HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Alondra Galves

Applicant

-and-

Balzac's Coffee Roastery Ltd. and Cathy Segeren

Respondents

INTERIM DECISION

Adjudicator:	Eric Whist
Date:	July 15, 2010
File Number:	2010-04790-I
Citation:	2010 HRTO 1539
Indexed as:	**Galves v. Balzac's Coffee Roastery**

[1] The applicant filed an Application under section 34 of Part IV of the Ontario *Human Rights Code,* R.S.O. 1990, c. H.19, as amended (the "*Code*"), on February 8, 2010, alleging discrimination in employment on the basis of disability. The applicant alleges that the respondents did not meet their duty to accommodate her disability when she sought to return to work following a workplace injury. This Interim Decision addresses a request by the respondents for an early dismissal of the Application on the grounds that the Workplace Safety and Insurance Board ("WSIB") has already appropriately dealt with the substance of the Application.

Background

[2] The applicant was employed as a barista by the corporate respondent. In January 2009, she suffered a work-related injury to her back and was subsequently off work. In March 2009, the applicant returned to work on an eight-week trial basis under a Return to Work ("RTW") plan facilitated by a WSIB RTW specialist. It appears that during this period the applicant remained on WSIB benefits rather than being paid by the respondents. By the end of this eight-week period the applicant had returned to working full time hours and, according to the applicant, was performing almost all of the assigned duties. On June 8, 2009, a meeting was held involving the applicant, the personal respondent and the WSIB's RTW specialist. According to the applicant, the personal respondent indicated at this meeting that the applicant could not perform all her duties and that there was no suitable position available for the applicant. At the meeting it was decided that the applicant would work until June 19, 2009, after which the WSIB would refer her to a Labour Market Re-entry program.

[3] The applicant re-injured herself before June 19, 2009, and as a result was again off work for, it appears, a 16-20 week period. In a letter dated November 5, 2009, the WSIB case manger responsible for the applicant's WSIB file wrote to the applicant to state that she would be writing to the applicant's employer to clarify the next steps to be taken in relation to the applicant's return to work. The letter states that if the applicant's employer was unable to provide the applicant with her pre-injury job with accommodations or an alternative within identified restrictions the case manager would

refer the applicant to a four-week job search training program. In a letter also dated November 5, 2009, the case manger wrote to the personal respondent seeking clarification as to whether the respondents could accommodate the applicant's restrictions (which were to limit lifting to 10kg, limit repetitive bending/twisting and to avoid lifting and carrying on stairs). In a letter dated November 17, 2009, the case manger wrote to the applicant to state that the she had received confirmation from the personal respondent that the respondents could not accommodate the applicant within the identified restrictions without hiring an additional person to assist her with the tasks of a barista and that there were no other positions available that would accommodate the identified restrictions.

[4] The respondents filed a Response on May 17, 2010, denying that they discriminated against the applicant. In their Response, the respondents request early dismissal of the Application on the basis that the WSIB had appropriately dealt with the substance of the Application. The applicant filed a Reply on June 20, 2010, requesting that the Tribunal dismiss the respondents' request for early dismissal on the basis that the respondents had not met their duty to accommodate the applicant.

SECTION 45.1 REQUEST TO DISMISS

[5] Section 45.1 of the *Code* provides as follows:

> 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.

[6] The Tribunal's jurisprudence has suggested that s. 45.1 should be considered in two parts: (1) whether there was another "proceeding" and (2) if so, whether it "appropriately dealt with" the substance of the application. The purpose of s. 45.1 is to avoid the duplication of proceedings and the re-litigation of issues that have been dealt with elsewhere.

[7] Was the WSIB's involvement in this matter a proceeding for the purposes of

section 45.1? The information before me is that there was a WSIB RTW specialist and a case manager involved, persons who could be described as front-line decision-makers. However, I find it is unnecessary to determine whether claim processing by front-line WSIB decision-makers constitutes a "proceeding" because I am not satisfied that the human rights substance of the Application was "appropriately" dealt with.

[8] The Tribunal's decision in *Boyce v. Toronto Community Housing Corporation*, 2010 HRTO 520 (CanLII), considers the relationship between the *Workplace Safety and Insurance Act*, *1997*, S.O. 1997, c. 16, Schedule A, as amended ("*WSIA*"), as well as WSIB practices and the *Code* in a case where the WSIB is determining whether a worker can return to work following a work-related injury. In *Boyce*, the Tribunal was specifically considering the circumstances under which a person's prior claim before the WSIB might be considered a "proceeding that appropriately deals with the substance of an application". In *Boyce* the Tribunal noted:

> Section 40 of the *WSIA* requires the workplace parties to co-operate in the ESRTW of the worker. The WSIB's "Operational Policy Manual Document No. 19-02-02" explains the goal of the ESRTW process:
>
> > The goal of the early and safe return to work (ESRTW) process is to return the worker to employment that is suitable and available, and if possible, restores the worker's earnings.
> >
> > The effectiveness of the workplace parties' ESRTW activities can be measured by the success with which the worker returns to suitable and available work with the accident employer, and the worker's earnings are restored
>
> "Suitable work" is not defined in the *WSIA* but is defined in the WSIB's "Operational Policy Manual Document No. 19-02-02":
>
> > Suitable work is work that is within the worker's functional abilities the worker has, or is able to acquire, the necessary skills to perform does not pose a health or safety risk to the worker or coworkers, and if possible, restores the worker's earnings.
>
> In many cases, accommodation of the workplace is necessary in order to make a particular job "suitable". The WSIB offers a variety of resources to facilitate accommodation of the workplace, including ergonomic assessments, functional abilities evaluations, and return to work

> mediators. See "Operational Policy Manual Document No. 19-02-05". The ESRTW process may accordingly involve accommodation of the workplace in the manner and to the extent required by the *Code*. However, this is not necessarily the case.
>
> Under the terms of the ESRTW policies, the question that the WSIB asks the employer is: "Do you have suitable work". This is different than the question under the *Code*, which is: "Can you accommodate this worker's disability, to the point of undue hardship?"
>
> To satisfy the employer's duty under the *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. The accommodation that is required may require more than simply identifying an existing job that is physically suitable for the worker.
>
> If the employer tells the WSIB that it does not have suitable work available for the worker, and in the absence of evidence that the employer cannot accommodate the worker because to do so would result in undue hardship, the employer may have breached its duty under the *Code* even if it has satisfied its duty under the ESRTW policies. This may be true even if the worker is provided with a labour market re-entry program by the WSIB: *Snow v. Honda of Canada Manufacturing*, 2007 HRTO 45 (CanLII).

[9] The issue before me in deciding whether the WSIB appropriately dealt with the substance of the Application is whether the WSIB, in its dealings with the respondents, particularly in November 2009, was determining that the respondents did not have suitable work for the applicant or that the respondents had attempted to accommodate the applicant up to the point of undue hardship and had been unable to do so.

[10] It is well-established in human rights law that the duty to accommodate under the *Code* encompasses two components: 1. procedural (that being the process whereby the accommodation was considered) and 2. substantive (the accommodation that was achieved or the reasons for lack of accommodation). See: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union,* [1999] 3 S.C.R. 3, at paras. 62-68.

[11] Based on the information provided by the parties, it appears that the WSIB did not address the accommodation issues as required by the *Code*. It appears that it may have relied on the respondents' claim that the applicant could not fully do all the tasks of the barista position and that no other position was available. There is no indication the WSIB determined whether the respondents met their obligation under the *Code* to meet both their procedural and their substantive duties to accommodate (including modified work), or considered whether the respondents' reasons for not returning the applicant to work were because of undue hardship and the underlying factors of health, safety and costs.

[12] In the circumstances, I am not satisfied that the applicant's allegations of disability discrimination have been appropriately dealt with under another proceeding. Consequently, the respondents' request for early dismissal of the Application is dismissed.

[13] Given that the Application will continue to be processed by the Tribunal the respondents are requested to indicate whether they are interested in participating in the Tribunal's mediation process.

[14] I am not seized of this matter.

Dated at Toronto, this 15th day of July, 2010.

"Signed by"

_____

Eric Whist
Vice-chair