

# **SPECIAL DIET PROGRAM DISCRIMINATORY: HUMAN RIGHTS TRIBUNAL**

On Wednesday, February 17, the Human Rights Tribunal of Ontario released its long-awaited decision in the lead Special Diet Allowance complaint cases.

In a 61-page decision, Interim Tribunal Chair David Wright found that the Ontario government's Special Diet Allowance Program discriminated against the lead complainants on the basis of disability and ordered retroactive and future Special Diet Allowance benefits for them.

The Tribunal did not agree to order the Ministry to redesign the program, as the complainants had asked. However, it did establish a set of clear guidelines that will apply to determining the outcome of the remaining 170+ adjourned cases and noted that there is nothing to stop other claimants from coming forward to make the complaints if the government does not act to make necessary improvements.

The Tribunal found that the three lead complainants were entitled to a higher special diet allowance amount than the schedule currently provides for hypertension, hypercholesterolemia and obesity. The Tribunal also found that hypoproteinemia (low blood protein) is a condition that should also be entitled to an allowance under the program.

The Ministry of Community and Social Services was ordered to provide retroactive and increased ongoing allowances for the three lead complainants within 90 days and to extend the same benefits to all eligible OW and ODSP recipients with hyperproteinemia, hypertension, hypercholesterolemia and extreme obesity within three months.

Some of the other key findings in the decision include:

- Where an individual has a disability or disabilities as defined in the Ontario Human Rights Code, resulting in dietary needs within the purpose of the Special Diet Allowance Program but which are not a specific, diagnosed medical condition, failure to provide a Special Diet Allowance is discriminatory.
- To make a successful claim that the failure to fund his or her special diet is discriminatory, a claimant must show that there is general recognition in the Ontario medical community that modifications to a regular, healthy diet should be made to treat the disability or disabilities. It is not sufficient to show that a medical professional recommends a specific diet for him or her.
- The purpose of the Special Diet Allowance Program is to fund additional costs of food; it is not a violation of the Code that the program does not cover the costs of supplements or food preparation.
- There is discrimination when those with different disabilities have significantly different proportions of the additional expenses of their special diet funded. The government is, however, entitled to significant deference in the costing process. Only where costs are significantly disproportionate, using equivalent methodology, will the amount of funding lead to a finding of discrimination.
- Section 14 of the Ontario Human Rights Code, which provides for a defence based on "special programs", does not change the analysis under s. 1 of the Code in these circumstances.
- No damages were awarded for injury to dignity, feelings and self-respect.
- Policy decisions about how to ensure the Special Diet Allowance scheme is made consistent with the Code are for the government to determine; the Tribunal makes no orders about general changes to the Special Diet regime.

As requested by the parties, the Tribunal's decision sets a date (April 13th) for a case management conference to discuss how the remaining 170+ complaints will be handled. People with complaints at the Human Rights Tribunal that were adjourned while awaiting this decision have been given four months to provide the Tribunal and other parties with an outline of how their complaint falls within the guidelines in the decision. To help with that process, page 60 of the decision lists four questions for complainants to answer.

ISAC will be continuing to assist clinics who are representing clients with Special Diet complaints and appeals.

**Shirley Pulkkinen**