Ontario Court Opens Door to Harassment-Based Constructive Dismissal Claims



Workers comp doesn’t bar constructive dismissal for harassment, court says.

Workers comp bars lawsuits against employers for work-related injuries; in exchange, workers get automatic coverage of work injuries regardless of who’s at fault. But a shocking new case from Ontario may create a side door allowing workers to get around this ‘historic tradeoff’ and sue their employers for harassment-based constructive dismissal.

What’s At Stake

Back in the days before workers comp existed, workers who got hurt on the job had 2 basic options:

- Option 1: Sue their employer for money damages; and
- Option 2: Suck it up and do the best they could without injury benefits.

Needless to say, very few workers had the gumption, let alone the financial resources necessary to pursue Option 1.

Workers comp was created to give workers a safety net and assure them that they’d be taken care of if they suffered work-related injuries, without the need to go to court and prove their employer was at fault. In exchange, they had to

accept their workers comp benefits as full redress for the injury and give up their right to sue the employer.

Mental Stress & the Historic Tradeoff

Workers comp was originally envisioned as coverage for physical injuries. But over the years, we've come to recognize that workplace injuries are inflicted on not only the body but also the mind. At first, workers comp didn't cover mental stress and injury unless it occurred as the result of a discrete traumatic event at work, like watching a co-worker suffer a violent death. However, workers comp has evolved by expanding coverage to chronic mental stress inflicted gradually on a continuing rather than traumatic basis, most notably as a result of workplace harassment.

At the same time, workplace harassment has become a rich source of employment litigation. The money damages handed out in these lawsuits have caught the attention of workers, especially those that have been recently fired by the company where they were harassed, nor the trial lawyers that represent them. All of this has placed the historic tradeoff under new pressures. **The big question:** Does the workers comp bar apply to wrongful termination and other employment cases stemming from harassment'

The *Morningstar* Case

A new Ontario case raising this critical question began when a hospitality worker quit her job because she was being bullied and harassed at work. Rather than seek workers comp for mental stress, she sued the employer for constructive dismissal, contending that the toxic work environment she had to endure was tantamount to a fundamental breach of the employment contract forcing her to resign. The case went to the Workplace Safety and Insurance Appeals Tribunal (WSIAT), the legal body

in Ontario that determines whether a worker has a 'right to sue' when a legal claim may be barred by workers comp.

The WSIAT ruled that workers comp would, in fact, cover the worker's chronic mental stress. Consequently, the lawsuit was subject to the workers comp bar.

The Court Green Lights Constructive Dismissal Lawsuit

The worker's appeal looked like a long shot because courts almost always uphold WSIAT decisions. But because this involved a question over jurisdiction, that is, legal authority to rule on a case, the worker and her lawyer figured they had a shot. And they turned out to be right.

The Ontario Superior Court held that the workers comp bar didn't apply to this case and reversed the WSIAT's ruling. The historic tradeoff is aimed to prevent negligence and other tort lawsuits, rather than employment and contract lawsuits, the court reasoned. Constructive dismissal isn't a tort but a employment contract claim the bar was never intended to cover, it concluded [*Morningstar v. WSIAT*, 2021 ONSC 5576 (CanLII), August 18, 2021].

What It Means

Employers have come under increasing legal pressure to take steps to protect their workers from harassment. Much of that pressure has come from the inclusion of onerous new workplace harassment duties in OHS laws. If'and it's a BIG if'*Morningstar* survives appeal, it might make employers more vulnerable to workers' constructive dismissal and other lawsuits for money damages stemming from harassment to the extent it takes the workers comp bar defence off the table. Of some relief is the belief of some lawyers that the *Morningstar* ruling is ill-reasoned and will be overturned on appeal. But

that’s anything but a sure bet.

In the meantime, it’s critical that employers continue their efforts to ensure psychological safety and implement effective workplace harassment and violence prevention plans. This was true before *Morningstar* and it will remain true regardless of the case’s ultimate outcome.