



What's New in HR Law

Duplicative and Statute-Barred Proceedings: The Divisional Court Clarifies Dueling WSIAT Decisions

August 31, 2021

Bottom Line

Employers can find themselves defending claims from the same aggrieved worker in multiple legal proceedings as a result of a new Divisional Court decision. In a [previous insight](#), we shared a Workplace Safety and Insurance Appeals Tribunal (WSIAT) decision that barred an employee from bringing a civil claim against her employer for lost wages, harassment, breach of the *Occupational Health and Safety Act*, and constructive dismissal on the basis that the issues were inextricably linked to a workplace claim for mental stress. That decision and its reconsideration have now been reviewed by the Divisional Court, which permitted the employee to sue her employer for constructive dismissal. In doing so, the Court endorsed a more recent WSIAT decision which we will discuss below.

The key takeaway from these recent case law developments is that a workplace accident can form the basis for benefits under the *Workplace Safety and Insurance Act, 1997 (WSIA)*, as well as a parallel civil action for constructive dismissal and other damages, so long as the action is not a claim for the personal injury in disguise. This decision complicates the efforts of employers to avoid facing a multiplicity of proceedings.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

Factual Background

In September 2017, Ms. Morningstar filed an application with the Human Rights Tribunal of Ontario alleging discrimination, bullying, and harassment. In February 2018, she resigned and sued her former employer for harassment, constructive dismissal based on the harassment, lost wages during a medical leave taken due to the harassment, and breach of the *Occupational Health and Safety Act*, as well as moral, aggravated, and punitive damages.

Although Ms. Morningstar did not file a claim for WSIB benefits, her employer applied to the WSIAT for a ruling that she was statute-barred from pursuing the civil action on the basis that her claim fell within the exclusive jurisdiction of the *WSIA* (a “right to sue application”).

The WSIAT’s Decisions (Decision No. 1227/19 and Decision No. 1227/19R)

The WSIAT found in favour of the employer and allowed the right to sue application. The Vice-Chair ruled that all the claims in the civil suit were “inextricably linked” to the alleged workplace harassment, and could form the basis for a claim of workplace mental stress injury under the *WSIA*. The Vice-Chair found that this linkage barred Ms. Morningstar’s civil claim in its entirety. Ms. Morningstar sought reconsideration of the first decision, but was unsuccessful.

Vice-Chair Dee Disagrees (Decision No. 616/21)

Prior to the Divisional Court’s ruling, WSIAT Vice-Chair Gart Dee considered the right to sue provisions of the *WSIA* and disagreed with the reasoning in the Morningstar decisions. Similar to the Morningstar decisions, Vice-Chair Dee’s decision involved a compensable mental injury and a civil claim for constructive dismissal. However, unlike the Morningstar decisions, Vice-Chair Dee declined to apply the “inextricable link” test, stating that it could not be sourced to the *WSIA*, and was inconsistently applied by other WSIAT decisions. Vice-Chair Dee criticized the Morningstar decisions for inconsistently describing the test paragraph-to-paragraph.

Instead, Vice-Chair Dee fell back to the words of the *WSIA* and its animating policy considerations to conclude that when the *WSIA* barred separate actions for workplace accidents, it was actually barring separate actions for workplace injuries. Vice-Chair Dee drew a distinction between actions based on injury (which would be barred by the *WSIA*) and actions not based on injury, but nevertheless based on the same circumstances that led to the injury (not barred by the *WSIA*). He observed that constructive dismissal did not require proof of any injury, and allowed the constructive dismissal claim to proceed.

Vice-Chair Dee ultimately barred the portion of the civil claim that sought damages for a workplace injury but did not bar a claim for constructive dismissal or the claim for punitive damages.

The Divisional Court’s Decision (*Morningstar v WSIAT*, 2021 ONSC 5576)

Ms. Morningstar applied for judicial review of Decision No. 1227/19 and its reconsideration, arguing that the WSIAT incorrectly barred the claim for constructive dismissal. The Divisional

Court found that the WSIAT unreasonably barred the constructive dismissal action, endorsing Vice-Chair Dee's approach as having properly distinguished between actions for personal injury and actions caused by facts that would incidentally support an action for personal injury.

The Court recognized the historical "trade-off" that forms the basis of the statutory bar in the *WSIA*, but took issue with the WSIAT's focus on the linkage of the facts to the incident in question, to the exclusion of the policy reasons in the cases at hand. The Court held, at para 94:

"An action for personal injury can properly be barred by the Act, but it would appear to be unreasonable to bar an action for constructive dismissal simply because the same facts that relate to that action also incidentally support an action for personal injury. Such a test ignores Canadian law permitting different causes of action to be advanced based on the same facts. To focus on the facts as linked to the workplace accident, but to disregard both the claim for constructive dismissal in its own right and the nature of the benefits sought in the action, arrogates to the WSIAT more authority than was ever intended to be granted to it."

Further, the Court held that while the restriction is broadly worded in order to capture actions for the personal injury that are merely disguised as some other action, it was not intended to bar any and all claims for non-personal-injury damages that happen to be caused by the same facts. The focus is thus not on the facts, but on the nature of the damages and the remedy sought; if the damages are not for a personal injury and the remedy could not be awarded under the *WSIA*, the claim cannot be statute barred.

It is worth noting that, though the Dee decision found that aggravated damages were statute-barred, as they were based on the mental injury itself, the Divisional Court allowed Ms. Morningstar's claim for aggravated damages to proceed, holding that those aggravated damages were linked not to the personal injury but to the employer's alleged disregard for the terms of employment. These decisions indicate that damages and remedies must be carefully analyzed on a case-by-case basis to determine whether they stem from a compensable injury and would be statute-barred as a result.

Check the Box

This decision clarifies an important jurisdictional dispute, at least for now. Claims, damages, and remedies may emerge from the same circumstances, but if they are not based on the injury itself, they may proceed despite the statutory bar contained in the *WSIA*. Employers should, in consultation with counsel, be diligent in identifying when they can challenge duplicative statute-barred claims and, depending on the particular facts and circumstances, how such challenges can most effectively be raised.

Need more information?

For additional information or strategic advice on litigation involving workers compensation issues, please contact [Hossein Moghtaderi](#) at 416-408-5564 or your regular lawyer at the firm.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

The author gratefully acknowledges the support and assistance of Micah Fysh, student-at-law, in the preparation of this update.



Toronto

Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filiation.on.ca

London

620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filiation.on.ca

Hamilton

1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filiation.on.ca

This update is for general discussion purposes and does not constitute legal advice or an opinion.