided the applicant with a letter dated October 12, 2010 confirming that she "suffers" from Lupus and chronic migraine headaches. The doctor wrote, "She is on multiple medications for these conditions and is constantly being followed by her specialist for these issues. She is now suffering from hip pain which is being worked up by an orthop[a]edic surgeon". The applicant emailed this letter to Ms. Paric, Ms. Sgro and Mr. Forbes on October 18, 2010.

[49] Mr. Forbes responded to the applicant's email on October 18, 2010, noting that Dr. Ashley's letter did not address any work restrictions she may have as a result of her medical conditions. The applicant emailed him back on October 19 stating that the main reason she submitted the letter was in regards to questions about her time off. If needed, she wrote, she could provide him with a more detailed letter. The applicant testified that she provided a letter from her specialist, but did not keep a copy. This letter was not introduced as an exhibit.

[50] On October 18, 2010, Mr. Forbes wrote to Dr. Ashley further to his October 12, 2010 letter. Mr. Forbes wrote, "Please let Strongco know in writing if there is [sic] any restrictions required" and provided his contact information. He attached a copy of the applicant's job description.

[51] The applicant testified that Mr. Forbes contacted her doctor without her permission or knowledge. When attending an appointment later in the month, Dr. Ashley told her about Mr. Forbes' letter and asked if she wanted him to respond. The applicant testified that she told Dr. Ashley to respond. She did not raise the issue with her employer, she testified, as she did not see the point in asking why they did this without her permission. Mr. Forbes testified that he wrote to Dr. Ashley to make sure that the respondent had the complete picture. He did not "explicitly" have the applicant's consent to communicate with her doctor, he testified.

[52] Dr. Ashley responded to Mr. Forbes' inquiry by letter dated October 29, 2010. He wrote, "This patient should be limited in her walking. She does need to have time to see her doctors for her appointments and tests. Otherwise, she should be able to do most of her requirements". He also handwrote this information on Mr. Forbes' letter.

[53] Mr. Forbes told Ms. Paric the information provided by the doctor. He testified that he did not discuss them with the applicant. Ms. Paric testified that she saw the letter. The applicant's restrictions about walking were not a problem as her position was a sedentary one.

The Warranty Department's Restructuring and Centralization

[54] Upon her promotion to manager, Ms. Paric was involved with centralizing the warranty department from its branches across the country to the respondent's head office. She and Mr. Forbes testified that the warranty employees in other provinces and in Northern Ontario either had their jobs changed or were terminated. In or about October or November 2010, Ms. Paric testified, it was determined that one or two bilingual warranty administrators were required because of the warranty business in Quebec. Ms. Sgro testified that Ms. Paric, being the only bilingual member of the department, would not be able to keep up with the French language service demands.

[55] The respondent engaged the services of an employment agency to find suitable candidates for the bilingual warranty administrator positions in approximately October to November 2010. Ms. Paric and Ms. Huot interviewed the

first round of candidates around November 2010 and Mr. Forbes and another Vice-President, Ted Breland, interviewed the second round. The respondent was interested in offering positions to two candidates, which meant that two of its existing warranty administrators at its head office would be terminated. It was determined that the applicant and G.R. would be terminated and P.D. and V.D. would be retained. Ms. Paric testified that the new bilingual warranty administrators would not be used exclusively for Quebec, which was confirmed by Mr. Forbes in his evidence. Ms. Paric testified that one of the bilingual administrators would be able to fill in for the other when she was on vacation.

[56] In its Response, the respondent stated that the four warranty administrators at its head office were assessed on their skills, abilities and experience in determining which two should be terminated. Mr. Forbes testified that Ms. Paric and Ms. Sgro conducted a skills and abilities analysis on a white board in Ms. Sgro's office, which he saw. He did not conduct a skills and abilities analysis himself, but he helped to "validate the process".

[57] Mr. Forbes testified that they reviewed the performance appraisals "for all these folks", but later testified that this only pertained to P.D. and the applicant as G.R. and V.D. had not received a performance appraisal. The applicant's performance appraisal was solid, Mr. Forbes testified. Ms. Paric testified that she had not completed any performance appraisals of the four warranty administrators since becoming their manager and no appraisals were reviewed during the skills and abilities assessment. Mr. Jeffrey testified that when he supervised the applicant, he completed a performance appraisal for the applicant in which she was rated above average. Ms. Sgro testified that there were no concerns with the applicant's performance. No performance appraisals for any of the warranty administrators were entered as an exhibit.

[58] Ms. Paric testified that she and Ms. Sgro went through the strengths and weaknesses of the current warranty administrators on a whiteboard in Ms. Sgro's office. Ms. Sgro confirmed this during her evidence. No written record of the white board analysis was maintained. Ms. Paric did not recall the order they reviewed the warranty administrators.

[59] Ms. Paric testified that P.D.'s years of warranty experience, including experience working for one of the companies whose products the respondent sold and leased, outweighed any weaknesses that she had. P.D. was scheduled to have surgery in the spring of 2011 which would require her to be absent from work for two months. Ms. Sgro testified about the extensive warranty experience that P.D. had with the respondent and the previous Volvo company. In addition, she would be used to work on policies. During cross-examination, Ms. Sgro testified that P.D.'s behaviour problems did not come up during the strengths and weaknesses assessment. She testified that P.D. was a very strong-willed individual and that trait could be considered a weakness.

[60] Ms. Paric testified that in addition to her warranty experience, V.D. was more like an administrative assistant who worked on the "entire company's" policy binders and reference materials. She was retained because of her marketing background

and her ability to analyze data and her analytical abilities. She would be used both in the warranty position for Alberta and in an administrative support role position. In cross-examination, she confirmed that a position was not being created for V.D. Ms. Sgro testified that V.D. had been an executive assistant prior to her employment with the respondent, used PowerPoint and Excel, and did plans and business proposals for the executive team. Ms. Paric had identified to Ms. Sgro that V.D. could do reporting and charts, and could provide support to the executive team. It was evident that V.D. had these skills, Ms. Sgro testified during her cross-examination, and she assumed that the applicant did not. She confirmed during her examination-in-chief that the applicant had approached her and Ms. Paric on a couple of occasions to express concerns that V.D. and G.R. were not "catching onto" warranty as quickly as she wanted them to. The applicant testified that Mr. Breland monitored V.D.'s performance for a day because of performance concerns, following which some of V.D.'s responsibilities were transferred to the applicant.

[61] With respect to the applicant, Ms. Paric testified that neither the applicant's medical condition nor her attendance were factors in the decision to terminate her. The applicant knew warranty well, Ms. Paric testified during her examination, but in cross-examination she qualified the applicant's warranty experience saying it was not "extensive". She did not recall that the applicant had 18 years of prior warranty experience before working with the respondent. With respect to the applicant's weaknesses, Ms. Paric testified during her examination-in-chief, she was not bilingual and she lacked the skill set and ability to prepare presentations and analyze data. During her cross-examination, Ms. Sgro testified that she could not recall any weaknesses and did not know if the applicant had a background in any administrative assistant role.

The Decision to Terminate the Applicant

[62] Ms. Sgro testified that she and Ms. Paric decided to recommend terminating the applicant and G.R. and then they brought in Mr. Forbes and told him. It was a group consensus to recommend terminating these two, she stated. Bob Dryburgh, the respondent's president, needed to approve the terminations and Mr. Forbes would speak with him. Ms. Sgro was uncertain of the date that the decision to terminate was made. It was made "somewhere between December 30 and January 2".

[63] Mr. Forbes testified that initially it was Ms. Paric's and Ms. Sgro's decision to terminate the applicant. "Fundamentally", he testified, "the applicant was terminated because she was not bilingual". That decision was made, he believed, before December 30, 2010. He did not know why the date of January 6, 2011 was selected to be the applicant's termination date, although he testified during his examination-in-chief that the respondent wanted signed offer letters back from the candidates before the applicant and G.R. were terminated.

[64] Ms. Paric testified that she did not recall when the decision was made to terminate the applicant. It was made, along with the decision to hire two new candidates, before Christmas and it was "just logistics" with human resources. Ms. Paric did not recall how the termination date itself was selected. She testified that

the candidates had already accepted positions.

[65] On December 30, 2010, Mr. Forbes emailed Ms. Huot advising that he had just met with Ms. Sgro and they had finalized a restructuring plan for the warranty group. He requested that Ms. Huot support Ms. Paric by the following, and he wrote:

> 1. Please get the search firm to complete the due diligence – references –on the 2 candidates. They like both candidates, but would I think it would [sic] be prudent for the agency to due [sic] some probing with respect to the health of the candidate that indicated she needs to be off for surgery for 3 weeks in January. We are concerned that her medical condition may prevent her from fulfilling the requirements of the job. Once they have completed the due diligence, let's have a discussion to confirm moving forward.
>
> 2. Once we have secured signed offers from the 2 candidates let's prepare letters for the exit of Michelle and [G.R.]. Anna, Ted and Andrea have completed a skills and abilities assessment to determine who is best suited to remain. They believe that [V.D.'s] analytics and reporting capabilities set her apart from [G.R.] and Michelle. [P.D.], although requiring some ongoing management for her behaviour, has the skills, abilities and experience the others don't. We can coordinate the actual departure logistics once we have secured start dates for the new ladies. We will have to be very specific on our reasons for selecting Michelle and [G.R.] when we terminate.

[66] The Medical Condition of the Bilingual Candidate CandidateDuring his cross-examination Mr. Forbes was asked questions about his December 20, 2010 email and his reference to the medical condition of one of the candidates. He testified that the respondent did not know the nature of the candidate's candidatesurgery, and that the words "her medical condition may prevent her from fulfilling the requirements of the job" meant her start date rather than the actual requirements of the position. The comments were a "generalization" and the respondent needed to make sure that the candidate candidatewas available to start when it needed her.

[67] Ms. Huot responded to Mr. Forbes' email with an email dated December 31, 2010. She wrote, "I just spoke with Anna. We're amking [sic] an offer … for both candidates. I give [sic] details to Anna about [the candidate's] surgery and we're fine with it. I can tell you more over the phone it you want to. It's nothing major". Ms. Huot testified that she contacted the employment agency to inquire about the candidate's availability to start work. The agency got back to her. It told her that the potential start date would be delayed two to three weeks and the surgery was minor. There was no discussion about the nature of the surgery, she testified. Ms. Huot prepared the offer letters for the candidates the morning of January 4, 2011.

[68] Ms. Sgro testified about the medical condition of the candidatecandidate. She testified that the respondent needed to know if there was more about the candidate candidateand how serious her surgery was before she was hired. The respondent needed to know if the candidate candidatewould be off work three weeks or three months. The due diligence referenced in Mr. Forbes' December 30, 2010 email, Ms. Sgro testified, was conducted to determine if the candidate candidatecould do the

job. With respect to the words “we’re fine with it” as indicated in Ms. Huot’s email, Ms. Sgro testified that this meant that the candidate candidatedid not have a terminal illness, was capable of returning to work after her surgery, and capable of fulfilling her employment contract.

The Applicant’s Anticipated Surgery

[69] The applicant was scheduled to have hip surgery in February 2011 which had an anticipated recovery period of six to nine months. On January 5, 2011, the applicant testified, she told Ms. Paric about this surgery, and identified February 8 or 9 as being date for which the surgery was scheduled. The applicant testified that Ms. Paric rolled her eyes and said “again”. In cross-examination, the applicant said that she did not recall if she told Ms. Paric the recovery period. Ms. Paric testified that on January 5 the applicant did tell her about the surgery, and recalled that it was imminent, although she did not recall the date. She testified that it did not “stick in her mind” because it was “normal in the course of life”. “I didn’t feel that it was detrimental and didn’t need to document it and cause alarm”, Ms. Paric testified during her examination-in-chief, because she knew the applicant’s termination was imminent. Ms. Paric did not change the date of the applicant’s termination. Mr. Forbes testified that he was not aware of this anticipated surgery.

The Applicant’s Termination, the Termination Letter and Issues Post-Termination

[70] The applicant was terminated on January 6, 2011 in a meeting attended by Ms. Paric and Ms. Huot. The applicant’s termination letter, which was signed by Mr. Forbes, states, “As a direct result of the restructuring of the warranty department, your position has been eliminated”. The applicant was offered a separation package which consisted of remaining on the respondent’s payroll for a six-week period, with the exception of her out-of-country coverage and short and long term disability benefits which ceased the date of her termination. The applicant was given until January 14, 2011 to accept the offer, for which she was required to sign a release which was attached to the termination letter. The release referenced the *Code* as well as the *Employment Standards Act* (“*ESA*”) and the *Workplace Safety and Insurance Act*. These were referenced several times in the release. The applicant was advised in the termination letter that if she did not respond by the deadline, the offer may be withdrawn without further notice and the respondent would pay the “minimum required by the ESA on [sic] Ontario”.

[71] Mr. Forbes testified that the reasons in the termination letter were specific. He disagreed, during cross-examination, that the applicant’s position was not eliminated. It was eliminated, he testified, and her position was replaced with bilingual warranty administrators.

[72] During the hearing an issue arose about whether the respondent could discontinue a terminated employee’s short and long term disability coverage before

the end of the *ESA* notice period and whether or not this was contrary to the *Code*. Mr. Forbes and Ms. Huot testified that this was standard practice in the respondent's termination letters. Mr. Forbes, who testified before Ms. Huot, testified that this has now been changed to comply with the *ESA*, but Ms. Huot testified that to her knowledge, it was still included in termination letters.

[73] The applicant did not accept the respondent's offer. She sent an email to Ms. Paric, Ms. Huot and Ms. Sgro on January 7, 2011 asking about some of her personal items and whether the respondent would reconsider her termination and reinstate her. Mr. Forbes responded the same day confirming that her personal items would be sent to her and that she would not be reinstated. He wrote that the decision to terminate her was a business decision and was "in no way a reflection of your performance".

[74] He also wrote:

> The job market is improving and you have good skills and experience. It is our hope that you use the transitional package provided and a good reference from us to move on to the next phase of your career. Unfortunately in my career I have seen many people allow the emotions you must be felling now, fuelled by the advice of lawyers, dictate decisions on how to proceed. When all is said and done, they end up being very frustrated, feeling very bitter and writing cheques to lawyers – ultimately delaying their transition to a new opportunity.

[75] The applicant testified that she felt that Mr. Forbes was trying to intimidate her into not obtaining legal advice. Mr. Forbes denied this and testified that he was trying to be helpful and pass along some of his experience. During this part of his testimony, and only during this part, his arms were crossed while he testified. He testified that a reference letter was not provided to the applicant because she did not request one.

[76] On January 28, 2011, the applicant sent several emails to the respondent requesting that disability claims forms be sent to her. Mr. Forbes denied the applicant's request stating that claims forms are not provided to persons who are not employed by the respondent and not covered by its policy. He wrote, "If you have a claim that pre-dates the termination of your coverage, then you need to identify this; otherwise we will not be sending claim forms".

THE LAW

[77] The relevant sections of the *Code* are sections 5(1), (2), 10(1), and 17.

GENERAL LEGAL PRINCIPLES

The Credibility of Witnesses

[78] The Supreme Court of Canada has observed, "[a]ssessing credibility is not a

science. It is very difficult … to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events," *R. v. Gagnon*, 2006 SCC 17 (CanLII), [2006] 1 S.C.R. 621, at para. 20.

[79] In my assessment of the evidence, I have also applied the well-established principles stated by the British Columbia Court of Appeal in *Faryna v. Chorny,* 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354, which is often cited by the Tribunal in cases in which credibility is assessed, which held:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[80] Underlying this traditional "harmony with the preponderance of the probabilities" are a variety of factors considered in appraising reliability and credibility, including:

- The internal consistency or inconsistency of evidence;
- The witness's ability and/or capacity to apprehend and recollect;
- The witness's opportunity and/or inclination to tailor evidence;
- The witness's opportunity and/or inclination to embellish evidence;
- The existence of corroborative and/or confirmatory evidence;
- The motives of the witnesses and/or their relationship with the parties;
- The failure to call or produce material evidence.

Shah v. George Brown College, 2009 HRTO 920 (CanLII) at paras. 12-14 ("*Shah"*); *Staniforth v. C.J. Liquid Waste Haulage Ltd.*, 2009 HRTO 717 (CanLII) at paras. 35-36.

[81] Thus, evaluating the reliability and veracity of a witness's evidence is a multi-faceted exercise, where a conclusion of credibility develops from various interrelated findings, such as whether, on a balance of probabilities, the evidence was sufficiently probable, logically connected to other points, and/or buttressed by independent evidence; as well as findings with respect to the state of the witness, such as candour or evasiveness, capacity to perceive and remember, and attitude towards the parties. Further, a finding of lack of credibility with respect to one aspect of a witness's testimony does not automatically render the entirety of the witness's evidence as incredible. An adjudicator may find a witness is not credible on a

particular point, but credible on another. A lack of credibility on a collateral matter is a factor to consider, but is not determinative in itself. See *Shah*, at para. 22.

Onus

[82] The Supreme Court of Canada confirmed in *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41 ("*McDougall*"), that the "balance of probabilities" standard of proof applies to all civil cases and, in order to satisfy this standard, evidence must be "sufficiently clear, convincing and cogent". The Court held that Courts must "look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case", at para. 58. A balance of probabilities means that it is more likely than not a violation has occurred or a "50% plus one" probability. See *Shah,* at para. 19.

[83] The initial evidentiary burden rests with the applicant to establish, on a balance of probabilities, a *prima facie* case that she was discriminated against on the basis of disability. A *prima facie* case of discrimination "is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent". See *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 ("*Simpsons-Sears"*) at para. 28 and *Shaw v. Phipps*, 2012 ONCA 155 (CanLII) at para. 14.

[84] Upon establishing a *prima facie* case, the burden shifts to the respondent to provide a non-discriminatory explanation for the conduct. The applicant is not required to establish that the respondent's actions lead to no other conclusion but discrimination. Rather the ultimate issue is whether an inference of discrimination is more probable from the evidence than the actual explanation offered by the respondent. See *Shaw*, at para. 13.

Was the applicant subject to harassing comments by Steve Jeffrey?

[85] The applicant alleges that Mr. Jeffrey made four comments to her which she alleges were discriminatory under the *Code*. The comment about the applicant's grandmother, which Mr. Jeffrey admits to saying, is not *Code*-related and accordingly does not come within the purview of the Tribunal.

[86] The remaining three comments are Mr. Jeffrey telling the applicant she should be "shot like a horse", saying her lesions were "disgusting" and asking if they were "contagious", and saying, "ask Michele, she probably has that" in the presence of another employee. I do not find that the applicant has substantiated these comments.

a) The Shot like a Horse Comment

[87] While this allegation was in her Application, the applicant's testimony between examination-in-chief and cross-examination was consistent, and she denied, during

her cross-examination, that Mr. Jeffrey made this comment about his own grandmother, which Mr. Jeffrey ultimately never testified about, at the end of the day, I have competing evidence about this allegation. The applicant alleging that it was said, twice, and Mr. Jeffrey denying that he said it at all.

[88] Given that the comment was allegedly made in the presence of "the entire department" according to the applicant, and no other employee was called by the applicant to testify about this allegation, I find that the applicant has not met her burden of proof in establishing that this comment was made. Accordingly, this part of the Application is dismissed.

b) The Skin Lesions Comment

[89] With respect to the comments about skin lesions, this allegation was not contained in either the Application or the Reply. In explanation as to why it was not included as an allegation, the applicant testified that she self-drafted her materials before she had counsel.

[90] I do not accept the applicant's evidence that Mr. Jeffrey made this comment to her although I note that during this part of his evidence she was crying. However, the emotional response a witness has to another witness' evidence is not a reason to decide in the applicant's favour. The applicant bears the onus of proving her allegation. In this case the applicant alleges that something was said and Mr. Jeffrey denies saying it. Mr. Jeffrey does not deny that the applicant had a medical condition that was being investigated by her physicians, although he did not know exactly what it was until after her termination. In the absence of anything more, I find that the applicant has not proven this allegation.

c) "Ask Michele, she probably has that" Comment

[91] I do not accept the applicant's evidence that Mr. Jeffrey said to another employee, "ask Michele, she probably has that" in a discussion about health conditions. The other employee, who was not identified, was not called as a witness, and I heard no explanation from the applicant as to why this person was not called. Despite the Response indicating that the applicant joked about her medical condition, both Mr. Jeffrey and the applicant testified that the applicant did take her medical conditions seriously and did not joke about it.

[92] In another context, this may violate the *Code*, but in the context and the evidence before me, I do not find that the applicant has proven this allegation.

Did the Respondent Fail to Investigate into the Applicant's Allegations about Mr. Jeffrey?

[93] I do not accept the applicant's evidence that she told Mr. Forbes during their October 2010 meeting about Mr. Jeffrey's alleged comments to her. Instead, I prefer the evidence of Mr. Forbes over the applicant on this issue.

[94] This allegation is not contained in the Application or Reply. I find it improbable that at this point Mr. Forbes would not have acted upon the applicant's allegations had he become aware of them. Mr. Jeffrey was not, in October 2010, the applicant's supervisor, and the allegations were separate from the applicant's absences, which were discussed at the meeting. More importantly, Mr. Forbes demonstrated a willingness to assist the applicant in the other issues that were discussed during their meeting, namely, a protocol for her to attend ongoing medical appointments without deductions in her pay; her restrictions; and the availability of short term disability benefits.

Did the respondent fail to accommodate the applicant's accommodation requests?

[95] I do not find that the applicant is credible with respect to her allegations that her accommodation requests for a new chair and footstool were not accommodated by the respondent. In this regard, I prefer the evidence of Ms. Paric, Mr. Jeffrey and Mr. Forbes, who all testified separately, and testified that the applicant did not seek this accommodation with them, over the evidence of the applicant.

[96] Ms. Paric and Mr. Jeffrey both testified that employees could order new supplies through the Staples catalogue, provided the employee had their supervisor's consent. It seems improbable that a footstool, an inexpensive item, would not be ordered for the applicant, when she had been provided with a $400 flip chart, even if she had not requested this herself.

[97] Furthermore, the applicant's evidence was inconsistent about the ergonomic chair. She testified that on the day of her termination, other employees went out to purchase new chairs and she believed that one would be for her. This belief undermines her assertion that the respondent failed to accommodate her request for a chair.

[98] Finally, I do not accept the applicant's evidence that she told Mr. Forbes that Ms. Paric and Mr. Jeffrey failed to provide her with her accommodation requests and accept instead the evidence of Mr. Forbes. I accept the respondent's evidence that the applicant's request for time off, including coming in late and arriving early, to attend medical appointments was provided to her both before September 29 and after and for which she was not deducted any pay. The applicant's doctor's October 29, 2010 letter does not specify any accommodations for her medical condition other than a continued need to attend medical appointments and a limitation about walking. Mr. Forbes' efforts to find out from the applicant's doctor what restrictions the applicant had indicates a willingness to consider what further accommodations would be required by the respondent.

[99] Accordingly, this part of the Application is dismissed.

Was the applicant's disability a factor in the respondent's decision to terminate the applicant?

[100] It is well-established in human rights law that the protected ground need only be one factor in the decision made that adversely affected the applicant; it does not have to be the only or primary reason. See: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 1989 CanLII 97 (SCC), 1989 CanLII 97 (S.C.C.); *McLean v. DY 4 Systems*, 2010 HRTO 1107 at para. 62; *Defina v. Lithocolor Services Ltd.*, 2012 HRTO 1768 (CanLII) at para. 51 ("*Defina*").

[101] The applicant does not allege that she was terminated only because of her disability, but submits that her disability was a factor in the respondent's decision to terminate her. Accordingly I need to determine whether or not her disability was a factor in the respondent's decision to terminate her. The respondent does not dispute that the applicant has a disability within the meaning of the *Code*.

[102] It is not unusual in termination cases in which an applicant has a disability that there is no direct evidence supporting an applicant's assertion that his or her termination was based upon his or her disability. Instead, I must determine, based upon circumstantial evidence whether an inference of discrimination is more probable than the actual explanation offered by the respondent. See *Shaw,* at para. 13.

[103] In the facts of this Application, I find it more probable than not that the applicant's disability was a factor in the respondent's selection of her to be terminated.

[104] The respondent is a sophisticated employer with sophisticated and articulate witnesses. Mr. Forbes, Ms. Paric, and Ms. Sgro, who were involved in the decision to terminate the applicant, each testified that neither the applicant's disability nor her attendance record was considered when they selected which warranty administrators to keep and which to terminate. In fact, the absence of this consideration in light of the recent events about the applicant's medical condition and absences became the metaphorical "elephant in the room".

[105] However, based upon the evidence that was before me, it is clear that in the period leading up to the applicant's termination, the applicant's disability, her absences, and the medical condition of an candidate were on the mind of the respondent. These, along with my findings about the problems with the selection process that was used to assess the warranty administrators, gives rise to the inference that the applicant's disability was a factor in the reason to terminate her.

[106] The parties agree that Ms. Sgro and Mr. Forbes attended a senior executive meeting in September 2010 at which Ms. Sgro was told that one of her employees had the highest absenteeism rate amongst employees across the country. Not only was Ms. Sgro told this, she was provided with documentation supporting this claim. Documentation specific to the applicant was later provided to the applicant.

[107] Following this, Ms. Sgro and Ms. Paric met with the applicant on September 29, 2010 to discuss her attendance record and her ongoing absences. I accept the evidence of Ms. Paric and the applicant that until this date, the respondent did not

know about the applicant's medical condition.

[108] Ms. Sgro and Mr. Forbes were more uncertain about the date that they became aware that the applicant has Lupus. Ms. Sgro was uncertain during her evidence about when she learned about the applicant's disability. She testified during her examination-in-chief that the applicant did not discuss it on September 29, saying that her condition was personal, but in cross-examination she confirmed that it could have been disclosed and she knew that the applicant was getting blood work. Similarly, Mr. Forbes testified that the applicant did not tell him about Lupus during their October 5, 2010 meeting. I do not need to reconcile the competing evidence between the applicant, Ms. Sgro and Mr. Forbes, because on October 12, 2010, the applicant emailed Dr. Ashley's October 12, 2010 letter to Ms. Paric, Ms. Sgro and Mr. Forbes. Accordingly, Ms. Sgro and Mr. Forbes knew as of October 12, 2010 about the applicant's disability.

[109] I accept the applicant's evidence that her absences, including her late arrivals and early departures to attend medical appointments, had become a "burden" for the respondent as told to her by Ms. Sgro. Ms. Sgro, although not admitting to using the word "burden", testified that she told the applicant about the "inefficiencies that started to occur", "the effect [the applicant's absences] were having on the team", the respondent "leaning on others" to get the work done, and "some girls" including V.D. coming in early and staying late to get the work done. Ms. Sgro's choice of wording suggests that the applicant's absences had become a burden on or a problem for the department. Ms. Paric, in her testimony, denied that Ms. Sgro used the word "burden", but testified that Ms. Sgro used the words "fair" and "give and take" in telling the applicant that the respondent needed to be fair to everyone in the department, and needed to work out a schedule that was "fair" for both it and the applicant. She also testified that Ms. Sgro told the applicant that there needed to be some "give and take" which suggests, in my opinion, that the respondent was prepared to give the applicant something to which she was not otherwise entitled, provided that the applicant gave something back to it.

[110] The applicant's evidence about her medical conditions and her requirement for ongoing medical appointments was not disputed. The evidence is clear that the applicant has Lupus, a chronic medical condition for which there is no cure, and that the applicant would continue to require time off work to attend medical appointments to address her Lupus and her secondary medical conditions.

[111] The parties agree that the applicant would provide advance notice of her absences to Ms. Paric, who would enter them on her electronic calendar. It is somewhat surprising that the applicant's absences after the September 29, 2010 meeting were not identified or entered as exhibits, as it would have provided a more complete picture of the applicant's attendance record up to her termination. However, nothing turns specifically on its absence. The applicant's evidence that she was prepared to make up the missed work time, either by working through her lunch or staying late, was not challenged by the respondent. In fact, Ms. Sgro, Ms. Paric and Mr. Forbes all testified that she was willing to do this.

[112] On October 4, 2010, the applicant wrote to her doctor, Dr. Ashley, requesting

a letter setting out her medical conditions. In light of the tone of the September 29, 2010 meeting, I accept the applicant's evidence that she felt worried about her employment, given the findings I have made about the words used by Ms. Sgro during that meeting. In this light it is understandable why the applicant wrote to her doctor, "I feel they are trying to use my illness against me".

[113] Dr. Ashley provided a letter dated October 12, 2010, which confirmed not just that the applicant had a serious and chronic medical condition, Lupus, but also a chronic medical condition, chronic migraine headaches. Further, he confirmed that the applicant was on multiple medications, is "constantly being followed by her specialist" and was also suffering from hip pain. His letter suggests that at least three doctors, himself, a specialist and an orthopaedic surgeon, were treating the applicant. In total, this letter presents a patient with chronic and complex medical conditions requiring constant and ongoing medical appointments.

[114] On October 18, 2010, and after receiving Dr. Ashley's letter, Mr. Forbes emailed the applicant to advise that the letter did not contain any work restrictions. The applicant emailed a response the next day stating that she could obtain further medical documentation with this information. However, by the time the applicant responded, and unbeknownst to her, Mr. Forbes had already written to her doctor asking about her work restrictions and providing a copy of the applicant's job description. Mr. Forbes testified that he did not "explicitly" have the applicant's consent to communicate with her doctor. However, I find that Mr. Forbes did not have the applicant's consent to communicate directly with her doctor and that such communication was also without her knowledge as she was not copied on Mr. Forbes' communication.

[115] I am not prepared to find that the respondent's unilateral communication with the applicant's doctor, without her consent or knowledge, was a separate violation of the *Code*, as the applicant submitted. However, I do find that the respondent's communication with the applicant's doctor indicates that her medical condition, and its impact upon her work, was still being considered by the respondent. The surreptitious manner of communicating with the doctor also suggests that the respondent was considering the information and making decisions about the applicant's medical condition behind the scenes and without telling the applicant what it was considering and the decisions it was making.

[116] My finding is also reinforced by the evidence to which Mr. Forbes testified about the respondent obtaining medical documentation, albeit his testimony was about the respondent's third party insurance carrier, Morneau Shepell. Mr. Forbes testified that the respondent should not see private medical documentation and that it had purged employee files of such confidential information. In light of this evidence, it is surprising that Mr. Forbes should be seeking out information from an employee's doctor, particularly without the employee's knowledge or consent.

[117] The applicant's absence record, which was entered as an exhibit, combined with the respondent's knowledge of the applicant's ongoing need for frequent medical appointments, suggests that the applicant's medical condition was problematic for the respondent. The absence report, which is called Vacation/Sick

Report, sets out the applicant's sick time and vacation time from April 3, 2009 until September 3, 2010. It shows that the applicant took, during this time period, 120 hours of sick time and 144 hours of vacation time. The dollar value of $2444.09 is recorded beside the sick time column. There is no dollar value beside the vacation column. Ms. Paric and Mr. Forbes could not tell me, when I asked them, why a dollar figure would be reflected on this report. To me, when reviewing this document, it informs the respondent of the costs of having a sick employee.

[118] Leaving aside the absences from 2009, the absence report shows that the applicant was absent from work for either sick time or vacation time for every pay period in 2010. I note that Mr. Jeffrey, while he was the applicant's supervisor for part of 2010, and Ms. Paric, when she became the applicant's supervisor later in 2010, both testified that they often did not record all of the applicant's late arrivals or early departures into the respondent's exception payroll system. This means that not all of the applicant's absences are recorded on the attendance report. Further, the respondent was aware that the applicant required ongoing medical appointments, which would mean continued, and frequent, absences from the workplace.

[119] A handwritten notation exists on the "National Warranty Organizational Chart – Post Centralization", reading, "Oct. 30/2010 Andrea, Bob approved 4 – headcount Admin; 1 – Manager; 1x – possible future". The names of the four existing warranty administrators is listed on the chart, as is Ms. Paric's name as manager. Ms. Paric's presentation at the general manager meeting on October 6 and 7, 2010, also shows the four existing warranty administrators named post-centralization, although Ms. Paric testified that names listed did not mean anything.

[120] There was no documentary evidence submitted by the respondent establishing when the respondent decided to replace some of its current warranty administrators with bilingual ones. Ms. Paric testified that by mid-October 2010 the respondent had engaged the services of an employment agency to find bilingual candidates for the warranty administrator position. This was after the senior executive meeting in September 2010 and the meeting held on September 29, 2010 with the applicant, Ms. Paric and Ms. Sgro. By mid-November, Ms. Paric testified, she and Ms. Huot had interviewed the first round of candidates. Mr. Forbes and Mr. Breland conducted the second round of candidates in December 2010.

[121] This background information, by itself, would not lead to a conclusion that the applicant's disability was a factor in her termination. However, this background information, combined with the evidence about the process that was used to determine which warranty administrators to retain and which to terminate establishes, in my mind, on a balance of probabilities that the applicant's disability was a factor in her termination. In that regard, I find that the evidence about the assessment process, which was inconsistent amongst the testimony of the respondent's witnesses, the Response and the exhibits, taints any assessment that the respondent conducted about the warranty administrators.

[122] In the Response, the respondent wrote that the applicant was one of two warranty administrators whose positions were eliminated and employment

terminated. At para. 5, the Response states:

> The positions of the two individuals who were retained were restructured. The four individuals in head office who had performed the position of Warranty Administrator were assessed based upon their skills, abilities and experience. Strongco chose to retain the two individuals with the best skills, abilities and experience needed. This included the individual with the best administrative and analytical skills needed due to the centralization of tasks within the department. The Applicant was not in a position to make an informed assessment of the skills, abilities and experience needed by Strongco on a go forward basis.

[123] It is not disputed that P.D. and V.D. were retained by the respondent and that the applicant and G.R. were terminated. It is not disputed between the parties that P.D. had significant warranty experience not just with the respondent, but also with a company whose products the respondent sells and leases. It is not disputed that V.D. had approximately six months of warranty experience and her previous work experience included working as an administrative assistant and in the travel industry. It is not disputed that apart from the applicant, the other warranty administrators had did not have attendance issues. What is disputed is why P.D. and V.D. were retained and the applicant terminated and why two bilingual warranty administrators were hired in place of the applicant and G.R.

[124] Mr. Forbes testified that to determine which candidates should be retained or terminated, Ms. Paric and Ms. Sgro conducted a “skills and abilities” assessment on Ms. Sgro’s white board of the four current warranty administrators. He saw the white board but was not involved in this other than to validate the process. In his December 30, 2010 email to Ms. Huot, he wrote that Ms. Paric, Ms. Sgro and Mr. Breland had conducted this assessment. I did not hear any evidence from Mr. Breland. Both Ms. Paric and Ms. Sgro testified that an assessment was conducted on Ms. Sgro’s white board. However, they called it a “strengths and weaknesses” assessment. The difference in this terminology, combined with the evidence that the respondent presented, is significant in my findings that the applicant’s disability played a factor in the respondent’s decision to terminate her.

[125] Ms. Sgro’s and Ms. Paric’s responses to the weaknesses analysis, along with Mr. Forbes’ evidence, casts doubt, in my view, on the reasons why the applicant was terminated, why P.D. and particularly V.D. were retained, and why two bilingual warranty administrators were required to be hired rather than one.

[126] Mr. Forbes testified that the performance appraisals of P.D. and the applicant were taken into consideration in the assessment of the warranty administrators and that the applicant’s performance was solid. Mr. Jeffrey testified that he did a performance appraisal on the applicant while he was her manager, and that he rated her above average. However, Ms. Paric testified that she did not consider the performance appraisals of any of the warranty administrators. Ms. Paric and Mr. Forbes both confirmed that performance appraisals had not been conducted for V.D. or G.R.

[127] Ms. Sgro testified that she had no concerns with the applicant's performance. She confirmed during her cross-examination that the applicant had brought concerns about how quickly G.R. and V.D. were catching onto warranty to the attention of she and Ms. Paric. Ms. Paric confirmed in her examination-in-chief that the applicant was a good warranty administrator. In her evidence, Ms. Paric identified some weaknesses with P.D.'s performance, although she testified that P.D.'s experience outweighed any weaknesses that she may have. .

[128] Ms. Sgro could not recall any weaknesses attributable to the applicant when testifying about the strengths and weaknesses assessment conducted on the applicant. Ms. Paric testified that the applicant's weaknesses included not being bilingual and not having the administrative support skills for the position. Mr. Forbes testified that "fundamentally, the applicant was not bilingual". However, none of the four warranty administrators was bilingual.

[129] Both Ms. Sgro and Ms. Paric testified that V.D. had the skill set required to provide administrative support to Ms. Paric and the respondent, including PowerPoint, Excel, and the ability to analyze data and make presentations, whereas the applicant did not. Ms. Sgro confirmed during her cross-examination that she did not know if the applicant could perform PowerPoint and Excel. Ms. Paric testified that the administrators' résumés were not before them. There appears to be no consideration of whether or not the applicant could perform these skills.

[130] The respondent may have determined that V.D. had excellent administrative assistant skills and could support Ms. Paric and the respondent. Mr. Forbes, in his December 30, 2010 email to Ms. Huot, wrote that, "They [Ms. Sgro, Mr. Breland, and Ms. Paric] believe that [V.D.]'s analytics and reporting capabilities set her apart from G.R. and the applicant". However, the documentary evidence tendered by the respondent about the warranty department post-centralization and the job description of warranty administrator does not indicate that the position was changed. Ms. Paric testified that V.D. was given the warranty business for Alberta in addition to administrative functions and she testified that a new position was not created for V.D. The applicant does not need to prove that her disability was the only reason for her termination; she only needs to prove that it was a factor.

[131] The respondent's evidence about the consideration it gave to the applicant's experience as part of the "skills, abilities and experience" assessment that Mr. Forbes testified about is also troubling. V.D. had approximately six months of experience in the position, compared with the applicant's 18-plus years of warranty experience, including two working for the respondent. Ms. Paric testified that the applicant did not have "extensive" warranty experience, and testified that she was unaware of the applicant's warranty experience prior to working for the respondent. Clearly the applicant had significantly more warranty experience than V.D.

[132] I am also troubled by Mr. Forbes' written comment, in his December 30, 2010 email, that "We will have to be very specific on our reasons for selecting Michelle [sic] and [G.R.] when we terminate". Mr. Forbes testified that "it's best practice to very specific" in telling an employee why they are being terminated; however, he was not at the termination meeting. The termination letter, signed by Mr. Forbes, but

prepared by Ms. Huot, states the reason for the applicant's termination as being: "As a direct result of the restructuring of the warranty department, your position has been eliminated". This reason was not accurate as the warranty administrator position continued to exist both by maintaining two former warranty administrators as well as the hiring of two new warranty administrators, albeit bilingual ones.

[133] Further, it is questionable why two bilingual warranty administrators were hired, rather than one, particularly when Ms. Paric herself was bilingual. Ms. Paric testified that the two bilingual warranty administrators would not only be servicing Quebec, but other provinces. She acknowledged that not all of the Quebec branches required bilingual services. The bilingual warranty administrators would be back-up for each other when the other was on vacation, but according to the letters offering them employment, which were entered as exhibits, they were each given two weeks' vacation. Mr. Forbes testified that not all departments within the respondent have such a high percentage of bilingual employees.

[134] In addition to the above, there were further indicia that the respondent was concerned with the medical condition of the applicant and replacing her with another individual with a medical condition. These further points, when reviewed with the totality of the evidence, support the inference that the applicant's disability was a factor in the respondent's decision to terminate her.

[135] Upon the applicant's termination, the respondent immediately discontinued her short and long term disability benefit coverage.

[136] Whether or not this practice violates the *ESA* is not within the Tribunal's jurisdiction. Mr. Forbes testified that the respondent's practice about ceasing such benefits as of the date of termination has now changed; however, Ms. Huot testified that to her knowledge that practice has not changed. Whatever the current practice, the fact that these benefits immediately ceased upon the applicant's termination, and the fact that this was referenced in her termination letter, indicates to me, along with the other conclusions that I have made, that the respondent, which was self-insured, did not want continued liability for the applicant with a chronic medical condition post-termination.

[137] Finally, there are Mr. Forbes' instructions to Ms. Huot in the December 30 email to contact the employment agency and do some "probing" into the health of the candidate who required surgery in January. "We are concerned that her medical condition may prevent her from fulfilling the requirements of the job", Mr. Forbes wrote. He testified, during his cross-examination, that this sentence was related only to the start date of that candidate and to ensure she was available for when the respondent needed her to start. He disagreed that her medical condition was a concern for the respondent.

[138] I do not accept Mr. Forbes' explanation about this sentence. The sentence could have expressed concern about the candidate's start date and could have been written, "We are concerned that her medical condition may prevent her from starting when we require her", but it was not. Further, Ms. Huot's emailed response,

"It's nothing major" along with "I give [sic] details to Anna about [the candidate's] surgery and we're fine with it" indicates something more than a delayed start date. Ms. Sgro's evidence is more telling and, in my assessment, more probable. Ms. Sgro testified that the "due diligence" referenced in Mr. Forbes' December 30, 2010 email meant that the respondent needed to know more about the candidate and her ability to perform the job. She testified that Ms. Huot's comment, "we're fine with it" meant that the candidate did not have a terminal illness, was capable of returning to work after her surgery, and capable of fulfilling her employment contract. Of course, contrasted with that is the applicant's chronic medical condition, which required numerous and frequent medical appointments. The respondent's conduct pertaining to the candidate reinforces that the medical condition of an employee, or even a prospective one, was of concern to it at a time when it was terminating an employee with a chronic medical condition.

[139] The concerns that I have highlighted with respect to the respondent's evidence about the assessment process that was used to decide which warranty administrators to retain and which to terminate, along with the evidence specifically pertaining to the applicant's medical condition and the respondent's consideration about that, establish that the applicant's medical condition was a factor in the respondent's decision to terminate the applicant.

[140] Both the applicant and Ms. Paric testified that on January 5, 2011, the applicant told Ms. Paric about her anticipated surgery. I do not accept the applicant's evidence that Ms. Paric rolled her eyes and said "again" upon being told about the surgery. There was no evidence before me that the applicant had previously told Ms. Paric about any surgery which would require time off work which would trigger an "again" response. By January 5, 2011, I accept the respondent's evidence that it had made the decision to terminate the applicant, as evidenced by the respondent's January 4, 2011 offer letter to the bilingual candidates and their written acceptance of January 5, 2011. I do find Ms. Paric's response to the applicant's anticipated surgery to be very unusual. She testified that this was "part of life", that it was not "detrimental", and she did not need to document it and "cause alarm". This is a very unusual reaction to being told that an individual who reports to her was having invasive surgery with a significant recovery period. However, ultimately nothing turns on her reaction.

[141] I do not find that Mr. Forbes' comments to the applicant in his January 7, 2011 email were designed to intimidate or prevent the applicant from seeking legal counsel as the applicant asserted during her evidence. The evidence before me is that the applicant knew Mr. Forbes, at the very least by meeting with him several times. There was no evidence before me that they had a difficult relationship. I accept Mr. Forbes' evidence that he was trying to be helpful and passing along comments based upon his experience. I also accept his evidence that a reference letter was not provided because the applicant did not request one. In any event, the applicant did not accept the severance payment and she pursued her rights under the *Code*.

[142] With respect to the respondent's failure to provide the applicant with short term or long term disability forms after she requested them at the end of January

2011, I find that this is not relevant to my determination of whether or not the applicant was terminated because of her disability. The applicant's request for these forms fell outside of the *ESA* termination notice period and, she testified in cross-examination, they were not required for any period during which she worked for the respondent.

[143] Based upon the above, I find that it is more probable than not that the applicant's disability was a factor in the respondent's decision to terminate the applicant on January 6, 2011. Accordingly, this part of the Application is upheld.

If the applicant's disability was a factor in the respondent's decision to terminate her, what are the appropriate remedies to award?

[144] Having found that the respondent breached the *Code,* I turn now to the question of the appropriate remedy in the circumstances. The Tribunal's remedial jurisdiction is based on sections 45.2(1) and (2) of the *Code.*

[145] At the beginning of the hearing, the applicant sought to amend her Application by claiming the following remedies: reinstatement; loss of wages in the amount of $43,000; and $35,000 for damages to dignity and self-respect. The applicant was self-represented when she drafted her Application, but was represented at the hearing. The respondent objected to the applicant's request to amend her remedies, by submitting that the request to amend could have been made at any time prior to the hearing and it was unfair for the applicant to "lie in the weeds" and then request an amendment at the hearing. The respondent indicated that it was not alleging that it was prejudiced by the late request. I issued an oral ruling allowing the applicant to amend the remedies that she was seeking, and noted that allowing the amendment did not mean that the applicant would be successful with her Application, or, if successful, that she would ultimately receive the requested remedies.

[146] It is well-established that the purpose of the *Code* is remedial, not punitive. The purpose of ordering that monetary compensation be paid to an applicant is an attempt to restore the applicant to the position he or she would have been in had the discrimination not occurred. An award of monetary compensation seeks to compensate the victim of discrimination and not punish the perpetrator. Intention to discriminate is not a governing factor in construing human rights legislation. See *Simpsons-Sears.* It is the result or effect of the alleged discriminatory action that is significant. See also *Nemati v. Women's Support Network of York Region*, 2010 HRTO 327 (CanLII) at para. 112.

Damages for Injury to Dignity, Feelings and Self-Respect

[147] In *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII), the Tribunal, at para. 52-54, summarized the principles on which damages under section 45.2(1) 1 are awarded:

The Tribunal's jurisprudence over the two years since the new damages provision

took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII) at para. 16.

The first criterion recognizes that injury to dignity, feelings, and self- respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at paras. 34-38.

[148] The applicant testified that since being terminated, she and her common law spouse had to sell their house and she has moved twice. She now resides in a cheaper location in an area in which she is not "too thrilled" to be living. She and her common law spouse have separated because the loss of her job put strain on their relationship. She had hoped to retire from the respondent and enjoyed working there, apart from the comments that were allegedly made to her and how the respondent handled "some things".

[149] As she was unable to find full-time employment in the warranty field, she is now in receipt of Ontario Works ("OW"), which she finds embarrassing, and through OW is completing an academic program. She testified that she did not like appearing at the hearing and "putting out all my laundry for everyone to see". It is devastating to talk to people about her personal circumstances, including her medical and financial details, she testified.

[150] This case is about the termination of an employee with just over two years of service. I have found that the applicant's disability was a factor in the respondent's decision to terminate her, but I have not found that it was the sole reason for her termination.

[151] In this Application, I have determined that it is appropriate to award $15,000 to the applicant as monetary compensation for damages for her injury to her dignity, feelings and self-respect. I heard the applicant's evidence about the impact of her termination upon her and saw its effect. I find that the situation before me is comparable to *Defina*, above, in which a short-term employee who was terminated, in part because of her disability, was awarded $13,000.

Loss of wages

[152] Pursuant to section 45.2 (1), above, an applicant who proves a breach of section 5 of the *Code* is entitled to compensation for wage loss arising out of the discriminatory act. The purpose of the compensation is to place the applicant in the position that she would have been had the discrimination not occurred. See *Ontario Human Rights Commission v. Impact Interiors Inc.*, 1998 CanLII 17685 (ON CA) at para. 2, *Kreiger* at para. 182 and *Whale v. Keele North Recycling*, 2011 HRTO 1724 (CanLII) at para. 58, upheld on judicial review, *Keele North Recycling v. Human Rights Tribunal of Ontario*, 2013 ONSC 268 (Div. Ct.).

[153] An applicant has a duty to mitigate his or her losses. In *Adams v. Knoll North America*, 2010 HRTO 376 (CanLII) (*"Adams"*), at para. 16, the Tribunal explained this duty as follows:

> The applicant is under a duty to mitigate his losses by making reasonable efforts to obtain suitable employment. He cannot remain idle and then expect complete compensation for the period of his unemployment. The applicant is entitled to be compensated only for those losses that could not have been avoided and the respondent has the onus of proving the applicant's failure to mitigate. See *Heintz v. Christian Horizons*, 2008 HRTO 22 (CanLII) at para. 265; *A. v. Ruby's Food Services Ltd.* (1992), 16 C.H.R.R. D/394 at para. 45 (Ont. Bd. Inq.).

[154] In some situations, the loss of wages amount has been capped if the applicant was otherwise going to be terminated. See *Mirshrafi v. Circuit Centre*, 2010 HRTO 512 (CanLII). In other situations, the loss of wages amount has been reduced because of the applicant's failure to mitigate his or her losses. See *Adams* at para. 17.

[155] The surgery about which the applicant advised Ms. Paric that was scheduled for February 2011 was not required, although the applicant testified that she did not learn this until February 2011. Instead, the applicant had less-invasive surgery, which was conducted in April or May 2011 with a one-month recovery period.

[156] The applicant testified that following her termination, she worked part-time as a waitress once or twice a week between one to three hours at Swiss Chalet. This was a position she also held while she was also employed with the respondent. She waitressed up to her surgery, and after her recovery until she returned to school. The applicant testified that she could not waitress full-time because of the physical restrictions that she had associated with her medical conditions.

[157] She commenced a college program for social work and gerontology in September 2011 with an anticipated completion date of April 2013.

[158] During her examination-in-chief, the applicant testified that she placed a lot of "cold calls", including places where she used to work, but was unable to find permanent employment. In cross-examination, she confirmed that she called about four to five dealerships.

[159] I do not find that the applicant was required to mitigate her damages by

working full-time as a waitress, as it was a position that she held while she was employed by the respondent. Further, I accept her evidence that she was not able to work full-time as a waitress because of her medical conditions but continued to work as a waitress because she needed the income.

[160] I accept that the applicant's anticipated surgery and her eventual surgery, with a one-month recovery period, had an impact upon her ability to mitigate her damages.

[161] While four to five calls to find employment in other circumstances may be enough to prove that an applicant failed to mitigate his or her damages, in these circumstances I find that the appropriate wage loss period is from January 6, 2011 until September 2011, when she commenced her college program, less any employment insurance overpayment, less any amounts already received, and less other deductions required by law.

Reinstatement

[162] The applicant testified briefly about being reinstated. She said that she was interested in being reinstated to the position that she had held and would be prepared to go back and work for the respondent. She does not like to sit at home and collect money from OW. Mr. Forbes testified that he did not know where the applicant would be placed if an order was made to reinstate her. The respondent's evidence is that there are still four warranty administrators within the department, two of whom are bilingual.

[163] The Tribunal has the jurisdiction to reinstate an applicant, but this order is rarely requested or ordered in human rights cases. See *Krieger* at para. 182. In cases in which an applicant has been ordered reinstated, the applicant has been a unionized employee for a large employer (*Kreiger*) or has been employed in a relatively unskilled position (*Dhamrait v. JVI Canada*, 2010 HRTO 1085 (CanLII)). Unlike *Dhamrait*, in which there were no other reasons for which the applicant was terminated, in this case I have determined that the applicant's disability was a factor but not the sole reason for her termination.

[164] Accordingly, I do not find it appropriate to order reinstatement.

ORDER

[165] The Tribunal orders that the respondent shall pay the applicant:

a. $15,000 as monetary compensation for her injury to her dignity, feelings and self-respect;

b. Loss of wages for the period January 6, 2011 to September 2011, less any employment insurance overpayment, any monies already paid, and less deductions required by law; plus pre-judgment interest from May 6, 2011 to the date of this decision in the amount of 1.3%, pursuant to section 127 of the *Courts*

of Justice Act; and

c. Post-judgment interest at the rate of 3% on any amounts that are unpaid after 30 days of the date of this Decision.

Dated at Toronto, this 16th day of May, 2013.

"Signed by"

_____

Alison Renton
Vice-chair