

## **WSIB Return to Work Decisions: Are they Binding on the Human Rights Tribunal?**

**Ryan J. Conlin**

The Workplace Safety and Insurance Act (“WSIA”) represents a historic bargain where workers traded their right to sue their employer for negligence arising out of workplace accidents in exchange for a employer funded no fault insurance scheme. Many employers incorrectly assume that the WSIA prevents workers from pursuing human rights litigation for events which took place in the context of a Workplace Safety and Insurance Board (“WSIB”) claim. The reality is that workers are free to pursue an application before the Human Rights Tribunal for alleged discrimination arising out of the employer’s actions and decisions with respect to a WSIB claim.

### **Boyce Decision**

One recent case explored the issue of the impact of WSIB return to work decisions on human rights applications. In *Boyce v. Toronto Community Housing Corporation* the employee was receiving WSIB benefits was offered a permanent modified position as a dispatcher. There was a dispute between the parties as to whether the worker could safely travel to the work location. The worker refused to perform work at the location offered by the employer.

The WSIB Claims Adjudicator ruled that the worker could safely travel to and from the work location and terminated payment of WSIB benefits. The worker apparently objected to the Adjudicator’s decision but did not take the required steps to pursue it. The employer subsequently terminated the worker’s employment on the grounds that he had not reported to work that the WSIB had determined was suitable and available.

The worker filed a human rights application alleging that the employer refused to consider allowing him to do the modified job that was offered at locations that were easier for him to get to and did not effectively accommodate the excessive walking issue associated with the modified work offered by the employer. The employer argued that the Human Rights Tribunal ought to dismiss the Application on the basis that the worker was trying to appeal the findings of the WSIB to another regulatory body.

The Vice-Chair rejected the employer’s argument and held the Human Rights Code imposes a higher level of accommodation than the WSIA. He noted that the WSIB return to work process only requires the employer to determine if it has a suitable job available for the worker. The Vice-Chair reasoned that to satisfy the employer’s duty under the Human Rights Code, the return-to-work process must incorporate consideration of accommodation that would allow the worker to return to the essential duties of the pre-disability job and consideration of other accommodation that would allow the worker to return to work. He held that the higher

threshold under the Human Rights Code means that it is possible for an employer to comply with the WSIA return to work provisions and still breach the Human Rights Code.

## **Practical Impact of Boyce**

The Boyce decision establishes that at least in some instances injured workers are free to attempt to concurrently pursue Human Rights Code remedies against their employer even if the WSIB has ruled in the employer's favour with respect to whether work is suitable.

It is important to appreciate that the decision in Boyce does not mean that workers will always be able to maintain parallel Code litigation where WSIB proceedings are still ongoing. In some instances the Human Rights Tribunal will defer the worker's application pending the outcome of a WSIB appeal. In *Dhunsi v. J.T. Bakeries*, the worker made a claim to the WSIB for benefits arising out of a workplace injury. She was awarded some benefits but her benefits were terminated on the basis that the employer had offered permanent modified work within her medical restrictions. The worker also made a claim for chronic pain disability which was denied. The worker appealed both decisions to an Appeals Resolution Officer.

The worker's human rights application arose out of the same facts as the WSIB appeal proceedings. The employer sought to have the human rights application deferred pending the outcome of the WSIB Appeals process. The worker opposed the employer's request. The Vice-Chair found that there clearly was an overlap between the issues in the WSIB appeals and the human rights application. She held that the results of the WSIB appeals may establish that the worker has no disability, or that she has a disability that results in further benefits from the WSIB and/or requires further modifications to her work.

The Vice-Chair determined that although the legal framework within which the questions will be considered is different, the WSIB proceedings would likely address some of the key issues in the human rights application. In light of the overlap of issues, the Vice-Chair granted the employer's request to defer the human rights application pending the outcome of the WSIB appeals.

## **Effective Management of Long-Term Disabled Employees: How to Navigate the Legal Minefield**

**Presenters: Allison L. Taylor and Ryan J. Conlin**

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## What Employers Need to Know

1. Employers must not narrowly focus on decisions made by the WSIB. The Human Rights Code applies to the entire WSIB early and safe return to work process. A decision by the WSIB that work is suitable does not bind the Human Rights Tribunal who has very clearly stated that it is possible to comply with WSIB obligations and still contravene the Code in the context of return to work.
2. Employers must be in a position to establish that measures have been taken that would satisfy the high undue hardship burden required by the Code. It is clear that a finding by the WSIB that work is suitable or that no suitable work is available will not always be sufficient.
3. An employer must be able to document what duties and potential modifications were considered. The reality is that it may be months or even years before the employer's representatives are required to give evidence before the WSIB or Human Rights Tribunal if litigation arises.
4. The development of a written return to work plan which is approved by the WSIB Return to Work Specialist is a key part of successfully managing claims and minimizing human rights litigation. Having a written return to work plan establishes that a process was in place for managing accommodation issues.
5. It is critically important that the worker's input be sought and considered as part of the process. There is no question that workers will cite specific positions or duties which they believe would be suitable with the WSIB and/or the Human Rights Tribunal. An employer must be able to demonstrate why the positions suggested by the worker represent an undue hardship.
6. The reality is that employers face the risk of both human rights and WSIB litigation in context of the return to work process. The best defence any such litigation is to have a process in place which proactively complies with both WSIB and Code requirements.

### For more information, please contact:

Ryan J. Conlin at [rconlin@sbhlawyers.com](mailto:rconlin@sbhlawyers.com) or 416-862-2566.

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MANAGEMENT  
LAWYERS

*UPDATE* is an electronic publication of **STRINGER BRISBIN HUMPHREY**  
110 Yonge Street, Suite 1100, Toronto, Ontario M5C 1T4

T: 416-862-1616 Toll Free: 1-866-821-7306 F: 416-363-7358

E: [info@sbhlawyers.com](mailto:info@sbhlawyers.com) I: [www.sbhlawyers.com](http://www.sbhlawyers.com)

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