

# Human Rights Tribunal Confirms Statutory Review Of Benefit Decision Does Not Constitute New Act Of Discrimination



In the recent decision [\*Yu v. Workplace Safety and Insurance Board\*](#), the Human Rights Tribunal of Ontario (Tribunal) provided important clarification on the distinction between continuing discriminatory acts and the ongoing effects of past discrimination. The decision offers valuable guidance for employers and administrative bodies on when subsequent reviews of past decisions can constitute fresh incidents of discrimination, particularly in the context of ongoing benefit payment and accommodation obligations.

## **Background**

The applicant, Yang Yu (Yu), was a former computer engineer from China who immigrated to Canada in 2005. After sustaining permanent injuries in a workplace accident in 2006, Yu received loss-of-earnings (LOE) benefits and participated in a Workplace Safety and Insurance Board (WSIB) labour market re-entry plan that included English as a second language (ESL) training. Following completion of a shortened ESL program and unsuccessful job placements, the WSIB deemed Yu eligible for retail sales work in 2011, resulting in reduced LOE benefits.

Since then, the WSIB had reviewed Yu's LOE entitlement four times. Each time, the WSIB upheld its earlier decision that employment in retail sales was suitable and available to Yu. However, his English proficiency had never been re-assessed and no further ESL training had been offered.

Yu filed a human rights application against the WSIB on April 3, 2020, alleging discrimination based on place of origin. Yu argued that WSIB's failure to adequately accommodate his language barrier constituted discrimination, particularly during subsequent statutory reviews of his benefits under section 44 of the *Workplace Safety and Insurance Act (WSIA)*, which states, "Every year or if a material change in circumstances occurs, the Board may review payments to a worker for loss of earnings and may confirm, vary or discontinue the payments."

Yu submitted that this discrimination occurred when the WSIB reduced the length of ESL training provided, and that it recurred each time the WSIB reviewed his LOE benefits and confirmed that employment in retail sales was "suitable and available" to him without offering additional ESL instruction. He contended that each statutory

review constituted a new incident of discrimination.

The WSIB sought dismissal of the application on multiple grounds, including timeliness. It argued that the periodic reviews of Yu's benefits were merely continuing effects of its 2011 decision rather than new incidents of discrimination.

## **Tribunal's Decision**

The Tribunal's analysis centered on the well-established principle that a "continuing contravention" under the *Human Rights Code* (Code) requires a succession or repetition of separate discriminatory acts, not merely the ongoing effects of past discrimination.

Citing related recent decisions, the Tribunal emphasized that mere confirmation of a previous position does not constitute a second discrete act of discrimination. The Tribunal determined the WSIB's 2011 decision regarding Yu's employment eligibility was the operative decision, and subsequent benefit reviews under section 44 of the *WSIA* merely confirmed payment calculations flowing from that decision. These reviews did not constitute new incidents of discrimination but rather continuing effects of the original decision.

The Tribunal found that while section 44(1) allows the WSIB to review LOE payments, it does not require or enable the WSIB to review the underlying elements of a labour market re-entry plan. Therefore, Yu's argument that each benefits review represented a new incident of discrimination failed. Moreover, since Yu filed his application in April 2020, well beyond the Code's one-year limitation period, the application contained no timely allegations that could proceed to a hearing on their merits.

The Tribunal ultimately dismissed the application against the WSIB, who was successfully represented by Hicks Morley's [Njeri Damali Sojourner-Campbell](#).

## **Key Takeaways**

This decision offers important guidance for employers and administrative bodies on the distinction between "continuing contraventions" and "continuing effects" in human rights matters.

A continuing contravention requires discrete discriminatory acts, while ongoing impacts from a past decision do not reset the limitation period. Furthermore, routine reviews or confirmations of previous decisions typically do not constitute fresh incidents of discrimination.

For assistance with accommodation matters or guidance on human rights issues, please contact [your regular Hicks Morley lawyer](#).

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

Author: [Njeri Damali Sojourner-Campbell](#)

Hicks Morley