## Case In Point

# WSIA "Employment Function" Mental Stress Exclusion Considered by Appellate Court

**Date:** May 29, 2019

In *Ontario Public Service Employees Union v. The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services)*, the Divisional Court recently overturned a 2017 Grievance Settlement Board (GSB) decision that found the grievor's right to a workplace free of harassment had been violated but that it had no jurisdiction to award damages to a worker for an injury (stress) that would be covered by the *Workplace Safety and Insurance Act, 1997* (WSIA).

The issue before the Court was whether the GSB's application of the "employment function" exclusion in mental stress claims under the WSIA was reasonable.

**The GSB Decision**

In the GSB decision under review, Arbitrator Carrier considered an allegation that the grievor was assaulted and racially slurred by a co-worker at a work-related function off-site. The Arbitrator did not focus on the incident itself, but rather the timeliness and adequacy of the employer's response to the incident and any resulting damages (para 24).

Arbitrator Carrier stated:

[39] The Grievor here, WA, did not suffer from a traumatic event at work. Rather, the remedy claimed by the union here flows from the employer's "decisions or actions related to the worker's employment…". In this case, it was the employer's inaction and delay in responding to the Grievor's plight such that he was obliged to work and continue to work in what for him was a poisoned work environment.

He concluded that the employer had failed "in its obligation to ensure a safe work environment for the Grievor and contributed through its inaction to the perpetuation of that poisoned atmosphere" (para 56).

The Arbitrator then referred to an earlier GSB decision which considered, among other things, a claim for reimbursement and/or damages in respect of mental distress arising in the course of employment and found that it "had no jurisdiction to provide a financial remedy in the circumstances before [it]. Rather, the "medical condition" of the Grievor was such as to be properly considered an insured condition/injury pursuant to the Workers Safety and Insurance Act of Ontario (WSI Act)" (at para 33).

He followed the reasoning in the earlier decision and stated the GSB had no jurisdiction to provide financial relief for the grievor's stress as the proper venue for dealing with this issue was the Workplace Safety and Insurance Board (WSIB).

**Judicial Review Decision**

In a brief oral endorsement, the Court referred to paragraph 39 of the GSB decision and the finding that the remedy claimed by the union flowed from the employer's "decisions or actions related to the worker's employment." It agreed with the following argument of the applicant union:

[6] … [t]he GSB's decision is clearly unreasonable in that it first found that the remedy claimed by the Applicant flowed from conduct that fell within the employment function mental stress exclusion and then found that the WSI ACT was the

appropriate forum for the Grievor's claims for damages.

The Court allowed the application for judicial review and remitted the matter back to Arbitrator Carrier for a "re-determination on the issue of whether the employment function mental stress exclusion applies" (at para 12).

We will continue to monitor this case, which will provide helpful guidance regarding the scope of the employment function mental stress exclusion under the WSIA.