HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Mike Frankson

Applicant

-and-

Workplace Safety and Insurance Board

Respondents

INTERIM DECISION

Adjudicator: Sherry Liang

Date: December 3, 2009

File Number: 2009-02616-I

Citation: 2009 HRTO 2084

Indexed as: **Frankson v. Workplace Safety and Insurance Board**

2009 HRTO 2084 (CanLII)

[1] This is an Application filed on June 15, 2009 under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19 as amended (the "*Code*").

[2] The Application alleges that the Workplace Safety and Insurance Board (the WSIB) discriminated against the applicant on the ground of disability, when it changed his Labour Market Re-Entry (LMR) program because of his learning disability. The applicant states that he was moved from a 3 year LMR program to a 5 week program because of the refusal of the WSIB to provide accommodation of his learning disability in his original program. The applicant states that at the conclusion of the shortened LMR program, he was considered to be fully trained and his benefits were accordingly reduced.

[3] The WSIB filed a Response to the Application. In the Response, it does not address the allegations about the applicant's LMR and the change from one program to another. The WSIB takes the position that the Tribunal does not have jurisdiction over the matters in the Application and requests that the Tribunal dismiss the Application in its entirety. The WSIB subsequently filed a Request for an Order During Proceedings, seeking the same remedy.

[4] The applicant has filed a Response to the Request, containing detailed submissions opposing the Request.

[5] The respondent relies on section 118 of the *Workplace Safety and Insurance Act*, S.O. 1997, C. 16, Sched. A, as amended (the *Act*), which it states gives it broad and exclusive jurisdiction to hear and decide all matters and questions arising under the *Act*. It submits that the substance of this Application concerns decisions made by the respondent in respect of the applicant's claim in the context of labour market re-entry benefits. The respondent states that, in essence, the application challenges the decisions made by the respondent respecting the applicant's claim, which decisions are within the exclusive jurisdiction of the WSIB.

2009 HRTO 2084 (CanLII)

[6] The respondent submits that decisions of the Tribunal have found that the adjudicative functions of a statutory tribunal are not "services" under the *Code*, such as *Baird v. Workplace Safety and Insurance Appeals Tribunal*, 2009 HRTO 99 (CanLII), 2009 HRTO 99 (CanLII) *Christianson v. Ontario (IPC)*, 2009 HRTO 203 (CanLII), 2009 HRTO 203 (CanLII), and *Bulimaibau v. Workplace Safety and Insurance Board*, 2009 HRTO 413 (CanLII).

2009 HRTO 2084 (CanLII)

[7] The WSIB describes the process of decision-making at the WSIB in the context of an LMR plan, and the availability of internal appeal. The WSIB also refers to the right to appeal to the Workplace Safety and Insurance Appeals Tribunal (WSIAT), stating that the WSIB and the WSIAT have exclusive jurisdiction to examine, hear and decide all matters and questions arising under the *Act*, and that as the Application deals with decisions of the WSIB as an administrative agency, the Tribunal does not have jurisdiction over those decisions or to make any order with respect to the applicant's entitlement under the *Act* that is contrary to those decisions.

[8] The applicant, in response, requests that the Application proceed to a full hearing on the merits in order to hear all the evidence regarding the service relationship between the parties, submitting that he should be afforded an opportunity to present the full factual matrix which anchors his claim that the Tribunal has jurisdiction in this matter.

[9] The applicant submits that in deciding whether services are included in the protections provided under section 1 of the *Code*, the Tribunal and the courts have applied a broad and purposive interpretation. The applicant submits that it is clear that adjudicative functions of decision-makers are not "services" pursuant to s.1 of the *Code*, and as such, concurs with the Tribunal's findings in the three cases cited by the respondent in which applicants were seeking to overturn or attack adjudicative decisions, including those of the WSIB.

[10] However, the applicant submits that what is at issue in this Application is the provision of re-training services by the WSIB, not an adjudicative decision of the WSIB.

[11] The applicant refers to the "complexities" of the WSIB and some lack of clarity in the Tribunal's jurisprudence in this area, but submits that this tension has been squarely resolved by the recent decision in *Zaki v. Ontario (Community and Social Services)*, 2009 HRTO 1595 (CanLII). Based on *Zaki*, the applicant submits that the subject-matter of this Application is his inability to obtain services from the WSIB because of its failure to accommodate. He does not challenge the content of the decisions made by the WSIB about his income replacement benefits, which he has appealed, and which he acknowledges only the WSIB and the WSIAT have the power to award. He does not seek to overturn any WSIB adjudicative decision through this Application. The remedies he seeks are general damages and public interest remedies for the failure to accommodate, which are not available to him under the *Act*.

2009 HRTO 2084 (CanLII)

DECISION

[12] The Tribunal denies the respondent's Request. In order to provide for the fair, just and expeditious resolution of any matter before it, the Tribunal's Rules of Procedure provide it with the discretion to determine and direct the order in which issues in a proceeding, including issues considered by a party to preliminary, will be considered and determined: Rule 1.7(g). On the basis of the material before me, I find that it would not be fair or just to decide the question raised by the respondent at this stage, and on the basis of the written submissions.

[13] The issue of whether the matters covered by the Application are within the jurisdiction of the Tribunal is important and complex. I agree with the applicant that it should not be considered without an understanding of the "full factual matrix" of the relationship between the WSIB and the applicant, the nature of the alleged services and the administration of the *Act* by the WSIB.

[14] While it is true that previous decisions of the Tribunal have found that adjudicative decisions of the WSIB are not "services" for the purpose of the *Code*, the subsequent decision in *Zaki* necessitates some reflection by the Tribunal on the application of the *Code* to actions of the WSIB, whether they are said to constitute

"services", "decisions" or "adjudicative decisions". In *Zaki*, the Tribunal distinguished between agencies adjudicating disputes amongst others, and those that provide benefits themselves, stating:

> Other circumstances involve not merely the adjudication of rights between others but also the provision of a benefit or other privilege by the agency itself. The social area of "services" clearly covers the underlying benefit. Therefore, in determining whether an application relates exclusively to the "content, reasons or result" of an administrative decision under the *Baird* analysis, the Tribunal must examine whether the claim is exclusively about the adjudication or decision or whether the applicant is making a claim about his or her inability to obtain benefits or other services from the respondent. In the latter case, while there is a statutory decision involved, the provision of the benefit or privilege is a "service" within the meaning of s. 1 of the *Code*, and the applicant may argue that he or she has experienced discrimination in the provision of that service. However, the content of the decision itself is not a service within the meaning of the *Code*. It is not the content of the decision or reasons that is the alleged violation of the *Code*, but the alleged inability of the applicant to obtain the services, but for the alleged discrimination.

2009 HRTO 2084 (CanLII)

[15] In *Cochrane v. Workplace Safety and Insurance Board*, 2009 HRTO 1596 (CanLII), a decision released concurrently with *Zaki*, the Tribunal decided to proceed with an Application against the WSIB on the basis that it was "not plain and obvious" that it was without jurisdiction.

[16] Having regard to the above, and the material before it, the Tribunal finds that it is not plain and obvious that this Application is outside of the Tribunal's jurisdiction. This is not a final decision about the Tribunal's jurisdiction, but rather, a determination that it is premature to decide the question without providing the parties with an opportunity to provide evidence and submissions on the issue.

[17] As the respondent's primary position in its Response was that the Tribunal was without jurisdiction to deal with this Application, it has not fully addressed the allegations made by the applicant about the failure to accommodate a learning disability. In view of this decision, the Tribunal finds it appropriate to allow the respondent to file an amended

Response to the Application, which must be filed with the Tribunal by December 23, 2009.

[18] If no mediation is scheduled or does not result in a settlement of the Application, the Vice-Chair assigned to adjudicate the matter may make further directions as to the hearing, including directions about whether the issue of jurisdiction will be heard separately from the merits of the Application.

[19] I am not seized of this matter.

Dated at Toronto this 3rd day of December, 2009.

"Signed By"

____

Sherry Liang
Vice-chair

2009 HRTO 2084 (CanLII)