--SUMMARY--

Decision No. 1227/19 **17-Oct-2019** **J.Smith**

- Right to sue (wrongful dismissal)

The defendant in a civil case applied to determine whether the plaintiff's right of action was taken away.

The action claimed damages for constructive dismissal, bullying, harassment and a poisoned work environment.

Generally, the Tribunal has found that the right to bring an action for wrongful dismissal is not removed by the WSIA. It is only in exceptional circumstances, where the circumstances of the wrongful dismissal are inextricably linked to the work injury, that the right of action is taken away.

The Vice-Chair found that the exception applied in this case. The Vice-Chair noted that this was not a case of wrongful dismissal in the usual sense but, rather, for constructive dismissal, meaning that the worker's 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. These facts, if proven, are inextricably linked to a claim for mental stress under s. 13(4) of the WSIA. Thus, the worker's right of action was taken away.

In arriving at this decision, the Vice-Chair noted that the Tribunal has found that actions for damages flowing from a work injury are statute-barred even when the remedies sought are different from those compensated in the WSIA when those damages flow from a work injury falling within the scope of the WSIA. The manner in which the action is framed is not determinative as to whether the action is statute-barred; rather, the determination is rooted in a consideration of the fundamental nature of the action and whether it arises in respect of a work injury.

In this case, the injury for which the plaintiff claims damages, albeit under several heads, all flow directly from the harassment and bullying she alleges in the workplace and the employer's response to these allegations, which contributed to the injury sustained and the mental stress she experienced.

The plaintiff's right of action was taken away.

15 Pages

References: Act Citation
- WSIA

Other Case Reference
- [w4819s]
- CASES CONSIDERED: Honda Canada Inc. v. Keays, 2008 SCC 39 consd; Whiten v. Pilot Insurance Co., 2002 SCC 18 consd
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 237/03 (2003), 64 W.S.I.A.T.R. 276 consd; Decision No. 237/03R (2003), 65 W.S.I.A.T.R. 87 consd; Decision No. 1241/16, 2016 ONWSIAT 3520 consd; Decision No. 3836/17, 2018 ONWSIAT 593 consd; Decision No. 1878/18, 2019 ONWSIAT 142 consd; Decisions No. 28/94 distd. 566/00 refd to, 1319/01F consd, 371/18 consd

Style of Cause: Morningstar v. Hospitality Fallsview Holdings Inc.
Neutral Citation: 2019 ONWSIAT 2324

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1227/19

BEFORE: J.E. Smith: Vice-Chair

HEARING: July 10, 2019 at Hamilton
Oral

DATE OF DECISION: October 17, 2019

NEUTRAL CITATION: 2019 ONWSIAT 2324

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

APPEARANCES:

For the applicant Hospitality Fallsview Holdings Inc.: D. Seupersad/S. French, Lawyers

For the respondent J. Morningstar: Z. Pringle, Lawyer

Interpreter: N/A

REASONS

(i) Introduction and background

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997* (the WSIA) by the defendant in an action filed in Hamilton, Ontario, in the Superior Court of Justice as File No. 18-65005.

[2] By way of background, the Respondent, Ms. Morningstar, was employed by the Applicant, Hospitality Fallsview Holdings Inc. (HFH), in its housekeeping department, from May 2015. In May 2016, she was promoted to the position of supervisor.

[3] The Respondent resigned her position with the Applicant in February 2018 claiming constructive dismissal as a result of harassment and bullying in the workplace. She filed a Statement of Claim in the Ontario Superior Court of Justice on April 2, 2018 claiming damages for constructive dismissal, bullying, harassment and/or a poisoned work environment pursuant to the *Occupational Health and Safety Act* (OHSA), the tort of harassment, as well as punitive, aggravated and/or moral damages. In particular, the Respondent claimed that she "was forced to resign from her positon with [the Respondent] due to the harassment, bullying and abuse she endured during the course of her employment and the resulting mental distress she experienced and continues to experience." She pled further that the claim "relates to the harassment and bullying that [she] experienced as a result of a toxic work environment created by [the Applicant's] employees and management and her subsequent constructive dismissal."

[4] The particulars of the incidents alleged by the Respondent, in the Statement of Claim in the above noted action, are summarized as follows.

[5] The Respondent claimed that housekeeping employees subjected her to abusive, humiliating and cruel conduct over the course of 17 months and that this conduct was supported and reinforced by the Applicant's management. The conduct began with an incident in which a number of employees sprayed the Respondent with Lysol claiming that she "smelled." The Respondent was a cancer survivor and was concerned that an unusual odour could indicate the return of her cancer. She advised the employees that she had made an appointment with her doctor in advance of the incident as a result of her concern and asked that they "cease the harassment." She saw her doctor and was reassured she was in good health. The odour went away after changing the medication the Respondent had been prescribed. However, the employees continued to complain about her odour and later in the month complained to the housekeeping manager. The Respondent claims that in a meeting with the housekeeping manager she was asked if she showered every day, if she washed her uniform every day and whether she had considered "using feminine products such as douches, sprays, pads or baby powder." The Respondent claims that she was "shocked and humiliated by the questions" put to her by the housekeeping manager and remained concerned that her cancer had returned despite the reassurances by her doctor.

[6] The Respondent further claimed that in early July 2016 the housekeeping employees began leaving towels on the chair on which the Respondent sat and, on some occasions, the Respondent found bathmats placed on her chairs. She claimed that this conduct went on for the next 15 months. In a subsequent meeting, the housekeeping manager again advised the Respondent that some employees had complained that she had a "certain odour" and again asked

if she had considered using feminine products. The Respondent advised that there was no odour, she continued to be screened once a year for the return of her cancer, and could not use feminine products due to the type of cancer she suffered. She advised, however, that she would return to the doctor again to ensure there was nothing medically wrong. She was again reassured by her doctor that she had "a clean bill of health."

[7] The Respondent claimed that following the second meeting, the other employees continued to place towels or bathmats on her chair on a daily basis, spread rumours that she had an odour, spread false rumours about her work performance, made up embarrassing stories involving her work performance which they laughed about in her presence, on one occasion hid her clipboard which contained personal and time sensitive information, and on one occasion placed the wrong work schedule on the scheduling board so that she would record the incorrect schedule.

[8] The Respondent filed a harassment complaint with the housekeeping manager and subsequently spoke to the Applicant's then Human Resources director. She was told there would be an investigation. She was told that one of the employees admitted to the clipboard incident but later recanted and the Respondent was asked to apologize to the employee about the clipboard accusation. She was told there would be new chairs in the housekeeping department and was asked if "she could try to work more cohesively with team members." The Respondent claimed that as a result of the inaction by the Applicant, the harassment and bullying conduct continued. She further alleged that in August 2017 she began to find that the towels routinely placed on her chair had yellow stains on them. The employees accused her of creating the stain on the towels which were often moist after she sat on them. She again went to her doctor who recommended that she take two weeks' medical leave.

[9] An internal investigation was conducted and an independent investigation was ordered by the Ministry of Labour following contact by the Respondent. The Respondent claimed that as a result of the stress of the internal investigation, the recommendations and the continuing harassment and bullying she experienced by co-workers and management she went on medical leave which continued until February 16, 2018 when, in consultation with her doctors, she claimed she was unable to return to work due to the harassment, and her fragile mental state resulting from the harassment and bullying to which she was subjected in the workplace.

[10] The Respondent claimed entitlement to payment in lieu of reasonable notice and that her injuries and damages resulting from the action of the Applicant's employees and management included diminished self-worth, depression, anxiety, difficulty coping with emotional stress and mental anguish, feelings of guilt and self-blame, insomnia, loss of consortium and loss of enjoyment of life.

[11] The Respondent filed a claim in April 2018, as set out above, for constructive dismissal, damages for mental stress, moral, aggravated and punitive damages, damages for bullying, harassment and the creation of a poisoned work environment and/or the tort of harassment.

[12] The Applicant filed a section 31 application seeking a declaration that the worker's right of action against it, as summarized above, is barred by the WSIA.

(ii) Issues

[13] The issue in this application is whether the Respondent's right of action is taken away pursuant to section 31 of the WSIA.

(iii) Law and policy

[14] Section 31 of the WSIA provides that a party to an action or an insurer from whom statutory accident benefits (SABs) are claimed under section 268 of the *Insurance Act* may apply to the Tribunal to determine whether: a right of action is taken away by the Act; whether a plaintiff is entitled to claim benefits under the insurance plan; or whether the amount a party to an action is liable to pay is limited by the Act.

[15] Section 26 states that entitlement to benefits under the WSIA are in lieu of all other rights of action in respect of a work accident:

> **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.

[16] Section 28(1) states that a worker employed by a Schedule 1 employer is not entitled to commence an action against a Schedule 1 employer, a director, executive officer or worker employed by a Schedule 1 employer in respect of a work injury:

> **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.
>
> ...
>
> **(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.

[17] Relevant to this application are the provisions under section 13(4) of the WSIA. The legislation was amended in 2018 to provide for entitlement to chronic mental stress, in addition to traumatic mental stress, resulting from work injuries. Specifically, effective January 1, 2018, section 13(4) provides for entitlement under the insurance plan for chronic and traumatic mental stress, 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.
>
> 13(4.1) The worker is entitled to benefits under the insurance plan as if the mental stress were a personal injury by accident.

[18] Transitional provisions were also enacted for mental stress claims occurring on or after April 29, 2014 and which had not been filed with the WSIB (the Board) before January 1, 2018 as follows:

> 13.1 (1) The rules set out in subsections (2) to (9) apply for the purposes of determining entitlement to benefits under subsection 13(4).
>
> (2) If a worker's mental stress occurs on or after April 29, 2014 and the worker has not filed a claim in respect of entitlement to benefits for mental stress before January 1, 2018,

> the worker or the worker's survivor may file a claim for entitlement to benefits for mental stress with the Board and the Board shall decide the claim in accordance with subsection 13(4) as it reads at the time the Board makes its decision.

[19] In *Decision No. 1460/02*, the Panel noted that the Tribunal is not required to apply Board policy in right to sue applications, as section 126 of the Act refers to appeals, not applications. The Panel, however, also noted that it is important to maintain consistency with findings that might have been made had the case come to the Tribunal by way of appeal from a decision regarding entitlement. Therefore, Board policy continues to be relevant in right to sue applications. See *Decision No. 755/02.*

[20] Board *Operational Policy Manual* (OPM) Document No. 15-03-14, Chronic Mental Stress, appearing in Addendum No. 1 to the Case Record, is relevant to the issues under consideration in this application. That policy provides for entitlement to benefits for chronic mental stress as follows:

> **Policy**
>
> A worker is entitled to benefits for chronic mental stress arising out of and in the course of the worker's employment.
>
> A worker is not entitled to benefits for chronic 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.
>
> ...
>
> **Guidelines**
>
> **Definition**
>
> **Workplace harassment**
>
> Workplace harassment occurs when a person or persons, while in the course of the employment, engage in a course of vexatious comment or conduct against a worker, including bullying, that is known or ought reasonably to be known to be unwelcome.
>
> **Chronic mental stress**
>
> A claim for chronic mental stress (as described below) is distinct from a claim for traumatic mental stress. For information relating to claims for traumatic mental stress, see 15-03-02,Traumatic Mental Stress.
>
> A worker will generally be entitled to benefits for chronic mental stress if an appropriately diagnosed mental stress injury is caused by a substantial work-related stressor arising out of and in the course of the worker's employment. For more information see 15-02-02, Accident in the Course of Employment.
>
> ...
>
> **Substantial work-related stressor**
>
> A work-related stressor will generally be considered substantial if it is excessive in intensity and/or duration in comparison to the normal pressures and tensions experienced by workers in similar circumstances.
>
> **Workplace harassment** will generally be considered a substantial work-related stressor.

(iv) Analysis

[21] The issue before me in this application is whether the Respondent's right of action is removed by the WSIA.

[22] Counsel for the Applicant submitted that the worker's Statement of Claim is effectively a claim for chronic mental stress under the WSIA and thus her right of action is removed in relation to her action for constructive dismissal, and for damages for mental stress, aggravated, moral and punitive damages, and for breach of the OHSA for bullying, harassment, the creation of a poisoned work environment and/or the tort of harassment.

[23] Counsel for the Respondent submitted that a worker's right to claim for damages in a civil action is taken away by the WSIA only in respect of the damages that are compensable under the WSIA and one must look at the three causes of action to determine whether they are inextricably linked to a work accident. In this case, he submitted, the Respondent would still have a claim for constructive dismissal, as a result of the Applicant's conduct, even if she had not suffered mental stress damage and thus her right to sue for constructive dismissal and for punitive, aggravated and moral damages, as well as for breaches of the OHSA and/or the tort of harassment should stand.

[24] Both representatives also stated that they relied on the submissions made in their right to sue materials.

[25] Having considered the submissions of the representatives in their entirety, including the jurisprudence they referenced, I find that the worker's claim falls within the jurisdiction of the WSIA and thus her right of action against the Applicant in the circumstances is statute barred. I arrive at this conclusion for the following reasons.

[26] I begin by noting that there is no dispute that the Applicant is a Schedule 1 employer under the WSIA and was so at all material times. I note that this was confirmed by the WSIB in the status check provided to the Tribunal in December 2018.

[27] Neither is there a dispute that the worker, the co-workers and managers named in the action were in the course of their employment when the incidents of harassment and bullying that the Respondent alleges took place.

[28] Lastly, I note that it is not before me to make a determination as to whether the worker was subjected to harassment and bullying in the manner she claims or whether she was injured as a result. It is only before me to determine whether the circumstances she alleges, if proven, bring her claim within the scope of the WSIA and thereby remove her right to bring a civil action against the Applicant, pursuant to sections 28 and 26(2) cited above.

[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, *Decisions No. 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.

[31] In arriving at these conclusions, I acknowledge the submissions of the Respondent. In the written submissions to the Tribunal in the Respondent's Right to Sue Statement, at paragraph 17, the Respondent noted that "a worker's entitlement to benefits under the WSIA is *in lieu* of all right of action against their employer for or by reason of an accident happening to the worker." The Respondent then submitted that this principle, "stated differently," is that "if a worker's claim for damages in the Superior Court of Justice would have otherwise been compensable under the WSIA, then their right to sue is taken away only in respect of their damages compensable by the WSIA." The Respondent cites *Decision No. 371/18*, paragraph 13, in support of this submission.

[32] I find this characterization reverses the emphasis in the principle set out in *Decision No. 371/18*. I note, as the Vice-Chair in that decision, I found that a claim for damages flowing from alleged negligence which resulted in a work accident and the associated personal injury fell squarely within the scope of section 26, and thus an action for damages for negligence was statute barred. In particular, in that decision the respondent argued that "...the court action filed by Mr. Kharazipour is in respect of damages for an alleged breach of the duty of care owed to him by the defendants rather than the injury itself, and thus is not barred by the WSIA." That argument was rejected, in *Decision No. 371/18*, based on the finding that the negligence alleged to have caused the work accident, and the inadequate response by the employer alleged to contribute to his injuries, were directly related to the work injury and thus fell within the scope of section 26, taking away the worker's right to sue:

> [13]....I note that Mr. Kharazipour's Statement of Claim is for damages flowing from alleged negligence by Welded Tube, Mr. Gneo and R&W, which he claimed led to his August 2013 work accident, constituted an inadequate response to the injury he sustained, and thereby contributed to his "serious and permanent injuries." As such, his claim for damages flows from the negligence by the defendants he alleges, which is directly related to the work injury on August 20, 2013, and thus falls squarely within the provisions set out in s. 26. Accordingly, Mr. Kharazipour's right to sue is taken away.

[33] I note that, in that decision, and others addressing this issue, the Tribunal has found that actions for damages flowing from a work injury are statute barred even when the remedies sought are different from those compensated in the WSIA, when those damages flow from a work injury falling within the scope of the WSIA. See for example, *Decision No. 237/03R*, in which the Panel stated:

> [37] In our view the matter also does not turn on the question of whether the remedies in the two matters are distinct. The remedies provided in a tort action may well be different than the remedies provided by the worker's compensation legislation. Yet the

> Act does constitute a bar on the worker's right to sue an employer in negligence for a workplace accident.

[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.

[35] I note that the Respondent expanded on the above argument, referencing *Decision No. 237/03* and submitting:

> ....Recall that the WSIA is concerned only with preventing a worker from claiming damages related to an injury (by reason of an accident) which would be compensable pursuant to the WSIA. Therefore, a right to sue may be taken away only where the WSIA could have compensated the worker for their damages.

[36] Once again, I find this submission misapprehends the conclusions drawn in *Decision No. 237/03.* That case involved a section 31 application in which a worker was injured at work by catching his hand in a press and sustaining a crush injury. He made a claim for benefits to the Board which was allowed. The worker left his employment claiming that the work assigned was not suitable. He claimed further benefits which were denied by the WSIB. He then brought an action for wrongful dismissal against the employer. The Vice-Chair found that the cause of action in question was for wrongful dismissal and, in that case, the cause of action was "distinct, separate and remote from the workplace accident causing personal injury...although the personal injury and the allegations of wrongful dismissal share some factual basis, the connection between the two is nevertheless incidental."

[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.

[38] Further, I note and agree with the Vice-Chair's view, in *Decision No. 237/03*, that the manner with which an action is framed is not determinative as to whether it is statute barred – the determination is rooted in a consideration of "the fundamental nature of the action" and whether it arises in respect of a work injury. As the Vice-Chair in *Decision No. 3836/17* put it:

> [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.

[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.

[40] This brings me to the Respondent's argument that there was no accident in this case, within the s. 2 definition provided in the WSIA. Counsel submitted that the facts alleged which resulted in the constructive dismissal claim do not meet the definition of accident under s. 2. I disagree. I note that s. 2 defines an accident broadly and inclusively, and includes a wilful and intentional act that is not the act of the worker, a chance event occasioned by a physical or natural cause and a disablement. I find that the harassment and bullying alleged by the Respondent describes a series of wilful or intentional incidents and thus meets the s. 2 definition of accident. Moreover, I note that section 13(4) provides that a worker is entitled to benefits for chronic or traumatic mental stress arising from the workplace and in such cases, pursuant to section 13(4.1), the worker is entitled to benefits as "if the mental stress were a personal injury by accident." I interpret this to mean that the workplace events resulting in an injured worker's mental stress, for which a worker has entitlement to benefits under the Act, constitute an accident for the purposes of the WSIA. Further, I note that workplace harassment is addressed specifically in OPM Document No. 15-03-14 cited above, which states that it will generally be considered a "substantial work-place stressor." I therefore do not accept that the incidents of harassment and bullying alleged by the Respondent do not amount to an accident as it is defined in the WSIA.

[41] Counsel for the Respondent submitted that the general principle applied by the Tribunal is that an action for wrongful dismissal will generally not be taken away, as stated in *Decision No. 1241/16*. Counsel submitted that the right to sue will not be removed, when the claim for wrongful dismissal is separate and remote from the work accident causing personal injury, even when the allegation of wrongful dismissal and personal injury share the same factual basis, again citing *Decision No. 273/03* in support of this submission. I find the work accident causing personal injury and the claim for constructive dismissal in this case are inextricably linked factually, and are not separate and remote.

[42] Counsel for the Respondent argued that Ms. Morningstar has claimed constructive dismissal as one of the causes of action against the Applicant. And that her claim for constructive dismissal is "due to the manner that HFH conducted itself both during *and* following the incidents" claiming that the constructive dismissal claim is based on the Applicant's failure to prevent further instances of the incidents and to appropriately respond to the Respondent's complaints about the other HFH employees, to take proper disciplinary measures against the perpetrators of the incidents, to seriously investigate the Respondent's complaints, to conduct a thorough investigation, to deliver the result of their investigation, or to deliver a written report to the Respondent with respect to the external investigation.

[43] I find that these allegations of mishandling of the harassment complaint by the employer are a component of the original harm claimed. More precisely, I interpret this allegation to mean the employer's action, or inaction, in addressing the worker's complaints contributed to, and made worse, the harassment and bullying to which the Respondent claims she was exposed, and the injuries she suffered, which ultimately resulted in her sick leave and subsequently the termination of her employment. I note that at paragraph 55 of the Statement of Claim it states that the harassment and bullying engaged in by the co-workers, which was supported and reinforced by the employer, resulted in her being forced to resign her position. It further states that the "poisoned and hostile working environment" created by the co-workers, the employer's internal investigation and the lack of corrective action by the employer demonstrated that the employer no longer intended to be bound by its contract. I find this allegation is not unlike that made in *Decision No. 381/17* cited above in which the claim was that the employer's negligence

before, and in response to, the work accident contributed to and worsened the injury sustained in that accident. In that case, like this one, I find that this alleged conduct of the Applicant, which contributed to the harm suffered by the Respondent, directly related to the work accident; I find this aspect of the Respondent's claim is a component of the same injury and in turn is inextricably linked to the accident.

[44] Counsel for the Respondent argued that the Respondent's constructive dismissal claim would exist even if she had not suffered mental injuries. Whether or not this is so is not before me to determine. Further, I find this a hypothetical, speculative argument given that the worker has claimed that she did suffer mental stress injuries resulting from workplace harassment and bullying. It is only the facts of this application that are before me to consider and not facts as they may appear in a hypothetical set of circumstances in which the Respondent did not sustain a mental stress injury in the manner she has claimed.

[45] Counsel for the Respondent submitted that the Applicant cited *Decision No. 28/94* in support of the proposition that the Tribunal will bar actions for wrongful or constructive dismissal where the basis for the claim was "for or by reason of injuries suffered in a workplace accident." Counsel noted, however, that this decision was deemed "wrongly decided" in *Decision No. 237/03*.

[46] The facts in *Decision No. 28/94* were, in my view, entirely distinguishable from those in this application. In that case, the worker resigned due to his injuries, for which he had claimed and received benefits, and the accident occurred on the weekend on personal time. The Panel found, notwithstanding this fact, that the worker was in the course of employment when the accident occurred and thus a workplace nexus was established. Further, the Panel found that the worker's claim for constructive dismissal was statute barred as it arose from his claim that he could no longer perform his duties due to the injuries sustained in a work accident. I therefore find the facts in that case were distinguishable, and thus the findings of that Panel are not applicable to the determination before me. Further, and more importantly, whether "wrongly" decided or not, in my view the principle underpinning that case is that even in cases of wrongful dismissal, if the facts bring the accident and injury for which a remedy is sought under the workers' compensation framework, the worker is statute barred from suing in respect of that accident and the associated injury.

[47] This principle was discussed by the Vice-Chair in *Decision No. 237/03.* While noting that typically wrongful dismissal actions are not statute barred, and opining that *Decision No. 28/94* was wrongly decided, the Vice-Chair described the test to be applied as follows:

> [68] Section 26 of the Act states that compensation under the Act is "in lieu of all rights of action (statutory or otherwise) that a worker… may have against the worker's employer….for or by reason of an accident happening to the worker." The language is the same as that which was applicable in *Decision No. 28/94.* In my view, in both the instant application and *Decision No. 28/94*, the wrongful dismissal action was "for or by reason of" an allegation of dismissal, constructive or otherwise, made in each case. In neither case was the action "for or by reason of an accident". I agree with the findings in *Decision No. 286/96* and *Decision No. 670/97* that the "incidental" relationship between the facts underlying a worker's personal injury by accident and those underlying an allegation of wrongful dismissal is not sufficient to support a determination that the action for wrongful dismissal should be taken away by the Act.

[48] The Vice-Chair noted that an incidental relationship between a worker's personal injury by accident and those underlying the allegation of wrongful dismissal is not sufficient to bar the

action for wrongful dismissal. Rather, the action must be "for or by reason of an accident." In this case, I find that the Respondent's action is rooted in a claim of injury by accident in the form of harassment and bullying in the workplace, and thereby brings the claim within the scope of the WSIA and in particular the provisions of s.13(4). I find, for these reasons, that the facts of the work harassment alleged, and resulting injury, are inextricably linked to a claim for chronic stress under the WSIA and are thus barred by the legislation.

[49] Further, I note that the Vice-Chair in *Decision No. 1241/16*, cited by the Respondent, while not addressing a case of wrongful dismissal considered a similar question, finding that the damages claimed in that case all arose from the same source of harm. In that case, the Respondents brought an action for damages for intentional infliction of mental suffering, breach of contract in the applicants' failure to provide a safe workplace which was alleged to be an implicit term of the employment contract and punitive damages arising from the applicants' malicious behaviours, as alleged. The respondent, in that case, was hired by the construction contractor applicants as the personnel security manager on the construction site. She claimed a series of abusive, discriminatory and threatening behaviours over the course of her employment with the applicants and damages under the heads set out about. The applicants sought a declaration that the respondent was barred from suing. It should be noted that this was prior to the legislative amendments which provided for entitlement for chronic mental stress and was considered under the old version of s. 13(4) that provided for entitlement for traumatic mental stress only. The Vice-Chair accepted the submission by the applicants that "an action which is essentially one related to personal injury cannot be maintained merely by framing the action in contract." The Vice-Chair found that the respondent's right to sue was removed by the WSIA for all claims other than the breach of human rights and pain and suffering arising from discriminatory treatment and the surveillance alleged, finding that the harm caused by the applicants' breaches were the same as the harm that would be claimed for personal injury by work accident:

> [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.
>
> ...
>
> [81] I find that, in this case, the harm to Ms. L.W. which would form the basis for an action for breach of the respondents' obligation to provide her with a safe work environment, is essentially the same harm which forms the basis of her claim for personal injury. Accordingly, the worker's action cannot be maintained on the basis that it is a claim for breach of contract not covered by the Act.
>
> ...
>
> [86] The claim by Ms. L.W. for punitive damages is also taken away by the Act, except for such damages that might arise from paragraph 1(a)(iv) of the Statement of

> Claim in relation to breach of human rights and discriminatory treatment, or arising from the surveillance issue.

[50] Significantly in that case, the Vice-Chair found the breach of the implied employment contract term and the punitive damages claimed were both statute barred as flowing from the same injury which would fall under the WSIA entitlements for traumatic mental stress. In my view, the breach of the implicit term is not unlike a claim for constructive dismissal in that the breach of the employment contract is implicit, rather than direct, in the alleged conduct of the employer. In turn, I find the analysis underpinning the conclusion by the Vice-Chair in this regard is comparable to the analysis in this case; the conduct of the employer implicitly breached the employment contract and that conduct, if proven, amounted to a personal injury arising from a work accident and thus is a claim under the WSIA.

[51] Moreover, I accept and adopt the approach in *Decisions No. 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.

[52] In his oral submissions, Counsel for the Respondent argued that the Statement of Claim must be reviewed in its entirety to determine exactly what is pled. He submitted that the Respondent's claim is for three causes of action; wrongful dismissal, breaches of the OHSA and harassment with multiple allegations supporting multiple causes of action. He submitted that simply because the pleading is made that the Respondent has suffered some form of mental harm does not mean that the entire claim is from the mental harm suffered. He submitted that the Tribunal must determine whether the allegations are inextricably linked to a work accident but that is not the end of the analysis; what is in the middle is the cause of action. He submitted that where a cause of action is pleaded and the only way to satisfy all the elements of that action is to rely on an injury occurring in the workplace, then that cause of action is statute barred as that would mean the cause of action is inextricably linked to the accident; if they do not rely on the injury in the workplace then they are not inextricably linked to the work accident.

[53] Counsel submitted that claims of constructive dismissal are good cases in which to look at this approach to the analysis, as in *Decision No. 1319/012.* In that case, constructive dismissal was claimed on the basis that the worker could not return to work because of the injury. In this case, he submitted, there were sufficient material facts pleaded to satisfy the cause of action for constructive dismissal without having to rely on the injury. He noted that the Statement of Claim refers to the facts and the allegations that formed the basis of the cause of action for constructive dismissal and these include a poisoned work environment created by co-workers and management, the internal harassment investigation report and the lack of significant corrective action taken by the employer, which established that the employer no longer intended to be bound by its contract of employment with the Respondent. Therefore, he submitted that there are two separate injuries that are at issue; certain allegations of harassment but also a separately and distinct set of actions taken by the employer, meaning its corrective actions or lack thereof, to remedy the poisoned work environment. He submitted that the employer either chose not to take appropriate steps to correct these issues or exacerbated them. That is all to say that even if the Respondent had not suffered mental damages then the cause of action would still stand; the same cannot be said for *Decision No. 1319/012*.

[54] As noted above, this submission asks me to consider a hypothetical situation in which the worker did not claim mental stress injuries. In the instant case, the Respondent is claiming personal mental stress injury resulting from the employer's actions, and inaction, surrounding the alleged workplace harassment, an accident I have found that is within the terms of the WSIA. Further, as previously noted, I do not accept that the employer's conduct in addressing the harassment complaints was separate and distinct from the harassment and bullying. Rather, I find the employer's management of the alleged harassment is a component of the accident and the injury the Respondent claims that resulted. Lastly, I find that this submission uses the terms injury and damages interchangeably and thus confuses the manner with which this application is decided. The issue is whether the Respondent sustained a personal injury by way of a work accident. If the answer to that question is yes, the resulting damage may take a number of forms. In this case, in my view, the injury is the harm sustained as a result of the workplace harassment alleged, and which includes damages for mental stress, constructive dismissal, as well as the other heads of damage claimed. As noted above, as this is the work injury underpinning the Respondent's cause of action against the Applicant, on all fronts, I find her action is statute barred.

[55] I note that counsel for the Respondent submitted that Ms. Morningstar has claimed aggravated, moral and punitive damages from the Applicant flowing from her constructive dismissal. He submitted that moral damages, as defined by the Supreme Court of Canada in *Honda Canada v Keays*, [2008] 2 SCR 362, flow from the events that constituted constructive dismissal, meaning the unfair conduct of the employer, and punitive damages are based on the claim that the employer's conduct was of such seriousness that it deserves condemnation or punishment, also as defined in *Honda Canada v. Keays*. He submitted that the Respondent should not be prevented from claiming these damages as "they are either unrelated or tangentially connected to her Mental Injuries," and are therefore separate and apart from damages for mental stress.

[56] Counsel for the Respondent argued that even if the Tribunal finds that the Respondent's claims for breach of the OHSA and the tort of harassment are compensable injuries under the WSIA, her action ought to be allowed to proceed in any event as she is seeking punitive damages which are not meant to compensate her but rather to punish the offending party. He referenced *Whiten v Pilot Insurance Co.*, [2002] 1 SCR 595, the case in which the Supreme Court stated that the purpose of punitive damages "straddles the frontier between civil law (compensation) and criminal law (punishment)." The Respondent submitted that the Tribunal does not have the authority to award punitive damages against the Applicant and, as these damages are not meant as compensation to the claimant, the Respondent's claim for breach of the OHSA and tort of harassment ought to be allowed to continue on this basis.

[57] I do not accept this submission. Again, I refer to the analysis in the decisions previously referenced and, in particular, *Decision No. 1214/16* which, as cited above, found that a claim for punitive damages flowing from a personal injury falling within the WSIA scheme was statute barred. I reiterate that Tribunal case law has found that it is the nature of the injury that is at issue in determining whether a right to sue is removed by the WSIA, rather than the remedies sought which may or may not be similar to those available under the WSIA. This is consistent with *Decision No. 1878/18* which made a similar finding, as follows:

> Punitive damages are only available in tort actions if tort liability has been established. As a result of either concessions made by Mr. MacRae at the hearing, or by my findings

> in this decision, all tort claims have been barred from proceeding by virtue of section 26(2) of the Act. Where a cause of action has been taken away by the Act, this extends also to any related claim for punitive damages (see, for example, *Decision Nos. 674/94* and *36/00*).

[58] Finally, I consider the submissions with regard to the transitional rules addressing the claims for chronic mental stress which were not yet filed with the WSIB or were not yet finally adjudicated at the time of the legislative changes to section 13(4), and cited above. Counsel for the Respondent argued that section 13.1 is permissive in that it does not require a worker to recover damages for mental stress through benefits under the insurance plan by providing that a worker "may file a claim for entitlement to benefits for mental stress with the Board." As such, Counsel argued that the WSIA is inapplicable to claims of chronic mental injury that occurred after April 29, 2014 and no claim for benefits was made before January 1, 2018.

[59] I do not accept this submission. Section 13.1 addresses claims for mental stress under section 13(4) which have arisen after April 29, 2014 and which have not been filed with the WSIB prior to January 1, 2018 when the new legislation came into force. The provision provides for the opportunity to file a claim in such circumstances. It does not create a right of election between filing a claim under the WSIA and pursuing a civil action for claims that fall within the scope of the legislative amendments.

[60] Counsel submitted, in respect of the retroactivity of 13.1(2), there could be a civil suit for chronic mental stress falling outside the dates of April 29, 2014 and January 1, 2018 in which the worker in that case could have sued their employer, and many have sued the employer in such circumstances. He submitted that it would be an absurd result to allow separate pathways for similar claims up to January 1, 2018. He cited *British Columbia v Imperial Tobacco Canada Limited*, [2005] 2 SCR 473, in support of this submission. However, I note that in that case the Supreme Court found that civil rights could be affected retroactively and this does not offend the rule of law. Moreover, I note that it is only before me to determine the Respondent's right to sue in this case, not the impact of the transitional provisions on all claims captured by them.

[61] In short, for all of the foregoing reasons, I find that the Respondent's action against the Applicant reflects a claim for personal injury arising from a work accident consisting of alleged workplace harassment and the employer's alleged failure to address it. As such, her claim falls within the jurisdiction of the WSIA and thus her right to bring a civil action against the employer is barred by statute in these circumstances.

DISPOSITION

[62] The application is granted. The right of action against the Applicant Hospitality Fallsview Holdings Inc. is taken away by the Act.

[63] Pursuant to section 31(4) of the WSIA, the Respondent may file a claim for benefits within six months of this decision.

DATED: October 17, 2019

SIGNED: J.E. Smith