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Action for Constructive Dismissal as a Result of Workplace Harassment Statute-Barred by WSIA

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The Workplace Safety and Insurance Appeals Tribunal (WSIAT) has held that a civil action for constructive dismissal based on alleged workplace harassment and bullying was statute-barred under the *Workplace Safety and Insurance Act, 1997* (WSIA) and could not proceed.

The WSIAT found that the claim was effectively one for a chronic mental stress injury arising out of employment, which is now an injury compensable under the WSIA. The Human Rights Tribunal of Ontario (HRTO) also dismissed an application brought by the same complainant, on jurisdictional grounds.

Background

[As we previously reported](#), amendments to the WSIA which came into force on January 1, 2018 introduced entitlement for work-related chronic mental stress injuries. The [Chronic Mental Stress Operational Policy](#) (Document No. 15-03-14) of the Workplace Safety and Insurance Board (WSIB) came into effect on the same date. It states that workplace bullying and harassment are examples of substantial work-related stressors that can give rise to a compensable chronic mental stress injury.

These changes have significant implications for employers, including with respect to the “historic trade-off” under the WSIA regime which removes the right of employees to sue their employers (and specified others) in exchange for the ability to claim benefits under the WSIA (section 31).

The Claims Asserted by the Employee

Both the WSIAT and HRTO decisions arise from the same set of allegations. An employee alleged that she experienced ongoing workplace harassment and bullying related to a medical condition she experienced. She further asserted that the employer’s internal investigation, the recommendations which resulted and the continued harassment and bullying by co-workers and management resulted in her suffering from mental stress that rendered her incapable of returning to work.

While still at work, the employee had filed a human rights application at the HRTO alleging

discrimination on the basis of sex and disability, as well as bullying and harassment. She claimed that “the employer discriminated against her in respect of harassing behaviour by her coworkers and her supervisor.”

After she filed the HRTO Application, the employee asserted she was forced to resign. She then filed a Statement of Claim with the Ontario Superior Court (ONSC) outlining substantially the same allegations as those in the HRTO Application and sought damages for constructive dismissal, bullying, harassment and/or a poisoned work environment pursuant to the *Occupational Health and Safety Act*, the tort of harassment, and punitive, aggravated, and/or moral damages. While the Statement of Claim did not explicitly seek a remedy pursuant to the *Human Rights Code* (Code), the damages sought were very similar to the Code-based remedies.

The HRTO Decision

In [*Morningstar v. Hospitality Fallsview Holding Inc.*](#), the employer requested that the HRTO dismiss the Application pursuant to section 34(11) of the Code. That section essentially precludes the HRTO from assuming jurisdiction over an application where the applicant has commenced a civil proceeding with respect to the same alleged infringement of the Code.

The employer argued that the Application and Statement of Claim were nearly identical and arose out of the same facts, involved the same parties, alleged identical Code violations and sought identical Code-based remedies.

The HRTO made the following findings:

- the facts and issues alleged in the employee’s Statement of Claim were the same as those raised in the Application
- the employee’s alleged Code infringements were not separate or distinct from her constructive dismissal claim, and
- although the employee did not explicitly seek a remedy under section 46.1 of the Code, the Application and the civil claim raised substantially the same allegations of harassment and a poisoned work environment, and the damages sought were similar to those available under section 46.1 of the Code for injury to dignity, feelings and self-respect.

Significantly, the employee argued that her Application should not be dismissed because the employer was also challenging her right to sue under to section 31 of the WSIA. If that challenge was successful, she would be “deprived of the ability to pursue her rights at both the HRTO and the ONSC.” The HRTO rejected this argument, stating that whether an applicant is barred from commencing a civil action pursuant to a different statutory scheme was irrelevant to the determination of whether section 34(11) of the Code applied.

The HRTO dismissed the Application.

The WSIAT Decision

Following the filing of the Statement of Claim, the employer brought a “right to sue” application under section 31 of the WSIA, seeking an order that the employee’s civil suit be declared statute-barred as it was effectively a claim for a chronic mental stress injury arising out of her employment, which is now compensable under the WSIA.

In [Decision No. 1227/19, 2019 ONWSIAT 2324 \(CanLII\)](#), the WSIAT agreed with the employer’s position and concluded that the civil action was in essence a workplace chronic mental stress claim. The Panel noted that the right to bring an action for wrongful dismissal was generally not removed by operation of the WSIA. However, the exception to this rule applied in the present case given that the “circumstances of the wrongful dismissal claim are inextricably linked to the work injury:”

The Respondent’s action against the Applicant is not for wrongful dismissal in the usual sense, but rather is for constructive dismissal, meaning her employment was effectively terminated by the harassing and bullying conduct of co-workers and management which caused her mental distress to such a degree that she was forced to take sick leave and ultimately to resign.

The WSIAT further held that the manner in which an action is framed is “not determinative,” and the analysis is centered on the “fundamental nature of the action.” Here, even though the civil action was framed as a constructive dismissal claim and some of the remedies were different than those provided by the WSIA, the fundamental nature of the action was nevertheless a claim for workplace harassment and bullying. The damages sought flowed from the associated mental stress injury the employee claimed she sustained as a result.

The employee argued, in the alternative, that even if some portions of her Statement of Claim were statute-barred, her claim for punitive damages should proceed since the WSIAT does not have the authority to award such damages. This argument was also rejected by the WSIAT. It held that an action for damages is still statute-barred “even when the remedies sought are different from those compensated in the WSIA, when those damages flow from a work injury falling within the scope of the WSIA.”

The WSIAT ultimately allowed the employer’s application and held that the employee’s claim fell within the jurisdiction of the WSIA. Her right of action against the employer was therefore statute-barred. The employee was provided with a six-month deadline to file a claim for benefits pursuant to section 31(4) of the WSIA.

Takeaways

Entitlement for workplace chronic mental stress under the WSIA is a significant development that employers should continue to factor into their litigation strategy.

The two decisions reviewed above suggest that employers should carefully consider whether workplace harassment and bullying civil claims and/or human rights applications more appropriately belong under the WSIA regime.

For more information on these decisions, please contact [Hossein Moghtaderi](#) at 416.864.7502, [Lauri Reesor](#) at 416.864.7288, [Jodi Gallagher Healy](#) at 519.931.5605, or your [regular Hicks Morley lawyer](#).

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