

WSIAT Takes Away an Employee's Right to Sue her Employer for Chronic Mental Stress in a case of Constructive Dismissal

In a decision issued October 17, 2019, *Morningstar v. Hospitality Fallsview Holdings Inc.* the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") found that a worker's right to file a civil action for constructive dismissal was statute-barred.

In May 2015, Ms. Morningstar started working for her employer in its housekeeping department. The following year, she was promoted to supervisor. In February 2018, she resigned from her position claiming constructive dismissal as a result of bullying and harassment in the workplace. Before resigning, Ms. Morningstar filed a harassment complaint with her employer and an internal investigation was undertaken. Among other things, she alleged that her co-workers placed towels or bathmats on her chair every day, spread rumours that she had an odour and spread false and embarrassing rumours about her work performance. She also claimed that her co-workers hid her clipboard, laughed about her in her presence, and posted a wrong work schedule on the scheduling board so that she would record the wrong dates. In addition to the internal investigation, the Ministry of Labour ordered an independent investigation regarding these allegations. Following the investigations, Ms. Morningstar went on medical leave due to stress. She claimed that she could not return to work as she did not want to continue to be subjected to ongoing harassment and bullying in her workplace.

Shortly after resigning, in April 2018, Ms. Morningstar initiated a civil action against her former employer claiming constructive dismissal and seeking punitive, aggravated and/or moral damages. Ms. Morningstar alleged that she was forced to resign due to the harassment, bullying and abuse she endured during her employment. She further alleged that she was subjected to a toxic work environment which caused her to experience mental distress.

After being named as a defendant in the civil action, the employer brought an application to WSIAT under section 31 of the *Workplace Safety and Insurance Act, 1997* ("WSIA") seeking a declaration that Ms. Morningstar's right to commence a civil action against the employer was taken away in light of WSIA. Counsel for the employer argued that the relief sought in the civil action was effectively a claim for chronic mental stress under

WSIA and as such, her right of action should be barred. Counsel for Ms. Morningstar disagreed. He submitted that the civil action should stand.

WSIA provides entitlement to chronic and traumatic mental stress resulting from workplace injuries. Section 13(4) of WSIA states:

13(4) Subject to subsection (5), a worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker's employment.

13(4.1) The worker is entitled to benefits under the insurance plan as if the mental stress were a personal injury by accident.

Vice-Chair's Ruling

The presiding Vice-Chair, J.E. Smith, ultimately ruled in favour of the employer and found that the claim raised in the civil action fell within WSIA's jurisdiction and, as a result, Ms. Morningstar's right to commence the civil action was statute-barred. In the past, the tribunal generally found that an employee's right to bring a civil action for wrongful dismissal was not barred by the WSIA. However, it could be barred in rare and exceptional cases where the circumstances of the wrongful dismissal claim were "inextricably linked to the work injury". The Vice-Chair found that exception to apply in this case, holding that the Statement of Claim described an injury resulting from workplace harassment and bullying which fell within the scope of s.13(4) of WSIA and the entitlement for chronic mental stress.

The Vice-Chair found that the civil action was not a typical wrongful dismissal case. Instead, it was a claim for constructive dismissal where Ms. Morningstar alleged mental distress resulting from being bullied and harassed by her co-workers to the point where she had to take sick leave and resign. The Vice-Chair found that the foundational facts for the civil action were

inextricably linked to workplace harassment, and the personal injury for which Ms. Morningstar was seeking damages stemmed from workplace harassment and bullying. Chronic or traumatic mental stress is already compensated under WSIA. Although the remedies sought in the civil action were different from those contemplated in WSIA, the damages still flowed directly from the harassment and bullying which caused the work injury. After reviewing the facts of the case, the Vice-Chair held that Ms. Morningstar's claim fell within WSIA's jurisdiction. As such, Ms. Morningstar's right to bring a civil action against her employer was barred. It will be interesting to monitor whether Ms. Morningstar seeks judicial review of this decision.

WSIB Chronic Mental Stress Policy

On January 2, 2018, the Workplace Safety Insurance Board ("WSIB") published Policy No. 15-03-14 which provides entitlement guidelines for claims dealing with chronic mental stress. Policy 15-03-14 states that a worker will generally be entitled to benefits for **chronic mental stress** if an appropriately diagnosed mental stress injury is caused by a substantial work-related stressor arising out of and in the course of the worker's employment. It goes on to state that **workplace harassment** will generally be considered a substantial work-related stressor.

Results of WSIB Audit

Notwithstanding the above policy, a recent WSIB audit found that the WSIB denied approximately 94% of work-related chronic mental stress cases. Between January and May of 2018, only 10 out of the 159 claims filed for chronic mental stress were in fact approved by the WSIB.

So where does this leave employees who wish to seek compensation for chronic mental stress resulting from workplace harassment? In *Morningstar*, the WSIAT Vice-Chair found that Ms. Morningstar's right to file a civil action was barred since compensation "could be" provided under WSIA. However, the above statistics tend to show that most claims for chronic mental stress are denied. Moreover, damages awarded by the WSIB are likely to be substantially less than damage awards issued by the courts. While the finding in *Morningstar* will be welcomed by employers, it may leave very little redress for employees suffering from chronic mental stress.



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