

## **Statement of Claim does not confirm *bona fide* intention**

The applicant was advised by WSIB in November 2018 that she did not qualify for the loss of earnings benefit (“LOE”) because she did not miss work. It was alleged that the applicant sought legal advice with respect to AB and tort in August 2019, with a Statement of Claim filed in September 2020 against the Town of Milton for improper lighting and signage.

An application with the Tribunal was filed in November 2020. It was not until January 2022 that WSIB was informed as to the applicant’s intention to pursue a claim under tort. Allstate took the position that these actions and timelines serve as evidence that the applicant commenced the tort action solely for the purposes of claiming AB.

The Tribunal noted that Allstate had advised the applicant in January 2019 that in order to elect AB she would need to pursue a tort action, however the Statement of Claim was not issued until September 2020.

Further, the applicant did not provide any evidence “of her mindset at the time of the re-election such that I could determine if the applicant’s decision to sue in tort was a choice made in good faith.”

In addition, she had informed WSIB of her intention to appeal their denial for a fourth time, even after filing the Statement of Claim and Tribunal application. This raised the question as to why there was continued appeal of the WSIB decision, were the true intention to pursue an action under tort. This “gives the impression that the applicant was forum shopping.”

The Tribunal further questioned why WSIB was not made aware of the stated intention to pursue a tort claim earlier, with no explanation having been offered as to why it took until January 2022.

The applicant also failed to provide any evidence with respect to the viability and likelihood of success of her tort action. Counsel pointed out the “statement of defense from the Town of Milton which shows that the applicant failed to provide the Town with proper notice of her claim within 10 days after the occurrence of the alleged injury”. This would potentially “impact her claim as she did not comply with the timeline.”

To that end, the Tribunal found that “filing a statement of claim does not overcome the applicant’s burden to prove on a balance of probabilities that she did not re-elect to sue in tort primarily for the purpose of claiming benefits under the *Schedule*.” Concluding, “On the whole, I am not convinced that there was a bona fide intent to commence a tort action and conclude that the insured person did so for the sole purpose of claiming accident benefits.”

FIND THE FULL DECISION AT:

<https://www.canlii.org/en/on/onlat/doc/2023/2023canlii15054/2023canlii15054.html?resultIndex=1>