HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Eleanor McMurter

Applicant

-and-

Goodyear Canada Inc.

Respondent

INTERIM DECISION

Adjudicator: Mark Hart

Date: November 5, 2013

File Number: 2012-12809-I

Citation: 2013 HRTO 1858

Indexed as: **McMurter v. Goodyear Canada Inc.**

WRITTEN SUBMISSIONS

Eleanor McMurter, Applicant	)	Self-represented
Goodyear Canada Inc., Respondent	)	Christine O'Donohue, Counsel

[1] This is an Application dated October 20, 2012, and filed under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to employment because of disability.

[2] In essence, the applicant alleges that the respondent failed to accommodate her disability to the point of undue hardship which resulted in her employment being terminated on April 16, 2012.

[3] The hearing in this matter is scheduled to take place in Toronto on December 12 and 13, 2013.

[4] The purpose of this Interim Decision is to address two Requests for Order that have been filed in this proceeding: (1) a request by the respondent to amend its Response and that this Application be dismissed pursuant to s. 45.1 of the *Code* on the basis of the decision of the Workplace Safety and Insurance Board ("WSIB") dated April 16, 2012; and (2) a request by the applicant for the production of certain documents.

Request for dismissal under s. 45.1 of the *Code*

[5] The respondent filed a Request for Order dated May 22, 2013 seeking to amend its Response and requesting dismissal of the Application pursuant to s. 45.1 of the *Code*. No objection is taken to the amendment of the Response. Accordingly, this request is granted.

The October 7, 2013 Case Assessment Direction

[6] Since the Request for Order was filed in this proceeding, this Tribunal has issued two significant decisions regarding the proper interpretation and application of s. 45.1 of the *Code*. The first is the decision of a panel of this Tribunal in *Claybourn v. Toronto Police Services Board*, 2013 HRTO 1298, released on July 25, 2013. While this case arose in the context of public complaints under the *Police Services Act*, R.S.O. 1990, c. P.15, the principles enunciated in this decision derive from the Supreme Court of Canada's decisions in *British Columbia (Workers' Compensation Board) v. Figliola*,

2011 SCC 52 ("*Figliola*"), and *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 ("*Penner*"), and have broader application. These principles include that, when determining whether the substance of a human rights application has been "appropriately dealt with", this Tribunal may consider the reasonable expectations of the parties, including the availability of any remedy or "financial stake" for the claimant in the other proceeding and the broader policy implications of applying s. 45.1 in the specific factual and legislative context.

[7] The *Claybourn* decision was followed by this Tribunal in *Maxwell v. Cooper-Standard Automotive Canada Limited*, 2013 HRTO 1482 (released August 30, 2013). The *Maxwell* decision arose specifically in the context of a decision by the WSIB about whether or not suitable work was available. In that case, the determination was made by a WSIB return to work specialist at a meeting and was based upon the employer's representations. It was held that this did not constitute a "proceeding" within the meaning of s. 45.1 of the *Code* and did not appropriately deal with the substance of the Application.

[8] Accordingly, I issued a Case Assessment Direction ("CAD") dated October 7, 2013, drawing the parties' attention to this recent case law. In the CAD, I expressed concern that the only legal issue addressed by the Case Manager in the April 16, 2012 decision was whether the employer was in violation of its obligation to cooperate under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A ("*WSIA*"). I further expressed concern that the potential consequence of a finding that the employer had violated its obligation to cooperate appeared to be limited to penalties that may be assessed against the employer, such that the applicant may not have any remedy or "financial stake" in such a determination.

[9] I also indicated in the CAD that I was aware that the applicant had expressed her intention to appeal to the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") from a WSIB decision dated June 4, 2013. The June 4, 2013 decision rejected the applicant's objection to the April 16, 2012 decision on the bases that the applicant was beyond the 30-day period to make her objection and that she did not provide new

information that was not available at the time of the initial review. However, I indicated that it was not clear to me what the extent of WSIAT's jurisdiction would be on any such appeal, and whether it would be limited only to a review of the June 4, 2013 decision or whether its review could extend to consideration of the underlying April 16, 2012 decision. I further indicated that, in any event, even if WSIAT were to consider the April 16, 2012 decision, it was not clear whether or how this would change the analysis under s. 45.1 of the *Code* in light of the *Claybourn* and *Maxwell* decisions.

[10] Accordingly, I invited submissions from the parties on the matters raised in the CAD and in light of the *Claybourn* and *Maxwell* decisions. Both parties filed written submissions in accordance with the timelines set out in the CAD.

The WSIB decision

[11] The WSIB decision dated April 16, 2012 states that the applicant sustained a work-related injury to her left thumb and wrist on August 5, 2008. Surgery was performed on February 26, 2009, and the applicant returned to modified duties on March 2, 2009. She then resumed her pre-injury duties on July 15, 2009, where she worked until April 2010 when she reported a recurrence of wrist pain. After that, she resumed modified work. The applicant was off work for surgery on December 9, 2010 and returned to work on modified duties on December 20, 2010.

[12] The WSIB decision states that at a Functional Work Capacity Assessment that was held in March 2011, the assessor determined that there were no modifications available for the applicant's pre-injury job. Following this assessment, a gradual return to work plan with a start date of May 9, 2011 was developed with the end goal being a return by the applicant to her pre-injury duties. At a follow-up meeting on June 22, 2011, the applicant reported issues working with a wrist splint, and all parties agreed to obtain an opinion from a physiotherapist regarding the long term feasibility of the return to work plan.

[13] In his June 29, 2011 report, the physiotherapist noted that the applicant was currently working four hours of regular duties per day and that she was experiencing pain in her wrist as a result of this work hardening / gradual return to work plan. He further opined that long term use of the splint was putting the applicant at risk for shoulder / elbow injuries, and that returning to her pre-injury position with the use of the splint was not sustainable.

[14] At the next meeting on July 21, 2011, the return to work plan was further revised with the goal of returning the applicant to full hours and regular duties by August 29, 2011. On August 30, 2011, the Work Transition Specialist stopped the gradual return to work plan as the applicant was having ongoing pain issues.

[15] The WSIB decision states that from September to December 2011, the modified work assigned to the applicant consisted of bundled duties in the Flex Tech role which included “serials” in curing, repairing A-frame liners, spool labelling, administrative paperwork as needed, and printing of 2D labels and time studies as needed.

[16] The decision states that on December 6, 2011, the applicant discontinued work for surgery and that she remained off work from that date forward.

[17] The decision states that, at a meeting on February 9, 2012, the employer explained that the bundled Flex Tech position is transitional and is used for work hardening purposes to allow workers to transition back to their pre-injury duties, and cannot be provided as a permanent position. The decision records the applicant’s view that the Flex Tech position should be made permanent. The decision also states that it was noted at this meeting that there were currently no other openings nor would there be in the foreseeable future.

[18] The decision states that the employer confirmed its inability to provide permanent suitable work in a letter dated February 23, 2012, which the decision states had been verified by the Work Transition Specialist at the February 9, 2012 on-site meeting.

[19] The decision states:

> A temporary modified work program is distinct from suitable work that becomes available. A temporary modified work program is not a job. It is a program that assists in the return to work process, such as the Flex Tech role described above.
>
> Although [the applicant] feels that the employer should be able to accommodate her, an employer is not required to create a position. The criteria as stated above is, "if a job becomes available that can be made suitable through accommodation, and the accommodation does not cause the employer undue hardship, the employer must provide the accommodation." That has not happened in this case. There has been no open position identified that could be made suitable through accommodation. The employer continued to cooperate in the Work Reintegration process as evidenced by the various Return to Work interventions.

[20] The decision concludes by finding that the employer cooperated in the Work Reintegration process and was not in violation of its cooperation obligations under the *WSIA*.

[21] The decision notes that there is a 30-day time limit for appeal. The applicant did not appeal this decision within the 30-day period.

[22] The applicant's employment with the respondent was terminated on the same day the WSIB decision was released.

Analysis under s. 45.1

[23] Section 45.1 of the *Code* states:

> The Tribunal may dismiss an Application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the Application.

[24] Section 45.1 requires a two-part analysis: (1) whether there was another "proceeding" and, if so, (2) whether it "appropriately dealt with the substance of the Application".

[25] In *Figliola*, at para. 34 the Court summarized the principles to be applied when considering whether another proceeding has appropriately dealt with the substance of a human rights application as follows:

> - It is in the interests of the public and the parties that the finality of a decision can be relied on;
>
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, re-litigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings;
>
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature;
>
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision; and
>
> - Avoiding unnecessary re-litigation avoids an unnecessary expenditure of resources.

[26] In assessing whether the substance of an application already has been "appropriately dealt with" in another proceeding, the Supreme Court of Canada in *Figliola* identified the following three factors (at para. 37):

> … whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself.

[27] This Tribunal addressed the application of the *Figliola* decision to the interpretation and application of s. 45.1 of the *Code* in *Gomez v. Sobeys Milton Retail Support Centre*, 2011 HRTO 2297, which concluded (at para. 4):

> " . . . the Court's reasoning in *Figliola* applies equally to the interpretation of s. 45.1 of the Ontario *Code*, and to whether an application should be dismissed when the issues have previously been addressed in another proceeding in which the parties have had the opportunity to know the case to be met and meet it. *Figliola* instructs this Tribunal not to consider the procedural or substantive correctness of the other proceeding or decision when deciding whether the application or part of the application can proceed. If the reasons in the other decision dispose of the human rights issues before the Tribunal, the application or part of the application must be dismissed on the basis that it was appropriately dealt with in the other proceeding.

[28] In *Okoduwa v. Husky Injection Molding Systems Ltd.*, 2012 HRTO 443, this Tribunal stated (at paras. 25-26):

> The Supreme Court of Canada's decision in *Figliola* provides guidance as to the interpretation of "appropriately dealt with" as it appears in s. 45.1. The Court makes clear that the Tribunal's role is not to sit in appeal of other decision-makers in their determination of human rights issues. Nor is it appropriate for the Tribunal to use s. 45.1 as a vehicle for a collateral attack on the merits of another decision-making process; the appropriate route for challenging another decision is through the appeal or judicial review routes available in the other decision-making process.
>
> Thus, the Tribunal's principal concern in applying s. 45.1 is not whether parallel litigation has correctly determined the human rights issues, but whether the applicant has already had an opportunity to have the human rights claim considered by an adjudicator who had jurisdiction to interpret and apply the *Code* . . .

[29] However, the principles enunciated in *Figliola* and followed by this Tribunal in the interpretation and application of s. 45.1 of the *Code* now need to be considered in light of the recent decision of the Supreme Court of Canada in *Penner*, above, as followed by this Tribunal in *Claybourn v. Toronto Police Services Board*, above. In *Claybourn*, this Tribunal held that, at least in the context of the public complaint and statutory discipline process under the *Police Services Act*, the factors to be considered when determining whether the substance of a human rights application has been "appropriately dealt with" require consideration of: the reasonable expectations of the parties, including whether the statutory scheme contemplates parallel proceedings; the availability of any remedy or "financial stake" for the complainant in the disciplinary proceeding; and the broader

policy implications of applying s. 45.1 in this context. In *Claybourn*, this Tribunal overturned its previous case law and held that the public complaint process under the *Police Services Act* does not appropriately deal with alleged violations of the *Code* as raised in an application before this Tribunal.

[30] More recently, with regard to the WSIB, the Tribunal held in *Maxwell v. Cooper-Standard Automotive Canada Limited*, above, that the process by which a WSIB Case Manager deemed a worker to be eligible for work transition was not a "proceeding" within the meaning of s. 45.1 and did not appropriately deal with the substance of the application.

[31] I accept the respondent's submission that the *Maxwell* is distinguishable, at least on the basis that, in *Maxwell*, the Tribunal found that there was no decision whereby the WSIB work transition specialist applied an "objective legal standard" to the facts, whereas in this case the WSIB Case Manager in her April 16, 2012 decision was applying an objective legal standard under the *WSIA* in determining whether the employer had complied with its cooperation obligations under that Act. I also accept that, in determining whether the employer had complied with its cooperation obligations under the *WSIA*, the WSIB Case Manager considered whether the employer had "suitable work" for the applicant, with included consideration of the duty to accommodate under the *Code*, and made a specific finding that no such suitable work was available.

[32] However, while not strictly a disciplinary process as addressed in the *Claybourn* and *Penner* decisions, it is notable to me that, as set out in the WSIB decision, the only impact of a finding of non-cooperation by an employer under the *WSIA* is the imposition of penalties on the employer. As in a disciplinary process, a finding of non-cooperation against an employer under the *WSIA* does not result in any direct remedy for the worker. For example, in the instant case, the applicant already had been determined by the WSIB to be eligible for loss of earnings and non-economic loss benefits, and that would not change one way or another whether or not the WSIB found the employer to have violated its cooperation obligations. As a result, while the applicant certainly had

the right under the *WSIA* to appeal the Case Manager's decision, she had no direct economic interest or incentive to do so. This may explain why she did not appeal the decision within the 30-day period, and only sought to appeal after the respondent in this human rights proceeding had sought to rely upon the WSIB decision to have her human rights Application dismissed. As a result, in the context of the specific decision made by the WSIB in the instant case, I find that, like the decisions at issue in *Penner* and *Claybourn*, there was no "financial stake" or remedy available to the applicant as a result of the WSIB decision dated April 16, 2012.

[33] Further, I find that it would not be in accord with the reasonable expectations of the parties for the applicant's rights under the *Code* to be found to have been extinguished by a decision of this nature. It is not precisely clear to me from the material filed by the parties who was responsible for initiating the WSIB decision. The decision letter dated April 16, 2012 is addressed not to the applicant (as WSIB decision letters typically are when they affect a worker's rights or entitlements), but is addressed to a WSIB consultant retained by the respondent employer and is only copied to the applicant. The decision letter commences by stating "further to our discussions, I am writing to confirm my decision as to whether [the respondent] has complied with their co-operation obligations as an employer under Operational Policy 19-02-02". As the letter is addressed by the WSIB Case Manager to the respondent employer's WSIB consultant, this can only refer to discussions as between these two parties. Further, from material submitted by the applicant from the WSIB file (Memo #17), it appears that the respondent employer's WSIB consultant had contacted the WSIB on March 12, 2012 to enquire about the applicant's file "with specific reference to cooperation and re-employment branch". And then on the day the WSIB issued its decision finding that the respondent had not violated its cooperation obligations, the respondent notified the applicant that it was terminating her employment.

[34] On the basis of the material before me, it appears that the respondent employer wanted confirmation from the WSIB that it had not violated its cooperation obligations under the *WSIA* before moving to terminate the applicant's employment. As such, it

appears to me that the WSIB decision at issue was initiated by the respondent rather than by the applicant, for a determination of the respondent's rights and obligations. In such circumstances, in my view, it would not be in accordance with the reasonable expectation of the parties that a WSIB decision initiated by the employer for a determination of its rights and obligations, particularly where the decision had no impact on the applicant's rights or entitlements under the *WSIA*, could reasonably be regarded as operating to extinguish the applicant's rights under the *Code*.

[35] I appreciate that the WSIB Case Manager, in the context of determining whether the respondent employer had violated its cooperation obligations under the *WSIA*, made a specific finding that the applicant's disability could not be accommodated. And I appreciate that the hearing before this Tribunal will also require a determination of that same issue under the *Code*. However, the same can be said for the circumstances in *Penner*, where the hearing officer under the *Police Services Act* made certain factual determinations in the disciplinary proceeding, and those same factual issues would need to be addressed again in the civil proceeding that was allowed to proceed. Similarly, in *Claybourn*, factual determinations were made as a result of the investigation of public complaints under the *Police Services Act*, including whether the subject officers had engaged in discrimination, and those same factual issues will need to be decided in the context of the human rights proceedings before this Tribunal. So the reality that a factual issue may need to be addressed again in a proceeding before this Tribunal does not automatically mean that an application must be dismissed under s. 45.1. The principles enunciated by the Supreme Court in *Penner* and as followed and applied by this Tribunal in *Claybourn* require a more nuanced analysis of the circumstances relating to the decision made in the other proceeding, and the consideration of the reasonable expectations of the parties and other factors as identified in *Claybourn*.

[36] Having carefully considered the matter before me, all of the parties' submissions and the applicable case law, I find that the WSIB decision dated April 16, 2012 cannot be regarded as having "appropriately dealt with the substance of the application" within

the meaning of s. 45.1 of the *Code*. I further find that the principles enunciated in *Penner* and *Claybourn* support the exercise of any discretion I may have under s. 45.1 to allow this Application to proceed.

[37] Given these findings, I do not express any opinion on the issue of whether the decision of the WSIB Case Manager dated April 16, 2012 was part of a "proceeding" within the meaning of s. 45.1 of the *Code*.

Applicant's request for production

[38] On October 17, 2013, the applicant filed a Request for Order seeking production of certain documents and information. The respondent objects to the production of any of these documents and information as beyond the scope of the issues before the Tribunal in this matter and as not relevant to the applicant's claim that her disability was not accommodated. Specific responses in relation to particular requests for documents and information will be addressed below.

[39] Pursuant to Rule 1.7(p), this Tribunal has the power to require a party "to produce any document, information or thing". The test for production of documents or information is arguable relevance to a matter at issue in the proceeding, which is not a particularly high threshold: see *Lampi v. Princess House Products Canada Inc.*, 2008 HRTO 1.

[40] The applicant first requests a "list showing the number of employees who have sustained permanent injury/disability, who are still currently employed with [the respondent]". Based upon the material filed, I understand the information sought to be relevant to the applicant's allegation that the respondent has a practice of terminating the employment of individuals who sustain permanent injuries or disabilities, and that this is arguably relevant to her allegation that she was treated, and her employment terminated, in accordance with this practice. The respondent takes the position that records and documents relating to other employees are personal information and objects to disclosure on this basis. While this no doubt is personal information, such

information may be required to be disclosed pursuant to an order of this Tribunal if found to be arguably relevant to a matter at issue in the proceeding. On the basis of the applicant's allegations, I find that this information is arguably relevant to the applicant's allegations, and order it to be disclosed. The list to be provided by the respondent should identify the employees by name, state the nature of each employee's permanent restrictions, and identify each employee's current position.

[41] The applicant next requests information and documentation regarding the "number of years that Tim Finn was classified as a 'flex tech' and a copy of his Employee Change form(s) including the most recent" and "copies of offers of modified / transitional work for Tim Finn for September, October and November 2011". I understand this request to be relevant to the applicant's allegation that an employee named Tim Finn was either permanently accommodated in the Flex Tech position or was accommodated in such position for a longer period than the applicant. Accordingly, in my view, this information and documentation is arguably relevant to a matter at issue in this proceeding and should be produced. Once again, while this is personal information, it can be ordered disclosed if arguably relevant to a matter at issue, which I have found that it is.

[42] The applicant next requests "credentials of current Human Resources Specialists and number of years in the role with [the respondent]". In my view, this request is overly broad as it extends to an entire group of individuals and is not restricted to those Human Resources Specialists who dealt with the applicant's situation during the relevant period, which based upon the narrative provided in support of the Application is from August 2011, when the applicant states that she was removed from her G3 technician position, to April 16, 2012, when she was terminated. I am prepared to order disclosure of the information requested as it pertains to those Human Resources Specialists who dealt with the applicant's situation during the relevant period from August 2011 to April 16, 2012.

[43] The applicant next requests the "total number of hours [she] spent building tires from May 2010 until October 2011". I understand this request to be relevant to the

applicant's allegation that she was working within her physical restrictions and able to build tires for 8 hours per day, and that she should have been accommodated in a position that allowed her to continue doing so while assigning her other work for the remainder of her shift. This information should be produced and broken down by day during the relevant period (if the applicant was consistently working a set number of hours building tires during portions of the relevant period, then the information provided cam simply refer to the applicable period of time and the number of hours per day spent building tires during this period). The information produced also should indicate the source(s) used for the information provided.

[44] The applicant next requests a "printout of my safety contacts (employee #6105) from 2007 to 2010". I am not clear as to what the applicant is referring to, or how the information sought is relevant to a matter at issue in this proceeding. Accordingly, I decline to order the production of this information at this time.

[45] The applicant requests the "names of all Health & Safety Managers (including interim) since 1998". Once again, it appears to me that this request is overly broad, as it extends back some 15 years and well before even the applicant's initial compensable injury. It also is not clear to me how this information is relevant to a matter at issue in this proceeding. Accordingly, I decline to order the production of this information at this time.

[46] The applicant next requests a "list of the number of [respondent] employees that have been 'displaced' as a result of accommodation". The respondent states that it does not understand the nature of this request or what is meant by "displaced" employees. If by "displaced", the applicant means those employees with permanent restrictions who have been removed from their regular positions and/or terminated as a result of accommodation (or an inability to accommodate), then in my view such information is arguably relevant to a matter at issue in this proceeding, namely the applicant's allegation that the respondent has a practice of removing employees with permanent restrictions from their regular positions and/or terminating such employees rather than providing accommodation in accordance with the *Code*, and that she was subject to this

practice. Accordingly, I will require production of this information for a reasonable period of time, which I find to be from January 1, 2008 to the present. The list to be provided by the respondent should identify the employees by name, state the nature of each employee's permanent restrictions, identify the regular position from which each employee was removed, and (if still employed) indicate the employee's current position or (if not) indicate the date of termination and reason for termination.

[47] The applicant next requests "the number of [respondent] employees that have been laid off due to [the respondent's] downsizing". The applicant relies upon the statement in the WSIB decision dated April 16, 2012, that "the company had recently downsized and in order to utilize [the applicant's] skills they would have to displace someone else". In my view, this request is arguably relevant to a matter at issue in this proceeding, namely whether the respondent could have accommodated the applicant in another position or whether, as apparently stated to the WSIB, such other positions were not available due to downsizing. Accordingly, I order the respondent to provide a list of all employees terminated during the period from January 1, 2008 to April 16, 2012. This list should identify the employees by name, indicate each employee's position at time of termination, and indicate whether this position subsequently was filled and, if so, when and by whom.

[48] The applicant next requests "Larry Kimmerly's file documents on 'McMurter in/out gate log' from October 2011 to November 2011" and his file document on December 14, 2011 "McMurter security breach". These files are directly referenced in the Application, and form part of the applicant's allegation that she experienced discrimination and/or harassment because of her disability. I find that these documents are arguably relevant to this proceeding, and they should be produced.

[49] The applicant next requests "Human Resources file documents on [her] call to Goodyear Integrity Hotline Nov. 2011". In her Application, the applicant makes reference to calling this hotline sometime after she discovered the "McMurter in out gate log" on November 25, 2011. If any such records exist, whether they reside with the

respondent's Human Resources department or some other office, then I find that they are arguably relevant to a matter at issue and should be produced.

[50] The applicant next requests information as to "how many A-frame movers are in use in the tire room". I do not have sufficient information to understand how this information is relevant to a matter at issue in this proceeding. Accordingly, I decline to order the production of this information at this time.

[51] The applicant next requests a "copy of G3 98 and Star 7 (Cell) technician job descriptions". The respondent takes the position that production job descriptions are not in issue and are not relevant. I disagree. If the applicant's allegation is that she could perform some or all of the duties of these positions and ought to have been accommodated in one of these positions, then the position descriptions are clearly arguably relevant. In my view, these position descriptions should be produced.

[52] The applicant finally requests a "copy of production employee wage rate with all mandatory overtime and shift premiums as of December 31, 2011", the "value of [her] benefits in 2012", and the "value of NPP payout for 2012". As I understand it, these requests are made in relation to the issue of remedy. With regard to the first request, I understand the applicant's position to be that, as the time she was removed from her G3 technician position in August 2011, she nonetheless could still have performed the essential duties of that position but only for a maximum of 8 hours per day (as opposed to a full 12-hour shift) and that the respondent should have accommodated her by allowing her to continue in that position while giving her other duties for the balance of the shift. As a result, while the production employee wage rate for the period from August 2011 to December 31, 2011 appears to be arguably relevant to remedy, it is not clear to me how mandatory overtime and shift premiums would be relevant if this would have required the applicant to work for than 8 hours in a shift building tires. I suppose that if, as opposed to extending a shift, mandatory overtime and shift premiums were required for production employees called in to work, for example on a weekend, the applicant arguably could claim that she ought to have been called in. Accordingly, I am prepared to order the respondent to disclose the wage rate for its production employees

during the period from August 1 to December 31, 2011 and any mandatory overtime required for production employees during this period (which did not involve extending an existing shift but calling in employees to work a shift when they would not normally be scheduled to do so) and the shift premium paid for any such overtime.

[53] With regard to the applicant's request for the "value" of her benefits in 2012, I am aware that sometimes companies will put a value on a benefits package as part of their overall remuneration of employees. If the respondent has valued the benefits package that the applicant received in 2012, this information is arguably relevant and should be disclosed.

[54] Similarly, if there was any NPP payout made in 2012, then this also should be disclosed.

[55] If the parties require any clarification regarding the information and documents I have ordered disclosed, then may seek such clarification by writing to the Registrar with a copy to the opposing party.

REQUEST TO ADJOURN

[56] By Request for Order dated November 1, 2013, the respondent has requested that the hearing in this matter be adjourned and the deadline for filing pre-hearing materials suspended pending the release of the Tribunal's decision on the s. 45.1 issue.

[57] As the Tribunal's decision on the s. 45.1 issue is now released, I see no reason for the hearing in this matter to be adjourned. I am prepared to allow a reasonable extension for all parties to file their pre-hearing materials, which shall be done within 14 calendar days of the date of this Interim Decision.

ORDER

[58] The respondent's request that this Application be dismissed pursuant to s. 45.1 of the *Code* on the basis of the WSIB decision dated April 16, 2012 is denied.

[59] The respondent's request to file an amended Response in the form attached to its Request for Order dated May 22, 2013 is granted.

[60] Within 14 calendar days of this Interim Decision, the respondent shall deliver to the applicant and file with the Tribunal the following documents and/or information:

a. A list showing the number of employees who have permanent restrictions, and who are still currently employed with the respondent. This list should identify the employees by name, state the nature of each employee's permanent restrictions, and identify each employee's current position;

b. The number of years that Tim Finn was classified as a "flex tech" and a copy of his Employee Change form(s) including the most recent, and copies of offers of modified / transitional work for Tim Finn for September, October and November 2011;

c. The credentials of Human Resources Specialists and number of years in the role with the respondent for those individuals who dealt with the applicant's situation during the period from August 2011 to April 16, 2012;

d. The total number of hours the applicant spent building tires from May 2010 until October 2011. This information should be produced and broken down by day during the relevant period (if the applicant was consistently working a set number of hours building tires during portions of the relevant period, then the information provided cam simply refer to the applicable period of time and the number of hours per day spent building tires during this period). The information produced also should indicate the source(s) used for the information provided;

e. A list of the number of respondent employees with permanent restrictions who have been removed from their regular positions and/or terminated as a result of accommodation (or an inability to accommodate) from January 1, 2008 to the present. This list should identify the employees by name, state the nature of each employee's permanent restrictions, identify the regular position from which each employee was removed, and (if still employed) indicate the employee's current position or (if not) indicate the date of termination and reason for termination;

f. A list of all employees terminated during the period from January 1, 2008 to April 16, 2012. This list should identify the employees by name, indicate each employee's position at time of termination, and

indicate whether this position subsequently was filled and, of so, when and by whom;

g. Larry Kimmerly's file documents on 'McMurter in/out gate log' from October 2011 to November 2011 and his file document on December 14, 2011 'McMurter security breach';

h. Any documents or records regarding the applicant's call to the Goodyear Integrity Hotline in November 2011, whether they reside with the respondent's Human Resources department or some other office;

i. A copy of G3 98 and Star 7 (Cell) technician job descriptions;

j. The wage rate for the respondent's production employees during the period from August 1 to December 31, 2011 and any mandatory overtime required for production employees during this period (which did not involve extending an existing shift but calling in employees to work a shift when they would not normally be scheduled to do so) and the shift premium paid for any such overtime;

k. Any valuation of the benefits package that the applicant received in 2012; and

l. Any NPP payout made in 2012.

[61] Within 14 calendar days of the date of this Interim Decision, all parties shall file their pre-hearing materials as required pursuant to Rules 16 and 17.

Dated at Toronto, this 5th day of November, 2013.

"Signed by"

_____

Mark Hart
Vice-chair