



HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Raj Dhunsi

Applicant

-and-

J.T. Bakeries

Respondent

INTERIM DECISION

Adjudicator: Sherry Liang
Date: March 12, 2010
File Number: 2009-02059-I
Citation: 2010 HRTO 540
Indexed as: **Dhunsi v. J.T. Bakeries**

[1] This is an Application filed on April 23, 2009, under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”). The respondent has filed a Request for an Order During Proceedings in which it asks the Tribunal to dismiss part or all of the Application on the basis that the matters in issue have been dealt with by the WSIB and, in the alternative, defer it until other matters have been completed. The Request also seeks an order permitting the respondent to rely upon and disclose documents received from the Workplace Safety and Insurance Board (the “WSIB”).

[2] The applicant opposes the Request to dismiss or defer, and consents to the use of documents received from the WSIB insofar as they may be relevant to the Application. The applicant has also filed a Request for Order seeking to amend the Application to include a remedial claim for monetary compensation characterised as “general damages”.

BACKGROUND

[3] The Application arises out of the applicant’s employment. The applicant was injured at work in February 2008. She returned to the workplace with accommodation for medical restrictions following on her injury. The accommodation involved modified duties as well as hours of work. It appears from the material that the respondent expected the applicant to return to a full workday over time. The Application asserts that the applicant was not capable of returning to full-time hours.

[4] The respondent took disciplinary action against the applicant in September 2008 and then on a number of occasions between March and June 2009. The Application alleges that the discipline amounts to harassment of the applicant because she is a person with a disability.

[5] The applicant made a claim to the WSIB for loss of earnings arising out of her workplace injury. She was awarded compensation for certain periods of time in 2008. The WSIB decided that her claim for loss of earnings ended as of December 8, 2008,

on the basis that the respondent had offered permanent modified work within her medical restrictions. The applicant has also made a claim for compensation based on chronic pain disability arising out of her workplace injury, which has been denied by the WSIB. The applicant has appealed this decision through the WSIB's appeals process, and by letter dated September 18, 2009, the WSIB confirmed that the matter would be assigned to an Appeals Resolution Officer.

SUBMISSIONS OF THE PARTIES

[6] The respondent submits that the entirety of the Application should either be dismissed in accordance with section 45.1 of the *Code* or, in the alternative, deferred pending resolution of the current appeal to the Workplace Safety Insurance Appeals Tribunal (the "WSIAT"). It refers to section 118(1) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A (*WSIA*), providing the WSIB with exclusive jurisdiction to determine, among other things, whether a loss of earnings has resulted from an injury or whether permanent impairment has resulted from an injury, and the degree of the impairment. Section 123 of the *WSIA* provides that the Appeals Tribunal (WSIAT) has exclusive jurisdiction to hear all appeals from the WSIB.

[7] The respondent relies on the decision of the Tribunal in *Berisa v. Toronto (City)*, 2008 HRTO 246 (CanLII) in which the Tribunal refused to permit a complainant from expanding the scope of the complaint referred by the Commission to include allegations of failure to accommodate and harassment. A factor in the Tribunal's decision was that many of the complainant's allegations were substantially addressed through the *WSIA* process. The Tribunal also found, in the alternative, that the WSIB proceedings had appropriately dealt with the substance of at least some of the allegations, within the meaning of section 45.1.

[8] In this Application, the respondent also relies on *Cui v. MSM*, 2008 HRTO 449 (CanLII), in which the Tribunal determined that in circumstances where a matter is under appeal to the WSIAT, it would be premature for the Tribunal to determine whether the proceedings under the *WSIA* have appropriately dealt with the substance of the

application, but it would be appropriate to consider whether the application should be deferred pending the outcome of the WSIAT appeal.

[9] The applicant's submissions state that the substance of this Application relates to harassment, referring to the progressive discipline undertaken by the respondent. The WSIB appeal, it is submitted, is in respect of the denial of a claim for Chronic Pain Disorder. The applicant states that her appeal is at very early stages. The WSIB has issued no decision with respect to the allegations that the applicant has been harassed in the workplace as a result of her disability, nor will they as the WSIB has no remedial power to make that order.

[10] The applicant relies on a number of decisions of the Tribunal, submitting that the Tribunal has refused to defer an application where the substantive issues before it were not being dealt with by the WSIB. Cases in which the Tribunal has deferred to a WSIB matter generally concern issues of accommodation.

DECISION

[11] I agree with the reasoning in *Cui* that it would be premature for the Tribunal to consider the question of whether the substance of the Application has been appropriately dealt with by the WSIB proceeding. Although there has been a decision by a WSIB Case Manager denying the claim for Chronic Pain Disorder, that decision has been appealed. In these circumstances, the proceeding under the *WSIA* has not yet resulted in a final determination on the applicant's claim that she has a chronic pain disability.

[12] I recognize that in *Berisa*, the Tribunal applied section 45.1 even where an appeal to the WSIAT was pending. In my view, that case is distinguishable insofar as it primarily concerned the question of whether the Tribunal should exercise its discretion to permit an expansion of a complaint referred under the old provisions of the *Code*. In any event, the interest served by section 45.1, to avoid duplication of proceedings and

re-litigation of issues, suggests that it is preferable to await the final outcome of the process under the *WSIA* before applying section 45.1.

[13] The Tribunal therefore denies the Request to dismiss all or part of the Application under section 45.1 of the *Code*.

Deferral of the Application

[14] The Tribunal has stated that

Deferral of an application ensures that proceedings dealing with the same issues do not run concurrently, thereby raising the possibility of inconsistent decisions on facts or law. However, deferral is not automatically invoked simply because the parties are involved in other legal proceedings.

Some of the factors that may be relevant in deciding whether to defer consideration of an application before the Tribunal are the subject matter of the other proceeding, the nature of the other proceeding, the type of remedies available in the other proceeding, and whether it would be fair overall to the parties to defer, having regard to the status of each proceeding and the steps that have been taken to pursue them.

Bhagdasseriens v. 674460 Ontario, 2008 HRTO 404 (CanLII)

[15] In this Application, it is clear that there is an overlap between the issues before the Tribunal and those currently under appeal at the WSIB. In determining whether the respondent's disciplinary actions over the applicant's absences from the workplace constitute harassment because of a disability, the Tribunal must consider the extent and nature of the applicant's disability. Although it does not appear that there is a dispute that the applicant has some level of medical restrictions that require accommodations in the workplace, there is an issue about whether a chronic pain disability underlies her actions and absences during the periods in question. This in turn, will influence any determination about whether the respondent's actions constituted harassment because of a disability or were responses to non-disability related issues.

[16] Although it is not clear to what extent this will form part of the applicant's appeal to the WSIB Appeals Branch, she has also informed the WSIB (in correspondence from her representative dated April 2, 2009) that the respondent is in contravention of its duty to accommodate under the *Code*.

[17] At the very least, it appears that the appeal at the WSIB will determine whether the applicant has a chronic pain disability within the meaning of the *WSIA*. The result of the appeal may establish that she 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. This may give rise to issues under the *WSIA* about whether the employer has met its obligation to offer suitable modified work, and is related to the allegations raised in the Application that the respondent violated the *Code* by treating her absences as disciplinary issues. Although the legal framework within which the questions will be considered is different, the WSIB proceedings will likely address some of the very issues before the Tribunal.

[18] The overlap in issues thus favours deferral of the Application. It is also relevant to me that the WSIB has considerable expertise in determining issues of disability. Considering these factors, although it is not clear from the materials how long it will take for the Appeals Resolution Officer (the "ARO") to make a decision on the appeal, in my view, it would be fair overall for the Tribunal to defer hearing the issues in this Application pending that decision.

[19] It is possible that the issues around the applicant's disability will not be resolved by a decision of the ARO, or will result in an appeal to the WSIAT. In the circumstances before it, the Tribunal finds it appropriate to defer this Application pending a decision of the ARO. Once that decision is given, and a party wishes to re-activate the Application, the Tribunal will consider whether the Application should continue to be deferred, or whether it would be fair at that point to proceed with the Application. It may also be appropriate to consider whether section 45.1 applies.

[20] In the result, the Tribunal will defer consideration of this Application pending a decision from the WSIB Appeals Resolution Officer. The hearing in this matter scheduled for May 17 and 18, 2010 is cancelled. In view of the deferral of the Application, it is unnecessary to deal with the other matters raised in the Requests of the respondent and the applicant, pending re-activation of the Application.

[21] Where a party wishes to proceed with an application which has been deferred, the party must make a Request for an Order During Proceedings in accordance with Rule 19 of the Tribunal's Rules of Procedure within 60 days after the conclusion of the other proceeding (Rules 14.3 and 14.4).

[22] I am not seized of this matter.

Dated at Toronto this 12th day of March, 2010.

"Signed by"

Sherry Liang
Vice-chair