HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

George Carter

Applicant

-and-

Chrysler Canada Inc.

Respondent

DECISION

Adjudicator: Brian Cook

Date: February 8, 2017

File Number: 2014-17406-I

Citation: 2017 HRTO 168

Indexed as: **Carter v. Chrysler Canada Inc.**

APPEARANCES

George Carter, Applicant	)	Self-represented
Chrysler Canada Inc., Respondent	)	Cliff Hart, Counsel

Introduction

[1] This Application alleges discrimination with respect to employment because of disability contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[2] This Application concerns the applicant's contention that the respondent failed to accommodate him when he was able to return to work following periods of disability.

[3] In particular, the applicant alleges the following:

- Because of incentives created by the workplace safety and insurance system, the respondent preferentially accommodates people with work-related medical restrictions.

- He was impacted by this system in the period from May 2013 to May 2014 and was sent home on long term disability benefits and not provided with suitable work which would have been provided if his disability was work-related.

[4] In its Response, the respondent denied that the applicant had been discriminated against because his disability was not work-related. The respondent subsequently agreed that because of cost incentives created by the WSIB system, the respondent is more likely to offer work to workers with restrictions resulting from work-related injuries as compared to workers with restrictions from non-work-related injuries. However, the respondent maintained that the applicant was not discriminated against and that the respondent fully met its duty to accommodate the applicant.

[5] This Application was heard over a number of days between October 2015 and October 2016. The last day of hearing was October 31, 2016.

[6] The applicant testified on his own behalf. He summonsed two members of the local union; Ardis Snow, who is the local president, and John Placedo, who is the senior union member on the Medical Placement Committee. Rob Gardiner testified for the

respondent. Mr. Gardiner is the senior management member of the Medical Placement Committee.

[7] Before filing this Application, the applicant filed an earlier Application, alleging discrimination in the operation of the respondent's return to work system in 2008 and 2010. The union was also named as a respondent to that Application. That Application was heard by me and I issued Decision 2014 HRTO 845, dated June 9, 2014. That Application is referred to as "the first Application" in this Decision.

[8] The present Application was filed during the hearing of the first Application. The parties agreed that it would be appropriate for me to also deal with the present Application and that it would be appropriate for me to consider evidence I heard during the hearing of the first Application in respect of the present Application.

The return to work system

[9] The return to work system relevant to this Application differs in many respects than the system that was in place relevant to the first Application. The system relevant to this Application is set out in a document entitled Return to Work Program, dated August 11, 2013.

[10] The Return to Work Program features a joint management-union Medical Placement Committee. In this case, the applicant dealt almost exclusively with Mr. Gardiner, the management member of the committee, and only minimally with Mr. Palcedo, the union member.

[11] Employees with medical restrictions are given the code PQX, which means "physically qualified with restrictions". The specific restrictions are coded as well. For example, B49 is "elbow no twist". There are approximately 180 codes.

[12] When an employee returns to work following an injury, the employee takes any medical documentation to the Medical Centre. The documentation is reviewed by the

plant physician who issues a Request for Medical ("RMA") form. The RMA form lists the codes that apply, based on the employee's restrictions. If the employee's supervisor can find a suitable job for the employee, the employee will be assigned work in the employee's regular department. If there is no such work available, the employee reports to the Medical Placement Committee.

[13] Seniority plays an important role in this return to work process. Apart from very exceptional circumstances (discussed later in this Decision), all work is assigned on the basis of seniority. If an employee is PQX (medical restrictions), and cannot do his or her regular job, the employee may be able to bump a more junior employee from that employee's job if it is physically suitable for the PQX employee. However the PQX employee could then be bumped by a more senior employee.

[14] An employee who is off work continues to "own" a job while off work for as long as the employee has enough seniority.

[15] The respondent has contracted with Manulife to manage its sickness and accident and its WSIB claims.

Policy Grievance

[16] On March 20, 2012, the union filed a Policy Grievance that alleged that the employer was "not accommodating employees with S&A [sickness and accident] restrictions".

[17] This grievance pre-dated the filing of this Application, which was in April 2014. Neither party proposed that the Application should be deferred because of the grievance and in fact both parties opposed deferral.

[18] At the outset of the hearing, I was advised of the grievance, but also advised that while it was on-going, it had not proceeded very far, although the employer had denied the grievance.

[19] Later in the hearing process, the applicant asked the respondent to disclose documents related to the grievance proceeding. This was opposed by the respondent. I issued Interim Decision 2016 HRTO 194. It directed disclosure of the employer's answer to the grievance, but not any other documents related to the grievance.

[20] The answer was disclosed but it did not provide any relevant information about the issues in the Application.

[21] I was then advised that the grievance had been settled. I agreed with the parties that the settlement of the grievance could not be said to have settled the substance of the Application.

Background

[22] The applicant has permanent medical restrictions regarding his right arm as a result of work-related injuries in 1997 and 2002. In September 2011, the applicant experienced a heart attack and had to stop work. The applicant returned to work in April 2012. He still "owned" his job in the paint department and returned to it on a work hardening program with graduated increasing hours. After about two weeks of this work, the applicant experienced another cardiac event and collapsed at work. He was then totally disabled and unable to do any work until May 6, 2013 when his cardiologist recommended that he try to return to light work.

[23] For the time the applicant was off work, he received sickness and accident benefits. These benefits ran out after a few months and he then went on Extended Disability Benefits. Sickness and accident benefits are payable at approximately two-thirds of the employee's regular pay. Extended Disability Benefits are payable at approximately 50% of regular pay.

[24] While he was off work, he lost ownership of his previous job in the paint department because he was bumped out of it.

The period from May 6, 2013 to August 9, 2013

[25] On May 6, 2013, the applicant reported to Mr. Gardiner, and gave him a note from Dr. Ahooja, the applicant's cardiologist. The note read as follows:

> George may return back to work with activities as tolerated, but should avoid extreme temperatures. Please call if there any questions.

[26] Mr. Gardiner sent the applicant to the Medical Centre, where he was assessed by Dr. Daly. Mr. Gardiner's contemporaneous note of May 7, 2013 regarding his discussions with the applicant indicates that he did not know if the applicant had sufficient seniority to remain in the paint department, or if he would have to work on the production line. Dr. Daly determined that it was necessary to obtain clarification about the applicant's medical restrictions before he could return to work. She gave the applicant a hand-written note to take to Dr. Ahooja. She also advised him that she would write directly to Dr. Ahooja.

[27] The hand-written note read as follows:

> Please clarify further. I will send you a detailed letter. This man on return to work will be scheduled as a floater on the production line, filling in for any available position within his WSIB permanent restrictions. This means he cannot work at his own pace.
>
> In your opinion is he capable of performing an on-line job 8 hours/day – 5-6 days per week – frequent mandatory overtime.

[28] It is not clear why Dr. Daly indicated that the applicant would have to return to work on the production line.

[29] After seeing Dr. Daly, the applicant returned to Mr. Gardiner and showed him the note from Dr. Daly. Mr. Gardiner testified that he told the applicant that it was necessary to clarify the applicant's restrictions and that he could not be returned to work until that had happened. The applicant does not dispute that Mr. Gardiner told him this.

[30] Sometime later, Dr. Daly added the code 190 to the applicant's restrictions, and applied this up to May 30, 2013. Code 190 indicated that the applicant was not capable of working. It appears that the applicant was not told that this had been done and the applicant submits that this was improper. Mr. Gardiner testified that the purpose of this code was to ensure that the applicant would continue to receive Extended Disability Benefits pending clarification of his restrictions. The applicant's restrictions were not clarified until August 9, 2013.

[31] The applicant testified that he did not give the hand-written note from Dr. Daly to Dr. Ahooja. He said that the reason for this was that he understood that Dr. Daly was going to write directly to Dr. Ahooja.

[32] Dr. Daly did write directly to Dr. Ahooja on May 6 or 7. In that letter, she explained that the applicant did not own a specific job and would be a floater, meaning that he could be placed on any job in the plant which did not violate his permanent arm restrictions. She explained some of the physical tasks associated with working on the production line. She advised that extreme heat was rarely an issue in the plant. She concluded:

> If you feel it is necessary I can give him a restriction – no line work, however, he will not be accommodated with this. As an alternative, you can request that Manulife pay him to perform work-hardening at 2 – 4 hours a day in our on-site physio dept. This would assess his ability to keep pace with the line.

[33] While this letter was sent on May 6 or 7, 2013, it was not reviewed by Dr. Ahooja until approximately July 31, 2013, when the applicant had an appointment with her. The applicant testified that during the appointment Dr. Ahooja discovered the letter in his file and indicated that it had been put in the file without her reviewing it.

[34] In June 2013, Manulife noted that clarification of the applicant's restrictions had not been received from Dr. Ahooja. The Case Manager wrote to Dr. Ahooja on June 3,

2013 and asked for medical information. It appears that Dr. Ahooja did not review this note either until the applicant's July 31, 2013 appointment.

[35] Dr. Ahooja then forwarded copies of medical records about the applicant and provided a letter dated July 31, 2013 that read:

> George may return to work on a graduated return to work program. Restrictions should include no more than 10lbs lifting, pushing and pulling. If any symptoms develop, rest immediately and return for follow up…

[36] The applicant reported to Mr. Gardiner on August 9, 2013, and provided a copy of Dr. Ahooja's letter to Mr. Gardiner. Mr. Gardiner sent him to see Dr. Daly, who completed a RMA form that set out the restriction codes related to his permanent WSIB restrictions, and codes in relation to his cardiac restrictions which were to be in place for six months.

[37] In regard to the allegation, I find that the allegation that the respondent failed to accommodate the applicant's disability in the period May 6 to August 9, 2013 is not supported by the evidence. The evidence shows that in this period the respondent was waiting to receive clarification of the applicant's medical restrictions, particularly with respect to his cardiac condition. As noted, Mr. Gardiner's evidence, which is supported by his contemporaneous note, is that he told the applicant that a return to work could not happen until the applicant's restrictions were clarified. In his testimony, the applicant confirmed that he understood this.

[38] The applicant had a number of appointments with Dr. Ahooja in this period. However, the applicant noted that the some of the appointments were to have tests done and he might not have seen the doctor on each occasion.

[39] The respondent submits that the request for clarification was necessary because the applicant had been off work for an extended period of time. When he had tried to return to work in May 2012, he had collapsed at work after a few weeks and was then off for about a year. When he reported to the workplace in May 2013, he provided a

note that said only that he needed to avoid excessive heat and could do work duties “as tolerated”. This was not sufficient to allow the respondent to determine what sort of work the applicant was capable of.

[40] Dr. Daly reviewed the note from Dr. Ahooja and determined that further clarification was necessary. She gave the applicant a note for the applicant to take to Dr. Ahooja but the applicant did not give it to her. Dr. Daly wrote a letter to Dr. Ahooja which was apparently not reviewed by Dr. Ahooja because it was overlooked at her office. Dr. Ahooja did finally review the matter and the requests for clarification, but only at the July 31, 2013 appointment, and only after the Manulife Case Manager had contacted her in mid-July.

[41] In these circumstances, I agree with the respondent that the applicant had a responsibility to do what he could to ensure that his restrictions were clarified. He knew that there was a need for clarification, and he knew that he would not be returned to work until his restrictions were clarified. Even if he did not see Dr. Ahooja personally in the period before July 31, 2013, he had regular contact with her office.

[42] The clarification would very likely have been provided at an earlier time if the applicant had given Dr. Ahooja the handwritten note from Dr. Daly. The applicant’s explanation for not doing so is that Dr. Daly had said she would write to Dr. Ahooja. I find that this does not provide a satisfactory explanation for the applicant’s decision to not give Dr. Ahooja the note. Even it was a satisfactory explanation; there is no explanation for why the applicant would not follow-up with Dr. Ahooja to at least ensure that she had received a letter from Dr. Daly.

[43] On the basis of the available evidence, I find that the fact that the applicant was off work for the period from May 6 to August 9, 2013 was not due to a failure to accommodate the applicant’s disability.

The period from August 9, 2013 to March 2014

[44] The applicant reported to Mr. Gardiner on August 9, 2013 and gave him a copy of Dr. Ahooja's note of July 31, 2013. Mr. Gardiner sent the applicant to see Dr. Daly.

[45] Mr. Gardiner's memo of August 9, 2013, indicates that he understood the applicant's restrictions at that time were:

> WSIB Restrictions – wrist no twist, limit vibratory tools right, no pushing pulling over 5 lbs right.
>
> S&A restrictions – no pushing or pulling over 10 lbs, no lifting over 10 lbs, and graduated return to work for five weeks.

[46] The "S&A restrictions" were the cardiac-related restrictions identified by Dr. Ahooja in her July 31, 2013 note. They were to remain in place for six months.

[47] According to his August 9 memo and his testimony, Mr. Gardiner told the applicant that job placement could be very difficult as a combined result of his restrictions and relatively low seniority. His note of August 9, 2013 indicates the same.

[48] The applicant and Mr. Gardiner discussed what would happen if a regular job could not be found for the applicant. Mr. Gardiner told the applicant that extended disability benefits last for only one year and that if the applicant was still not back to work when they ran out, he would be put on "pension total disability" or "Category Layoff". In his testimony, Mr. Gardiner indicated that this information was not correct and that in fact the applicant would have continued to be eligible for extended disability benefits to age 65. As things turned out, the applicant returned to work before the one year of extended disability benefits happened.

[49] In this same conversation, the applicant asked Mr. Gardiner about a provision in the Collective Agreement that allows an employee to be returned to a job even if the employee does not have enough seniority to do the job. Mr. Gardiner told the applicant that this provision was used only in very exceptional circumstances. This information is

consistent with the evidence I heard about this provision in the first Application (see, 2014 HRTO 845 at paragraph 90 – 95.)

[50] In the period following August 9, 2013, Mr. Gardiner attempted to clarify the applicant's options. He determined that the applicant did not have enough seniority to secure a permanent job in the paint department, even if there was a job that the applicant could do with his restrictions. Mr. Gardiner determined that the applicant did have enough seniority to be a floater in the paint department, but since a floater was expected to do a variety of jobs, it was not likely that the applicant could work as a floater because of his restrictions.

[51] On August 20, 2013, Mr. Gardiner exchanged emails with Sue Tyndall, a Labour Relations specialist in Windsor. Mr. Gardiner advised that one permanent job had been identified that the applicant could physically do but the applicant did not have the seniority to perform. Mr. Gardiner asked Ms. Tyndall if the applicant should be made "Category layoff" on the basis that there was a job that he could physically do, but did not have enough seniority to secure. He asked if this should happen immediately, or only once the applicant's Extended Disability Benefit entitlement ended in September. (This question about the applicant's Extended Disability Benefit entitlement was based on Mr. Gardiner's erroneous understanding at that time that the applicant benefits would run out when in fact they could have continued to age 65.)

[52] Under Category Layoff, the applicant would have been laid off on the basis that there was work that he could do but that he did not have enough seniority to secure. An employee under Category Layoff would be expected to apply for employment insurance and could be eligible for a supplement from the employer.

[53] Ms. Tyndall replied that she would consider the situation and that in the meantime, the status quo would remain. This meant that the applicant remained off work in receipt of Extended Disability Benefits. This continued to be the situation until March 2014.

[54] As discussed in more detail below, the respondent's position is that in the period from August 2013 to March 2014, the respondent continued to look for a suitable permanent position for the applicant but without success. The applicant asserts that the respondent did not look for work for him in this period. He also asserts that he should have been allowed to return to work in non-permanent jobs and that he would have been allowed to do this if his cardiac-related restrictions had been related to a WSIB claim.

Developments in March 2014 and subsequently

[55] In March 2014, the Manulife Case Manager noted that the cardiac-related restrictions that had been imposed in August 2013 had been made effective for six months, which was February 2014. The Case Manager suggested that the applicant's restrictions be reviewed so that he could either return to work or remain entitled to Extended Disability Benefits.

[56] Mr. Gardiner arranged for the applicant to be assessed by Dr. Daly following a review of his cardiac restrictions by Dr. Ahooja. This process was delayed because the applicant could not get an appointment with Dr. Ahooja until April 30, 2014. Mr. Gardiner asked that the applicant's Extended Disability Benefits continue.

[57] Dr. Ahooja provided a note dated April 30, 2014 which states:

> George may return to work with no restrictions with a phased-in schedule, 4 hours/day for 4 weeks.

[58] Dr. Daly then removed the cardiac-related restrictions of no pushing or pulling or lifting over 10 pounds.

[59] In an email dated May 6, 2014, Mr. Gardiner indicated that the applicant would be contacted and offered a "temporary accommodation". This would involve a graduated return to work, starting at 4 hours a day. Significantly, the work that would be offered to the applicant would include non-standard jobs if a permanent job could not be

found. This was an option that had not been previously considered. Previously, Mr. Gardiner considered that the applicant could only return to work if there was a suitable permanent job that was available based on the applicant's seniority.

[60] Mr. Gardiner advised Mr. Snow of this intention, who indicated that he was in agreement, as was the Labour Relations department in Windsor.

[61] The applicant returned to work on graduated hours on May 7, 2014, and was assigned non-standard jobs.

[62] Mr. Gardiner testified that the reason that the respondent agreed to accommodate the applicant in non-standard jobs was largely related to the Application to this Tribunal that was then underway. This was the first Application in which Decision 2014 HRTO 845 was issued on June 9, 2014. Mr. Gardiner indicated that Labour Relations Department in Windsor approved of accommodating the applicant in non-standard jobs because it was thought that in light of the ongoing litigation, it would be appropriate to get the applicant back to work if possible.

[63] On May 20, 2014, Mr. Gardiner identified a job "Seal Top Doors Left" as a job that could be physically suitable and that the applicant had the necessary seniority. Dr. Daly approved the job for the applicant and he started to do the job on or about May 22, 2014. However, on further review on June 10, 2014, it was determined that the job was not suitable for the applicant.

[64] The applicant was then assigned non-permanent or non-standard jobs until November 2014, when a permanent suitable job that he had the seniority to secure was found. At the time of the hearings in this matter, the applicant remained in this job.

The applicant's allegations concerning his restrictions

[65] The applicant raises a number of other concerns and allegations of discrimination related to the restrictions that were in place at different times. He alleges that incorrect

restrictions were placed without his knowledge and that these incorrect restrictions further reduced the number and types of work that would otherwise have been available to him. He alleges that these incorrect restrictions thus compromised the accommodation process.

[66] The applicant asserts that his restrictions in May 2014, when he returned to work were no different than they had been in August 2013, when he was sent home on Extended Disability Benefits. He argues that since the respondent was able to accommodate him in May 2014, they could have also accommodated him in August 2013. This assertion rests on a theory that when the cardiac-related restrictions were coded by Dr. Daly in August 2013, they were permanent restrictions and not temporary restrictions. The applicant thinks that when Dr. Ahooja said in her note of April 30, 2014 that the applicant could return to work “with no restrictions” apart from the need to return on a graduated basis, she meant no restrictions apart from the previous permanent cardiac restrictions.

[67] There is no evidence to support that Dr. Ahooja somehow understood that Dr. Daly had in fact made the restrictions permanent. In my view, Dr. Ahooja’s note of April 30, 2014 can only be sensibly understood to mean that the applicant no longer had cardiac-related symptoms that required accommodation.

[68] In regard to the applicant’s belief that his restrictions in May 2013 were the same as they were in May 2014, he is wrong in this belief. For the period from August 2013 to May 2014, the applicant had cardiac-related restrictions of no pushing, pulling or lifting over ten pounds. By May 2014, he no longer had those restrictions. The allegation that the applicant's restrictions in May 2013 were the same as his restrictions in May 2014 is therefore not supported.

[69] Another area of concern is about the coding of the applicant’s arm restrictions. These restrictions were the cause of some confusion on occasion. One occasion was when the applicant's restrictions were reviewed in May 2014. It initially appeared that the arm restrictions had been removed as well as the cardiac restrictions. However, this

was straightened out fairly quickly. Then Dr. Daly changed one of the codes from B09 to B49. B09 means no twist right wrist. B49 means no twist left elbow. Memos from Dr. Daly and Mr. Gardiner show that the reason for the change was that Dr. Daly felt that the wrist restriction was more appropriate based on the applicant's actual medical condition. Mr. Gardiner testified that part of the purpose of the review was to potentially open up more jobs that might be suitable as a restriction on elbow movement is easier to accommodate than a wrist restriction. It therefore appears that this change was intended to better reflect the applicant's actual restrictions. It also opened up more job opportunities rather than less as the applicant suggested.

[70] There was also some confusion about a B14 code which indicates a restriction on use of vibratory tools. This code is not listed on the Chrysler code system. Mr. Gardiner explained that this is a code that is plant specific although he was not sure why there are plant specific codes that are different than the Chrysler system. From the evidence before me, it is not clear if this restriction had any impact on the efforts to return the applicant to work, or if the restriction was medically necessary.

[71] While there is evidence of some confusion about the applicant's restriction coding, I find that there is no evidence that this confusion contributed in any significant way to the applicant's absence from work or that can be seen as contributing to or causing any failure to accommodate the applicant's disability.

Differential treatment between WSIB and Sickness and Accident disability

[72] The applicant's primary contention in this Application is that the respondent treats employees who have work-related restrictions differently than employees who have non-work-related restrictions.

[73] At the start of the hearing, my understanding was that the respondent denied that there was any differential treatment based on whether restrictions were work-related or non-work-related. Later in the hearing, the respondent acknowledged that there was

differential treatment but maintained that the applicant was accommodated during the relevant time periods.

[74] The applicant called two union officials, Mr. Placedo, the union placement officer, and Mr. Snow, the local president, as witnesses.

[75] In his testimony, Mr. Snow said that the differential treatment definitely occurred. He said that injured workers who were receiving benefits from the WSIB seemed to be generally returned to work even if they had significant impairments whereas workers who have restrictions that are not from a work-related injury are more likely to remain at home in receipt of sickness and accident benefits. Mr. Placedo indicated that this was his general understanding too, although he was not clear about the extent of this.

[76] Mr. Gardiner provided clarification on this issue when he testified. He explained that the respondent is part of a WSIB experience rating system, referred to as "NEER". Under the NEER program, the assessments paid by an employer can vary significantly depending on the amount of lost time injured workers experience after a work-related injury. The system creates an incentive to employers to offer injured workers suitable work at full pay after an injury. If the employer does not offer such work and the worker remains off work in receipt of WSIB benefits, the amount that the employer must pay in assessments can increase significantly.

[77] On further questioning, Mr. Gardiner indicated that these considerations do not apply to all workers with work-related restrictions. The NEER experience rating system features a "cost window", which is open for approximately four years after the injury. It is only costs that arise in this window that affect the employer's assessments. As a result, the incentive to offer suitable work at no wage loss lasts for a time limited period. After the cost window closes, there is no incentive to offer suitable work at no wage loss to an injured worker. The incentive only applies to workers who have a claim that is "active" for the purposes of the NEER scheme. An active claim is one in which claim costs could arise if the worker has lost time from work as a result of the work-related injury. A claim

ceases to be active when the NEER cost window in respect of the injury closes, regardless of whether the worker has a wage loss as a result of the injury.

[78] Mr. Gardiner testified that injured workers who have an active claim are much more likely to be offered non-permanent work than injured workers who do not have an active claim or who have restrictions resulting from non-work-related injuries.

[79] The respondent does therefore treat disabled employees differently. The differential treatment however, is not as between employees who have work-related injuries and those who have non-work-related injuries, but rather between employees who have an active WSIB claim and other employees who have restrictions but who do not have an active WSIB claim. This latter group includes employees like the applicant who have restrictions from work-related injuries but who do not have an active WSIB claim because the NEER cost window for those injuries has closed.

[80] Specifically, the applicant had long-standing arm restrictions as a result of work-related injuries in 1997 and 2002. By the events relevant to this Application, the NEER cost windows in respect of these injuries had closed. As a result, the fact that he had work-related restrictions was not a relevant factor in how the respondent attempted to find suitable positions for the applicant.

[81] Mr. Gardiner explained that the respondent makes a distinction between “standard” and “non-standard” jobs. Generally speaking, standard jobs are jobs that need to be done to produce a car. Non-standard jobs are jobs that arise temporarily or on an ad hoc basis. This could include quality control issues or special inspection jobs to correct a production issue. Non-standard jobs are mostly temporary in nature. Standard jobs are generally permanent in nature.

[82] An employee who has medical restrictions that prevent them from doing their standard job may be able to do a non-standard job. On any one day there are typically many more employees who have such restrictions than there are non-standard jobs available. Mr. Gardiner testified that there is no doubt that non-standard jobs are much

more likely to be offered to injured workers with active WSIB claims than to other restricted employees. He said that this does not mean that employees without an active WSIB claim will not be offered a non-standard job. However, a goal is to ensure as much as possible that injured workers with active claims suffer no loss of earnings as a result of their work-related injuries. Other employees with restrictions who are not injured workers with active claims will generally only be offered non-standard jobs if there are more such jobs available than there are injured workers with active claims.

[83] Mr. Gardiner testified that it sometimes happens that there are not enough non-standard jobs even for the group of injured workers with active claims. He said that in that event, the injured workers who are not assigned non-standard jobs may be assigned “non-productive jobs” such as inventory counting or reading manuals. The reason for this is that it is better to have an injured worker with an active claim doing non-productive work than to be at home collecting WSIB benefits. This type of work would never be offered to anyone other than an injured worker with an active claim.

[84] Mr. Gardiner testified that the policy of differentiating between injured workers with an active claim and other employees with restrictions arose as a result of a WSIB “Workwell audit” in 2013. Previously, the system was as described in Decision 2014 HRTO 845, in the applicant's first Application. The new policy is set out in a document entitled “Return to Work Program”, which was implemented in July 2013. The program is described in paragraphs 11 – 17, above.

[85] The policy purports to apply to “the rehabilitation of ill/injured employees, due to work and/or non-work related incidents”. However, most of the detailed provisions appear to apply only to employees with a work-related injury.

[86] Mr. Gardiner testified that for any employee who cannot do his or her regular permanent standard job because of medical restrictions, the goal is to find a new standard permanent job. He said that this is true regardless of whether the restrictions relate to an active WSIB claim.

Is the differential treatment discriminatory?

[87] It is clear that the differential treatment as between injured workers with an active claim and other disabled workers arises from the operation of the *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, as amended ("WSIA").

[88] WSIA creates a statutory scheme setting out benefits for workers injured at work, and the rights and obligations of the workplace parties, including rights and obligations relating to a worker's return to work following a work-related injury. WSIA gives benefits and rights to injured workers that are not available to workers who are disabled from a non-work-related injury. For example, injured workers receive loss of earnings benefits if they experience a loss of earnings as a result of the work-related injury. They are also entitled to health care costs that are necessary as a result of the injury.

[89] In regard to return to work, WSIA similarly gives injured workers rights and benefits that are not available to workers who are disabled from a non-work-related injury. These benefits include access to Work Reintegration or labour market re-entry assistance, or other vocational rehabilitation measures to improve the worker's ability to return to work with no loss of earnings.

[90] WSIA also creates obligations for the workplace parties in regard to the return to work process. Workers and employers are required to co-operate in the return to work process. Under section 41, an employer is obliged to offer to re-employ an injured worker in certain circumstances, and can be penalized if it fails to do so. If an employer who is obliged to offer to re-employ does not do so, the worker is entitled to continuing loss of earnings benefits. If an employer who has re-employed the worker terminates the employment within six months, there is a rebuttable presumption that the termination was related to the injury and the worker may be entitled to further benefits, even if the worker no longer has a disability.

[91] These are all statutory benefits and the fact that these benefits are only available to workers who are injured at work is not discriminatory.

[92] Section 83 of the WSIA authorizes the Workplace Safety and Insurance Board ("WSIB") to establish experience rating systems and to increase or decrease the amount of an employer's premiums based upon the frequency of work injuries or accidents or both.

[93] To establish discrimination under the *Code*, there must be evidence of a distinction based on a prohibited ground that creates a disadvantage (*Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, at paragraph 74).

[94] It is not sufficient to establish that the person is associated with a prohibited ground and that he experienced a disadvantage. There must be evidence to show that the disadvantage resulted from a distinction based on a prohibited ground.

[1] The principle that not all distinctions are discriminatory in the context of human rights codes was explained in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4. At paragraph 50, Abella J. held that, under Quebec's human rights statute,

> (…) [T]here is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden

[95] In this case, the respondent created a process that resulted in a distinction as between disabled employees who have medical restrictions as a result of a work-related injury and who have an active WSIB claim, and other disabled employees with medical restrictions.

[96] This is not a distinction that is based on a prohibited ground. While the result of the policy is that some disabled workers are treated more advantageously than others,

the distinction does not arise from disability but rather from the operation of a statutory scheme. While the applicant has established that the respondent treats injured workers with an active WSIB claim differently than other employees with medical restrictions, he has not established that this is discriminatory under the *Code*.

Applicant's request for further disclosure about the respondent's NEER costs

[97] After hearing the clarification about the nature of the distinction that the respondent makes as between injured workers with active WSIB claims and other employees with medical restrictions, the applicant asked that the respondent disclose records concerning its NEER costs. He said that this was necessary to show that the respondent would not have experienced undue hardship if it had accommodated him in the same way that it accommodates injured workers with an active WSIB claim, even if doing so would have resulted in higher NEER costs.

[98] The respondent objected to this request, noting that it would necessarily further prolong an already prolonged hearing and also noting that the request arose late in the proceeding. On this point, the applicant noted that until Mr. Gardiner testified, the respondent's position seemed to be that it did not treat restricted employees differently based on whether they had an active WSIB claim.

[99] The respondent said that accommodating the applicant in the way he proposed might cause undue hardship. However, counsel for the respondent clarified that the respondent was not claiming that it would have caused the respondent undue hardship to return the applicant to work. He noted that in fact, the applicant was eventually returned to work.

[100] On this issue, I determined that it was not clear that the respondent's NEER records were relevant. I indicated that if in the process of coming to a decision on the Application I determined that they were relevant, the hearing could be reconvened. In light of my findings about the reasons for the differential treatment described in the

preceding section of this Decision, I confirm that I have concluded that the respondent's NEER records are not relevant.

The general duty to accommodate

[101] The fact that the differential treatment as between injured workers with active WSIB claims and other disabled employees is not discriminatory does not end the enquiry in this case. The employer has a general duty to accommodate the applicant's disability to the point of undue hardship.

[102] Section 5 of the *Code* establishes the right to equal treatment without discrimination with respect to employment:

> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

[103] In this case, the alleged discrimination is because of disability. Section 17 provides as follows:

> 17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
>
> (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[104] In the Decision in the first Application, I said as follows at para 61:

> Under section 5, every person has a right to equal treatment with respect to employment without discrimination because of disability. Section 17 qualifies this, and recognizes that disability may make a person incapable

> of performing or fulfilling the essential duties or requirements associated with the employment. Section 17(1) says that it is not discriminatory to deny a person access to employment if the person is incapable of performing or fulfilling the essential duties or requirements associated with the employment because of disability. Section 17(2) however, provides a further qualification. It says that before it can be determined that a person is incapable of fulfilling the essential duties associated with employment, it is necessary to consider whether the needs of the person can be accommodated. The "duty to accommodate" is therefore really a duty to take whatever measures are necessary in order to remove barriers that stand in the way of a person's right to equal treatment with respect to employment. The duty to accommodate is limited and the employer is not required to accommodate if this would result in undue hardship.

[105] The issue in this case is whether the respondent fulfilled its duty to accommodate the applicant in the period from August 2013 to May 2014. In this period, the applicant was at home receiving Extended Disability Benefits. He had medical restrictions related to his arm condition and to his cardiac condition. Combined, those restrictions ruled out most of the standard production jobs. In addition, relative to the workforce as a whole in the plant, the applicant had low seniority. In these circumstances, the respondent still had an ongoing duty to accommodate the applicant to the point of undue hardship in his return to work.

[106] The respondent asserts that it did this in the period from August 2013 to May 2014 by continuing to search for suitable work that was available based on the applicant's seniority.

[107] The applicant believes that nothing was done to facilitate a return to work in this period.

Did the respondent look for work for the applicant?

[108] The applicant asserts that the respondent was not looking for work for him in the period from August 2013 to May 2014. He notes that although Mr. Gardiner testified that he was looking for work for the applicant in this period, there is no documentary evidence to support this. Mr. Gardiner did not have a recollection of considering the

applicant for any specific job. Mr. Placedo testified that he was not aware that the applicant had been sent home on the grounds that there was no suitable work available and did not recall being in any attempt to find the applicant suitable work until the applicant came back to the workplace in May 2014.

[109] Mr. Gardiner testified that he was looking for work for the applicant in the time the applicant was off work from August 2013 to May 2014. However, he concedes that there is no record of this. Mr. Gardiner indicated that he maintained a record of each restricted employee who needed a new permanent standard job. However, the record was a living document and there is no permanent record of the searches that were done for any one employee. He said that on most days, he had a deck comprising between about 50 to 100 employees for whom he was looking for a permanent standard job. To place an employee, the job has to be suitable, and the employee has to have enough seniority to secure the job.

[110] Mr. Gardiner testified that because of the applicant's relatively low seniority, the applicant's name would not have made it to the top of the deck for consideration of available jobs. If it had, the applicant's significant restrictions would have meant that he was not a candidate in any event.

[111] Mr. Gardiner testified that the situation changed in May 2014 because the applicant's restrictions changed. He no longer had the cardiac restrictions which meant that the applicant was potentially a candidate for many more jobs. At the same time, the Labour Relations department in Windsor authorized Mr. Gardiner to place the applicant in non-standard jobs. In effect, this meant that the applicant was then treated as if he was an injured worker with an active claim.

What sort of work was the respondent looking for?

[112] Assuming that the applicant's name was in Mr. Gardiner's deck of disabled employees who needed work, and that Mr. Gardiner was looking for suitable work, what sorts of jobs was he considering?

[113] Mr. Gardiner was clear that prior to May 2014, he would only have considered a permanent standard job for the applicant.

[114] Mr. Gardiner clarified this point on several occasions in his testimony. The applicant asked him “Did you look for non-standard jobs for me while I was off work?” and Mr. Gardiner replied “No”. The applicant asked, “so you only looked for permanent jobs for me while I was off?” and Mr. Gardiner replied “correct”. Mr. Gardiner was also asked if the applicant would have been considered for temporary jobs that came available that might be suitable and that the applicant would have the necessary seniority for and he said that he was only looking for permanent standard jobs. Mr. Gardiner indicated the same thing in memos he wrote in the period from May to August 2013, which indicate that he was looking only for permanent standard jobs that were compatible with the applicant’s restrictions.

[115] The evidence establishes that at any time there are jobs that are available on a temporary basis. These would include jobs in which the incumbent was on a medical or other leave of absence. On the basis of Mr. Gardiner’s evidence, it is clear that the applicant was not considered for temporary jobs that were available, even if the jobs were physically suitable and the applicant had the necessary seniority.

[116] The issue of whether a medically restricted employee is eligible for temporary jobs that come available was an issue in the first Application. In that Application, the issue was that there was a rule that employees with a medical restriction and who were employed in a permanent standard job were not permitted to apply for temporary jobs. Employees in permanent standard jobs who did not have a medical restriction were able to apply for these jobs. In the first Application, the distinction was only as between employees with medical restrictions and those without medical restrictions. The distinction as between injured workers with an active WSIB claim and other disabled employees was not present. In the first Application, I heard that this rule had been changed as part of the new return to work policy that is relevant to the current Application. At paragraphs 149 – 153, I found as follows:

> Prior to the changes instituted in 2012, a disabled worker who had been placed in a standard job was not permitted to bid on certain temporary jobs that were posted. The rationale for this was that the worker would have given up the standard job in order to take the temporary job and thus have no job to return to at the end of the temporary job posting. The worker then has to go back into the Modified Work Program and start a new search for a permanent standard job.
>
> A disabled worker could bid on these jobs if at the time the employee was not working in a standard job.
>
> The applicant alleges that he was impacted by this rule. First, he says that since he was automatically precluded by the rule from applying for temporary postings he did not apply when they were posted. He also testified that he once specifically asked if he could bid on a temporary job at a time when he was in a permanent standard job. He testified that he was told that he could not.
>
> The rule was changed in 2012 as part of the plant-based collective bargaining process. Now, a disabled worker in a standard job can bid on temporary postings and return to the worker's standard job when the temporary posting ends.
>
> In my view, the pre-2012 rule was discriminatory as it plainly denied access to a benefit because of disability. I accept that the applicant was adversely affected by this rule.

[117] The situation discussed in Decision 2014 HRTO 845 was different than the situation in the instant case. Whereas the issue in the first Application was that an employee with medical restrictions who was placed in an permanent standard job was not permitted to apply for a temporary job posting, the issue in the present Application is that in the period August 2013 to May 2014, the jobs that Mr. Gardiner would have considered for the applicant did not include any temporary job postings.

[118] In addition, it appears clear that in this period Mr. Gardiner would also not have considered the applicant for any non-standard job. I have discussed the reasons why non-standard jobs were preferentially given to injured workers with an active WSIB claim. As a result of that, non-standard jobs were not regularly available for assignment to other medically restricted employees. However, both Mr. Gardiner and Mr. Placedo

testified that this did not mean that only injured workers with an active WSIB claim would be assigned to non-standard jobs. They both indicated that if there non-standard jobs available after the injured workers had been assigned, non-standard jobs could be assigned to other employees.

[119] Mr. Placedo testified that when people are at the workplace he looks for job opportunities for all the medically restricted employees who need placement. He will look for standard and non-standard jobs and also for temporary jobs that may come open. However, he said that he had never called a person who was at home with permanent restrictions for assignment to a temporary posting.

[120] I conclude that in the period from August 2013 to May 2014, the respondent discriminated against the applicant on the grounds of disability by refusing to consider assigning the applicant to temporary postings that were available based on his seniority and that were physically suitable.

R**emedy**

[121] The Tribunal's remedial powers are set out in section 45.2 of the *Code*:

> 45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

> 3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

[122] In principle, the applicant would be entitled to monetary compensation equivalent to the earnings he would have had if he had been accommodated by the respondent through consideration of placing him in either temporary or non-standard positions, less the Extended Disability Benefits that he already received. There is, however, no evidence about what jobs the applicant might have been able to access, or even whether there were any such jobs available, given the applicant's restrictions and seniority. It seems apparent that there would be no way to clarify this with any additional evidence either.

[123] I therefore conclude that any compensation should be characterized as general damages, or injury to dignity, feelings, and self-respect. The amount of such damages is difficult to quantify. The applicant was out of the workplace for an extended period of time. He might have been off for this same period even if he had been considered for temporary or non-standard jobs. The compensation is therefore based on the fact that because of his disability, he was not considered for temporary or non-standard jobs.

[124] In consideration of the available evidence and the complex circumstances of this Application, I find that the applicant is entitled to compensation in the amount of $5,000 for injury to dignity, feelings, and self-respect.

[125] Pursuant to section 45.2(1)(3), the respondent is directed to review its procedures for returning to work those employees who are medically restricted and who do not have an active WSIB claim to ensure that procedures are compliant with the *Code*.

Decision

[126] The respondent did not discriminate against the applicant in the period from May 2013 to August 2014. In this period, the respondent was waiting for necessary medical

clarification of the applicant's medical restrictions. The delay in clarifying this was not due to a failure to accommodate the applicant by the respondent.

[127] The respondent does give preferential treatment in regards to access to non-standard jobs to injured workers who have an active claim with the WSIB. This results from the operation of the WSIA and not from discrimination contrary to the *Code*.

[128] The respondent did discriminate against the applicant by precluding consideration of categories of jobs other than a permanent standard job in the period from August 2013 to May 2014.

[129] It is not possible to determine if any other category of job would in fact have been suitable for the applicant or available based on seniority. There is therefore no basis to quantify any compensation for lost income.

[130] The applicant is entitled to $5,000 as compensation for injury to dignity, feelings, and self-respect for the discrimination arising from the fact that the applicant was not considered for categories of jobs other than a permanent standard job in the period from August 2013 to May 2014. Payment should be made without deductions to the applicant by March 3, 2017.

[131] The respondent is directed to review its procedures for returning to work those employees who are medically restricted and who do not have an active WSIB claim to ensure that procedures are compliant with the *Code*.

Dated at Toronto, this 8th day of February, 2017.
"Signed By"

_____
Brian Cook
Vice-chair