WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 616/21

BEFORE: G. Dee: Vice-Chair

HEARING: April 20, 2021 at Toronto
Oral by Videoconference
Post-hearing activity completed on May 5, 2021

DATE OF DECISION: May 27, 2021

NEUTRAL CITATION: 2021 ONWSIAT 848

APPLICATION FOR ORDER UNDER SECTION 31 OF THE *WORKPLACE SAFETY AND INSURANCE ACT, 1997*

APPEARANCES:

For the applicant: A. Tarasuk and K. Stone, Lawyers

For the respondent: Not participating

Interpreter: N/A

REASONS

(i) Introduction

[1] The defendant in Court File No. CV-18-58998 has applied under section 31 of the *Workplace Safety and Insurance Act, 1997* (the WSIA or the Act) for a determination that the plaintiff's right to bring the civil action is taken away by the Act.

(ii) Background

[2] The defendant owns and operates a retail store and car repair business. The defendant is a Schedule 1 employer under the WSIA. The plaintiff was a department manager for the defendant. She was a worker of the employer in the course of her employment at all times relevant to the present application.

[3] On March 6, 2017 the owner of the defendant was at the store. He became aware that a store manager was needed to assist a customer but none of the managers on duty were responding to pages asking them to assist. The owner looked after the customer by himself and then he sought out the plaintiff. When the owner found the plaintiff he expressed his displeasure at the lack of a response to the pages.

[4] What happened during that exchange is disputed. The plaintiff claims that she was yelled at in front of customers. The defendant denies that claim.

[5] The true nature of the exchange that took place and what happened subsequent to that exchange is not necessary for me to decide in this application. I will therefore avoid commenting on or making findings about precisely what happened during the exchange and subsequent to it as it may be necessary for those facts to be determined in future legal proceedings. I will instead attempt to provide an overview of some of the contested and uncontested facts surrounding these events.

[6] The store is a franchise store. Following the March 6th incident someone called the head office of the franchisor and complained about the conduct of the store owner "yelling at the top of his lungs" at a staff member.

[7] The owner believed that the call was likely made by the plaintiff or someone associated with the plaintiff. This has been denied by the plaintiff. The owner ordered an investigation of the call by senior staff members in order to find out who made it. The call has been characterized as slanderous by the owner and senior staff members of the employer.

[8] During the course of its investigations the employer's committee interviewed the plaintiff on March 10, 2017. The plaintiff was questioned about:

- her version of the March 6, 2017 event;
- whether she called head office to complain about the store owner or knew of who did; and
- whether she had discussed her interaction with the owner on March 6, 2017 with others.

[9] The defendant applicant's own materials in this application indicate that the committee advised the plaintiff during this meeting that the spreading of false allegations about the owner's reputation and credibility was harmful to the president's interests. The plaintiff was asked to provide a letter of retraction about her version of the events of March 6, 2017. The plaintiff did not agree to provide a letter of retraction.

[10] It is clear that the owner of the defendant was displeased with the plaintiff and with the fact that a complaint had been made to head office that he believed the plaintiff was responsible for and also that the plaintiff was the subject of investigations by the defendant. Those investigations included the meeting of March 10, 2017 described above. Senior store staff also asked questions of the plaintiff's daughter and a friend of her daughter who also worked at the store. The plaintiff has made statements indicating her belief that she was threatened by managers of the defendant with very substantial financial repercussions for her comments about the owner's alleged actions. The defendant denies that such threats were made.

[11] The plaintiff saw her family doctor on March 13, 2017. She obtained a note stating that she would not be working for medical reasons. The doctor also completed a Health Professional's report on a Workplace Safety and Insurance Board (WSIB) Form 8. A claim for mental stress was established with the WSIB. The plaintiff and defendant subsequently filed their own accident reports with the WSIB as well.

[12] The plaintiff has never returned to work for the defendant.

[13] The plaintiff's claim for a mental stress injury was initially denied by the WSIB.

[14] In January 2018 the plaintiff issued a statement of claim against the defendant. Damages were sought for psychological injuries that were alleged to have been the result of the employer's actions. Damages were also sought as a result of claimed constructive wrongful dismissal as well as for punitive and aggravated damages.

[15] The WSIB reversed its entitlement decision and in December 2019 it allowed the plaintiff's claim for mental stress as a result of her workplace exposures. The defendant has objected to that decision but has not yet proceeded with its appeal at the WSIB.

[16] The defendant has also initiated this right-to-sue application under section 31 of the WSIA to the Appeals Tribunal and is seeking a determination that the plaintiff's ability to bring the action is taken away by the WSIA.

[17] The defendant's argument, greatly simplified, is that the circumstances giving rise to the plaintiff's workers' compensation claim for a chronic mental stress injury are inextricably linked to the circumstances giving rise to her civil action. It is therefore submitted that the plaintiff is restricted by the WSIA to only those rights available to her under the WSIA. The Defendant relies in particular on prior Tribunal *Decision No. 1227/19* that has interpreted the Act's provisions regarding restrictions on civil actions in the context of a claimed psychological injury and a civil action for constructive wrongful dismissal.

[18] The plaintiff has not filed responding materials. A hearing by video and telephone conference call was scheduled for April 20, 2021. Neither the plaintiff nor her representative appeared at the hearing. For the reasons provided below I determined that the plaintiff had been served with notice of hearing and was aware of the opportunity to be heard in this matter. The hearing therefore proceeded. Oral submissions were received from the defendant's representatives to supplement the written materials that have been filed. There was no witness

testimony. A subsequent post-hearing submission from the applicant about a legal issue I raised during the hearing (but which in the end has not required resolution) has been received and considered.

(iii) Notice of hearing has been provided to the plaintiff

[19] The plaintiff's lawyer in her civil action was provided with notice of hearing of this section 31 application. However, on April 20, 2021 neither the plaintiff nor her lawyer attended the scheduled hearing. A half hour adjournment was called as is required by Tribunal Practice Direction. During that brief adjournment a Tribunal staff member contacted the lawyer's office and was informed that the lawyer had not been retained for this proceeding and would not be appearing.

[20] When the hearing resumed lawyers for the defendant participating in the hearing confirmed to me that the Statement of Claim had not been withdrawn and that the lawyer, Patrick James, was still counsel of record in the civil action.

[21] This application is similar to that of a motion in respect of the civil proceeding. The application can be brought by the applicant because it is a party to the civil proceeding. The determinations resulting from the application may have a direct impact on the ability of the civil action to proceed in whole or in part.

[22] The lawyers for the defendant also informed me that they had served documents in this proceeding on Mr. James (this is confirmed in the application record) and in at least one instance Mr. James had responded to an e-mail sent to him by the defendant's lawyers. The defendant's lawyers also informed me that they had been dealing with Mr. James within the last week prior to the hearing concerning other proceedings involving the plaintiff and the defendant.

[23] I am satisfied that Mr. James is the representative of the plaintiff in this matter. He has received correspondence from the Tribunal and from the defendant's lawyers in this matter and has responded to Tribunal requests in relation to this matter. He is named counsel of record in the court action associated with this proceeding and has an ongoing professional relationship with the plaintiff as her lawyer. He has never refused service of documents in relation to this matter from the plaintiff or from the Tribunal nor is there any documentation indicating Mr. James requested that he be removed from the record.

[24] I am also satisfied that notice of hearing was provided regarding this proceeding and a full opportunity to participate in this proceeding was made available to the plaintiff. Proof of service is available in the record and the result of the phone call made to Mr. James' office on the date of hearing did not result in the receipt of any information indicating that either Mr. James or the plaintiff was not aware of this proceeding. The only information received was that they would not be participating in the proceeding.

[25] I therefore determined that the matter was to proceed as scheduled.

(iv) Analysis

(a) Decision overview

[26] The defendant's application is allowed in part.

[27] The plaintiff is prohibited from pursuing a claim for damages in respect of her claimed workplace injury including a mental stress condition. The circumstances claimed to have caused that condition are all circumstances the plaintiff was exposed to in the course of her employment for a Schedule 1 employer under the WSIA. Her remedy for that claimed injury is restricted to her potential entitlement to worker's compensation benefits under the WSIA.

[28] The plaintiff is not prohibited from pursuing a claim for constructive wrongful dismissal. That claim does not require proof of an injury to establish and is therefore not barred by the WSIA.

[29] It will be up to the Court to determine to what extent the plaintiff's damages, if any, flow from a lack of notice of her dismissal as opposed to flowing from her claimed workplace injury.

[30] In arriving at this decision I have considered the legal analysis contained in *Decision No. 1227/19* that is being relied upon by the applicants. The circumstances under consideration in that application are similar in a number of respects to this application. The decision contains a number of statements of the legal test that is to be applied when determining whether an action brought as a claim for wrongful dismissal will or will not be barred by the WSIA in the context of a claim for psychological injury. Those statements of the legal test to be applied are not all identical but the focus of the statements is on whether there is an "inextricable link" between the circumstances of the civil action and the circumstances that may give rise to a worker's compensation claim. The inextricable link test has its origins in some earlier Tribunal decisions that have also determined whether or not actions for wrongful dismissal are or are not barred by the WSIA.

[31] I have decided, however, not to apply an "inextricable link" test in deciding this case. The phrase inextricable link is not found in the WSIA and the use of the phrase in prior Tribunal decisions has not been entirely consistent. Depending on how the inextricable link test is applied the test may result in the removal of rights to bring civil actions beyond that contemplated by the WSIA.

[32] Under the WSIA and in particular under sections 26(2) and 28 of the WSIA the actions that are barred are those that are brought in respect of personal injuries that may be covered by the WSIA. I prefer the line of Tribunal cases that focuses on whether a civil action is in respect of damages due to an injury to those that have focused on the existence of an inextricable link.

[33] Actions for aggravated damages and for punitive damages are based upon different principles.

[34] In the wrongful dismissal context aggravated damages are awarded in the appropriate circumstances for psychological distress or harm caused by the defendant's conduct that resulted in the dismissal. In the circumstances of this application where aggravated damages are only claimed based upon the existence of the plaintiff receiving an injury, the claim for aggravated damages must be considered a claim in respect of an injury and the plaintiff is prohibited from pursuing a claim for aggravated damages in her civil action.

[35] Punitive damages, on the other hand, are non-compensatory and intended to punish the conduct of a defendant. As a claim for punitive damages is not a claim in respect of an injury, the plaintiff is not prohibited from pursuing a claim for punitive damages in her civil action.

(b) The historic trade-off

[36] The need to determine when workers may bring civil actions against their employers in circumstances where work-related chronic mental stress may exist is not completely new.

[37] The rules concerning the provision of workers' compensation benefits for chronic mental stress have, however, evolved over the last number of years. This application involves the determination of the worker's right to sue under the laws regarding compensation for chronic mental stress as they have evolved fairly recently.

[38] It is useful in these circumstances to be mindful of the first principles that the Ontario workers' compensation system is based upon.

[39] It is often noted that the existence of workers' compensation benefits in Canada is the result of a historic trade-off whereby workers gave up the right to sue employers in return for the promise of no-fault benefits in case of work-related injury.

[40] The Supreme Court of Canada has discussed this historic trade-off. It has noted that the barring of civil actions for injuries is not ancillary to the workers' compensation scheme but is instead central to it. The Court stated as follows in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, 1997 CanLII 316 (SCC), [1997] 2 SCR 890:

> History and Purpose of Workers' Compensation
>
> 23 The history and purpose of workers' compensation supports the proposition that the Board in this case had exclusive jurisdiction to decide the question of whether the statutory bar applies, because this question is intimately related to one side of the historic trade-off embodied in the system.
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> 24 Workers' compensation is a system of compulsory no-fault mutual insurance administered by the state. Its origins go back to 19th century Germany, whence it spread to many other countries, including the United Kingdom and the United States. In Canada, the history of workers' compensation begins with the report of the Honourable Sir William Ralph Meredith, one-time Chief Justice of Ontario, who in 1910 was appointed to study systems of workers' compensation around the world and recommend a scheme for Ontario. He proposed compensating injured workers through an accident fund collected from industry and under the management of the state. His proposal was adopted by Ontario in 1914. The other provinces soon followed suit. Saskatchewan enacted *The Workmen's Compensation Act, 1929*, S.S. 1928-29, c. 73, in 1929.
>
> 25 Sir William Meredith also proposed what has since become known as the "historic trade-off" by which workers lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay. Similarly, employers were forced to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability. Initially in Ontario, only the employer of the worker who was injured was granted immunity from suit. The Act was amended one year after its passage to provide that injured Schedule 1 workers could not sue <u>any</u> Schedule 1 employer. This amendment was likely designed to account for the multi-employer workplace, where employees of several employers work together.
>
> 26 The importance of the historic trade-off has been recognized by the courts. In *Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* (1987), 1987 CanLII 118 (NL CA), 44 D.L.R. (4th) 501 (Nfld. C.A.), Goodridge C.J. compared the advantages of workers' compensation against its principal disadvantage: benefits that are paid immediately, whether or not the employer is solvent, and without the costs and uncertainties inherent in the tort system; however, there may be

some who would recover more from a tort action than they would under the Act. Goodridge C.J. concluded at p. 524:

> While there may be those who would receive less under the Act than otherwise, when the structure is viewed in total, this is but a negative feature of an otherwise positive plan and does not warrant the condemnation of the legislation that makes it possible.

I would add that this so-called negative feature is a necessary feature. The bar to actions against employers is central to the workers' compensation scheme as Meredith conceived of it: it is the other half of the trade-off. It would be unfair to allow actions to proceed against employers where there was a chance of the injured worker's obtaining greater compensation, and yet still to force employers to contribute to a no-fault insurance scheme.

27 Montgomery J. also commented on the purposes of workers compensation in *Medwid v. Ontario* (1988), 1988 CanLII 193 (ON SC), 48 D.L.R. (4th) 272 (Ont. H.C.). He stated at p. 279 that the scheme is based on four fundamental principles:

(a) compensation paid to injured workers without regard to fault;

(b) injured workers should enjoy security of payment;

(c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and

(d) compensation to injured workers provided quickly without court proceedings.

I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission, the Workers' Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. The principle of no-fault recovery assists the goal of speedy compensation by reducing the number issues that must be adjudicated. The bar to actions is not ancillary to this scheme but central to it. If there were no bar, then the integrity of the system would be compromised as employers sought to have their industries exempted from the requirement of paying premiums toward an insurance system that did not, in fact, provide then with any insurance.

[41] The Supreme Court of Canada has more recently noted the existence of the historic trade-off in workers' compensation legislation in *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 (CanLII), [2013] 3 SCR 53, and *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25 (CanLII), [2014] 1 SCR 546.

(c) The Tribunal's jurisdiction regarding right-to sue applications

[42] The Appeals Tribunal has exclusive jurisdiction to determine right to sue applications as a result of the provisions of section 31 of the WSIA that provide as follows:

> **31(1)** A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,
>
> (a) whether, because of this Act, the right to commence an action is taken away;
>
> (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
>
> (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

> **(2)** The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).
>
> **(3)** A decision of the Appeals Tribunal under this section is final and is not open to question or review in a court.
>
> …

[43] The legality of the delegation of this type of authority to workers' compensation agencies has been considered and approved by the courts. Again, see the Supreme Court of Canada's *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* referred to above at paragraphs 29 to 38.

(d) The WSIA's substantive provisions concerning the right to sue

[44] The sections of the WSIA that are most relevant to the restriction on civil actions are sections 26 to 31. Sections 29 to 31 are not, however, directly relevant to defining the substance of which actions may proceed and which ones may not.

[45] Sections 26 to 28 of the Act are quoted in their entirety below. The most directly relevant of these provisions are found in subsections 26(2) and 28(1). The content of those subsections will be reproduced again in the section of this decision dealing with statutory interpretation.

[46] Sections 26 to 28 of the Act provide as follows:

> **26(1)** No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.
>
> **(2)** Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.
>
> **27(1)** Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.
>
> **(2)** If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or
>
> survivors are, also, not entitled to commence an action under section 61 of the Family Law Act.
>
> **28(1)** A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
>
> 2. A director, executive officer or worker employed by any Schedule 1 employer.
>
> **(2)** A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. The worker's Schedule 2 employer.
>
> 2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

> **(3)** If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.
>
> **(4)** Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

(e) The Tribunal's general approach to applications to bar actions for wrongful dismissal

[47] The remedy for wrongful dismissal is damages in lieu of notice of dismissal. The WSIA does not provide this remedy and many decisions have noted that for this reason a cause of action for wrongful dismissal is not subsumed by the WSIA. See *Decision No. 194/16* at paragraph 25 for example.

[48] The general rule in right-to-sue decisions that have been made by the Appeals Tribunal is therefore that the right to bring an action for wrongful dismissal is not taken away by the Act.

[49] However, as has also been noted in many decisions, it is the substance of the action that matters and simply calling a matter an action for wrongful dismissal is not sufficient to avoid the action being barred by the WSIA if in reality the action is for something else. See *Decision No. 3836/17* at paragraph 12 for example.

(f) The inextricably linked test in earlier right to sue applications

[50] There are a significant number of cases where the Tribunal has decided whether the substance of a civil action that has been brought in form as a wrongful dismissal action is instead, in substance, the type of action that is barred by the Act. These decisions describe the legal tests that have been applied to determine which types of actions brought in the form of wrongful dismissal actions are barred and which types of actions are not barred. Many of these decisions employ a test that examines whether the circumstances of the action and the circumstances giving rise to a workplace injury are inextricably linked.

[51] Further on in this decision I will discuss the language used by *Decision No. 1227/19* in describing the legal test to be applied in determining whether a wrongful dismissal action could proceed in that decision. *Decision No. 1227/19* is relied upon heavily by the applicant in the present proceedings and it is one of the Tribunal's first decisions concerning chronic mental stress and constructive wrongful dismissal actions since the WSIA was amended to explicitly recognize a right to workers' compensation benefits for chronic mental stress.

[52] *Decision No. 1227/19* uses an inextricably linked test. There is, however, some variation in the exact words chosen to describe the test within the decision. Some of those variations could result in a wider or narrower understanding of the types of civil actions that are barred by the WSIA, particularly where those claims involve assertions about constructive dismissal and mental stress.

[53] To a considerable extent the variation in the exact words used to describe the inextricably linked test found in *Decision No. 1227/19* reflect similar variations in the words used to describe the legal test in earlier Appeals Tribunal decisions that have also applied the inextricably linked test.

[54] Some of these decisions refer to whether or not the action is inextricably linked to the worker's injuries. Other decisions refer to whether the action arises from the same facts as, or is inextricably linked to, a workplace accident. Still other decisions refer to the relationship of the facts in support of the civil action to both the accident and the worker's injury.

[55] The following are some examples of decisions that have utilized the inextricably linked test or a similar test. The emphasis added to the following excerpts is my own.

[56] *Decision No. 1319/01 2* removed a worker's right to bring an action for wrongful dismissal and in doing so stated as follows:

> [45] **The action in this case, as amended to include pleadings regarding wrongful dismissal, is in the Panel's view an action that is inextricably linked, on the facts presented, to the injury and accident governed by the Act and is therefore taken away by application of the Act.**

[57] *Decision No. 977/03R* stated the test as follows:

> [17] ….Past Tribunal decisions have generally held that the test in considering whether separately listed rights of action are likewise removed by the WSIA or its predecessors is **whether the claim is separate and distinct from the workplace accident or whether it is intrinsically related to the workplace accident.**

[58] *Decision No. 194/16* reviewed the contents of an earlier Tribunal decision, *Decision No. 237/03* and stated as follows:

> [23] *Decision No. 237/03* reviewed a number of Tribunal decisions where subsequent to a workplace accident a plaintiff brought an action for personal injury and for wrongful dismissal. It noted that the overwhelming preponderance of those decisions found that an action for wrongful dismissal is not statute-barred. One of the few decisions that found that the plaintiff's action for wrongful dismissal was taken away by the WSIA, *Decision No. 566/00*, was decided based on an agreement between the parties. In that application, **the Panel accepted the parties' agreement that the respondent's claims for damages in negligence and wrongful dismissal were inextricably linked to the workplace accident and therefore state-barred**. Unlike *Decision No. 237/03*, the decision does not include a detailed analysis of the jurisprudence and seems to have been essentially determined on the consent of the parties. I prefer the more detailed analysis of *Decision No. 237/03*.
>
> [24] In both *Decision No. 237/03* and in this application, the wrongful dismissal action is in respect of an allegation of dismissal, constructive or otherwise. The action is not framed "for or by reason of an accident." **While there may be an "incidental" relationship between the facts underlying a worker's personal injury by accident and those underlying an allegation of wrongful dismissal, they are not sufficient to support a determination that the action for wrongful dismissal should be taken away by the WSIA.** I further note that in this case, some of the facts pleaded in respect of the wrongful dismissal are completely separate from N.S.'s conduct and relate instead to the change of the worker's terms of employment when she was transferred from the butcher shop to the restaurant premises.
>
> [25] The remedy for wrongful dismissal, as has been noted in several of the decisions, is damages in lieu of notice. The WSIA does not provide this remedy; a cause of action for wrongful dismissal is therefore not subsumed by the WSIA.
>
> [26] I apply the analysis in *Decision No. 237/03* and find that the worker's claim for wrongful dismissal is not taken away by the WSIA.

[59] The following was stated on this matter in *Decision No. 3836/17:*

> [12] The preponderance of Tribunal decisions have found that an action for wrongful dismissal is not statute barred (see for example *Decision No. 194/16*). That being said however, simply framing a claim as an action for wrongful dismissal cannot, in and of itself, displace the application of the WSIA. Rather, **one must consider the fundamental nature of the action and determine, regardless of its description, whether it arises in respect of the worker's injuries and is therefore clearly barred by the application of the WSIA.**
>
> …
>
> [15] Having had the opportunity to review the pleadings in this case, I find **that the portion of the action claiming $20,000 for "negligence causing the workplace accident, pain and suffering, and the lack of accommodation for the workplace accident" is inextricably linked to the compensable accident which is governed by the WSIA.** The facts as outlined in the amended Plaintiff's Claim are almost exclusively related to the compensable accident. …
>
> [16] The Plaintiff's concerns about ongoing compensation for loss of earnings and pain and suffering, as well as concerns about a lack of accommodation are more within the purview of the WSIB and matters for which remedies would be available to the worker under the WSIA.
>
> [17] **I also find however, that the Plaintiff's claim for $5000 for "lost pay" appears to reflect more of a *bona fide* wrongful dismissal action.** This portion of the action is more in the nature of pay in lieu of notice. In his Amended Claim, the Plaintiff alleges there was no system of Progressive Discipline, the employer condoned his tardiness and permitted an unhealthy and stressful work environment and failed to establish an appropriate mechanism for the Plaintiff to call in and report his absences. The Plaintiff pleads that "*as a result of the termination without cause by the Defendant company, the Plaintiff has suffered damages, in the form of payment in lieu of notice under the Common Law*, stopped loss of earnings from the WSIB, and mental stress and suffering as a result of his workplace injury, and *wrongful dismissa*l" (emphasis added). **In my view, the Applicant has not established, on a balance of probabilities, that the Respondent/Plaintiff's claim for $5000 is a "disguised WSIB claim"** and therefore the Respondent's right of action with respect to that portion of his action is not taken away.

[60] This is not an exhaustive list of earlier Tribunal decisions on this matter but it is representative of some of the variety of language employed to distinguish between actions for wrongful dismissal that are allowed to proceed and those that are not where the decisions have focused on whether the civil claim and the circumstances surrounding the workplace accident or injury were inextricably linked.

(g) The amendments to the WSIA concerning entitlement for chronic mental stress

[61] I will not review in detail the development of the law concerning the provision of workers' compensation benefits for mental stress injuries. It is important to note, however, that the WSIA was amended on January 1, 2018 to explicitly recognize the right to workers' compensation benefits for chronic mental stress. As of that date subsections 13(4), (4.1)and (5) of the Act reads as follows:

> 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.

> (4.1) The worker is entitled to benefits under the insurance plan as if the mental stress were a personal injury by accident.
>
> (5) A worker is not entitled to benefits for mental stress caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision to change the work to be performed, or the working conditions, to discipline the worker or to terminate the employment.

[62] There are transitional rules for the implementation of these new provisions contained in section 13.1 of the Act that provide for the retroactive application of these provisions in specified circumstances back to April 29, 2014 which was the date that the Appeals Tribunal released *Decision No. 2157/09* that found the Act's previous provisions regarding mental stress that did not allow for recognition of chronic mental stress, to be contrary to the requirements of the *Canadian Charter of Rights and Freedoms*.

[63] There have been cases where entitlement to workers' compensation benefits for chronic mental stress was allowed prior to January 1, 2018 and even prior to April 29, 2014. However, the changes to the WSIA on January 1, 2018 resolved any doubt regarding this issue and the WSIB has implemented policy to reflect these legislative changes. Board policy recognizing potential entitlement for chronic mental stress injuries did not exist before that date. As a result of these legislative changes and policy changes there is now greater recognition that work-related chronic mental stress may attract workers' compensation benefits. At the same time there is also greater recognition of the fact that, given that mental stress conditions may be compensable, civil actions by workers against employers for chronic mental stress injuries may be barred on that basis.

(h) *Decision Nos. 1227/19* and *1227/19R*

[64] The applicant in this proceeding has relied heavily on the contents of *Decision No. 1227/19* in order to establish the legal test to be applied when determining whether the plaintiff's civil action is barred by the WSIA. The applicant has argued that the alleged events that form the basis of the plaintiff's claim for workers' compensation benefits are the same events that form the basis for the plaintiff's civil action and, because of the inextricable link between the two, the plaintiff's right to bring her civil action is therefore removed by the WSIA.

[65] *Decision No. 1227/19* is a decision on a right-to-sue application brought by the defendant in an action in which a claim was made for constructive wrongful dismissal as well as for a psychological injury as a result of workplace bullying and harassment. Punitive and aggravated damages were sought as well. Unlike in this application, there was no claim made for workers' compensation benefits by the plaintiff in that proceeding.

[66] As in the present application there was no dispute that the defendant was a Schedule 1 employer and the plaintiff was a worker of that employer who was in the course of her employment when the matters that were the subject of the civil action occurred. Also as in the present application, as is usual for many section 31 applications, *Decision No. 1227/19* makes no findings on the merits of the claims made by the applicant regarding whether harassment or other forms of mistreatment occurred.

[67] The application by the defendant in *Decision No. 1227/19* was allowed. The decision, in explaining why the application was allowed, makes a number of statements about the legal test to be applied when determining whether to remove the respondent's right to pursue an action that has been brought, in form, as an action for wrongful dismissal. While the decision generally

examines whether the facts supporting the constructive dismissal are "inextricably linked" to the claim for an injury under the WSIA, specific statements of the legal test to be applied are not identical in their wording.

[68] The variations in the statements of the inextricably linked legal test to be applied that are contained in *Decision No. 1229/19* are somewhat similar to the variations in the statements of the inextricably linked legal test that are contained in the earlier section 31 proceedings involving wrongful dismissal matters that I have discussed above.

[69] Most statements of the legal test to be applied in *Decision No. 1227/19* link the barring of the plaintiff's civil action to both the worker/plaintiff's alleged exposure to harassment and her injury. For the reasons to be provided below, I accept that civil claims for psychological injuries sustained due to bullying and harassment during covered employment are barred by the WSIA.

[70] However, some of the statements of the inextricably linked legal test suggest more broadly that all remedies requested by the plaintiff, whether based on the existence of psychological injury or not, are to be barred because all of the requested remedies are claimed to be the result of the bullying and harassment that is alleged to have taken place. See for example the second last sentence in paragraph 30 of the decision that is quoted below.

[71] Also, at some places in the decision the word "injury" itself is used in a manner that appears to possibly include something more than physical or psychological injury and that might include financial losses due to a lack of notice of dismissal. See for example paragraphs 34 and 37 of the decision that are also quoted below.

[72] These statements of legal principle, if followed, could potentially prohibit civil actions when bullying and harassment are alleged by a plaintiff, even where not all of the plaintiff's claimed losses flow from a personal injury. As will again be explained below, I do not believe that such a result would be consistent with the wording and intent of the WSIA or the historic trade-off between workers and employers.

[73] Some of the descriptions with *Decision No. 1227/19* of the legal test to be applied are as follows.

[74] First from paragraphs 29 and 30:

> [29] In light of these areas of factual agreement, I note that it is the application of the law to the foregoing facts which is determinative in the case before me. In this regard, I note that generally the Tribunal has found that the right to bring an action for wrongful dismissal has not been removed by the WSIA. **It is only in the exceptional case that this is not so, where the circumstances of the wrongful dismissal claim are inextricably linked to the work injury.** See, for example, *Decision Nos. 3836/17, 1319/01 2*, and *566/00*.
>
> [30] In my view, that exception applies here. 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. I find that **these facts, if proven, are inextricably linked to a claim for injury governed by the terms of section 13(4) of the WSIA**, as cited above. In other words, I find that **the worker's Statement of Claim is, in essence, a claim for injury** resulting from alleged workplace harassment and bullying and thus is within the scope of section 13(4) as amended to provide for entitlement for chronic mental stress arising out of, and in the course of, the Respondent's employment. **Moreover, I find that the other remedies**

> **sought by the Respondent are also claimed on the same facts, of harassment and bullying in the workplace.** Accordingly, I find the worker's right of action is taken away by the WSIA, pursuant to section 26 in this case.

[75] Then at paragraph 34:

> [34] In this case, as stated above, **I find that the injury for which the Respondent claims damages in the action against the Applicant, albeit under several heads, all flow directly from the harassment and bullying she alleges in the workplace, the employer's response to these allegations which contributed to the injury sustained, and the mental stress she experienced as a result. As such, I find that the foundational facts for the cause of action are inextricably linked to workplace harassment, an injury that is compensated under the WSIA, and thus the Respondent's right to sue the Applicant is removed in these circumstances.**

[76] And paragraph 37:

> [37] Such is not the case here. Rather, in my view, **the factual basis underpinning the claim of constructive dismissal, as well as the other damages sought, is the work accident alleged, that being the harassment and bullying in the workplace by co-workers and management, and the associated personal injury the Respondent claims she sustained as a result. In particular, I note that the Statement of Claim states, in a number of ways and in a number of places, that the injury warranting all damages claimed is the harassment, bullying, abuse, and the resulting poisoned work environment to which she claims she was exposed in the course of her employment.**

[77] And paragraph 39:

> [39] I find **the fundamental nature of the Respondent's action is a claim for injury resulting from harassment and bullying in the workplace and is therefore statute barred.**

[78] And lastly at paragraph 54:

> [54] Moreover, I accept and adopt the approach in *Decision Nos. 237/03* and *3836/17*, that the manner with which the claim is framed is not determinative of the question of whether the action is statute barred. It is the fundamental nature of the claim which must be considered. In this case, **I find that the personal injury for which the worker claims remedies, under all heads of damage, flows from workplace harassment and bullying. As such, her right to sue is removed by the WSIA.**

[79] The applicant in *Decision No. 1227/19* requested a reconsideration of the decision but that reconsideration was denied in *Decision No. 1227/19R* on the grounds that the threshold test for granting a reconsideration had not been met. A judicial review application in respect of the decision has been initiated but has not yet been determined.

(i) What is at stake with the wording of the test?

[80] The nature of the legal test used to determine which actions for wrongful dismissal will be allowed to proceed and which ones will not, is determined by the requirements of the *Workplace Safety and Insurance Act, 1997.* In determining what the Act requires, however, it is important to bear in mind the context within which the test will be applied and its practical impacts on both the workers' compensation system and on the laws applicable to employment contracts and dismissals from employment.

[81] A claim for workers' compensation is based upon the employee experiencing an injury that arises out of and in the course of employment. There can be no successful claim for workers' compensation benefits in the absence of an injury. Section 13(1) of the WSIA provides as follows:

> A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

[82] A claim for constructive dismissal, on the other hand, is based upon an allegation that the employer is not complying with its contractual obligation to provide working conditions that had been agreed to. In these situations the employee is entitled, if the allegation is proven, to regard the employment relationship as being at an end. The employee is considered to have been constructively, rather than explicitly, dismissed and dismissed without notice. The remedy for the constructive dismissal is based upon pay in lieu of an appropriate period of notice prior to dismissal. It is not necessary to demonstrate the existence of a personal injury.

[83] The following was stated about the principles underlying wrongful dismissal claims and the determination of notice periods by Bastrache J. speaking for the majority of the Supreme Court of Canada in *Honda v. Keays*:

> [28] In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by McRuer C.J.H.C. in *Bardal*, at p. 145:
>
> > There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.
>
> …
>
> [50] An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term (*Wallace*, at para. 115). The general rule, which stems from the British case of *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.), is that damages allocated in such actions are confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages are available to the employee for the actual loss of his or her job and/or pain and distress that may have been suffered as a consequence of being terminated. This Court affirmed this rule in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, at p. 684:
>
> > . . . the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the [employee's] wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment.

[84] The circumstances of employment that may give rise to a claim for constructive dismissal vary from job to job and person to person. I will not attempt to describe what those circumstances might entail. It is to be expected, however, that the circumstances that would give rise to a successful action for wrongful dismissal would in many cases likely be a source of stress for the employee involved. Those stressors may or may not have a significant impact on the psychological well-being of the employee. The effect, if felt, could be trivial or major. It might be temporary or permanent.

[85] In the case of a psychological injury caused by work and for which workers' compensation benefits may be payable, it is clear that the historic trade-off applies and an action in respect of those injuries cannot be maintained. Subsection 13(4.1) of the Act states that:

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

[86] Given this provision there can be no basis for treating workers who sustain psychological injuries that occur as a result of qualifying workplace mental stressors differently than other workers with different sorts of injuries. In the context of the historic trade-off, it is therefore to be expected that the broader right of workers to receive workers' compensation entitlement for chronic mental stress injuries will be accompanied by a corresponding limitation on the rights of such workers to maintain civil actions for those injuries.

[87] There will be situations, however, where regardless of the losses that a worker experiences as a result of a mental stress injury caused by the workplace, significantly greater losses will be experienced by the worker as a result of the lack of notice provided with a wrongful dismissal.

[88] An example of such a situation might be a long serving, highly paid, senior management worker who is approaching retirement age and who is being pressured out of his or her position. The actions taken to pressure the worker out of his or her position might cause the worker stress. The worker might see a physician and receive medication or counselling but still be able to continue working.

[89] The wrongful dismissal action in these circumstances, if successful, could involve a very substantial award of damages. The potential workers' compensation claim is financially inconsequential by comparison.

[90] If the barring of a civil action for constructive wrongful dismissal occurs because the action is based in the same circumstances that gave rise to the worker's injury, then the civil action is barred in this situation.

[91] However, if the barring of a civil action for constructive wrongful dismissal occurs only where it is based upon the loss associated with the compensable injury, then those aspects of the civil action that are not based upon the existence of an injury, primarily pay in lieu of notice, may continue.

(j) Interpretation of the *Workplace Safety and Insurance Act, 1997* (WSIA) provisions

[92] The following was recently stated about the Tribunal's approach to statutory interpretation in *Decision No. 1891/18IR* (footnotes omitted):

> [31] This Tribunal has followed the courts in adopting the modern principle of statutory interpretation, which requires that the words of an Act be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act, and the intention of Parliament or the Legislature.
>
> [32] The Tribunal also applies section 64 of the Legislation Act, 2006, which provides that an Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

[93] Sections 26(2) and 28(1) of the Act provide as follows:

> **26 (2)** Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.
>
> **28(1)** A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
>
> 2. A director, executive officer or worker employed by any Schedule 1 employer.

[94] The wording of section 28(1) is quite clear in describing the types of actions that may not be brought by workers of Schedule 1 employers (and others as described) against their own employers (and others as described). A worker is not entitled to commence an action against the employer "in respect of the worker's injury or disease".

[95] There is nothing in this section that would restrict a civil action because the circumstances that are relied upon in support of the action are the same as or inextricably linked to the causes of a worker's injury. The actions that are prohibited are actions in respect of the worker's injury or disease.

[96] The wording of subsection 26(2) is, on the other hand, less clear in directly linking the protections of an employer against a right of action to the worker's injury but I find that it still does so. When the applicant's representative was asked to identify the statutory authority for the argument that he was advancing it is subsection 26(2) of the WSIA that was relied upon.

[97] There is an argument that, based upon the wording of subsection 26(2), no civil action may be brought where the same circumstances relied on for the civil action are the same as the circumstances as those giving rise to the worker's injury.

[98] The argument is based upon the premise that the word "accident" as used in that subsection describes an injuring process that is distinct from the injury that results from that process.

[99] If the word accident is the process and the injury is the result of that process then if the worker has a mental stress injury it is because he or she has been the subject of an accident and the worker has no right of action against his or her employer in respect of that accident. Given that the circumstances that gave rise to the wrongful dismissal action are essentially the same circumstances that gave rise to the injury then those circumstances constitute the accident and they cannot be used as the basis for a civil action.

[100] I do not accept this argument, however, because I do not accept the underlying premise that the word accident as used in the WSIA describes an injuring process that is separate and apart from the injury.

[101] The definition of accident in section 2 of the WSIA includes a disablement and states as follows:

> "accident" includes,
>
> (a) A wilful and intentional act, not being the act of the worker,

> (b) a chance event, occasioned by a physical or natural cause, and
>
> (c) disablement arising out of and in the course of employment.

[102] A disablement is therefore not an injuring process. It effectively is the injury itself. The definition of disablement in OPM Document No. 15-02-01 "Definition of an Accident" describes a disablement as "a condition that emerges gradually over time" or "an unexpected result of working duties". Under this definition, the condition or injury becomes an accident for the purposes of the Act if it arises out of and in the course of employment. The injury and the accident are not separate things. The injury is an essential component of the accident because without the injury there is no accident.

[103] Although there are now specific provisions of the WSIA providing for the compensation for chronic mental stress, prior to those provisions being put in place entitlement for chronic mental stress has been considered a type of disablement injury.

[104] The meaning of the word accident in workers' compensation proceedings has also been examined by the Tribunal in the context of the appropriate application of the presumption clause found in subsection 13(2) of the WSIA:

> 13(2) If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

[105] The leading Appeals Tribunal decision on the application of the presumption clause is *Decision No. 1672/04.* That decision includes a review of the meaning of the word accident at common law and in the WSIA and includes the following summary of the applicable case law indicating that under workers' compensation law the unexpected injury itself constitutes the accident. The decision states:

> [69] The distinction she refers to arises in the case law. However, the case law does not turn on the concept of whether the accident can be "seen". The discussion in the case law originates in the question of what may be considered an "accident" and in the concept that a chance event involves something "untoward" or "unexpected" or, under current Board policy, "unintended".
>
> The case law addresses the facts in which an injury arises in the course of the worker's normal working duties in light of these concepts.
>
> **(b) The issue at common law: Fenton and Theed**
>
> [70] The early British common law case of *Fenton* v. *Thorley,* [1903] A.C. 443 and the Supreme Court of Canada case of *New Brunswick (Workmen's Compensation Board)* v. *Theed,* [1940] S.C.R. 553, addressed these questions. It is important to note that the Courts in these cases were not addressing a statutory definition of the word "accident", such as that now found in the Ontario compensation legislation. They were also not considering the issue of causation.
>
> There was no issue, on the facts of *Theed*, about whether the work had caused the worker's injuries. That was conceded. The issue was what type of work-related injury was covered by the applicable workers' compensation legislation as an "accident". The Courts were addressing facts which, under current Ontario law, are indisputably accidents, given the presence of the term "disablement" in the definition of accident. Also, the Courts were not considering the language found in the chance event branch of the definition of accident. They were considering the meaning of the term "accident" itself.

> [71] In *Fenton*, a worker over-exerted himself while turning the wheel of a machine and sustained an internal rupture. The Court found that the word "accident" in the relevant legislation was used in the popular and ordinary sense, and meant a "mishap or untoward event not expected or designed". The Court found that:
>
> > If a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in…this is accidental injury in the sense of the statute.
>
> [72] In *Theed*, the Supreme Court considered the case of a worker who had been pushing a heavy lever and developed symptoms in her mid-back, requiring surgery. The Court found that, on the facts of that case, "the injury itself constitutes an accident in the sense of a mishap or untoward event not expected or designed."
>
> [73] These decisions found that the fact that a worker suffered an injury while performing work duties was sufficient to mean that there was an "accident" at work. Therefore it was not necessary to address whether there had been an "untoward" "external" event causing the injury. It was only necessary to find that there was an untoward or unexpected injury.
>
> [74] In Ontario, any earlier debate about what facts fell within the definition of accident was clarified when the provision governing disablements was added to the legislation in 1963. However, Tribunal decisions have been consistent in finding that disablements fell within the definition of accident even prior to that date, and that finding is based on the *Theed* analysis.

[106] In summary, the Courts have found that the accident occurred when the injury occurred. The accident does not exist on its own separate and apart from the injury such as would be necessary to find in order to support the argument that the use of the word accident within subsection 26(2) was meant to describe the injuring process as opposed to the injury by accident.

[107] There are other factors that also lead me to the conclusion that the restrictions on civil actions in section 26(2) are related to the injury by accident and not just the fact that the worker has been exposed to an injuring process.

[108] First, I note that subsection 26(2) not only removes rights of action in respect of an accident but also removes rights of action in respect of an occupational disease. A disease is not an injuring process but is instead a form of injury caused by a workplace exposure.

[109] Second, the consequence of considering the work accident in subsection 26(2) to be a reference to an injuring process without the necessity of an injury would lead to a massive expansion of employer protection from civil actions where no workplace injury is apparent. If the injuring process can be an accident without the necessity of an injury then almost all constructive dismissal actions are likely to be defended on the basis that the plaintiff has been in an accident even where no injury is apparent. The use of the WSIA to restrict the right of workers to bring wrongful dismissal actions would be inconsistent with past Tribunal case law that has found that, generally speaking, that the right to bring such actions is not taken away by the WSIA.

[110] Third, the general entitlement provision for workers that reflects what workers gained in the historic trade-off is found in subsection 13(1) of the Act. The insurance that employers receive in return in that historic trade-off is found in subsection 26(2).

[111] Subsection 13(1) of the Act states as follows:

> 13(1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

[112] Subsection 26(2) of the Act begins:

> 26(2) Entitlement to benefits under the insurance plan is in lieu of all rights of action …that a worker … may have against the worker's employer

[113] The removal of a right of action that is not based on injury would in my view be inconsistent with the general intent of this historic trade-off. There are no benefits paid to workers in the absence of injury. In order to maintain adherence to the historic trade-off it is necessary to interpret the Act in such a way that no rights of action are removed from workers against their employers either unless those rights of action are also based upon the presence of injury.

[114] The distinction between the ability to pursue rights of action based on injury and the ability to pursue other actions not based upon injury, has previously been drawn at the Appeals Tribunal on a number of occasions in circumstances where the workplace injury is intertwined with the circumstances of a dismissal. The approach of these cases is in my view preferable to those cases that examine whether the two matters are "inextricably linked".

[115] In *Decision No. 670/97* the worker/plaintiff was injured attempting to arrest an individual who was suspected of shoplifting from his employer. The worker received workers' compensation benefits until those benefits were terminated as a result of the WSIB (WCB then) finding that the worker had declined suitable employment with the employer and that the worker's ongoing complaints were not compatible with his accident. The employer terminated the worker's employment and the worker brought an action for wrongful dismissal and also brought an action to recover benefits under an employer health plan that was run by the employer. Although the application was dealt with under the former pre-1997 *Workers' Compensation Act* the similarities between subsection 26(2) of the WSIA and section 16 of the former Act make the results of the decision relevant to this proceeding.

[116] In allowing the worker's action for wrongful dismissal to proceed *Decision No. 670/97* states as follows:

> [25] There can be many circumstances in which the resignation or termination of a worker's employment will occur against the background of a compensable accident, or a dispute concerning the availability of compensation benefits or ongoing employment after a compensable accident. The *Workers' Compensation Act* provides a remedy for workers who require compensation for injuries sustained in the course of employment. However, apart from the re-employment provisions set out in section 54 of the Act, the Act does not address the consequences of the termination of an injured worker's employment, even where this termination is closely preceded by a compensable injury which may have had some effect on a worker's ability to maintain that employment.
>
> [26] We agree with the *Decision No. 286/96* Panel that the *Workers' Compensation Act* is intended to address the "compensatory functions" that result from accidents arising out of and in the course of employment. It is our view that, generally speaking, a worker's right to damages for wrongful dismissal is not comparable to any right which he or she possesses under the Act. Although management decisions respecting the termination of employment may be influenced by the background of a compensable injury, it is our view that the Act does not go so far as to prevent a worker from maintaining an action against his or her employer for wrongful dismissal even though a compensable injury may have had some role in forming the basis of the dismissal, or may have had an impact on the consequences of the worker's dismissal.

> [27] Like the *Decision No. 286/96* Panel, we are satisfied that an "incidental relationship to the compensable injury" is not sufficient to remove a common law right to sue for wrongful dismissal. However, notwithstanding our general observation about the lack of overlap between rights under the *Workers' Compensation Act* and rights of action for wrongful dismissal, there may be cases in which the connection between the injury and the claim for damages for wrongful dismissal is so strong that a panel would perceive that the substance of the wrongful dismissal action was merely a claim for workers' compensation benefits in disguise. This appears to have been the situation confronted by the *Decision No. 28/94* Panel, which considered the substance of the allegations made by the worker, and not just the cause of action relied upon in the pleadings. However, it is our view that the facts alleged in this case do not fall within such an exception.

[117] When removing the worker's right to pursue an action against the employer under its health plan in respect of his injuries this same decision states:

> Although the Respondents have argued that it should not matter whether it is the employer or a third party insurer who holds the Plan, we have found this to be a very relevant consideration. The Act does not prevent actions by workers against third parties in certain circumstances, but it does prevent actions against workers' own employers, where the subject matter of the action arises out of an injury for which benefits are payable under the Act. The Act itself creates this distinction, and we are unable to disregard it.

[118] A similar distinction is drawn in *Decision No. 194/16* where the worker/plaintiff resigned after being the subject of alleged sexual harassment and assault. The worker sued her employer for wrongful dismissal and also sued for damages for injuries sustained on the basis of vicarious liability. In allowing the wrongful dismissal action to proceed but barring the action against the employer for her personal injuries the decision states as follows:

> [25] The remedy for wrongful dismissal, as has been noted in several of the decisions, is damages in lieu of notice. The WSIA does not provide this remedy; a cause of action for wrongful dismissal is therefore not subsumed by the WSIA.
>
> …
>
> [41] I interpret the Tribunal jurisprudence as a whole as essentially stating that where a plaintiff is entitled to benefits under the WSIA, her rights of action against her own employer in respect of the workplace accident are taken away unless the employer's actions were criminal in nature such that the employer removed itself from the scope of the WSIA.

[119] And again this distinction is drawn in *Decision No. 77/97* which, although it uses the words "inextricably linked" in its analysis, focuses on the relationship of the civil action to the workplace injury:

> [74] In *Decision No. 846/93*, the Panel distinguished between actions for personal injury which are taken away by the Act, and other causes of action. That Panel found that damages that are claimed for wrongfully terminating an employment contract without appropriate notice are based on the salary payable during the notice period. Thus, in the case before that Panel, neither the damages nor the remedy arose out of the workplace injury and the worker's action was allowed to proceed. Similarly, *Decision No. 846/93* did not take away a claim for damages for wrongful detention of goods because the wrong and the measure of damages were not based on the personal injury.
>
> [75] Applying the tests implicit in the above decisions, it is evident to the Panel that if Ms. Jewell's action for constructive dismissal was inextricably linked with her workplace injury, the action would be barred by section 16. If her action and remedy did not arise out of her workplace injury, it may proceed.

[120] This analysis also appears in other decisions relied upon by the applicant.

[121] *Decision No. 28/94* removed a right of action brought in form as an action for wrongful dismissal because it sought damages for injuries sustained and not due to a lack of notice of termination of employment. At page 13 of the decision:

> Mr. Gentner is doing no more than alleging that, because of the injuries he suffered in the attack on April 20, 1991, (which we have found to have arisen in the course of his employment), he was no longer able to carry out all the duties of his employment.

[122] *Decision No. 566/00* involved the acceptance of a settlement and not a full adjudication and has generally been provided with less weight for that reason in subsequent Tribunal decisions. However, the decision, in accepting that an action for wrongful dismissal was barred by the Act, notes that the respondent had suggested that the applicant had not provided him with suitable alternative work "given his injuries."

[123] And again in *Decision No. 1241/16* at paragraph 79:

> I agree with these decisions cited by counsel for the applicants for the proposition that, unless it can be shown that the nature of the harm that forms the basis of an action for breach contract is distinct from a potential claim for personal injury which would be taken away by the Act upon application, as is the case in an action for wrongful dismissal, the action for breach of contract cannot be maintained in a section 31 application on the basis that it is not an action for personal injury. In this case, in their Statement of Claim, the respondents have advanced an action for breach contract, alleging that the applicants have breached a term of the employment contract between Ms. L.W. and the applicants, namely, the respondents' obligation to maintain a safe workplace for Ms. L.W. I find that the harm caused to Ms. L.W. associated with the allegation of this breach is essentially the same harm that would be claimed by Ms. L.W. in a claim for personal injury.

[124] I accept the analysis contained in these decisions. There may be significant overlap in circumstances between an accident and a dismissal, particularly in matters involving constructive wrongful dismissal. However, the WSIA does not provide for damages in lieu of notice and an action for wrongful dismissal is not subsumed by the WSIA. The WSIA does, however, provide compensation for personal injuries caused by workplace accidents and actions in respect of those injuries are taken away by the WSIA.

[125] In conclusion on the legal interpretation issue, I find that the words "by reason of an accident happening to the worker or an occupational disease contracted by the worker" found in subsection 26(2) of the WSIA do not describe and injuring process that is separate and apart from an injury. These words do not describe circumstances that will result in the barring of a civil action unless the action seeks damages in respect of a personal injury that has been sustained as a result of the accident.

[126] The fact that a civil action is based upon the same set of facts that are alleged to have caused a work related injury (i.e. that they are inextricably linked) is therefore not sufficient to result in the removal of a right to bring a civil action under the WSIA. The words inextricably linked do not appear in the WSIA and it is the provisions of the Act that must govern. It is only when the damages claimed in the civil action result from the existence of a work-related personal injury that the right to bring a civil action is barred.

(k) The nature of the civil action pursued by the plaintiff

[127] The Amended Statement of Claim contains a number of assertions regarding the facts. Those alleged facts and the facts as alleged by the defendant in the court action have been summarized above in the Background section of this decision and will not be repeated.

[128] A claim for breach of the employment contract and damages amounting to the equivalent of 36 months for reasonable notice at common law is made at paragraphs 35 to 37 of the Statement of Claim as follows:

> 35. The Plaintiff pleads that the Defendant, through its actions, has breached its employment contract with the Plaintiff. The Plaintiff pleads that [the Defendant] is the successor employer of [the Plaintiff] through its purchase of [the store] from [the former store owner] and [the Plaintiff] is entitled to a period of notice consistent with her accumulated services of employment with both [the former store owner] and [the Defendant].
>
> 36. At the time of the wrongful breach of contract, the Plaintiff was 49 years old, had dutifully served the defendant for over 33 years, and was earning an annual salary of approximately $39,000. Given these circumstances, the Plaintiff is entitled to 36 months' reasonable notice at common law.
>
> 37. The Plaintiff has suffered damages from the Defendant's breach of contract.

[129] A claim for harassment and/or intentional infliction of mental harm leading to injury is made at paragraphs 38 to 43 with the statement being made in paragraph 43 that the defendant's conduct caused her "severe and extreme emotional distress and/or visible and provable illness". Paragraphs 38 to 43 of the Statement of Claim state as follows:

> 38. [The Plaintiff] pleads that the Defendant's campaign of harassment and bullying constitutes harassment and/or intentional infliction of emotional harm.
>
> 39. [The Plaintiff] pleads and relies upon the principles articulated by this court in *Merrifield v. The Attorney General*, 2017 ONSC 1333.
>
> 40. [The Plaintiff] states that the Defendant's conduct in its acts of harassment towards here was outrageous and/or flagrant.
>
> 41. [The Plaintiff] states that the intention on the part of the Defendants was to cause her emotional distress or the Defendants had a reckless disregard for causing her emotional distress.
>
> 42. [The Plaintiff] states that she suffers from severe or extreme emotional distress and/or a visible and provable illness.
>
> 43. [The Plaintiff] states that the Defendant's conduct is the actual and proximate cause of her severe or extreme emotional distress and/or visible and provable illness.

[130] A claim for punitive and aggravated damages is made at paragraphs 44 to 47 of the Statement of Claim as follows:

> 44. As a result of the Defendant's unlawful conduct outlined in this claim, the Plaintiff has suffered damages for which the Defendant is liable.
>
> 45. The Plaintiff pleads that the treatment she was subjected to by the Defendants was oppressive, unreasonable, and offensive to common fairness.
>
> 46. The conduct of the Defendants constitutes bad faith and is a breach of the implied obligation of good faith that the Defendant owes to the Plaintiff.

> 47. As a result of the Defendant's conduct, an award of aggravated and punitive damages ought to be made against it.

(l) Conclusion – personal injury

[131] The plaintiff's right of action for injuries sustained, physical or psychological, as a result of harassment and/or intentional infliction of mental harm is removed by the WSIA.

[132] The plaintiff's action for injuries sustained is a claim in respect of a workplace injury for which the plaintiff is presently receiving workers' compensation benefits.

[133] I make no findings as to the correctness of the WSIB's decision to award benefits for chronic mental stress. I simply note that the claims of workplace harassment resulting in a psychological impairment, if demonstrated to be accurate, would entitle the plaintiff to workers' compensation benefits in respect of her injury pursuant to the relevant provisions of section 13 of the WSIA and the WSIB's *Operational Policy Manual* Document No. 15-03-14 governing chronic mental stress.

[134] In arriving at this decision I have examined the nature of the allegations made by the plaintiff. The plaintiff's claim is against the corporate employer. There is no personal claim against the owner/executive officer in respect of his own actions.

[135] Previous Tribunal decisions have allowed actions to proceed against individual defendants whose wilful personal actions were such that they no longer had a work-related nexus. However, those decisions have still upheld the protection that the plaintiff/worker's employer has against civil actions in those circumstances where the plaintiff worker was subject to the actions of the individual defendant in the course of his or her employment. See for example *Decision Nos. 1607/03*, *2282/05*, *2501/09*, and *1043/20.*

[136] As the plaintiff has not brought an action against the owner of the defendant or any other employees of the defendant as individuals, it is not necessary for me to determine whether the actions of the owner or any other employee of the defendant were such that they no longer retained a sufficient nexus to their responsibilities in the workplace.

[137] The plaintiff's right to pursue a civil action against the defendant in respect of her injuries as described in paragraphs 38 to 43 of the Statement of Claim is therefore removed by the WSIA.

(m) Conclusion – wrongful dismissal

[138] The plaintiff's right of action for wrongful breach of her employment contract as described in paragraphs 35 to 37 of the Statement of Claim for a reasonable notice period is not taken away by the WSIA.

[139] I make no findings on the merits of the wrongful dismissal action either but it is not an action that is dependent upon the existence of a workplace injury and is therefore not taken away by the WSIA.

[140] Should the plaintiff be successful in establishing that she was constructively dismissed it will be up to the Court to determine the extent to which any loss the plaintiff experienced as a result of that dismissal (if any) is distinct from the loss she experienced as a result of her workplace injury (if any) which she has been barred from pursuing recovery for in her civil action by the WSIA.

[141] I appreciate that it may be a difficult task for a Court to attribute a loss between the workplace injury and the wrongful dismissal. There will be circumstances where the existence of a psychological injury renders the lack of notice of dismissal meaningless because the plaintiff is incapable of work due to his or her injury. There may be other circumstances where the psychological injury is inconsequential in its impact on future employment but the lack of notice very impactful. There will also, likely, be circumstances that fall somewhere in the middle.

[142] However, Courts are familiar with making difficult decisions and the existence of difficulty in attributing loss between a workplace injury and a lack of notice is not a sufficient reason to either allow actions for work-related personal injuries to proceed or to prohibit actions for wrongful dismissal from proceeding.

(n) Aggravated and punitive damages

[143] The plaintiff's claim for aggravated damages and her claim for punitive damages are both based upon the same set of alleged actions of the employer that preceded the plaintiff's departure from employment.

[144] The legal underpinnings of these two claims are, however, very different. The plaintiff's claim for aggravated damages is, pursuant to the applicable common law and in the circumstances of this proceeding, a claim in respect of personal injuries received. Her claim for punitive damages is not.

[145] The plaintiff's right to bring an action for aggravated damages in respect of her claim of wrongful dismissal is therefore taken away by the WSIA but her right to bring an action for punitive damages is not.

[146] There is a discussion in the majority decision in *Honda Canada Inc. v. Keays* at the Supreme Court of Canada regarding the state of the law with respect to damages for the employer's conduct in dismissal. That discussion starts with the general rule that damages for wrongful dismissal are confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages are available for the actual loss of the job or for pain and mental distress suffered as consequence of being terminated. The decision then goes on to discuss the circumstances in which aggravated damages might be awarded. It is clear from this discussion that aggravated damages would incorporate psychological damage resulting from a dismissal that was conducted in an unfair manner or in bad faith. The decision states as follows:

> [56] We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: "[W]hat did the contract promise?" The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision.
>
> At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.
>
> [57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" (para. 98).

> [58] The application of *Fidler* makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. *Fidler* provides that "as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable" (para. 48). In *Wallace*, the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in *Fidler* itself, where we noted that the principle in *Hadley* "explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law" (para. 54).
>
> [59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).

[147] The Statement of Claim in this matter contains no indication of a claim for aggravated damages due to the employer's alleged conduct in the dismissal that is not clearly based on the existence of her injuries.

[148] In the circumstances of this application I find that the plaintiff's claim for aggravated damages is a claim in respect of a personal injury and is therefore barred by the WSIA.

[149] The *Honda* decision in the Supreme Court of Canada also contains a discussion of the principles underlying awards for punitive damages. The decision states as follows at paragraph 62 (emphasis added):

> [62] In *Vorvis*, McIntyre J., for the majority, held that punitive damages are recoverable provided the defendant's conduct said to give rise to the claim is itself "an actionable wrong". This position stood until 2002 when my colleague Binnie J., writing for the majority, dealt comprehensively with the issue of punitive damages in the context of the *Whiten* case. He specified that an "actionable wrong" within the *Vorvis* rule does not require an independent tort and that a breach of the contractual duty of good faith can qualify as an independent wrong. Binnie J. concluded, at para. 82, that "[a]n independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation." In the case at hand, the trial judge and the Court of Appeal concluded that Honda's "discriminatory conduct" amounted to an independent actionable wrong for the purposes of allocating punitive damages. This being said, there is no need to discuss the concept of "actionable wrong" here; this was done in *Whiten*. What matters here is that there was no basis for the judge's decision on the facts. I will therefore examine the facts and determine why punitive damages were not well justified according to the criteria in *Whiten*. I will also discuss the

> need to avoid duplication in damage awards. **Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.**

[150] And further at paragraph 68:

> [68] Even if I were to give deference to the trial judge on this issue, this Court has stated that punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised" (*Vorvis*, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (*Vorvis*, at p. 1108). The facts of this case demonstrate no such conduct. Creating a disability program such as the one under review in this case cannot be equated with a malicious intent to discriminate against persons with a particular affliction.

[151] As the Plaintiff's claim for punitive damages is not a claim based upon an injury sustained and it may therefore proceed.

[152] The Plaintiff's right to bring a civil action for aggravated and punitive damages as described in paragraphs 44 to 47 of the Statement of Claim is removed in part. The Plaintiff's right to bring an action in respect of her claimed aggravated damages is removed but her right to bring an action in respect of punitive damages is not removed.

DISPOSITION

[153] The application is granted in part.

[154] The plaintiff's right to commence an action in respect of personal injuries received, physical and psychological, as contained in paragraphs 38 to 43 of the Statement of Claim, is removed by the WSIA.

[155] The plaintiff's right to commence an action in respect of a claim for wrongful dismissal as described in paragraphs 35 to 37 of the Statement of Claim, is not removed by the WSIA.

[156] Should the plaintiff be successful in establishing that she was constructively dismissed it will be for the Court to determine the extent of her loss, if any, that the plaintiff experienced as a result of an insufficient notice period of that dismissal, as distinct from any loss she experienced as a result of her workplace injury.

[157] The plaintiff's right to commence an action for aggravated damages, as contained in paragraphs 44 to 47 of the Statement of Claim is removed by the WSIA.

[158] The plaintiff's right to commence an action for punitive damages, as is also contained in paragraphs 44 to 47 of the Statement of Claim, is not removed by the WSIA.

DATED: May 27, 2021

SIGNED: G. Dee