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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Shannon Ford (Adams)

COMPLAINANT

A N D:

Peak Products Manufacturing Inc. and John Gross

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Tonie Beharrell
Counsel for the Complainant:	Fred Wynne
Counsel for the Respondents:	Thomas Ciz
Dates of Hearing:	March 22 – 24, 2010
Date of Final Written Submissions:	April 14, 2010

I INTRODUCTION

[1] Shannon Ford filed a complaint alleging that the respondents, her former employer Peak Products Manufacturing Inc. (“Peak”) and John Gross, Peak’s President and CEO, discriminated against her with respect to her employment on the basis of mental disability, contrary to s. 13 of the *Human Rights Code*.

[2] When Ms. Ford was employed by Peak, she was known as Shannon Adams. However, by the time she filed her complaint, she was using her married surname, Ford. I will therefore refer to her as Ms. Ford in this decision.

[3] Ms. Ford was hired by Peak as a senior administration coordinator in August 1, 2007. When she was hired, but unknown to the respondents, she had a history of mood disorder, in particular depression and anxiety, but this condition had been in remission for some time.

[4] In the Spring of 2008, Ms. Ford began to suffer a relapse of her illness and by the end of May 2008 she was advised by her physician to take time off work. Ms. Ford remained off work until August 22, 2008, when the respondents terminated her employment. Ms. Ford alleges that this constitutes discrimination contrary to the *Code*, while the respondents deny that they discriminated.

II EVIDENCE

[5] Ms. Ford testified on her own behalf, and called three witnesses: her sister, Andrea Adams; her husband, Stan Ford; and Dr. Raymond J. Ancill, a psychiatrist who assessed Ms. Ford at an independent medical examination.

[6] The respondents called three witnesses, all employees of Peak: Jas Dhaliwal, Peak’s Manager of Human Resources and Director of Finance; Crystal McGowan, an executive assistant and Peak’s payroll and benefits coordinator; and Jean-Marie Pepin, Peak’s North American Logistics Manager. Although named as a respondent, Mr. Gross did not testify at the hearing.

[7] I find that all of the witnesses testified to the best of their ability and recollection and attempted to accurately recall the events at issue.

[8] Although I have considered all of the evidence presented, in these reasons I set out only the evidence necessary to my decision. My factual conclusions are incorporated in my review of the evidence.

1. Peak Products Manufacturing

[9] Peak was founded in 1998. It is involved in the distribution of exterior home improvement products. In February 2006, Peak's operations expanded to include manufacturing as well as distribution.

[10] All of the shares of Peak are held by Peak Innovations Inc. ("Innovations"). The common shares of Innovations are held by Mountain Top Holdings Ltd., the preferred shares are held by West Coast Summit Holdings, and John Gross is the sole shareholder of both Mountain Top and West Coast. He is also a director of Peak.

[11] Ms. Ford testified that Mr. Gross was a very hands-on owner. She testified that Peak is his life, and he expected complete dedication. She testified that, in her experience, Mr. Gross had the ultimate say on all firing decisions.

[12] When Ms. Ford was employed with Peak, the company had two facilities in Vancouver: the main office, and the manufacturing plant. It employed approximately 35 employees on a permanent basis, but due to changes in production volumes, employed as many as 100 employees at some times of year.

[13] Jean-Marie Pepin, the North America Logistics Manager, had general managerial responsibilities at the manufacturing plant, and Ms. Ford worked closely with him.

2. Ms. Ford's Psychiatric History

[14] Ms. Ford has a familial and personal history of mood disorder. She testified that she experienced post-partum depression after the birth of each of her three children, and the condition got progressively worse after each birth. Her third child was born in 1999, and in June 1999, approximately one month after his birth, she was admitted to hospital

suffering from post-partum psychosis. She testified that, during this period she was actively suicidal, felt that she was not worth anything, and was better off dead. For the next two years she was in and out of the hospital, including after one suicide attempt in 2001.

[15] Until 2004, Ms. Ford was on a number of medications for her illness. At that time, her doctor started the process of slowly weaning her off the medications, so as to avoid a relapse. She was under the care of a psychiatrist until 2005, and entered a period of sustained remission at that time.

[16] In 2004, Ms. Ford started offering daycare in her home. In 2005, Ms. Ford returned to the work force, initially part-time, but soon on a full-time basis.

3. Ms. Ford's Employment with Peak

[17] Ms. Ford started her employment with Peak on August 1, 2007, as a Senior Administrative Coordinator. Her duties included assisting with payroll and liaison. She enjoyed her job and worked hard. She was excited to join a dynamic and growing company and was impressed by the owner, John Gross.

[18] Ms. Ford had a variety of duties. The plant had opened in the Spring of 2007, so some of her duties involved setting up the office. In addition, she was responsible for ordering supplies, answering the phone, and assisting the Plant Manager. She also had responsibilities for payroll, and for coordinating and liaising with one of Peak's major clients, Mitten Vinyl. This latter responsibility took up a significant portion of her work time.

[19] In meeting her duties, Ms. Ford worked a significant amount of overtime. Between August and December 2007, she banked approximately three weeks of overtime.

[20] Ms. Ford testified that, in late 2007, she was expected to take over extra work, which necessitated working longer hours. Specifically, Ms. Ford became responsible for the Health and Safety Committee, the Social Committee, as well as some responsibilities for coordinating hiring of production employees for a third shift. At the same time, there was a reduction in overtime hours allowed within Peak generally. As a result, Ms. Ford

felt that she had more work to do in less time. She skipped lunch and other breaks in order to complete as much of her work as possible, and felt under increasing pressure.

[21] In addition, the relationship between Peak and Mitten was not going all that well, and the atmosphere at Peak was less positive.

[22] Ms. Ford was also dealing with a number of personal stressors at the time, including her upcoming marriage and the challenges posed by merging two families.

4. Ms. Ford's Medical Leave

[23] In early 2008, Ms. Ford started having anxiety and panic attacks. She consulted with her physician, who recommended a week off work. She then returned to work full-time. However, she continued to battle symptoms of anxiety and depression, which worsened over time.

[24] Although she had planned to move into a home with her fiancé in March, in advance of their July wedding date, she was simply unable to get organized to do so. All she was able to do at this time was go to work, go home, make dinner, and go to bed. She was seeing her doctor regularly, and had been put on medication. She was talking to her sister, trying to stay stable. However, her condition did not improve.

[25] On May 26, Ms. Ford attended at work but found that she was unable to complete even simple tasks. She left at approximately noon and went to see her family doctor.

[26] On May 27, 2008, Ms. Ford emailed a medical certificate to Mr. Pepin. Her email stated that she would be unable to work until July 14th due to “unforeseen medical circumstances”. Ms. Ford noted that she would be in touch in the following days to discuss what she was currently working on, and what needed to be dealt with. The medical certificate was attached to the email, and stated she was “suffering from illness”, and that she would be unable to attend work until July 14.

[27] Ms. Ford testified that, during this period she was seeing her doctor weekly, and that her medications were increased. Her fiancé was dropping off and picking her children up from school, and she was mainly sleeping.

[28] On July 4, 2008, Ms. Ford again emailed Mr. Pepin, indicating that she required a further two weeks of sick leave. The medical certificate, in the same form as previously, was attached to the email. It indicated that she would be unable to attend work until July 27, 2008.

[29] Ms. Ford testified that, at this time, her doctor suggested to her that less stressful, and part-time, work may be more appropriate for her at that time. Ms. Ford stated that, on her doctor's advice she applied for some part-time jobs, but she did not obtain any, and her real wish was to return to work full-time at Peak. In cross-examination, she testified that she had no recollection of where she had applied for work, and that she had not retained copies of the letters in question.

[30] At this point in Ms. Ford's testimony, the respondents sought disclosure of any résumés or letters of application that she had made during this period. I denied the application on the following grounds. First, Ms. Ford had indicated that there were no copies of the letters. Second, it was clear from Ms. Ford's medical records, which the respondents had access to well in advance of the hearing, that there was a discussion about Ms. Ford applying for part-time work. Given that the respondent had been on notice of this possible issue for some time, any relevance that the documents may have had was outweighed by the prejudice to the parties and the Tribunal's processes of ordering the disclosure of the documents in mid-hearing, while Ms. Ford was under cross-examination: see *Vasil v. Mongovious and another (No. 3)*, 2008 BCHRT 139

[31] Ms. Ford was married in early July 2008, and she and her fiancé then had a honeymoon during which they stayed at a house in California. Ms. Ford testified that her doctor was aware of both the wedding and the travel, and felt that the time away relaxing would be a good idea.

[32] On July 7, Mr. Pepin instructed Ms. Dhaliwal to call Ms. Ford and check on her progress. In an email to Ms. Dhaliwal, he wrote, "we are very concerned that this date keeps moving etc., we don't want this to drag out any further than it already has. We also want to ensure that once she is back ... she stays back". Ms. Dhaliwal testified that it was important for Mr. Pepin to have a firm date. He had taken over the responsibilities of General Manager in April, and he was relying on Ms. Ford for continuity.

[33] On July 9, Ms. Dhaliwal called Ms. Ford. Both Ms. Dhaliwal and Ms. Ford testified about this conversation, and though there were some small differences in their recollection of the conversation, they testified to similar effect.

[34] Ms. Dhaliwal asked how Ms. Ford was doing, and if she still anticipated returning to work on July 28. Mr. Ford responded that she felt fairly confident that she would be able to do so. Ms. Dhaliwal advised Ms. Ford that, if she was not able to return on the date planned, she should let Peak know as soon as possible as they were stretched quite thin, and may need to look at other options, like bringing in a temporary employee. Ms. Ford agreed to let them know. She told Ms. Dhaliwal how much she enjoyed her job and was looking forward to her return. Ms. Dhaliwal asked if Ms. Ford would need to return part time, and Ms. Ford responded that she did not think so. Ms. Dhaliwal also told Ms. Ford that she was missed, and that her co-workers had only good things to say about her work within the company.

[35] Although at the time she spoke to Ms. Dhaliwal, Ms. Ford felt that she would be able to return to work at the end of July, this did not occur. She testified that her condition had improved: that she had decreased anxiety and depression, and that she was looking forward to getting back on track. During her honeymoon, she had felt almost well. However, when she returned from her honeymoon, it became apparent that she was not as well as she had thought. She had continuing issues with anxiety, her ability to cope was limited, and she found leaving the house difficult. Her doctor advised her to take additional time off work.

[36] As a result, on July 22, she left a voice mail message with Ms. Dhaliwal, stating that she was still unable to return to work and was giving Peak as much notice as she could so they could bring in a temporary employee. She reported that her absence would be until the end of August. Ms. Ford also emailed Ms. Dhaliwal a copy of a doctor's note, which indicated that she would be off work until the end of August, "for medical reasons".

[37] Ms. Dhaliwal relayed this information to Mr. Pepin, who replied via email, stating: "I'm feeling like we are playing a game of moving the line in the sand...let's apply some pressure....".

[38] Ms. Dhaliwal testified that the medical notes Ms. Ford had provided to that point did not provide any details about her illness. She testified that Peak was really struggling to fill the void left by Ms. Ford's absence. Crystal McGowan, Mr. Gross's executive assistant and the payroll and benefits coordinator, had been brought over from the main office to cover off many of Ms. Ford's duties on an interim basis. Some of Ms. Ford's duties had also been distributed to others. Ms. Dhaliwal sought assistance from Peak's in-house legal department in determining what the next step should be.

[39] Following these discussions, Ms. Dhaliwal wrote to Ms. Ford on July 30, asking for medical information about her continued illness. The letter stated, in part:

The medical certificates submitted to date do not provide any information that would assist us in making the necessary arrangements at the workplace. They do not describe what limitations or disabilities prevent you from returning to work. Due to the number and unexplained extensions of your return to work date, we are also concerned as to whether you will be able to return to work in the reasonably foreseeable future.

In order that we may manage the workplace and accommodate you if necessary, we require further information from your physician, specifically, a description of any limitations or disabilities, which prevent you from returning to work. Due to the shifting return to work dates and the palpable absence of information that would allow us to make appropriate arrangements at the workplace, we ask that your physician provide us with information that forms the basis of her opinion on your current return to work date.

[40] Peak requested the information by August 15.

[41] Ms. Ford testified that, when she received this letter she was a little alarmed because of its formal tone. However, she noted that the letter mentioned accommodating her, and making appropriate arrangements, and felt this was positive. She believed that Peak wanted additional medical information to assist her in her return to work.

[42] Ms. Ford ensured that her doctor responded to the letter. As Peak had not provided a form for Ms. Ford's physician to complete, Ms. Ford sought one from her father, who had some experience in human resources. She provided the form to her physician, who completed it and submitted it to Peak. On the form, Ms. Ford's physician indicated that Ms. Ford was suffering from depression and anxiety, that she was being

treated with antidepressant medication and counselling, that she was seeing her physician every other week, that she had been referred to a psychiatrist but had not yet obtained an appointment, and that she was, at present, not fit to work. Ms. Ford's physician also provided a letter that stated, in part:

[Ms. Ford] has been unable to work since May 27, 2008 and has been actively followed by our office in regards to depression and anxiety. ...

She is having difficulty coping with regular activities of daily living, so at present is not fit to return to work at any capacity. ...

I am unable to provide a return to work date for this patient at this time.

...

[43] With respect to the information provided by Ms. Ford's physician, Dr. Ancill testified that this type of response was very common in cases involving mood disorders. In the context of a mood disorder, it can take some time to determine the appropriate combination of medication required. After that combination is determined, recovery can be quite rapid. Dr. Ancill testified that, in August 2008, the probability that Ms. Ford would recover and return to work was excellent, but the timing was less certain.

[44] Dr. Ancill noted that, in this context, an appropriate response to a question about return to work would depend on the question asked. For example, if the doctor is asked, "will the patient return to work", the answer would be yes, but if asked when, the answer is "not known".

[45] Ms. Dhaliwal testified that she reviewed the information from Ms. Ford's physician and discussed the matter with Mr. Gross. She advised him that Ms. Ford had been away from work for medical reasons, that her return to work date had changed multiple times and that the current return date was unknown.

[46] Ms. Dhaliwal testified that Peak was not able to keep Ms. Ford's position open for an indeterminate period of time. The three months she had been away had been extremely disruptive. Ms. Ford was very good at what she did, and Mr. Pepin relied on her a great deal. Mr. Pepin, Ms. Dhaliwal and Ms. McGowan each testified that Ms. Ford's position was crucial, and comprised of many different responsibilities. It would

take months to get someone up to speed on all of the responsibilities. Mr. Pepin testified that he needed someone in the position.

[47] Mr. Pepin testified that, if he had known a return date, he could have made a plan to accommodate Ms. Ford's return. Ms. Dhaliwal testified, to similar effect, that if the medical information indicated that Ms. Ford would be able to return to work in six months, or eight months, or some other definite amount of time, Peak may have been able to accommodate her absence, possibly through hiring a temporary employee or a contract position. This, however, was a costly alternative, and the only real option was to hire a permanent replacement. As a result, the decision was made to terminate Ms. Ford's employment.

5. Termination of Ms. Ford's Employment

[48] On August 22, Ms. Ford received a letter from Peak, signed by Ms. Dhaliwal, stating that she was being terminated due to her ongoing absence. In the letter, Ms. Dhaliwal stated that Peak was unable to keep Ms. Ford's position open for an indeterminate period. Her termination was effective September 1, 2008.

[49] Ms. Ford testified that she was devastated to receive this letter. She had loved her job, and she had lost it. She felt as if she had failed. She testified that the termination of her employment had a significant financial and psychological impact on her.

6. Impact of Termination

[50] Ms. Ford testified that she was terminated two weeks before she would have been eligible to apply for long-term disability coverage. Peak had no short-term disability program, and Ms. Ford received Employment Insurance sick benefits during the initial period of her absence. Peak's long-term disability program had a qualifying period of 120 days, and paid 66.7% of an employee's monthly earnings, to a maximum of \$5,000.

[51] As a result of her termination, Ms. Ford lost the opportunity to apply for long-term disability, and all of her employment benefits. Those benefits included extended health care and dental care.

[52] Ms. Ford testified that she had significant financial worries as a result of the fact and timing of the termination, and she worried about the impact on her marriage as well.

[53] In addition, she testified that the termination significantly aggravated her medical condition. Stan Ford, Ms. Ford's husband, testified that the termination put her into a "tail spin".

[54] Ms. Ford testified that, by August 24, she had a "suicide plan", and as a result visited a psychiatric nurse at her local hospital. This led to an increase in her medication, including prescription of lithium, a drug that she had previously used and caused significant weight gain. Ms. Ford testified that being prescribed lithium was devastating for her. She had been put on lithium during the most difficult period of her previous struggle with mood disorder, and being prescribed it again underlined for her that she was back in "that place" again. Further, the weight gain that followed her use of lithium had a negative impact on her self-esteem and was another sign to her of how unwell she was.

[55] Andrea Adams, who is Ms. Ford's sister, also testified about the impact of the termination on Ms. Ford. Ms. Adams lives in Alberta, and is in regular phone contact with Ms. Ford. She also saw Ms. Ford at their parents' wedding anniversary in early September, shortly after the termination of her employment. The celebration involved a camping trip in Wells Grey Park with their parents, and Ms. Ford's children. Ms. Adams testified that the camping trip occurred over the Labour Day long weekend, which was August 30 and 31st, as well as September 1st.

[56] Ms. Adams testified that she was very concerned about Ms. Ford after seeing her on the camping trip, and that she was doing very badly. Ms. Adams compared it to the state Ms. Ford had been in at the height of her illness in 1999-2002.

[57] Ms. Adams testified that, when Ms. Ford gets really ill she doesn't take care of herself very well, and that this was the case during the camping trip. She noted, in particular, dirty clothes, no makeup and unwashed hair. In addition, although Ms. Ford typically has a very good sense of humour, she would not laugh, and did not make much eye contact.

[58] Ms. Adams and Ms. Ford both testified about some of the events of the camping trip.

[59] Ms. Ford testified that, at one point during a hike on Saturday, she stood at the edge of a ravine and started calculating how long it would take her to hit the rocks below if she decided to jump. She thought about how good it would be to not have to fight her illness anymore. She turned around and looked at her children and thought about the impact it would have on them if she left, but there was a big part of her that just didn't care. Prior to her termination, she had been starting to get better, but now she was ill again. She felt that she had no money, no job, and that it was her fault. However, she reached out to her sister, and they left the area.

[60] Ms. Adams testified that it was clear to everyone on the camping trip that Ms. Ford was not in a good state. As a result, on the Sunday morning, her parents arranged for Ms. Adams to have some time alone with Ms. Ford while they, and Ms. Ford's children, went to church. Ms. Adams and Ms. Ford went on a two hour walk. Ms. Ford talked about her feelings and the issues, and together they tried to come up with a plan to go forward, and manage her condition. Ms. Adams testified that she was attempting to generate some hope for Ms. Ford because, when she was completely hopeless, she saw nothing but doom and gloom.

[61] Ms. Adams testified that she remembered stopping up on an embankment where there was a view of the merging of two rivers. It was a beautiful day, and she asked Ms. Ford to just look at the scene, but her sister could not see the beauty.

[62] Ms. Adams testified that, when her sister is experiencing difficulties with depression and anxiety, she often expresses issues about her self-esteem. On this day, she noted that she was gaining weight because of her medications, as well as other issues. Ms. Adams recalled that, as they were walking down the hill, Ms. Ford was talking about all of her self-esteem issues, and at the end she noted, "and I can't even keep a job".

[63] Ms. Adams testified that, after 1999-2002, she didn't want to ever see Ms. Ford in the same state again, but that, during this period, she was. Ms. Adams was clearly quite shaken and upset by the impact of the termination on her sister.

[64] Dr. Ancill noted that Ms. Ford reported experiencing suicidal thoughts within two days of her termination. She had not previously experienced them during the 2008 period of relapse. Dr. Ancill testified that it was difficult to avoid the conclusion that there was an acute relapse and worsening of her condition as a result of the termination.

7. Employment After Termination

[65] Ms. Ford found a new job on October 31, 2008 as a merchandiser and sales representative with a sales and marketing company. She was representing a specific brand and was responsible for the marketing of that brand in 80 stores from North Vancouver to Hope. Essentially, Ms. Ford could work when she felt well enough, and set her own schedule. Ms. Ford was paid \$15 an hour for her work, and had a contract for 40 hours per week from October 31 to December 19. During this time, Ms. Ford was feeling like she was getting back on her feet. She felt good about getting a job, and bringing in a paycheque. She had been referred to a psychiatrist, and had seen him.

[66] Her condition again worsened in January 2009. At that time, she had anticipated her contract being renewed. She found out late in December that it would not be. She did obtain some casual work with the same company, amounting to approximately 10 hours per week. At the same time she was also looking for additional work, but was not successful.

[67] The reduction in her hours caused her significant concern as she and her husband had mortgage payments to make, and she felt that any financial issues were her fault. She also had a number of personal stressors. She testified that she felt that she had started climbing out of the hole in the Fall, but she again slipped in the face of this adversity.

[68] As a result, by February 2009, she again needed to seek additional psychiatric help. She attended at the hospital for appointments with a psychiatric nurse, and obtained counselling.

[69] Ms. Adams also gave testimony about her interactions with Ms. Ford during this period. She stated that she got a very distressed phone call from her sister in February 2009, in which Ms. Ford stated that she was taking herself to the hospital. Ms. Adams testified that this meant to her that Ms. Ford was suicidal, because that was when she

would seek help. At this point, Ms. Adams started making phone calls, looking for help for her sister. She put Ms. Ford in contact with a private care provider, and Ms. Ford was admitted to a private treatment centre for depression in Delta/Surrey. She noted that Ms. Ford's state at this time was even worse than it had been on the camping trip.

[70] Ms. Ford stayed at the facility for four days, working to establish a plan that she could follow through with.

[71] Dr. Ancill testified that this period of worsening in January and February 2009, which involved a recurrence of suicidal ideation and a period of hospitalization, was part of the same acute relapse which occurred following the termination of Ms. Ford's employment.

[72] By March 2009, Ms. Ford's condition had begun to improve significantly. At the same time, she started getting more hours at her employment with the sales and marketing company. However, those hours can be quite variable, and the position did not pay as much as her position with Peak. She testified that there has been a lasting financial impact from the termination: a significant line of credit, maxed out credit cards, and depleted savings and RRSPs.

[73] Dr. Ancill testified that, in his opinion, as a result of the events at issue, Ms. Ford demonstrated symptoms of post-trauma anxiety which would mean that she will remain vulnerable to workplace stress, with an increase in her risk of relapse in the future.

8. Steps taken by Peak after Termination

[74] Ms. Dhaliwal testified that, after Ms. Ford's termination, Peak did not in fact hire a replacement. On September 8, Peak distributed a memo to staff announcing that Ms. Ford would not be returning to work for Peak, and thanking her for her efforts. The memorandum went on to state:

Crystal [Ms. McGowan] has been filling in for Shannon during her absence and has agreed to continue this role until a permanent solution can be found.

[75] Ms. Dhaliwal testified that, although Ms. McGowan and other employees were stretched thin, this was the easiest solution. Ms. McGowan managed to streamline processes quite a bit, which cut down on some of the paperwork required.

[76] Ms. McGowan testified that by early October many of Ms. Ford's former duties had been redistributed.

[77] In addition, at around the same time, the economy took a steep downturn, and the volume of orders from Mitten decreased significantly. The need for a key Mitten person was "pretty much non-existent", in Ms. McGowan's words. There were significant budgeting cut-backs at Peak. However, Ms. Dhaliwal testified that while there was some natural attrition, there were no layoffs of administrative staff in either 2008 or 2009.

III ANALYSIS AND DECISION

[78] Ms. Ford filed her complaint under s. 13 of the *Code*, which provides, in part:

- (1) A person must not
 - (a) refuse to employ or refuse to continue to employ a person, or
 - (b) discriminate against a person regarding employment or any term or condition of employment because of ... physical ... disability
- ...
- (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

[79] Ms. Ford named both Peak and Mr. Gross as respondents in her complaint. For the reasons outlined below, I find that Peak discriminated against Ms. Ford with respect to her employment, contrary to s. 13 of the *Code*. I come to a different conclusion with respect to Mr. Gross.

[80] I will first outline my findings with respect to Mr. Gross, and then with respect to Peak.

1. Has Ms. Ford established that Mr. Gross discriminated against her?

[81] The respondents argue that the complainant has failed to establish that Mr. Gross made the decision to terminate her employment or that, if he did, he knew the circumstances of her disability when he did so. They rely on Ms. Dhaliwal's testimony that, although Mr. Gross authorized her to sign the termination letter, the termination itself was her decision, in consultation with legal counsel.

[82] In *Daley v. B.C. (Ministry of Health) and others*, 2006 BCHRT 341, the Tribunal considered circumstances in which liability should be found against an individual respondent, in circumstances where a corporate respondent is also named, and the actions in question arise in the course of the individual respondent's employment responsibilities. Although that case was decided in the context of an application to dismiss under s. 27(1)(d)(ii) of the *Code*, the principles set out in it are useful to the question of whether the complaint against Mr. Gross, in his personal capacity, should be dismissed.

[83] In *Daley*, the Tribunal noted that s. 44(2) of the *Code* ensures that corporate entities are held responsible for the acts and omissions of their employees and other listed representatives. This ensures that such respondents, who are most likely to be able to provide remedies under the *Code*, are obligated to do so. The Tribunal stated:

In my view, there are circumstances in which it would not further the purposes of the *Code* to name individual respondents. In particular, where the complainant names the corporate or institutional employer as a respondent, and that respondent has the capacity to fulfil any remedies that the Tribunal might order, little useful purpose may be served by also naming the individuals who were involved in the events in issue on behalf of that respondent. A significant factor to be taken into account is whether the institutional respondent, as in *Marc*, and in the present case, has acknowledged the acts and omissions of the individual in question as its own, and has irrevocably acknowledged its responsibility to satisfy any remedial orders which the Tribunal might make in respect of that individual's conduct.

Also significant will be the nature of the conduct alleged against the individual. Without attempting to provide an exhaustive list, consideration should be had as to whether the conduct alleged was within the course of that person's employment or whether there is anything in the allegations made against that person which would take his or her conduct outside of the normal scope of his or her duties. It may also be relevant to consider

whether the person is alleged to have been the directing mind behind the discrimination alleged or to have had the ability to influence substantially the course of action taken.

Finally, it may also be appropriate to consider whether the conduct alleged against the individual has a measure of individual culpability. The clearest example of such conduct is where an individual is accused of sexual harassment or other similar behaviour. In such a case, no plausible argument can usually be made that the harasser was acting within the scope of his or her authority. While the employer is, in such cases, still liable for the harassment engaged in, as it occurred in the course of the harasser's employment, broadly defined, the individual harasser also has a measure of individual culpability. Such a person is not merely performing the duties of their employment, albeit in a manner which is ultimately found to have resulted in discrimination. It tends to further the purposes of the *Code* in such circumstances for the individual harasser to be subject to individual liability. (paras. 60-62)

[84] In this case, Peak is named as co-respondent, and has the capacity to fulfil any remedies that the Tribunal may order. It has never disputed that the acts and omissions in question are its own, and that it is therefore responsible for those acts.

[85] Further, the evidence relating to Mr. Gross' role in Ms. Ford's termination was unclear. Ms. Ford testified that Mr. Gross was "always" involved in termination decisions, but had no direct evidence with respect to his involvement in her individual case. Mr. Ford's communications throughout were with Ms. Dhaliwal, not Mr. Gross. Further, Ms. Dhaliwal testified that Mr. Gross was aware of the termination, but not that he directed it.

[86] In addition, I note that Mr. Gross did not testify before me. The respondents did not call him as a witness, which is not, in and of itself, sufficient to absolve him of liability. Indeed, in appropriate circumstances, it may be a basis upon which the Tribunal may draw an adverse inference. However, Ms. Ford, who was ably represented by counsel, also chose not to require his presence as a witness, and did not argue that I should draw an adverse inference as a result of his failure to testify.

[87] The whole of the evidence before me does not establish that Mr. Gross was directly involved in the decision to terminate Ms. Ford.

[88] Finally, although I have found the termination decision to be discriminatory, and the impact of that decision on Ms. Ford to be substantial (as I will discuss below), there is nothing in Ms. Ford's allegations as against Mr. Gross which indicate a measure of individual culpability such as discussed in *Daley*.

[89] For all of these reasons, I dismiss the complaint as against Mr. Gross.

2. Has Ms. Ford established a prima facie case of discrimination with respect to Peak?

[90] As the complainant, Ms. Ford has the onus of establishing her complaint on a balance of probabilities. In order to do so, Ms. Ford must first establish a *prima facie* case of discrimination. As outlined by the Supreme Court of Canada in *O'Malley v. Simpson-Sears Ltd.* [1985], 2 S.C.R. 536, para. 28:

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 employer.

[91] In this case, in order to establish a *prima facie* case, Ms. Ford must show that she had a disability, that she suffered adverse treatment in her employment, and that it is reasonable to infer from the evidence that her disability was a factor in the adverse treatment: *Armstrong v. British Columbia (Min. of Health)*, 2010 BCCA 56.

[92] Although the respondents initially took the position that Ms. Ford did not have a disability at the time of her termination, they abandoned this position following Dr. Ancill's testimony. Given that concession, and for the following reasons, I find that Ms. Ford has established a *prima facie* case of discrimination.

[93] First, it is not disputed that Ms. Ford was suffering from a recurrent mood disorder that rendered her unable to work at the time of her termination.

[94] Second, there is no dispute that Ms. Ford suffered adverse treatment, in that her employment with Peak was terminated effective September 1, 2008.

[95] Third, it is clear that Ms. Ford's disability-related absence, and medical information indicating that her return to work date was unknown, was the reason for her

termination. As noted by the Tribunal in both *Senyk v. WFG Agency Network (No. 2)*, 2008 BCHRT 376, para. 346 (“*Senyk*”) and *MacRae v. Interfor (No. 2)*, 2005 BCHRT 462, para. 103, anytime an employer terminates an employees’ employment due to absenteeism related to disability, a *prima facie* case of discrimination on the basis of disability will be established. This approach is also consistent with the decisions of the Supreme Court of Canada in both *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l’Hôpital général de Montréal*, [2007] S.C.J. No. 4 (“*McGill*”), and *Hydro-Québec v. Syndicat des employés de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 (“*Hydro-Québec*”).

3. Has Peak established a bona fide occupational requirement?

[96] Given my finding that Ms. Ford has established a *prima facie* case of discrimination, the burden shifts to the respondents to establish that its conduct was a *bona fide* occupational requirement (“BFOR”). In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3, para. 54 (“*Meiorin*”), the Supreme Court of Canada said that an employer must establish, on a balance of probabilities, that:

1. it adopted the standard for a purpose rationally connected to the performance of the job;
2. it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[97] In this case, the standard Peak employed is, essentially, that employees on a medical leave be available to work within a foreseeable period of time. As outlined by the Tribunal in *Senyk*, that standard is clearly rationally connected to the performance of the job. Further, there is no evidence before me that Peak adopted that standard in

anything other than an honest and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose.

[98] Thus, the issue before the Tribunal with respect to the BFOR defence lies in the third branch of the *Meiorin* analysis, that is, whether Peak accommodated Ms. Ford's absence to the point of undue hardship. In *Hydro-Québec*, the Court clarified the content of this third branch, noting that the test is not actual impossibility, but whether accommodation is reasonably possible, or possible without imposing undue hardship. Further, in *McGill*, the majority of the Court stated:

The factors that will support a finding of undue hardship are not entrenched and must be applied with common sense and flexibility ... For example, the cost of the possible accommodation method, employee morale and mobility, the interchangeability of facilities, and the prospect of interference with other employees' rights or of disruption of the collective agreement may be taken into consideration. Since the right to accommodation is not absolute, consideration of all relevant factors can lead to the conclusion that the impact of the application of a prejudicial standard is legitimate. (para 15)

[99] Peak argues that it had reached the point of undue hardship with respect to Ms. Ford's continued employment. In this regard, it relied on the decision of the Supreme Court of Canada in *Hydro-Québec*. In that decision, the Court considered the issue of undue hardship in the context of the discharge of a unionized employee for non-culpable absenteeism. The Court stated:

Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory. (para. 76)

[100] The basis of Peak's position in this regard appears to be two-fold. First, in any case where there is information that an employee will not be able to return to work in the reasonably foreseeable future, an employer will have established undue hardship and will be justified in terminating the employee. Second, that in this particular case, the fact that

Ms. Ford's return to work date was undetermined imposed undue hardship on them, and they were justified in terminating her employment.

[101] With respect to the first proposition, Peak states that the basis of the Court's decision in *Hydro-Québec* was future uncertainty, and that providing an employer with a medical note that indicates that a return to work date cannot be specified, in and of itself establishes undue hardship. Peak submits in its argument that the outcome of *Hydro-Québec* "would not have been different if the employee in that case had experienced only one day of absence". This is a remarkable, and in my view an incorrect, assertion. Indeed, in *Hydro-Québec* the Court stated:

A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on the assessment of the entire situation. Where, as here, the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship. (para. 21)

[102] I therefore have no difficulty in rejecting the first of Peak's arguments in support of undue hardship. The question which remains, however, is whether on all the evidence before me, and in the particular circumstances of Ms. Ford's case, Peak has established undue hardship. For the reasons which follow, I find that they have not.

[103] First, Peak did not have any information before them which indicated that Ms. Ford would not be able to return to work in the reasonably foreseeable future. Rather, the medical information indicated that she was not able to return to work at the time the information was provided, and that her physician was unable to provide a return to work date at that time. This is not the same thing as a statement that Ms. Ford would not be able to return to work in the reasonably foreseeable future. As noted by Dr. Ancill in his testimony, in the context of a mood disorder, it can take some time to determine the appropriate combination of medication. In such cases, the prognosis may be excellent (in other words, the doctor is confident that the individual will be returning to work), but the precise timing of that return cannot be specified. This was the situation with Ms. Ford in August 2008.

[104] Second, Peak did not provide Ms. Ford with proper notice that her employment was in jeopardy. Peak states in its written submissions that this is because Ms. Ford's employment was never in jeopardy at any time prior to the receipt of the medical opinion. Once it received this medical opinion, providing a warning would have served no purpose:

Once Peak ... had received the Medical Opinion it could not notify the Complainant that, if she did not return to work, her employment was in jeopardy. It is clear from the Medical Opinion that it was not possible for the Complainant to have returned to work. ... In such circumstances the issuance of a warning notice to the Complainant could serve no legitimate purpose. Moreover, because the Complainant was suffering specifically from anxiety and depression, the issuance of such a warning notice could have caused adverse consequences to the Complainant's health and mental state particularly as it was not possible for the Complainant to return to work.

[105] Further, Peak argues that, once it sent the August 22 letter, and received the medical opinion from Ms. Ford's physician, it had no further duty to enquire or clarify the information. Rather, any failure was a failure on the part of Ms. Ford to provide them with adequate medical information.

[106] These submissions reflect a significant misunderstanding of an employer's obligations to an employee in Ms. Ford's situation. They are contrary to well established common law, human rights, and arbitral jurisprudence which provide that, if an employer wishes to terminate an employee for non-culpable absenteeism, that employer must comply with procedural obligations, including warning the employee that their employment is in jeopardy and providing the employee with the opportunity to provide further, relevant information. As outlined by the Tribunal in *Senyk*:

There are sound reasons for requiring employers to give such a warning and provide employees with an opportunity to provide relevant medical evidence before terminating their employment. First, the warning and opportunity may open a dialogue between the employer, the employee and their medical advisors, through which the employee may be able to return to work, with or without modifications. Second, it ensures that the employer, in making termination decisions, which have a profound effect on the employee, will do so with the best available information, which should lead to better decisions.

Third, even in a case where the employee is unable to return to work within a reasonable period of time, and the employer is ultimately justified in terminating their employment, the warning and opportunity to provide medical information gives the employee a valuable opportunity to be heard in respect of this crucial decision. Doing so helps to ensure that disabled employees are treated with dignity. Further, the warning may provide the employee whose employment is ultimately terminated with some opportunity to prepare themselves, which may tend to avoid or reduce ... negative consequences. (paras 398-9)

[107] Once Peak had determined that Ms. Ford's employment was in jeopardy, it did not provide Ms. Ford with any warnings to this effect. As in *Senyk*, it did not put Ms. Ford on notice that it was considering terminating her employment, or its reasons for doing so, and it did not provide her with an opportunity to provide further information. In *Senyk*, this was a significant factor in the Tribunal's decision that Ms. Senyk's employer had not accommodated her to the point of undue hardship when it terminated her after a two-year absence.

[108] In addition, on the facts of this case, there would have been good reasons for Peak to provide Ms. Ford with the opportunity to give them additional medical information. As outlined above, the information Peak had did not indicate that Ms. Ford would not return to work in the reasonably foreseeable future, and obtaining further information around this would have been useful to its assessment of the situation. Also, the medical opinion indicated that Ms. Ford had been referred to a psychiatrist, who may well have been able to provide additional information about her ability to return to work.

[109] Third, the length of Ms. Ford's absence prior to her termination was, at just over three months, relatively brief. Although each case needs to be assessed in its specific circumstances, I note that in *Senyk*, an employee's absence of two years was found to not justify her termination (or the manner of her termination) in the circumstances of that case. *McGill* involved a three-year deemed termination provision which was found to be justified. *Hydro-Québec* involved an employee who had missed 960 days of work over 7.5 years, with the most recent absence being five months, coupled with a doctor's note that indicated the employee would not be able to maintain consistent attendance.

[110] Fourth, Peak's assertions that Ms. Ford's continued absence amounted to undue hardship must also be viewed in the context of the benefits Peak provides to its

employees. Although Peak does not have a short-term disability plan, it does provide a long-term disability plan, for which an employee is eligible after 120 days of absence. In the context of such a benefit, I find that there would have to be substantial evidence of operational, financial or other cost to Peak resulting from an employee's absence in order to establish that continuing to employ an individual to the point where they can apply for long-term disability benefits would amount to undue hardship.

[111] Fifth, Peak argues that Ms. Ford's continued absence, and the lack of clarity around an eventual return to work date, was causing them operational difficulties. Mr. Pepin testified that Ms. Ford's absence caused him increased stress, because he relied on her assistance. In addition, the evidence was clear that Ms. Ford's position was very important, with a number of responsibilities, and that it would take significant training to get someone else up to speed. I accept that there was some inconvenience and difficulty caused to Peak as a result of Ms. Ford's absence, and in particular to Mr. Pepin and Ms. McGowan. In addition, I accept that the magnitude of this inconvenience must be considered in light of the fact that Peak is a small to medium sized employer, and did not have unlimited resources.

[112] However, I cannot find on the evidence before me that these difficulties amounted to undue hardship. Within days of Ms. Ford's absence, Ms. McGowan had been transferred to the plant to assist in filling her duties. In addition, some of her duties were distributed to other employees. Further, after Ms. Ford's termination, Ms. McGowan continued in that role for some time. There is no indication that the respondents attempted to find any other solution to the staffing issue. Peak did not hire anyone to replace Ms. Ford, although as a result of her absence, her salary was available to it. Other than operational inconvenience, Peak did not incur any cost as a result of Ms. Ford's absence. In short, Peak has not established that there was any pressing operational or financial need for it to terminate Ms. Ford's employment in September 2008.

[113] For all of these reasons, I find that the evidence before me does not amount to undue hardship in the circumstances of the case. I therefore find that Peak has failed to establish a BFOR.

4. Remedies

[114] The *Code's* remedial provisions are set out in s. 37, which provides, in part:

- (2) If the member or panel determines that the complaint is justified, the member or panel
 - (a) must order the person that contravened this *Code* to cease the contravention and to refrain from committing the same or a similar contravention,
 - (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this *Code*,
 - (c) may order the person that contravened this Code to do one or both of the following:
 - (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
 - (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this *Code*, and
- ...
- (d) if the person discriminated against is a party to the complaint, ... may order the person that contravened this Code to do one or more of the following:
 - ...
 - (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
 - (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

...

- (4) The member or panel may award costs
 - (a) against a party to a complaint who has engaged in improper conduct during the course of the complaint ...

A. Cease and Refrain order, and Declaration

[115] Pursuant to s. 37(2)(a), Ms. Ford seeks an order that Peak cease and refrain from committing the same or a similar contravention. Such an order is mandatory in cases where the Tribunal has found discrimination, and I therefore order Peak to cease and refrain from discriminating in relation to employment, in particular on the grounds of disability.

[116] Peak argued that this order was not appropriate, as it would result in Ms. Ford's reinstatement. This submission appears to be based on a misunderstanding of what the cease and refrain order requires. Such an order does not include, and Ms. Ford did not seek, an order that Peak reinstate her to employment with Peak. Where the Tribunal has ordered reinstatement, it has done so pursuant to s. 37(2)(d)(i), not s. 37(2)(a).

[117] Pursuant to s. 37(2)(b), Ms. Ford seeks a declaratory order that the conduct complained of is discrimination contrary to the *Code*. Such a declaratory order is discretionary, but Peak did not dispute that such an order was appropriate. Further, given Peak's apparent misunderstandings of its human rights obligations, I find that such an order would be consistent with the purposes of the *Code*. I therefore declare that Peak discriminated against Ms. Ford on the basis of disability when it terminated her employment.

B. Ameliorative Order

[118] Pursuant to s. 37(2)(c), Ms. Ford seeks an order that Peak implement a workplace policy detailing procedures for communicating with employees who are absent due to disability.

[119] Peak submits that there is no basis or justification for such an order. In particular, Peak notes that there was no evidence that Peak engaged in discriminatory practices beyond the confines of this specific complaint, or that there were any disadvantaged

employees or groups who suffered discrimination. Further, they note that any policy relating to procedures for communicating with employees who are absent due to disability would by its nature be unduly rigid, which is contrary to the fluid and responsive approach that is required in order to accommodate a wide variety of differing employee circumstances.

[120] In *Senyk*, the complainant also sought remedies relating to the formulation of anti-discrimination and accommodation policies, and training. The Tribunal found that the orders were unwarranted, as the discrimination found was individual rather than systemic. The evidence did not substantiate any allegation that the respondent in that case engaged in a pattern of discrimination. The Tribunal therefore found that the purposes of the *Code* did not require that the respondent create policies and engage in training. In this regard, the Tribunal stated:

While errors were made, some of them significant, in [the respondent's] treatment of Ms. Senyk, I am unable to say, on the evidence before me, that those errors are part of a larger pattern of discriminatory conduct.
(para. 513)

[121] In both *Senyk* and *Kerr v. Boehringer Ingelheim (Canada) (No. 4)*, 2009 BCHRT 196 (upheld on judicial review, *Boehringer Ingelheim (Canada) Ltd./Ltee/ v. Kerr*, 2010 BCSC 427), the Tribunal held that the combination of the Tribunal processes and decision, and the cease and refrain order, were sufficient to meet the educational purposes of the *Code*, and that nothing further was necessary.

[122] While, again, I have some concerns about Peak's awareness of its human rights obligations, particularly as they relate to an employee absent from work for medical reasons, it is not clear to me that those concerns would be addressed through the specific order sought by Ms. Ford. Balancing these considerations, I decline to make the order sought by Ms. Ford in this regard.

C. Wage Loss

[123] I have found that Peak discriminated against Ms. Ford when it terminated her employment. At the time of her termination, Ms. Ford was unable to work, and thus would not have been in receipt of wages in any event. However, and despite the fact that

the termination of her employment worsened her condition, Ms. Ford was able to start new employment at the end of October 2008. That employment was initially full-time, but it paid significantly less than her work at Peak. In addition, the work hours have been variable.

[124] Ms. Ford seeks the wage differential between what she earned at her new employment, and what she would have earned at Peak, to the date of the hearing.

[125] Peak argues that Ms. Ford was able to obtain alternative employment within two months of the termination of her employment, and that this alone is a sufficient and full answer to Ms. Ford's claim for an award for lost wages.

[126] Peak also argues that Ms. Ford's claim for wage loss is based on several tenuous assumptions, including the following: that Ms. Ford would have been able to return to active employment with Peak had her employment not been terminated; that Ms. Ford has not proven that she has made any effort to obtain alternative employment at a comparable rate; and that her employment with Peak would have continued uninterrupted after September 1, 2008.

[127] The evidence before me indicates that Ms. Ford had an initial period of re-employment that extended from November 1 to December 19, 2008. At that point her contract was not renewed. Nevertheless, she continued to pick up casual work for the same employer. She continues to be employed with the same employer, working mainly full-time hours, although those hours can be variable.

[128] Section 37(2)(b) provides me with the discretion to award a complainant none, some, or all of any wages lost as a result of the contravention. In appropriate cases, this can include some or all of any differential in wages beyond the date of re-employment where a complainant is able to secure other employment: *Dewitter v. Northland Security*, 1996 B.C.C.H.R.D. No. 27 (Q.L.), para. 94.

[129] I find that it is appropriate, in the circumstances of this case, to award Ms. Ford the differential in her wages between the dates of November 1, 2008 and April 30, 2009. I find it appropriate to limit the wage differential claim to six months because there is

little evidence that Ms. Ford has sought higher paid work, even after her medical condition stabilized to some extent.

[130] In addition, I find it is appropriate to deduct 25% from the wage loss award, in respect of the contingency that Ms. Ford would not have returned to work at Peak on a full-time basis or at all (see: *Bolster v. B.C. (Min. of Public Safety and Sol. Gen.)*, 2004 BCHRT 42, paras. 140-143). While Dr. Ancill testified that, as of August 2008 the likelihood of Ms. Ford returning to her employment was excellent, there is evidence before me which indicates that such a return was not assured. In particular, I note the following:

- a) Ms. Ford's general practitioner was advising her, in July 2008, prior to her termination, that she should find alternate employment, possibly part-time;
- b) Ms. Ford testified that she was able to work full-time early in her re-employment because of the flexibility in hours available to her. That flexibility may not have been as available at Peak, even had she been appropriately accommodated; and
- c) Ms. Ford testified that her psychiatrist (who she saw in November, after her termination) had advised her to find a low stress job, which the position at Peak clearly was not.

[131] While at Peak, Ms. Ford earned a base salary of \$43,000 per year, plus 4% vacation pay and an annual bonus (\$500 in 2008). Ms. Ford submits that this translates into a gross total of \$45,220 per year, or \$3,768.33 per month. For a six month period, this would amount to \$22,609.98.

[132] Paystubs submitted by Ms. Ford indicate that, during that period, the amount she actually earned was \$6,900.69.

[133] This amounts to a total wage loss of \$15,709.29 (\$22,609.98 - \$6,900.69). Taking into account the 25% reduction for the contingencies outlined above, I order Peak to pay Ms. Ford \$11,781.97 on account of wages she lost as a result of Peak's contravention of the *Code*.

D. Injury to Dignity

[134] Ms. Ford sought an order pursuant to s. 37(2)(d)(iii) for compensation for injury to her dignity, feelings and self-respect in the amount of \$35,000.

[135] Peak submitted that any such award should be limited to \$5,000. Peak says that it honestly believed that its decision to terminate Ms. Ford's employment was operationally necessary and lawful. It also notes that the termination was not the only significant stressor in Ms. Ford's life at the time of her termination. Peak states that it is not possible to ascertain the impact that the termination of Ms. Ford's employment had in perpetuating her ongoing mental health issues in isolation from the impact of the other stressors.

[136] In the circumstances of this case, I agree with Ms. Ford that a substantial order for compensation for injury to dignity, feelings and self-respect is required to remedy the harm she has suffered as a result of Peak's discriminatory conduct.

[137] At the time Peak terminated Ms. Ford's employment, it was aware that she was suffering from anxiety and depression, that she was unable to work, and that she had been referred to a psychiatrist. She was particularly vulnerable.

[138] Peak provided Ms. Ford with no notice that her employment was in jeopardy. Thus, the termination, when it occurred, was completely unexpected and had a significant negative impact on her. Ms. Ford, her husband, and, in particular, her sister, testified in clear and compelling terms about the extent of the impact on her.

[139] While it is not disputed that Ms. Ford was dealing with a number of personal stressors at the time of her termination, the evidence before me establishes that the termination had a significant impact on Ms. Ford and aggravated her illness. In particular, within two days of her termination, Ms. Ford began to experience suicidal ideation, which had not occurred earlier in her relapse, and which she had not experienced since 2002. As outlined above, Dr. Ancill testified that it is difficult to avoid the conclusion that the worsening of her condition was a result of the termination.

[140] Dr. Ancill also testified that the period of worsening in January and February 2009, which involved a recurrence of suicidal ideation and a period of hospitalization, was part of the same relapse.

[141] This combination of an employee suffering from serious mental health issues when her employment was terminated, and the exacerbation of the condition by the

termination, is similar to both *Senyk* (where the Tribunal awarded \$35,000) and to *Toivanen v. Electronic Arts (Canada) (No. 2)*, 2006 BCHRT 396 (where the Tribunal awarded \$20,000).

[142] Peak submits that, unlike the circumstances in *Toivanen* and *Senyk*, Ms. Ford was a short-term employee, and thus that a larger award for compensation to injury to dignity is not justified.

[143] It is true that many of the Tribunal's cases which have involved large awards for injury to dignity have involved long-term employees. The Tribunal has stated that a longer period of employment is likely to make a complainant more vulnerable to the effects of the discriminatory termination of their employment: *Senyk*, para. 466. In each case, however, the underlying question is what the impact of the discriminatory action was on the particular complainant.

[144] In all of the circumstances of this case, I have concluded that the gravity of the effects of the discrimination suffered by Ms. Ford call for an award in the higher end of the spectrum, and I award \$25,000 in this regard.

E. Expenses

[145] Ms. Ford seeks compensation for expenses she incurred as a result of Peak's discriminatory conduct. Pursuant to s. 37(2)(d)(ii) of the *Code*, the Tribunal may order a respondent to compensate a complainant "for all, or a part the member or panel determines, of any ... expenses incurred, by the contravention". The purpose of a remedial award for expenses is to make the complainant "whole", that is, to put her in the position she would have been in absent the discrimination found.

[146] Ms. Ford provided receipts and itemizations for a number of expenses. For the reasons outlined below, I order Peak to reimburse Ms. Ford for each of the expenses incurred.

[147] Ms. Ford seeks compensation for expenses incurred with respect to photocopying (\$275.50) and courier charges (\$72.02) in relation to preparation for the complaint. I find such expenses were incurred by the contravention I have found.

[148] Ms. Adams, who testified on Ms. Ford's behalf, lives out of province and flew in to testify at the hearing. Ms. Ford's counsel arranged for this expense to be paid and charged as a disbursement to Ms. Ford. I find that the Tribunal has the power to order respondents to pay compensation to a complainant for expenses incurred by a complainant to pay for their witnesses' travel expenses: see *Willis v. Blencoe*, 2001 BCHRT 12, paras. 70-71 and *Vestad v. Seashell Ventures Inc.*, 2001 BCHRT 38, para. 82. Further, Ms. Adams' testimony was of significant assistance in establishing the impact of the discrimination on Ms. Ford.

[149] Ms. Ford sought reimbursement of expenses incurred for medical records and reports, including the attendance of Dr. Ancill at the hearing, in the amount of \$4,257.60. In *Cassidy v. Emergency and Health Services Commission and another (No. 3)*, 2009 BCHRT 110, paras. 116 & 120-124, the Tribunal held that it had the jurisdiction to award compensation for expert evidence (whether written or in person), where such evidence is necessary to establish a contravention of the *Code*. As outlined by the Tribunal in *Cassidy (No. 3)*:

It would render the means of redress which the Code is intended to provide illusive for many of those who have suffered a contravention of their rights if they are not entitled to compensation for expenses incurred by them to have their own doctors and psychologists, or other experts, prepare expert reports and testify in Tribunal proceedings. Such experts cannot reasonably be expected to take the time to prepare expert reports and to attend hearings to testify without compensation. Their expert fees are likely to be outside the means of many complainants. Yet their testimony may be essential to proving a contravention or the damages flowing from it. (para. 122)

[150] In this case, at all times prior to the hearing, Peak made it clear that it intended to challenge Ms. Ford's assertion that she was suffering from a disability at the times relevant to the complaint. As a result, Dr. Ancill's report was necessary. Dr. Ancill also testified at the hearing. Given Peak's concession, following Dr. Ancill's testimony, that Ms. Ford did have a disability at the relevant periods, I find that his testimony was necessary in order for Ms. Ford to establish her complaint.

[151] Ms. Ford seeks reimbursement of expenses she incurred to attend the three days of hearing, and that her husband incurred to attend the hearing on the day he gave his

evidence. These expenses included parking (at the Skytrain station), Skytrain fare (to and from the hearing), and meals. They totalled \$82.50. As outlined by the Tribunal in *Cassidy*, paras. 104-106, compensation for such expenses is frequently ordered by the Tribunal, on the basis that, in order to establish a contravention of the *Code*, a complainant must attend the hearing, and may incur expenses in order to do so.

[152] The total of the amounts outlined above is \$5,043.72, and I order Peak to reimburse Ms. Ford in that amount.

[153] Peak states that, in view of Ms. Ford's conduct and the expense that it incurred in preparing and filing the application for an order compelling medical disclosure and in the delay of the hearing of the respondents' application to dismiss, no order should be made by the Tribunal to compensate Ms. Ford for expenses which she may have incurred. I reject Peak's argument in this regard. The issue relating to the disclosure of Ms. Ford's medical records will be dealt with below.

F. Tax Gross Up

[154] Ms. Ford seeks a tax gross up as a result of the possible tax consequences of receiving compensation within a single taxation year. I note that the award for lost wages which I have made, above, is relatively small. Further, the period represented by the order is less than one year. I therefore find that a tax gross up is not necessary, and I decline to order it.

G. Costs for Improper Conduct

[155] In addition to the remedies outlined above, Ms. Ford argued that she should be awarded costs, pursuant to s. 37(4), as a result of improper conduct engaged in by the respondents.

[156] The scope of improper conduct was described by the Tribunal in *McLean v. British Columbia (Ministry of Public Safety and Solicitor General)(No. 3)*, 2006 BCHRT 103:

In my view, the Tribunal's increased willingness to consider conduct to be improper, and thereby open a party to an award of costs, is largely related

to characteristics of the direct access system. Many parties before the Tribunal now engage in a significant amount of pre-hearing litigation. The manner in which that litigation is conducted can have a significant effect on the processing and eventual hearing of the complaints, and can exact significant costs, financial and otherwise, on both other parties and the Tribunal. Under the *Code*, the Tribunal has very limited tools at its disposal in order to control parties' conduct; findings of improper conduct, and the resulting possibility of costs, are the main tools available.

In my view, the expansion of circumstances in which the Tribunal is prepared to find conduct to be improper, and thereby subject to the potential for an order for costs, is appropriate. ... while conduct which is the result of intentional wrongdoing may certainly be "improper" ... improper conduct is not necessarily limited to intentional wrongdoing. Any conduct which has a significant impact on the integrity of the Tribunal's processes, including conduct which has a significant prejudicial impact on another party, may constitute improper conduct within the meaning of s. 37(4). (paras. 7-8)

[157] Ms. Ford alleges that Peak engaged in improper conduct with respect to the complaint in two respects. First, through an ongoing general refusal to consider settlement; and secondly, by engaging in what Ms. Ford terms as "intimidating conduct". For the reasons outlined below, I do not find it appropriate to award costs with respect to the settlement issue, but I do find it appropriate with respect to the conduct issue.

1. Ongoing General Refusal to Consider Settlement

[158] Ms. Ford argued that costs should be awarded as a result of what she characterized as Peak's ongoing general refusal to consider settlement. In this regard she relied on the Tribunal's decision in *Shannon v. Strata Plan KAS 1613*, 2009 BCHRT 438 ("*Shannon*"), where the Tribunal held that a refusal to accept a reasonable settlement offer, coupled with other conduct, constituted improper conduct.

[159] In support of her argument, Ms. Ford attempted to rely on a without prejudice letter which her counsel provided to Peak on January 25, 2010, and Peak's response the same day.

[160] Peak objected on the basis that these communications were covered by settlement privilege. I agreed with the respondents, and ruled that the communications in question were not admissible. I provided my parties with the reasons for my decision at that time, and I will not repeat them here.

[161] Ms. Ford also notes that Peak did not adduce any evidence indicating their intent to settle the matter at an early stage or at all. Their position throughout the whole litigation has been an assertion of a vigorous defence and outright denial that Ms. Ford's complaint has any merit whatsoever. Ms. Ford submits that much time and resources could have been saved if the respondents had carefully considered the medical evidence provided throughout the litigation and conceded the issue of disability. Ms. Ford argues that the Tribunal should penalize Peak through an award of costs for improper conduct.

[162] Peak argues that, as a general principle, the Tribunal should not inquire into the conduct of the parties in regard to their negotiations towards settlement and should certainly not substitute their judgment for the judgment exercised by a litigant on the inherently subjective matter of the reasonableness of an offer of settlement.

[163] There are situations, such as an offer to settle and application to dismiss under s. 27(1)(d)(ii), where the Tribunal will determine the reasonableness, or otherwise, of a settlement offer. There are also situations, such as those outlined in *Shannon*, where a refusal to engage in a settlement may constitute improper conduct. In both of those situations, the Tribunal requires that the possibility that the settlement offer in question may be relied be made known to the opposing party by means of a "with prejudice" offer to settle. There was no such offer in this case. Thus, in the specific circumstances before me, I agree with the respondents. I find that there is nothing in the settlement discussions between the parties, or lack thereof, that would constitute improper conduct pursuant to s. 37(4) of the *Code*.

2. *Intimidating Conduct*

[164] In addition, Ms. Ford submits that the vigour with which Peak pursued its case exceeded the scope of a permissible or reasonable defence and amounts to intimidation or bullying. She submits, further, that this must be placed in context of a complainant who was suffering from a psychiatric disorder. Peak was aware that Ms. Ford was suffering from anxiety and depression at all relevant times. Ms. Ford submits that this sort of behaviour should be addressed by the Tribunal. She relies, in particular, on two incidents.

Document Requests from Physician

[165] Ms. Ford filed her human rights complaint on September 30, 2008 and the respondents were notified of the complaint on December 11, 2008.

[166] On January 12, 2009, Peak's in-house legal counsel wrote a letter to Ms. Ford's physician, copied to Ms. Ford, outlining that Ms. Ford had filed a human rights complaint about Peak and requesting that the doctor provide counsel with a copy of Ms. Ford's "full and complete medical file and records" as it relates to her "alleged mental disability". Counsel goes on to state that, if the physician did not provide the documents, or confirm that she would do so, within five days, he would apply to the Tribunal for an order compelling the production of the requested records.

[167] This letter actually pre-dated Peak's filing of its Response to Complaint Form, which occurred on January 13. On the same day, the Tribunal wrote to the parties in order to schedule a pre-hearing conference. In the letter to the parties, the Tribunal specified that one of the issues to be dealt with was document disclosure.

[168] Ms. Ford's physician responded to the letter, stating that she did not have Ms. Ford's authorization to release her medical records to a third party.

[169] It is to be noted that the request was not directed through Ms. Ford, but was made directly to her physician. Although the letter indicated that it was copied to Ms. Ford, Ms. Ford testified that she never received an independent copy of the letter, and was told about it by her physician. It is also to be noted that this request was made well in advance of the disclosure dates set by the Tribunal. Ms. Ford testified that, when she became aware of this letter she was very upset and "stressed out of [her] mind". She felt that Peak was being overly aggressive and demanding things they were not entitled to at that time.

[170] On January 21, counsel wrote to Ms. Ford, indicating the respondents' intention to make an application to the Tribunal for the documents in question. The respondents subsequently filed the application, but the Tribunal declined to process it, instead scheduling a pre-hearing conference to confirm the disclosure dates in the matter had not yet passed, and so such an application was not timely.

[171] In May 2009, the Tribunal, on application from the respondents, ordered Ms. Ford to disclose her medical file and records. Although the respondents asked that the order specify that the documents be disclosed directly to them, rather than through Ms. Ford, the Tribunal declined to so order: *Ford v. Peak Products Manufacturing and others*, 2009 BCHRT 191.

[172] Ms. Ford was self-represented throughout the period in question, and she testified that her experience in this regard was one of the reasons she sought representation. She felt that she was unable to cope with the correspondence and procedural issues, and became increasingly anxious when she was required to deal with Peak.

[173] In sum, Peak attempted to obtain disclosure of medical documents directly from Ms. Ford's doctor, without first making a request to Ms. Ford. They did this while aware that Ms. Ford was unrepresented. In addition, the request was made well prior to the disclosure dates outlined in Rule 18 of the Tribunal's *Rules of Practice and Procedure*, and subsequently set out by the Tribunal during the pre-hearing conference. I find that, in all of the circumstances of this case, including Ms. Ford's particular health circumstances, Peak's actions amounted to improper conduct, for the following reasons.

[174] First, it is inappropriate for a respondent to contact a complainant's physician directly seeking information in the context of an active human rights complaint. Peak attempts to argue that, in the letter provided to it by Ms. Ford's doctor in August 2008, the doctor had indicated that if there was any further information that Peak required, it should contact the doctor's office. Peak states that it is inconceivable that the invitation would have been made without the knowledge and approbation of the complainant.

[175] Simply put, this argument is disingenuous. It is inconceivable that Peak did not understand that there was a significant difference in a request for medical information made in response to inquiries made while Ms. Ford was still employed with Peak, and one made after Ms. Ford had been terminated and had filed a human rights complaint against her former employer.

[176] Second, Ms. Ford did not have any disclosure obligations absent either the arrival of the disclosure dates outlined in Rule 18, or other order of the Tribunal. Peak states that "the disclosure obligation of the complainant arose at the time that she filed the

complaint, whereas it is the deadline for complying with the disclosure obligation that is established under Rule 18(4)”. I cannot agree.

[177] Third, Ms. Ford was unrepresented at the time in question. Peak, in contrast, was represented by its in-house counsel who should have been aware that Ms. Ford’s physician would require her consent in order to disclose the documents in question.

[178] Fourth, while I have considered that the Tribunal subsequently found, on application, that the documents in question were relevant and ordered them disclosed, this does not, in my view, lessen the negative impact on Ms. Ford of Peak’s overly aggressive approach. Peak argued that it was in fact Ms. Ford who engaged in improper conduct, by failing to disclose the documents in question until she was ordered to do so by the Tribunal. I do not agree. Part of Ms. Ford’s arguments in opposition to the disclosure of the documents related to her privacy concerns with respect to that information. In all of the circumstances of the case, I cannot find that those concerns were unreasonable.

Pursuit of Ms. Ford’s Former Spouse as a Witness

[179] On September 14, 2009, Peak’s counsel contacted Ms. Ford’s counsel stating that he would like to speak to Ms. Ford’s former spouse for the purposes of assessing whether to call him as a witness. He asked to be provided with the individual’s name, telephone number, and address. Ms. Ford’s counsel responded the same day, asking how the individual’s evidence could be relevant. Peak’s counsel replied as follows:

... I am unable to explain the relevance to you because I have not yet interviewed your client’s former husband. However, I would expect that having lived with your client for a period of time that he would be able to comment on her state of mind during that period. I also note that you are proposing to call your client’s current husband and daughter and so the same question could be posed to you. ...

If you are unable to provide me with the name, telephone number and the address of your client’s former husband by the end of the day today I intend to obtain this information by alternative means.

[180] Ms. Ford’s counsel responded by noting that Ms. Ford’s current husband and daughter were expected to provide evidence of the effect on Ms. Ford of the loss of her employment. Counsel also noted that Ms. Ford’s former marriage dissolved in 2004 and 2005, well in advance of her hiring by Peak in August 2007. Counsel noted his view that

any evidence from Ms. Ford's ex-husband was irrelevant and solely inflammatory. Counsel also advised that the request to interview Ms. Ford's ex-husband could have a detrimental impact on her psychological state and could form the basis of an application for costs.

[181] Peak's counsel responded:

The respondents intend to vigorously defend themselves against the meritless complaint brought by your client. To that end the respondents will attack the notion that your client suffers from a mental disability and will attack her credibility as a witness. We believe that your client's former husband may be able to provide relevant evidence on these crucial issues. To that end we seek to interview him in order to assess for ourselves whether he can offer relevant testimony.

[182] The respondents' list of witnesses, dated October 6, 2009, included "The former husband of Shannon Ford".

[183] Ms. Ford testified that she was stunned by the respondents' position in this regard. She and her former husband had divorced in 2004, they were in the midst of ongoing custody issues, and she felt there were ongoing safety issues. She testified that she has learned to deal with her ex-husband in a "strictly business" fashion and the potential of her ex-husband testifying against her made her feel extremely vulnerable, scared, and bullied. It resulted in massive anxiety.

[184] At the hearing, during Ms. Ford's cross-examination, the respondents made an application for disclosure of the contact information for Ms. Ford's former spouse. The application came after a series of questions relating to Ms. Ford's contact with her spouse during a period in the Summer and Fall of 2008 when there were ongoing custody issues, culminating in a mediation in November. I denied that application. I found, first that the application was made too late in the proceedings. It is clear that the respondents had contemplated calling this individual as a witness since September 2009. It has been equally clear that the complainant did not intend to provide the information sought. Bringing an application in the midst of cross-examination during the hearing was, in the circumstances, inappropriate. Further, and more centrally, there was no information before me that Ms. Ford's former spouse could give any testimony that was relevant to the events in question. Peak submitted that he could testify about Ms. Ford's mental state

at the time of her dismissal, noting that there were legal proceedings relating to the custody of the couples' children as of June or July 2008. However, the evidence before me was that Ms. Ford deliberately does not provide her ex-husband with any personal information and operates on a "need to know" basis with him. Second, there is no indication that there was significant interaction between them at the time of Ms. Ford's termination. The mediation in question was held in November 2008, which was well after Ms. Ford's termination. For these reasons, I denied the application.

[185] Ms. Ford argues that this renewed application supports her argument for costs. Peak, in contrast, argues that it was within its rights to seek disclosure from the complainant of the name and contact information of her former husband for the purpose of interviewing him and possibly calling him as a witness if it was determined that he could offer relevant testimony. Peak states that he would be able to confirm whether or not Ms. Ford's assertions regarding the state of her mental health and her ability to cope with the regular activities of daily living were consistent with assertions she made during the custody discussions.

[186] The Tribunal is hesitant to interfere with the litigation strategy of parties before it. Preparation for a hearing can involve a number of different avenues and enquires, and a good deal of latitude is necessary to ensure that parties have the ability to fully prepare and defend their cases. Decisions relating to the identity of witnesses and enquires in this regard should not, as a general rule, give rise to findings of improper conduct. However, the circumstances in this case lead me to a finding that it is appropriate to make an exception to that rule.

[187] In this case, Peak raised the issue of calling Ms. Ford's former spouse as a witness in September 2009. Ms. Ford's counsel immediately responded to the enquiry, stating his view that the individual had no relevant evidence to give, and noting that Ms. Ford was in a vulnerable position with respect to the individual in question. The respondents did not make an application to the Tribunal at that time for an order requiring the complainant to disclose contact information for the individual.

[188] In October 2009, Peak produced a witness list naming Ms. Ford's former spouse. However, they took no further action in that regard.

[189] This gave rise to a great deal of uncertainty and anxiety on the part of Ms. Ford, who was not aware of whether her former spouse had in fact been contacted or whether he would be called as a witness.

[190] At the commencement of the hearing, the respondents did not indicate that they would be calling the individual. The hearing proceeded. Ms. Ford, under questioning from her counsel, gave evidence about her difficult relation with her former spouse, her perceived vulnerability to him, and the impact on her of Peak's request for his contact information.

[191] Following this evidence, Peak made an application for disclosure of her former spouse's contact information. They made this application at a time when it should have been clear to all involved that he had no relevant evidence to give, and at a time that was most likely to cause disruption to the hearing. It is reasonable to assume that one of the motivations for Peak's timing and actions was to cause maximum anxiety and discomfort to Ms. Ford. It did nothing to advance Peak's defence to the complaint.

Intimidating Conduct Considered Globally

[192] Based on the two incidents outlined above, Ms. Ford submits that the respondents intentionally or recklessly engaged in intimidating conduct in an attempt to bully Ms. Ford and gain litigation advantage. Ms. Ford submits that this conduct goes well beyond the bounds of a vigorous defence and strays into the realm of intimidation. For the reasons outlined above, I agree. The actions, particularly taken together, had a significant impact on the integrity of the Tribunal's processes, including, in particular, a significant prejudicial impact on Ms. Ford. The actions therefore constitute improper conduct within the meaning of s. 37(4), and will result in an award of costs against Peak.

[193] I turn, therefore, to the issue of quantum.

3. *Quantum*

[194] The primary purpose of s. 37(4) is punitive. As stated in *Hendrickson v. Long & McQuade Ltd. (No. 3)* (1999), 36 C.H.R.R. D/111 (B.C.H.R.T.):

... the amount of an award under s. 37(4) of the *Code* should reflect the particular misconduct involved, the seriousness of its effects upon wronged parties to the complaint, and the effect of the conduct upon the

functioning of the human rights complaint system itself. The amount awarded should also be adequate to deter the party against whom the order is made, and others, from similar conduct in the future. (para. 12)

[195] In a number of decisions, the Tribunal has found that costs may be quantified with reference to the legal fees incurred by the party as a result of the conduct in question. As noted by the Tribunal in *Shannon*:

While orders for costs for improper conduct are primarily punitive rather than compensatory, parties' reasonably incurred legal expenses have been used as a basis for determining quantum in some cases: see *C.S.W.U. Local 1611 v. SELI Canada and others (No. 9)*, 2009 BCHRT 161; and *Chaudhary v. Smoother Movers (No. 2)*, 2009 BCHRT 176. Basing costs orders on a party's legal expenses is particularly appropriate where, as here, the improper conduct has been the cause of the expenditure of those funds. ... In the circumstances of this case, where the Strata's improper conduct spanned the length of the proceedings, and unnecessarily caused Mr. Shannon to incur legal expenses to take the matter through to hearing, I conclude that it is appropriate to order the Strata to pay Mr. Shannon's reasonable legal expenses. (para. 256)

[196] Ms. Ford argues that this would also be an appropriate award in her case. She states that, as in *Shannon*, the respondents conduct caused her to incur legal expenses.

[197] Ms. Ford testified that when she filed her human rights complaint in September 2008, she felt that she could pursue the matter on her own. She felt that she was taking a step towards standing up for herself, and setting an example for her children.

[198] As the human rights process continued, Ms. Ford found dealing with it increasingly difficult. It caused her significant stress to receive letters from Peak as part of the process. Further, by January and February 2009 her mental state had again deteriorated and she simply could not deal with an additional issue. This was also the time when Peak was seeking medical information directly from her physician. She found this highly stressful and anxiety producing. As a result, she sought legal counsel.

[199] I find that Peak's actions, in particular in respect to communication with Ms. Ford's physician, were one of the elements that led to Ms. Ford retaining legal counsel. However, it was not the only element in that decision. In this regard, I note the following.

[200] First, Dr. Ancill was asked to provide an opinion on Ms. Ford's ability to pursue litigation against her former employer without legal representation, given her mental health from May 2008 to the present time. He states as follows:

Her description of the events at issue and the clinical records support a level of post-trauma anxiety, although it does not rise to the level of a formal DSM-IV-TR diagnosis of Post-Traumatic Stress Disorder. As was evident in my interview, recounting these events triggered anxiety and distress. Such a response is also likely to result in avoidance and it is my opinion that she would not be able to progress her litigation without legal representation. To have done so would have significantly raised the risks of relapse.

[201] Dr. Ancill testified that, in his opinion, individuals with psychological illnesses should not represent themselves in legal proceedings. In particular, where an individual suffers from a mood disorder, including anxiety, and part of their anxiety is linked to the subject matter of the complaint, they should have representation.

[202] Given this evidence, it is likely that Ms. Ford would have required legal counsel even absent Peak's approach to the medical records, although Peak's actions in that regard may well have hastened her decision.

[203] Second, the improper conduct that I have found is relatively discrete, relating to two issues that arose during the course of the complaint proceedings. This is dissimilar from the findings in *Shannon*, where the Tribunal found that the improper conduct "spanned the length of the proceedings".

[204] On the other hand, I do find that Peak's approach was a factor in Ms. Ford's decision to retain legal counsel. I find that in these circumstances, it is appropriate to exercise my discretion to award Ms. Ford one third of her legal costs as costs for improper conduct by Peak.

[205] I leave it to the parties to attempt to determine the amount of costs payable. If they are unable to agree on the amount, they are to advise me in writing by June 30, 2010, in which case I shall determine a process to fix the amount.

H. Interest

[206] Ms. Ford seeks an order for interest for all amounts awarded, pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, as amended. I order pre- and post-judgment interest on the amount awarded as wages and expenses, and post-judgment interest on all amounts awarded.

IV CONCLUSION

[207] I have dismissed the complaint against Mr. Gross.

[208] I have found Ms Ford's complaint of discrimination against Peak to be justified. Peak discriminated against Ms. Ford on the basis of disability, when it terminated her employment as a result of her disability-related absence, and the absence of a firm return to work date.

[209] As a result of my findings, I have ordered the following:

- a) Pursuant to s. 37(2)(a) of the *Code*, that Peak cease the discriminatory conduct, or any similar conduct, and refrain from committing the same or similar contravention.
- b) Pursuant to s. 37(2)(b) of the *Code*, that Peak's conduct is declared to be contrary to s. 13 of the *Code* in that it failed to accommodate Ms. Ford to the point of undue hardship;
- c) Pursuant to s. 37(2)(d)(ii), that Peak is to pay Ms. Ford \$11,781.97 as compensation for her lost wages;
- d) Pursuant to s. 37(d)(iii), that Peak is to pay Ms. Ford the sum of \$25,000 for compensation for the injury to her dignity, feelings and self-respect;
- e) Pursuant to s. 37(2)(d)(ii), that Peak is to reimburse Ms. Ford in the amount of \$5,043.72 for expenses incurred by her as a result of the contravention;
- f) Pursuant to s. 37(4), that Peak is to pay Ms. Ford an amount equivalent to 1/3 of her legal fees as costs for its improper conduct; and

- g) That Peak pay pre-judgment and post-judgment interest on those amounts calculated to compensate Ms. Ford for her wage loss and expenses incurred, and post-judgment interest on all amounts awarded, after the date of this decision, pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, as amended.

Tonie Beharrell, Tribunal Member