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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:

Janie R. Toivanen

COMPLAINANT

A N D:

Electronic Arts (Canada) Inc.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:	Barbara J. Junker
Counsel for the Complainant:	Murray Tevlin
Counsel for the Respondent:	Howard Ehrlich and Taryn Mackie
Dates of Hearing:	November 14 to 18, 2005

I INTRODUCTION

[1] Janie Toivanen filed a complaint alleging that Electronic Arts (Canada) Inc. ("EA") discriminated against her in her employment on the basis of physical and mental disability, contrary to s. 13 of the *Human Rights Code*, when it dismissed her from employment on October 10, 2002. EA made an admission immediately prior to the hearing that it discriminated against Ms. Toivanen. This decision therefore focuses on the evidence and analysis relevant to the determination of the appropriate remedies.

[2] Ms. Toivanen testified on her own behalf.

[3] Penny Chong, Senior Human Resource Manager at EA, and Pat York, former Human Resources Director at EA, testified on behalf of EA.

II FINDINGS OF FACT

Entertainment Arts

[4] EA is a developer and manufacturer of computer games. EA is one of the largest video-game makers in the world. It has a studio located in Burnaby, and in 2002/2003 acquired a company called Black Box ("BB"), which is located in downtown Vancouver.

[5] Ms. Toivanen began her employment with EA in 1996. At the time she was dismissed she was 47 years of age and employed as a Localisation Producer, responsible for EA's NHL hockey game. The localisation producer is responsible for converting the game from English into different languages. Ms. Toivanen was one of a team of individuals working on producing the 2003 NHL game (the "NHL Team").

Black Box

[6] BB competed with EA in the development of NHL hockey games. The plan developed in June/July 2002 was that the organizations would merge their NHL game productions. EA began discussions with BB about transition issues, including identifying the employees in both organizations who worked on the NHL games.

[7] In July 2002, EA conducted an open-house for potential future employees. One thousand people requested to attend, however, EA pared the list to 100. The open house prompted concerns for the NHL Team. Realizing they would be merging with BB, there were concerns about future employment. As a result, Rory Armes, Executive Producer, sent a lengthy e-mail to the NHL Team on July 11, 2002, reassuring them that there was no cause for concern about future employment. In particular, he stated:

> I know the lack of information can create uncertainty. But please remember two things: 1) we will not force anyone to move downtown; 2) there are many opportunities here at EAC for those who aren't moving downtown. [reproduced as written]

[8] Since Mr. Armes was to be away the two weeks following his e-mail, he left Brian Wideen in charge of communicating the transition plan to the NHL Team. Mr. Wideen's first e-mail was on July 17, 2002. He apologized for the delay in letting the NHL Team know whether they would be moving downtown, but also reassured them that, if they were not, there were lots of opportunities at EA. In fact, he advised that the plan was to add 90 new hires for the EA game teams.

[9] On July 22, 2002, Mr. Wideen sent his next e-mail to the NHL Team and advised them that EA was planning to have approximately 50 people on the 2004 NHL Team, including about 20 from EA's existing NHL Team.

[10] On July 26, 2002, Mr. Wideen sent his third e-mail. He advised that not all of the existing NHL Team members would be asked to join the 2004 NHL Team. Mr. Wideen also told the NHL Team that there were opportunities, for the short-term, to join other teams that needed help. As well, he advised that he was canvassing the Senior Development Directors for long-term studio opportunities. He told them that there were unfilled positions on FIFA (a soccer game), Triple Play, Tools & Libraries, NBA Live, and the new EA Framework team.

[11] On July 31, 2002, again via e-mail, Mr. Wideen advised the NHL Team that the following week EA would start working on a plan for moving the NHL "franchise" downtown and would be getting to a "beta list" of people who would be invited to BB.

He also told them that, during the week of August 12, EA would determine the reassignments for those not going to BB.

[12] In the week of August 20, 2002, Dave Warfield, Ms. Toivanen's immediate manager, and Ms. York, informed Ms. Toivanen that she was not going to be transfered to the 2004 NHL team.

Ms. Toivanen's Workload and Health Issues

[13] EA's game production cycle is from September to September. The 2003 NHL hockey game began production in September 2001 and was to complete in September 2002.

[14] An audio producer was fired from the NHL Team and Ms. Toivanen was asked by Mr. Warfield to assume the audio producer responsibilities, while continuing with her own. The producer was to have started on the audio in October, however, had not done so, and the audio was behind schedule. Ms. Toivanen assumed the responsibilities in January 2002 and, as a result, doubled her overall responsibilities for the NHL game production.

[15] As a result of the increased workload, Ms. Toivanen's health began to suffer. Her sleep pattern became disturbed. Sometimes she could not sleep at all because she was so worried about meeting deadlines. Other times, when she had time off, she would sleep the whole time. In addition, Ms. Toivanen lost and gained weight, was irritable and withdrawn.

[16] Ms. Toivanen met weekly with Mr. Warfield, and advised him of her overwhelming workload, seeking assistance. There were to be two people sitting in on the audio recording sessions, but a second person from the NHL Team only attended on two occasions. She had a co-op student assist her for eight months, but he was not replaced when his term ended.

[17] Ms. Toivanen is originally from Alberta, and has kept Dr. M. C. Rode as her family physician, even though he is located in Edmonton. Ms. Toivanen also sees a Dr. W. Woodfield in Vancouver.

[18] Ms. Toivanen began complaining of her heavy workload to Dr. Rode in September 2001. His chart notes indicate that she had to get her exercise routine back on track as she required balance in her life. Dr. Rode also noted that it was apparent that she was stressed and had significant depressive features; however, Ms. Toivanen did not want to take any medication that would impair her ability to function at work.

[19] Dr. Rode's chart notes from December 20, 2001 indicate that Ms. Toivanen was complaining of headaches, shortness of breath, insomnia, and the heavy workload and stress at work. She relayed an incident in November where EA's security guard had to take her to Burnaby Hospital emergency because of a sudden sharp headache.

[20] Dr. Rode took several phone calls from Ms. Toivanen starting on February 2, 2002, where she explained that she was covering two jobs. His chart notes indicate that he doubted that she could continue at that pace without creating a negative impact on her ability to function at work, which would further complicate her situation. He concluded that she was deteriorating.

[21] Ms. Toivanen saw Dr. Rode on August 4, 2002. His chart notes reflect that she had serious work-related problems; headaches, with increasing severity over the past two months; and, increasing insomnia. He noted that there was progressive deterioration with increasing depression and anxiety, and that the "Pt has feelings of inadequacy, guilt, worthlessness, appetite is variable although generally decreased, wt loss is evident…Affect is flat, pt speaks in a monotone, is generally expressionless, psychomotor retardation is evident." Dr. Rode advised Ms. Toivanen to immediately book off work; however, she refused, saying that she just could not book off work as the schedule was very tight and deadlines needed to be met. He told her that to continue in this fashion was a "sure formula for disaster" and that she should see a psychiatrist/psychologist for regular counselling. Dr. Rode stressed that to continue working in her present state could well result in a "psychotic break". Ms. Toivanen's

evidence as to why she did not book off work was that if she did, it would be viewed negatively as a sign that she could not handle the workload or her job. She said there was a stigma attached to stress leave at EA and she did not want her private life revealed to the company, so she put off taking a leave.

[22] Dr. Rode spoke to Ms. Toivanen on a number of occasions between August 4 and September 2, 2002, and noted that she was severely depressed, totally decompensated and not able to cope; that she was not functional at a reasonable level at work or home. It was also around this time that Ms. Toivanen was virtually only working and sleeping; that people had to bring food to her apartment because she wasn't able to cook for herself, as that meant she would have to get out of bed. On September 2, Dr. Rode advised Ms. Toivanen to immediately book off work and attempt to locate a psychiatrist in Vancouver who could see her as soon as possible. He started her on medication through Dr. Woodfield. Dr. Rode faxed Ms. Toivanen the following letter on September 3, 2002:

> On reviewing your history and the clinical picture, you should book of work immediately. Waiting for your holiday and a rest is not a good option. If anything you may get some temporary relief however the problem(s) will not be solved.
>
> The only reasonable solution is to book off work immediately, start medication and I will set up a referral with a Vancouver physician for you. It may take several months to get in to see specialist. [reproduced as written]

Events Between August 20 and September 4, 2002: Re-deployment and Performance

[23] Ms. York was involved in the re-deployment process for employees on the NHL Team who were not transferring downtown to the 2004 NHL Team. When she met with Mr. Warfield and Ms. Toivanen on August 20 and advised Ms. Toivanen that she would be redeployed, she told Ms. Toivanen to think about where she might be interested in working. Ms. York explained to Ms. Toivanen that the reason there was no role on the NHL Team for her was that EA had changed the localisation job, and it would carry less responsibility, and be classified at a Co-ordinator level, not Producer. Ms. Toivanen was upset about not being kept on the NHL Team as she had been part of building it over six years. Ms. York encouraged her not to be angry, but to look at this as an opportunity to

pick a job that would make her excited and look forward to going to work. As a result, Ms. Toivanen thought her employment was secure.

[24] Ms. York's role, apart from meeting with employees, was to bring the operation leaders together to talk about the employees who needed to be redeployed and to which team. It became apparent from those meetings that no-one wanted Ms. Toivanen on their team.

[25] On September 2, 2002, between 10 and 11 p.m., there was an exchange of e-mails between Mr. Armes and Mr. Warfield. Mr. Armes advised Mr. Warfield the following about Ms. Toivanen:

> The feeling that I get is that we have not sat down with her and gone through the future. It is getting worse and worse. We have to do something. Set something up with Pat and lets get a solution fast.
>
> This has to be solved early this week. [reproduced as written]

[26] Mr. Warfield wrote back and advised that he had been preparing a performance review and that throughout the year he had pointed out some problems to Ms. Toivanen, but her reaction would be a "20 minute explanation from her of why it would go that way". He also pointed out that she was very angry at him, Mr. Armes and Mr. Wideen, and that she was telling everyone that she was never told there was a performance problem. Mr. Armes replied:

> …
>
> I think my learning on this is to sit down with someone as soon as well know things are changing and come clean. The back lash is causing more of a problem.
>
> If we can not find a place in EAC fast then we need to move to the next solution fast before it gets even more out of control. [reproduced as written]

[27] Mr. Warfield then forwarded the performance appraisal he had been working on, as well as Ms. Toivanen's appraisals from 2000 and 2001, both of which were positive. In his current appraisal, Mr. Warfield had some production criticisms of Ms. Toivanen in that she did not follow some of his directions. In particular, he noted:

-**Development**

...

When areas for improvement or problems are identified, Janie immediately goes into defense mode. She will spend 20 minutes citing all the reasons why something occurred instead of the 10 minutes it would take to fix it. If she spent as much time working on improving areas instead of worrying about defending her job she would be much further ahead at this stage. Whenever a conversation turns towards areas she should improve in it becomes a battle for her to admit there's a problem, making development and further conversations a much tougher thing to deal with, and many times it is just easier to forget it and find another way to take care of it.

-**Emotion**

The smallest of situations seem to be the biggest of deals, from a team laptop being made available to the entire team, to being excluded from a PR driven design session, all of these are escalated into major emotional issues and made into a personal attack or exclusion. In general, issues will be raised as a concern or critical before and investigation is put into what the situation is, this helps to raise the perception that she is not on top of her responsibilities.

…

Earlier in the year we were looking at changing the reporting structure so that Jack Hsu could help to improve the situation between LQA and LP, and continue to improve the skills that make up a Localisation Producer role. Janie would have none of it, and would not agree to changing managers, she did have some valid reasons, and some not so valid reasons, This ties into the difficulty a manager has when dealing with changes that may affect Janie.

With almost all situations in dealing with Janie that involve concerns or change there will be one of two reactions. Crying or Anger.

Her general disposition when dealing with members of the Dev team always seems to have a level of bitterness, which makes dealing with her uncomfortable for a number of people, and does not help with the overall team morale.

…[reproduced as written]

[28] The performance review is somewhat critical of Ms. Toivanen's audio work, but somewhat complimentary of her localisation work. The main area of criticism surrounds her interactions with others, in that Mr. Warfield notes that a number of people would

prefer not to deal with Ms. Toivanen as she always made tasks they were doing for her a priority and a "must do" situation.

[29] Mr. Warfield advised in his e-mail that he did not think that sharing the performance review with Ms. Toivanen would have a positive outcome. Mr. Armes agreed.

[30] Mr. Wideen was copied on the e-mail from Mr. Warfield and he responded on September 3, 2002, by indicating, amongst other points: "We did the redeployment process this morning. Nobody wants her. Warren is expecting some action this week". It was not disclosed who "Warren" is.

[31] Ms. Toivanen testified that she attempted to meet with Mr. Warfield on September 4, 2002, as she wanted to ask for a leave of absence. Ms. York's evidence was that she had attempted to set up a meeting with Mr. Warfield, Ms. Toivanen and herself, but Ms. Toivanen declined. The purpose of Ms. York's meeting was to hand Ms. Toivanen a letter of dismissal which she had her assistant prepare late the day before. Eventually, Ms. Toivanen went in to see Mr. Warfield and before he started the meeting with her, he asked Ms. York to join them, which she did, taking the dismissal papers with her.

[32] Before Ms. York could give Ms. Toivanen the dismissal papers, Ms. Toivanen handed Ms. York Dr. Rode's letter of September 3 and advised that she would be taking a stress leave. When Ms. York asked how long Ms. Toivanen would be off, Ms. Toivanen advised that she had no idea.

[33] On September 4, 2002, Ms. York prepared the following letter and forwarded it to Ms. Toivanen:

> We asked you to our offices today in order to terminate your employment with Electronic Arts (Canada) Inc.
>
> Before we had the opportunity to do so, you provided us with a note from Dr. Rode (copy attached)

> We are currently evaluating our position and will be in touch with you in the near future. [reproduced as written]

[34] Ms. Toivanen did not recall receiving the letter at the time. She said she was in pretty bad shape. However, she did advise her first lawyer at some time that she had received it on September 12, 2002.

Post September 4, 2002

[35] On September 5, 2002, Ms. Toivanen saw Dr. Woodfield who started her on medication. Dr. Woodfield also completed a doctor's note indicating that Ms. Toivanen was presently unable to work. Ms. Toivanen was unsure if she sent it to EA.

[36] Ms. York was puzzled by the Alberta address on Dr. Rode's September 3rd letter, so she attempted to contact him. She left a message with his receptionist, but did not receive a return phone call. Instead, Dr. Rode wrote on October 11, 2002 and advised the following:

> The patient arrived here some 24 hours after requesting her leave of absence. Additional consultations are booked.
>
> Should you wish to be in contact with the patient please forward correspondence to our office. [reproduced as written]

A. The Termination Package

[37] Ms. York attempted to send Ms. Toivanen a termination package to her Vancouver address by courier, but it was returned as undeliverable. The package was the same as the one prepared on September 3, except re-dated October 10, 2002. Before finalizing the re-dated package, Ms. York awaited the outcome of discussions Ms. Chong was having with their insurance carrier. EA does not have a short-term disability plan, but it does have a long-term disability plan. Ms. Chong wanted to ensure that if EA terminated Ms. Toivanen, she would still have access to the plan. The negotiation of terms to ensure Ms. Toivanen would be covered by the insurance plan was concluded on October 8, 2002. The terms continued coverage for Ms. Toivanen to the end of the waiting/qualifying period for long-term disability benefits.

[38] When Ms. York received Dr. Rode's letter of October 11, 2002, she forwarded the termination package to his office. She made no attempt to determine the extent of Ms. Toivanen's illness before doing so.

[39] The termination package included a cheque for accrued vacation, funds accrued under the Employee Stock Purchase Plan, and five weeks pay in lieu of notice. In addition, in exchange for a signed release, EA offered a lump sum payment of $19,744.00 which represented five months severance. Further, EA advised that Ms. Toivanen's medical plan would continue until March 31, 2003, and that her coverage under the dental, extended health, health spending account, life insurance, long-term disability and employee assistance program would continue until March 10, 2003.

[40] Then counsel for Ms. Toivanen, and counsel for EA, had settlement discussions surrounding Ms. Toivanen's dismissal and severance pay. In those discussions, EA offered less severance pay than it offered in October 2002 and told Ms. Toivanen she had a deadline of June 6, 2003, within which to accept the offer or it would be withdrawn. Ms. Toivanen wanted to wait until the end of 2003, at least, to settle her wrongful dismissal claim. EA did not remove its deadline, after which it advised it would have no further settlement discussions. Ms. Toivanen then filed her human rights complaint.

B. Medical Care

[41] Ms. Toivanen continued to see Dr. Rode throughout September and October 2002. I have transcribed his chart notes, omitting the medications prescribed or tests he ordered and some unrelated portions. The chart notes reflect the seriousness of Ms. Toivanen's condition:

> **September 13, 2002** – totally decompensated, classical reactive/ exogenous depression, anxiety, insomnia, headaches, MSK aches and pains. Overall situation reviewed. Will need prolonged treatment, counselling, medication.
>
> **Sept 22/02** Patient is extremely depressed, withdrawn, may require hospitalization. She is weepy most of the time, sleeps excessively, weight fluctuating, essentially isolates herself completely, feels worthless, guilty, that she is a failure, that there is no hope for the future. Her sleep habits

> are quite abnormal, initially she has early and mid insomnia, then she will sleep/remain in bed to 4pm. In part this is an attempt to avoid contact with anyone. She notes that there is nothing to get up for, that if she does get up she will only have to face problems.
>
> She has absolutely no interests, is apathetic, speaks in a monotone, speech is slow, almost slurred, spends most of her time looking down at the floor. Dress and grooming is far below her normal. There is marked psychomotor retardation, she is bordering on catatonia.
>
> Thought pattern, content is very negative, hopeless, unrealistic. Suicide is a real possibility although she denies any "active" thoughts or plans of same.
>
> ***Oct 12/2002*** *Perhaps slightly better than on previous visit. Continues to be a suicide risk still denies any thoughts of suicide. She is totally non functional. Advised that (medication) will need to be increased considerably, that she will need regular counselling, needs to re-start her exercise routine…*
>
> **Oct 21/02** UIC – will be off minimum of 4 months based on most recent exam/based on most recent assessment, she will be off at least another 3 months, likely longer. Get fax number, mail copies. [reproduced as written][italics in the original]

[42] Ms. Toivanen received EA's October 10 package on October 25, 2002. She was devastated. She said it took her job and hope away when she needed it the most. Ms. Toivanen testified that she didn't have much hope to start with and the letter took away all hope. She felt that by terminating her, EA was essentially saying that we do not support you; we have no obligation to you, and as she put it, "sort of see you later".

[43] The reason given in the letter for Ms. Toivanen's dismissal was because of studio restructuring. She was advised that she had 90 days from October 10 to exercise her vested stock options. The 90 days took her to January 10, 2003. Ms. Toivanen tried to get EA to extend that to 90 days from the date she received the letter, but EA was unable to get approval from "corporate U.S.". In the end, Ms. Toivanen exercised her stock options on January 10, 2003; she was afraid that otherwise she would lose them.

[44] Ms. Toivanen continued to see Dr. Rode. In November, Dr. Rode found her symptoms much like the September 22 visit. On a December 7 visit, they had a long discussion of problems leading up to depression and anxiety, being booked off work, then

being terminated. Dr. Rode notes "At this time she is having a host of difficulties coping emotionally, intellectually, financially, socially, in reality, she is having difficulty in all areas".

[45] Ms. Toivanen commenced the process of applying for long-term disability benefits in January 2003. At the same time, she returned from Alberta to Vancouver in order to commence legal proceedings against EA. She discussed filing a complaint with the Human Rights Commission. However, the Commission did not process her complaint because it ceased to exist on March 31, 2003. As a result, in April 2003, the Tribunal communicated with Ms. Toivanen, providing her with a complaint form, and she then filed her complaint with the Tribunal on June 13, 2003.

Long-Term Disability and Continued Health Issues

[46] National Life, Ms. Toivanen's long-term disability carrier, made arrangements in April 2003 for an independent medical assessment with a psychiatrist, Dr. Alexander Levin.

[47] Dr. Levin prepared a lengthy report, including a diagnosis, concluding:

> It would be my clinical opinion that Ms. Toivanen, however, most likely is currently unable to work either in her own occupation or in any other occupation. [reproduced as written]

[48] When taking her history, Dr. Levin asked Ms. Toivanen about her return to Vancouver and how she was feeling. He noted the following:

> She returned to Vancouver in January 2003 but continued "feeling tired and tense". She expressed her concerns that while in Edmonton her parents and friends took care of her, preparing food and providing support, but now she is alone. While in Vancouver she remains socially isolated, limiting her social contacts and physical activities. She explained that she had to return to Vancouver because of litigation with her company. Apparently while on a medical leave from her work she was fired. She explained that the company terminated her contract without explanation and she is currently consulting a lawyer as well as the Human Rights Commission. She said that these stressors added to her depressive mood and insomnia, causing her increasing anxiety and "feeling sick". At that point in the interview, Ms. Toivanen became visibly distressed, tearful,

> and was crying. She talked about feeling hopeless and helpless. She expressed feelings of bitterness. She was sobbing and unable to take control of her emotions. She continued crying uncontrollably for the next 15 to 20 minutes. She admitted frequently having similar episodes. [reproduced as written]

[49] On May 5, 2003, National Life advised Ms. Toivanen that she had been accepted on to LTD benefits effective January 2, 2003. Ms. Toivanen took counselling offered through National Life and was referred by Dr. Levin to a cognitive behavioural coping psychiatrist. Ms. Toivanen also saw a mental health counsellor in May 2003.

[50] Ms. Toivanen was referred to a psychiatrist in Vancouver who confirmed with Dr. Woodfield in August 2003 that Ms. Toivanen would likely not be able to return to work before October 2003.

[51] Ms. Toivanen returned to live in Alberta and, as required by National Life, was referred to a psychiatrist there, Dr. D'Costa. She continued to see him through 2004.

[52] In April 2004, Ms. Toivanen's first legal counsel applied for an adjournment of the Tribunal's proceedings until her health improved. Based on the medical information provided, that adjournment was granted until January 2005.

[53] In order to assess Ms. Toivanen for continued LTD benefits, she was referred by National Life to an independent psychiatric examiner in December 2004. The assessment was the same as previous ones; that Ms. Toivanen suffered from a major depressive disorder. As a result of that assessment, Ms. Toivanen's LTD benefits were continued as disabled from any occupation. At the time of the hearing, Ms. Toivanen remained on LTD benefits.

The EA Work Environment

[54] The corporate environment created at EA is very much one of "competitive edge". EA lets it be known that employees can be replaced and requires a huge commitment from them.

[55] Ms. Chung described the work environment as fast paced and "Mach 3". EA is highly demanding of its employees in terms of quality and meeting deadlines for production. She said that, in order for EA to be the number one developer of video games, each game iteration has to be faster and better. As a result, change is constant, and although projects are alike in terms of genre, with some standardized processes, each is unique in content and design. There is a "crunch time" for each game, when it is being finalized to meet the shipping date deadline. This is usually approximately two months before the shipping date. The usual target is to ship for the U.S. Thanksgiving, so that means September/October is the "crunch time". The demand on employees is extremely high at that time, hours are long, and employees work through breakfast, lunch and dinner, and on weekends.

[56] In exchange for the demands it places on employees, EA has on-site facilities for their use, such as: a gym; physiotherapy and massage therapy; yoga, spin, kickboxing, and Pilates classes; as well as a steam room. EA provides a full concierge service for employees, including laundry, dry cleaning, car washing, and aesthetics. It has a large cafeteria with healthy food, as well as pizza, sushi, a stir fry bar, and an ice cream bar.

[57] EA has benefit coverage for employees, including: life insurance with accidental death and dismemberment; medical, dental and extended health care; and LTD insurance. The premiums for the LTD plan are paid for by the employees – deducted from their paycheques and remitted by EA to the carrier. In this way, the benefits, when received, are not taxable.

[58] EA employees are eligible for target bonuses which are based on a percentage of their base salary. The bonus percentage rate varies by position, and is based on grade and job level. Bonuses are tied both to an employee's performance and the overall studio's performance. Full-time employee bonuses are paid annually after the fiscal year end, March 31.

[59] EA employees are also eligible for merit increases which are based on the results of performance reviews conducted annually in October. Employees are given ratings on a scale of one to five. The higher the performance level, the larger the salary increase.

For the purposes of this hearing, the parties agreed on the following performance rating descriptions:

3.5	4.0
Capable, thoroughly competent performance.	Superior performance.
Steady valued contributor.	Finds new ways to contribute and create results.
Meets and occasionally exceeds expectations and standards.	Achieves results that exceed standards and expectations for the position most of the time.
Solid performance gets the work done with good quality.	

[60] Employees can also arrange for RRSP contributions to be deducted from their paycheque.

[61] EA also offers employees stock options and an "employee stock purchase plan".

Stock Options and the Employee Stock Purchase Plan

A. Stock Options

[62] Ms. Chung testified about EA's stock options and I was also referred to a number of documents that explain EA's offer of stock options to employees.

[63] Stock options allow EA employees to purchase a specific number of shares at a set price. There are four opportunities when employees can receive stock options:

1. Upon being newly hired: New Hire Grants.
2. Employee promotion to a new or higher grade level.
3. Recognition stock awarded to high performers; about 15% of the employees may be eligible.

4. Replenishment stock: may be given when employee has no stock options left because they have been fully vested and purchased all of the available stock under their options. The replenishment stock options are at management's discretion.

[64] The entire stock under option cannot be purchased when an employee first receives or is granted it, for example, at hire. Instead, employees earn the right to commence buying the shares 12 months after the date of hire. Earning the right to buy is called "vesting". Vesting is at 2% per month with the first possible vesting of new-hire grants at 24% after 12 months of employment. Thereafter, options vest at 2% per month until they are fully vested. Employees do not have to wait until all the options are fully vested before exercising an option to purchase; an employee can purchase shares once an option is vested. Once vested, the option can be exercised at any time by the employee.

[65] The purchase price, or option price, of an employee's shares is the closing market price on the date the options are granted; the "grant date". An employee can exercise their options to purchase in two ways: a "cash exercise" or a "same-day sale".

[66] In a cash exercise, an employee uses their option to purchase shares, pays EA for the shares, and is granted a stock certificate in their name. The employee then holds EA shares.

[67] A same-day sale is where an employee exercises their options to buy shares and sells them the same day. The sale is arranged through a broker. The result is that the employee ends up with cash in hand as opposed to shares. The same day sale is facilitated when a broker sells the shares, sends EA the money to cover the cost of the stock (and any taxes), and then sends the employee the balance of money after deducting a commission.

B. Employee Stock Purchase Plan

[68] Employees can acquire stock through a payroll deduction plan and in addition, purchase the stock at least 15% below the market price. Employees can designate between 2% and 10% of their total compensation for a six month period to be deducted from their pay towards stock purchases. The money is retained by EA and at the end of

the six months (February and August), EA takes the accumulated amount and purchases as many whole shares as possible for the employee's benefit. The purchase price is the lower of the market price on the first or the last day of the 6 month period, less a 15% discount.

Ms. Toivanen's Remuneration, Performance Assessments and Stock Options

[69] EA made certain admissions about Ms. Toivanen's remuneration, performance assessments and stock options.

A. Remuneration

[70] Ms. Toivanen was promoted as follows:

Effective Date	Action	Job Title	Annual Salary
November 18, 1996	Hired	Production Assistant I	$38,000
April 6, 1998	Promotion	Production Assistant II	$42,200
June 5, 2000	Promotion	Localisation Producer	$56,000

[71] Ms. Toivanen received the following pay increases:

Effective Date	Annual Rate
November 3, 1997	$39,200
November 2, 1998	$44,600
November 1, 1999	$49,060
October 30, 2000	$57,500
April 2, 2001	$59,500

October 29, 2001	$61,600

[72] Ms. Toivanen received the following bonuses:

Bonus Date	Bonus Amount
May 8, 1998	$2,700
May 22, 1999	$5,500
March 27, 2000	$2,500
June 1, 2001	$1,500
May 17, 2002	$3,770

B. Performance Ratings

[73] EA evaluated Ms. Toivanen's performance every fall, and provided her with the following performance ratings:

Year	Rating
1998	4.25 out of 5
1999	4 out of 5
2000	3.5 out of 5
2001	3.75 out of 5

C. Stock Options

[74] Ms. Toivanen's stock options as of January 10, 2003 were as follows:

Grant	Grant Date	Option Price per share	Shares Granted	Share Options Vested	Shares Not Vested
15254	June 23, 2000	$37.4688 US	1,300	728	572
10177	April 22, 1998	$21.5625	500	500	0
8072	Dec. 20, 1996	$15.0625	500	340 (160 exercised Feb/98)	0

[75] As noted in para. 43, on January 10, 2003, Ms. Toivanen exercised all options that had vested by October 10, 2002, which totalled 1,568. She exercised her options through a same day sale. On January 10, 2003, EA shares were trading at $52.17 US, a post split value of $26.085 US. When Ms. Toivanen exercised her vested options in January 2003, she received a profit of $38,622.77 US

[76] A stock split occurred in EA stock on November 18, 2003 on a 2:1 basis. In other words, the option price per share was halved and the number of shares doubled.

III POSITIONS OF THE PARTIES

[77] Ms. Toivanen says that she had a disability, EA refused to continue to employ her and that her disability was a factor in that refusal. EA relies on its admission and says that I can proceed to a consideration of damages.

[78] Ms. Toivanen takes the position that she suffered a loss by being forced to exercise her stock options at a time when she would not otherwise have chosen to, and

that the Tribunal should award compensation for that. EA says that Ms. Toivanen failed to mitigate her loss by not purchasing shares with her vested options.

[79] Ms. Toivanen argues that her disability is not a bar from her recovering damages for lost wages and relies on *Sylvester* v. *British Columbia* [1997] S.C.J. No. 58 (S.C.C.) and *Dunlop* v. *B. C. Hydro and Power Authority*, [1988] B.C.J. No. 1963 (C.A.) for the proposition that she is entitled to damages equivalent to wrongful dismissal notice. EA disagrees that the Tribunal has the authority to award such damages and says because Ms. Toivanen was disabled, she is not entitled to damages in the form of lost wages.

[80] Ms. Toivanen also says that money received by her in the form of LTD insurance benefits should not be deducted from the damages award. She relies on *Tozer* v. *British* Columbia, 2002 BCHRT 11 and *Cunningham* v. *Wheeler*, [1994] S.C.J. No. 19 (S.C.C.), and distinguishes *Sylvester*, where LTD benefits were deductible, by arguing that she paid her own LTD premiums and in *Sylvester* the employer had paid the premiums.

[81] EA argues that *Tozer* does not apply because the Tribunal awarded wage loss for a period of time when it considered that the individual was able to work and therefore did not deduct the disability benefits paid to the complainant. EA says that the analysis in *McKendrick* v. *Open Learning Agency* [1997] B.C.J. No. 2763 (B.C.S.C.) should apply.

[82] EA submits that Ms. Toivanen is not entitled to vest her October 2002 unvested stock options, receive credit for wage increases, or bonuses, because the Tribunal should consider her status as if she was on an unpaid leave of absence.

IV ANALYSIS AND REMEDY

[83] Section 13 of the *Code* 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 the…physical or mental disability, of that person …

[84] The burden of proof lies on a complainant to establish, on a balance of probabilities, that a respondent contravened s. 13 of the *Code*. The initial evidentiary burden lies on Ms. Toivanen to establish a *prima facie* case that she was discriminated against on the basis of physical or mental disability.

[85] The test with respect to what constitutes a *prima facie* case of discrimination was established by the Supreme Court of Canada in *O'Malley* v. *Simpson-Sears Ltd.*(1985), 7 C.H.R.R. D/3102:

> 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. (at D/3108)

[86] Ms. Toivanen must therefore establish:

a. That she had a disability

b. That EA refused to continue to employer her; and

c. That it is reasonable to infer from the evidence that her disability was a factor in that refusal.

[87] Once a complainant succeeds in establishing a *prima facie* case, the burden shifts to the respondent to lead credible evidence of a non-discriminatory explanation for its conduct or a *bona fide* occupational requirement. If it does, the evidentiary burden shifts back to the complainant to show the explanation is not credible, or is simply pretext. Ultimately, however, the legal burden rests on Ms. Toivanen to establish, on a balance of probabilities, that her physical or mental disability was a factor in EA's conduct towards her.

[88] Immediately prior to the hearing, EA made the following admission:

> After receiving a copy of Dr. Rode's letter (Respondent's document 29) on September 4, 2002, EA unintentionally violated the Human Rights Code by failing to make inquiries about Ms. Toivanen's medical status prior to terminating her employment. [reproduced as written]

[89] By their admission, EA has violated s. 13 of the *Code* and discriminated against Ms. Toivanen on the basis of her physical and mental disability. It provided no defence for its conduct which was a failure to provide any accommodation to Ms. Toivanen. Instead, it reacted to her request for a leave of absence, without investigating the reasons for her request, by dismissing her. I find that EA discriminated against Ms. Toivanen and I proceed to consider the damages that should be awarded to Ms. Toivanen.

[90] Section 37 of the *Code* 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,
>
> **…**
>
> (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:
>
> (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;
>
> (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.

Order under s. 37(2)(a)

[91] An order under s. 37(2)(a) is mandatory when discrimination is found and accordingly, I order that EA cease its contravention and refrain from committing the same or similar contravention.

Orders under s. 37(2)(d)(ii)

A. Healthcare Costs

[92] The parties agreed that it was appropriate for the Tribunal to order that EA pay Ms. Toivanen's prescription, medical, dental and eye expenses, in the amount of $6,004.12. I so order.

B. Legal Costs

[93] Ms. Toivanen sought legal expenses incurred by her for her first lawyer, in the amount of $5,800.00, and for TevlinGleadle Employment Law Strategies, in an amount to be provided on request.

[94] Ms. Toivanen argues that her first lawyer's fees can be awarded as costs arising from the contravention of the *Code*. In respect of the expenses from TevlinGleadle, Ms. Toivanen argues that she would have been in an unequal power situation with EA, if she did not have legal counsel. In those circumstances, and because TevlinGleadle was engaged so shortly before the hearing, requiring the resources of three lawyers from the firm, and in light of the late admission from EA, she says the only fair thing to do would be to award legal expenses against EA.

[95] According to the invoices submitted, some of Ms. Toivanen's first lawyer's fees are legal expenses that arise from the contravention and are not costs of the complaint proceeding. The total of the three invoices submitted is $5,791.32. However, only the third invoice, in the amount of $1,906.10, relates solely to activities after Ms. Toivanen's complaint was filed. The first invoice of $2,571.97 covers matters that entirely arise from the contravention. The second invoice of $1,313.25 covers matters that arise in part from the contravention, and the remainder relates to costs of the complaint proceeding.

[96] The Tribunal will award legal expenses incurred because of the contravention of the *Code*, but it does not award legal fees that are characterized as 'costs' of the proceeding: *Waters* v. *BC Medical Services Plan*, 2003 BCHRT 13, and *Morris* v. *British Columbia Railway Co.,* 2003 BCHRT 14.

[97] As a result, I decline to order any amount for legal expenses for TevlinGleadle. However, it is appropriate in the circumstances to order that EA pay legal expenses for Ms. Toivanen's first lawyer in the amount of $3,300.00 as compensation for expenses incurred prior to the filing of her complaint.

C. Out-of- Pocket Expenses – Medical Reports

[98] Ms. Toivanen seeks out of pocket expenses in the amount of $2,500.00 which she says she incurred in securing medical reports and records. However, she has provided no invoices in support of that amount. I am satisfied, based on the medical evidence put before me, that Ms. Toivanen would have incurred some expense for securing some of the reports and records. I therefore award $1,000.00 for out-of-pocket expenses.

Orders under s. 37(d)(i)

A. Stock Options

[99] Neither party argued that Ms. Toivanen was not entitled to some damages arising from the need to exercise her stock options. Section 37(2)(d)(i) provides that the Tribunal can make available to a person discriminated against a right, opportunity or privilege that, in the opinion of the member, the person was denied contrary to the *Code*. I find that the stock options are such a right, opportunity or privilege.

Value of Loss due to forced Cash-in

[100] The issue here is what loss Ms. Toivanen suffered as a result of having to exercise her stock options in January 2003, when she would not otherwise have chosen to, rather than holding them and cashing them in at some time in the future.

[101] All references in this section of the decision are to US dollars.

[102] EA argued that the loss of value due to the forced sale of Ms. Toivanen's options should be calculated at the average share price for the period January 10, 2003 to November 25, 2005, (post-split value) of $48.160919. Ms. Toivanen argues on the other

hand, that the highest share value over the same period, close to $70.00, should be used to calculate the loss.

[103] EA relies on *Radloff* v. *Stox Broadcast Corp,* [1999] B.C.H.R.T.D. No. 36, where the Tribunal used the average share price in calculating damages for stock options that had not been exercised. In *Radloff* the complainant argued that the highest share price should be used, as that is when she said she would have cashed in her options. The Tribunal commented on her position, as follows:

> …She submits that she likely would have exercised her option in November 1995 or July 1996 when the shares were trading at their highest. It is, of course, possible that Ms. Radloff would have had the insight and good fortune to exercise her option when the share prices were at their height. With hindsight we could all be successful investors. I am not prepared to assume that Ms. Radloff would have timed her purchase to maximize her profit. In my view, a conservative approach to calculating the amount that she would have benefited is to assume she would have purchased shares at the option price of $0.40 and sold her shares at the average price during that period, which I calculate at $0.48 (based on the closing price on each day there was at least one trade)…

[104] The reasoning in *Radloff* for not accepting the highest share price equally applies to Ms. Toivanen's position, and I do not accept that a $70.00 share price is appropriate.

[105] As a result, in the absence of evidence about when Ms. Toivanen would have cashed in her options, I find that the fairest stock price to calculate the value of Ms. Toivanen's loss is the average share value. Therefore, in calculating Ms. Toivanen's damages for being forced to cash-in her options, I have used $48.160919 for the share value.

[106] In January 2003, when Ms. Toivanen was forced to cash-in her options she had 1568 vested options, at a total option price of $43,179.79. Assuming she had not cashed in her options, that value would be the same, except she would have had double the options because of the stock split in November 2003. At the time of the hearing, Ms. Toivanen therefore would have had 3136 vested options. At a stock price of $48.160919, the value of those cashed-in options is $151,032.64, less the option price of $43,179.70, resulting in a profit for Ms. Toivanen of $107,852.85. The parties agreed that Ms.

Toivanen's previous profit ($38,622.77) must be deducted from that profit, for a net profit of $69,230.08.

[107] EA says that Ms. Toivanen had an obligation to mitigate her loss by reinvesting her profit of $38,622.77 back into EA shares. It relies on *Asamera Oil Corp.* v. *Sea Oil and General Corp.*, [1979] 1 S.C.R. 633, for the application of the principle of mitigation to the purchase of replacement shares in stock option cases.

[108] EA relies on *Asamera*, a breach of contract case, for the proposition that a defendant should not be called upon to pay for avoidable losses by a plaintiff which would result in increased damages for a defendant.

[109] However, in *Genesee Enterprises Ltd.* v. *Abou-Rached* [2001] B.C.J. No. 41, relied on by Ms. Toivanen, the B.C. Supreme Court clarified the application of *Asamera*:

> In *Asamera Oil Corporation Ltd*., the plaintiff was a large corporation and there was no evidence that it did not have the financial resources to enter the market and purchase replacement shares for those it claimed had not been delivered. In this case, the evidence is clear that Genesee had no assets with which to purchase a large number of IHI shares. Further, the evidence of the individual defendants by counterclaim shows that none of them had the financial resources to provide funds to Genesee for that purpose.
>
> One of the issues that occupied the Supreme Court in *Asamera Oil Corporation Ltd.* was whether the plaintiff could claim that it had adequately mitigated by pursuing its action against the defendant. The Supreme Court found that it had delayed unduly, and could only claim mitigation by litigation for a portion of the period over which the litigation ensued.
>
> In this case, the plaintiff pursued litigation promptly, first by the petition and subsequently by this action. The time that has ensued until this judgment is not a factor that reduces the effect of the plaintiff's actions on the mitigation of damages.
>
> I therefore find that the plaintiff mitigated its damages by pursuing its claim against the defendants.

[110] In evidence before me were documents regarding Ms. Toivanen's financial situation at the time she was forced to exercise her stock options. She did not have the

financial resources to go into the market and repurchase the EA shares. Ms. Toivanen needed the cash from the exercise of her stock options to live. She was out of work, living with her parents, was responsible for a mortgage, and was not in receipt of LTD benefits until May 2003. In all of the circumstances, I find that to impose such a duty to mitigate upon Ms. Toivanen would be unreasonable in all the circumstances. Ms. Toivanen filed her complaint right after EA withdrew from settlement discussions about its discriminatory conduct, and I therefore find she mitigated her damages by pursuing her claim against EA. Similar to the situation in *Genesee*, the time that has ensued until this Decision does not reduce the mitigation of damages.

[111] EA is ordered to pay Ms. Toivanen $69,230.08 for the value lost when it required her to cash-in her share options in January 2003.

Unvested Options and Lost Stock Benefits

[112] Ms. Toivanen says that her unvested stock options as at October 2002, an amount of 572, should continue to vest while she was on LTD. However, while Ms. Toivanen was on LTD benefits, her options would not continue to vest, even presuming she had not been dismissed and remained on LTD benefits. EA's stock option grant is clear that vesting is suspended during unpaid leaves of absence, which would have been Ms. Toivanen's employment status had she still been employed.

[113] In *Ontario Nurses' Association.* v. *Orillia Soldiers Memorial Hospital*, (1999) 42 O.R. (3d) 692, the Court confirmed an arbitration board's finding that it was not discriminatory for an employer to discontinue benefit plan contributions when an employee was absent from work due to a disability. The Court's reasoning was that the benefit plan contributions formed part of the compensation for work or services provided to the employer by the employees. The Court confirmed that employees not at work are not providing services to their employer. The Court found that requiring work in exchange for compensation was a reasonable and *bona fide* requirement.

[114] As a result, a benefit accruing to an employee while they are at work may discontinue while they are on an unpaid leave of absence due to a disability, because the

accumulation of the benefit relates to the fact they are working. While they are on an unpaid leave of absence due to a disability, they are not working and so not entitled to the benefit accumulation.

[115] The vesting of stock options at EA clearly relates to work. The stock options are part of the employee compensation package, but are not available to be cashed in until they are vested, and vesting occurs at 2% for each month that an employee works. As a result, vesting would not occur when Ms. Toivanen was not working and while on LTD.

[116] Ms. Toivanen also seeks the stock option benefits she lost after she was dismissed, but continued on LTD. She says she should be entitled to the same benefits as similarly situated employees. Relying on the past regular receipt of stock options, Ms. Toivanen argues she should be granted 1000 new options on April 1, 2003. However, the difficulty with Ms. Toivanen's position is that stock options, like the vesting of stock options, are compensation benefits relating to work. Because Ms. Toivanen was not working, these benefits are not available to her.

B. Lost Wages and Bonuses

[117] Ms. Toivanen seeks an order pursuant to s. 37(2)(d)(ii) of the *Code* for wage and bonus loss and stock and other benefits from September 3, 2002 to the date of the Decision in this case. Ms. Toivanen argues that, based on her prior performance reviews and resulting salary increases and bonuses, for the purposes of calculating the lost wages, I should assume a 5% annual wage increase and bonus loss of $4,500.00 per year. Based on Ms. Toivanen's calculations, she is seeking a total wage plus bonus loss of $232,500.00 (plus interest). However, I must first determine Ms. Toivanen's entitlement to a wage loss claim.

[118] The Tribunal has not awarded damages for lost wages where a disabled employee is unable to work. It has awarded an equivalent to LTD benefits where an individual was deprived access to the benefits as a result their dismissal: *Innes* v. *Re-Con Building Products*, 2006 BCHRT 99. However, Ms. Toivanen was not deprived of access to LTD

benefits, and continues to receive those benefits as she remains totally disabled from any occupation.

[119] The Tribunal has awarded damages for lost wages where a disabled individual was capable of returning to work, but for the discrimination: *McArthur* v. *M & A Ventures Ltd. (c.o.b. "Esso Consumer Sales Centre")* [1996] B.C.C.H.R.D. No. 32 and *Tozer* v. *British Columbia (Motor Vehicle Branch)*, 2002 BCHRT 11, but has declined to award lost wages when a complainant was unable to perform work required: *Flamand* v. *Chow (c.o.b. "The Greenery Sandwich Bar")*, [1989] B.C.C.H.R.D. No. 10. The evidence is clear that Ms. Toivanen has been and continues to be unable to work. As a result, I decline to order Ms. Toivanen an amount for lost wages. I therefore also decline to order that EA pay any statutory benefits. As a result, I need not consider whether salary increases or bonuses, based on performance, are applicable.

C. Severance Pay

[120] I agree with EA that the Tribunal does not have express jurisdiction to award an amount to a complainant in the form of wrongful dismissal type damages. This was confirmed in *McArthur*, citing *Vanton* v. *British Columbia (Council of Human Rights)* (1994), 21 C.H.R.R. D/492 (B.C.S.C.). However, in this case, I find that Ms. Toivanen is entitled to a remedy relating to severance pursuant to s. 37(2)(d)(i), as set out below.

[121] In normal circumstances, an employee on LTD continues to be employed and unless an employer dismisses them, the issue of severance pay does not arise. However, EA dismissed Ms. Toivanen before she qualified for LTD, and the issue of severance arose at that time.

[122] The Tribunal has recently considered the purpose of severance pay in *MacRae* v. *Interfor (No. 2)*. 2005 BCHRT 462 and *Mehar and others* v. *Interfor (No. 2)*, 2006 BCHRT 189. I agree with the reasoning in *Mehar*, which describes the purpose and intent of severance pay at paras. 30 to 35:

> The purpose of severance pay has been described as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business – the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service…Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment: excerpt cited in *MacRae* v. *Interfor (No. 2)*, 2005 BCHRT 462 at para. 140 from *Re Telegram Publishing Co*. v. *Zwelling* (1972), 1 L.A.C. (2d) 1 (cited with approval in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 26)

The purpose of severance was also addressed in detail in *Ontario Nurses' Assn.* v. *Mount Sinai Hospital*, [2004] O.J. No. 162 ("*Nurses*, Div. Ct.") and by the Court of Appeal in Ontario Nurses' Assn. v. Mount Sinai Hospital (2005), 75 O.R. (3rd) 245, [2005] O.J. No. 1739 ("*Nurses*").

In the *Nurses* decision, a provision in the *Ontario Employment Standards Act* ("*ESA*") that disentitled disabled employees from receiving severance pay was challenged under s. 15(1) of the *Charter*. The arbitration board applied *Law* v. *Canada (Minister of Employment and Immigration*), [1999] 1 S.C.R. 1 (the "*Law* Analysis"), and determined that there was no violation of s. 15(1) of the *Charter*, as the benefit of severance was denied because of the non-viability of the employment contract and not due to the nurse's disability. The Divisional Court disagreed with the board's *Charter* analysis, and found that the dignity of the severely disabled was violated by their exclusion from entitlement to severance pay. The Divisional Court held that s. 58(5)(c)of the *ESA* was contrary to the *Charter* and of no force and effect. The Court of Appeal upheld the decision of the court below, and found that the provision had a profoundly discriminatory impact on the most disabled.

Although the *Nurses* decision is a *Charter* case, I find the Courts' determinations concerning the purpose of severance applicable and helpful to the present case.

The Court of Appeal held that the purpose of severance was to provide an earned benefit to long-serving employees: at para. 38. It went on to state:

> Further, to the extent that severance pay is intended to ease the transition of terminated employees to other employment, the need of disabled employees for support in retraining and the acquisition of new skills may be even more pressing that that of other terminated employees…

In applying s. 15(1) of the *Charter*, the Divisional Court elaborated on the impact of disentitlement based on disability. It stated:

> To deprive a person of a benefit of employment relating to their investment in the business for which they have worked, based on severe disability, goes to the very core of the values contemplated in s. 15(1) of the Charter…Subsection 58(5)(c) singles out the severely disabled to deny them an employment benefit to which they would have been entitled but for their disability. In so doing it devalues their past contributions to their employment. The denial of an employment benefit that has been established to recognize a person's contributions to the employer goes directly to the dignity of a disabled person.(at para. 47)

[123] At the time it dismissed Ms. Toivanen in October 2002, EA offered her five months severance, in exchange for a release. The parties were in discussions about Ms. Toivanen's LTD benefits and also had discussions about severance. In May 2003, EA offered Ms. Toivanen, after she was accepted on LTD, approximately $5,000.00 less than it proposed in October 2002. When Ms. Toivanen declined the offer, EA withdrew it, denying her a right.

[124] As a result, in the circumstances of this case, I find it appropriate pursuant to s. 37(1)(d)(i) to order EA to pay Ms. Toivanen five months severance pay, in the amount it was prepared to offer her when she was dismissed, $19,744.00 CDN, with interest.

D. Deduction of LTD Benefits

[125] EA argued that if damages in the form of lost wages or notice for wrongful dismissal were ordered that I should deduct any LTD benefits that Ms. Toivanen received. Although severance as described above is not equivalent to damages for wrongful dismissal, I nevertheless will address EA's argument with respect to the deduction of LTD benefits from the severance.

[126] Ms. Toivanen paid her own LTD pension premiums. I acknowledge EA's argument that the nature of the long-term disability plan offered to its employees is similar to that described in *McKendrick* where the Court found that despite the fact the employee had paid their own coverage premiums, LTD benefits were deductible from

damages awarded for the employee's dismissal. The Court found that the short and LTD plans in effect at the time of the employee's dismissal were an integral part of the employment contract. While the *McKendrick* decision was rendered after the Supreme Court of Canada's decision in *Sylvester*, it is apparent from more recent cases that the Court in *McKendrick* reached a different conclusion about what the reasoning in *Sylvester* stood for. In *McNamara* v. *Alexander Centre Industries Ltd.*, [2001] OJ No. 1574 (Ont. CA), the Court upheld the decision of a trial judge who concluded that LTD benefits were not deductible from a damages award. In doing so, the Court explained the reasoning in *Sylvester*, as follows:

> The trial judge in the present action recognized that in Sylvester both salary and disability payments came directly from the employer's pocket, whereas in this case, ACI was responsible for McNamara's salary but London Life would pay the disability benefits. In my view, she was right to think that this was an important difference. It is one thing to be concerned, as the court was in *Sylvester*, with double recovery when all the money comes from a single source, the employer. The concern should be significantly diminished when the double recovery flows from clear entitlement to two different and legitimate recoveries (damages for wrongful dismissal and disability benefits) and neither payor would be responsible for paying even a penny more than it should pay pursuant to its individual obligation. (at para. 22)

[127] Similar reasoning was followed in *Thomson* v. *Bob Myers Chevrolet Geo Oldsmobile Ltd.*, [2001] O.J. No. 5228. In that case, like EA employees, the employees paid the premiums for LTD coverage, and like EA, the employer made the arrangements for the LTD policy. And, finally, the Nova Scotia Court of Appeal concluded the following in *Kaiser* v. *Dural, a division of Multibond Inc.*, [2002] N. S. J. No. 249:

> With respect to the disability benefits, the record is clear that these derived from a contract of insurance with Canada Life, the cost of which was contributed to by Mr. Kaiser. They are accordingly not deductible from the damages awarded: see *Sills* v. *Children's Aid Society of Belleville* (2001), 198 D.L.R. (4th) 485 (Ont. C.A.); *McNamara* v. *Alexander Centre Industries Ltd*. (2000), 199 D.L.R. (4th) 717 (Ont. C.A.); *Cooper* v. *Miller*, [1994] 1 S.C.R.; *Sylvester* v. *British Columbia* [1997] 2 S.C.R. 315.

[128] As a result, I prefer these more recent cases and follow their reasoning to conclude that any LTD benefits Ms. Toivanen may have received would not have been deductible

had I found an award for loss on income (damages) was applicable. In any event, both because of the characterization of severance, and my conclusion on the non-deductibility of LTD benefits, no LTD benefits are deductible against the severance I have ordered that EA pay Ms. Toivanen.

Order under s. 37(d)(iii)

[129] Ms. Toivanen is seeking $20,000.00 for injury to dignity, feelings and self-respect.

[130] I have considered the award for injury to dignity in the context of how EA treated Ms. Toivanen. It must have been apparent from Ms. Toivanen's behaviour, as observed by Mr. Warfield in his draft performance appraisal, set out at para. 27, that something was wrong. Ms. Toivanen's past evaluations were good; she had received good ratings and bonuses in past years, yet suddenly, in the summer of 2002, no-one wanted to work with her and as Mr. Warfield observed, "With almost all situations in dealing with Janie that involve concerns or change there will be one of two reactions. Crying or Anger".

[131] EA should have investigated this change in behaviour; instead it was preparing to dismiss her on September 4, 2002. But for her request for a leave of absence that day, it would have. The proper reaction should have been to investigate the need for a leave of absence. EA now admits it breached the *Code* in failing to do so and dismissing Ms. Toivanen in October 2002. However, that does not cure how Ms. Toivanen was treated by EA in 2002 and 2003. Considering the impact on Ms. Toivanen, and her emotional state at the time, the dismissal was a most disturbing act by EA. When Ms. Toivanen left EA in September 2002, she thought she would be returning to work. However, that hope ended upon her dismissal which undoubtedly exacerbated her illness. As was stated in *Wallace* v. *United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1:

> …The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C. J. noted in *Reference Re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313, at p. 368, 38 D.L.R. (4th) 161:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well being.
>
> Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions. In "Aggravated Damages and the Employment Contract", supra, Schai noted at p. 346 that, "[w]hen this change is involuntary, the extent of our personal dislocation is even greater.
>
> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In *Machtinger*, *supra*, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself. (at paras. 93 to 95)

[132] Ms. Toivanen's career was her life. EA expected that level of commitment from its employees. Particularly during "crunch time" she worked seven days a week and sometimes until 3, 4, or 5 a.m. She didn't keep in touch with friends and if she had time off, she slept. Even outside of "crunch time" Ms. Toivanen put all her time and energy into her job. She was so dedicated that she did not follow Dr. Rode's advice in August 2002, at the risk of her health. Ms. Toivanen was so worried that if she took time off work, EA would view her negatively. When she finally got the courage to hand in her doctor's note on September 4, 2002, indicating she required time off, she had expected EA to "step up to the plate" and repay her for all her hard work and dedication by supporting her need for time off. Instead, it dismissed her.

[133] Ms. Toivanen said that when she got the letter of termination it blew her world apart. She was going through one of the worst emotional and physical challenges that she had ever experienced. As well, personally, it was a huge challenge for her, at 47, to have to return to Alberta and live with her parents, in a one bedroom apartment in a senior citizen's complex, when she was used to living on her own in her West End apartment. However, she was unable to cope on her own and had no choice.

[134] When Ms. Toivanen was terminated, she felt like she had been thrown away. She thought that EA was a company that prided itself on looking after employees. Instead of investing any time and energy in bringing her back, healthy, to her work place, it fired her. This is not a case where Ms. Toivanen found herself "worked to death" by EA, but it is about the fact that EA did nothing to investigate why she needed a leave of absence and did nothing to accommodate her. It was a situation where she required time off, requested it of EA, and it fired her at a most vulnerable time. Based on the medical evidence, National Life has determined that Ms. Toivanen is disabled from any occupation. It was apparent from Dr. Levin's April 2003 medical report that Ms. Toivanen's dismissal had a devastating effect on her. To this day, she is unable to work; however, her goal is to believe that she will one day return to work.

[135] As a result of EA's conduct and the impact on Ms. Toivanen's injury to dignity, feelings and self-respect, and based on the compensatory principles set out in the *Code*, pursuant to s. 37(2)(d)(iii), I order EA to pay Ms. Toivanen $20,000.00 for injury to her dignity, feelings and self-respect.

V ORDERS

[136] Having found the complaint justified, I make the following orders under s. 37(2) of the *Code*:

1. EA is ordered to cease the contravention of the *Code* and to refrain from committing the same or similar contravention;

2. EA is ordered to pay Ms. Toivanen $6,004.12 for healthcare costs;

3. EA is ordered to pay Ms. Toivanen $3,300.00 to compensate for legal expenses;

4. EA is ordered to pay Ms. Toivanen $1,000.00 to compensate for out of pocket expenses to pursue the complaint to hearing;

5. EA is ordered to pay pre-judgment interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, on the amounts for healthcare costs, legal expenses and out of pocket expenses from a date, or dates, determined by the parties. If the parties are unable to agree on the appropriate date for this calculation, I will remain seized to determine it.

6. EA is ordered to pay Ms. Toivanen the amount of $69,230.08 US for the lost value of her stock options;

7. EA is ordered to pay pre-judgment interest on the lost value of Ms. Toivanen's stock options, from January 10, 2003 in accordance with the *Court Order Interest Act*, calculated at six month intervals;

8. EA is ordered to pay Ms. Toivanen the amount of $19,744.00, to compensate for loss of severance pay;

9. EA is ordered to pay Ms. Toivanen pre-judgment interest on $19,744.00 from October 10, 2002, in accordance with the *Court Order Interest Act*, calculated at six month intervals;

10. EA is ordered to pay Ms. Toivanen $20,000.00 for injury to dignity, feelings and self-respect.

11. Post-judgment interest is payable on all amounts ordered. Interest is to be calculated at the bankers' prime rate as published by the British Columbia Supreme Court Registry.

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Barbara J. Junker, Tribunal Member