

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario Public Service Employees Union v. Ontario (Community Safety and Correctional Services), 2013 ONCA 406

DATE: 20130614

DOCKET: C56541

Winkler C.J.O., Rouleau and Hoy JJ.A.

BETWEEN

Ontario Public Service Employees Union

Appellant

and

The Crown in Right of Ontario (as represented by the Ministry of Community Safety and Correctional Services and the Ministry of Children and Youth Services)

Respondent

and

The Grievance Settlement Board

Respondent

Richard A. Blair and Christopher Bryden, for the appellant

Malliha Wilson, Christopher P. Thompson, Jennifer Richards and Robert Fredericks, for the respondent the Crown in Right of Ontario

Heard and released orally: May 29, 2013

On appeal from the order of the Divisional Court (Justices James C. Kent, Robert R. Jennings and Sarah E. Pepall), dated September 11, 2012, with reasons reported at 2012 ONSC 2348, 296 O.A.C. 373, dismissing an application for

judicial review of a decision of the Grievance Settlement Board, dated April 29, 2010.

ENDORSEMENT

[1] The Union filed some 235 grievances between 1991 and 2008 on behalf of employees of the Ministry of Community and Correctional Services and the Ministry of Children and Youth Services concerning exposure to second-hand cigarette smoke in correctional facilities. The grievances claimed unspecified damages for alleged violations of the Health and Safety Provisions of the current and prior collective agreements.

[2] The parties agreed that the Grievance Settlement Board should determine the preliminary issue of whether it was precluded from granting the grievors compensation for their alleged injuries or any other remedy. The employer relied on the wording of the Health and Safety Provisions in the agreements, s. 16 of the *Workers' Compensation Act*, R.S.O. 1990, c. W.11 ("WCA"), and s. 26 of the *Workplace Safety and Insurance Act*, S.O. 1997, c. 16 ("WSIA"). It argued that the Board had no jurisdiction to consider fault-based claims pertaining to compensable injuries as defined under those Acts and the grievances therefore had to be dismissed.

[3] The Vice-Chair rejected the Union's argument that the WCA and WSIA restrictions only applied to tort and not to contract. He observed that the historical trade-off embodied in the two Acts was that the employer's contributions to the

compensation fund protected it from liability for compensable workplace injuries. Whether pleaded in tort or in contract, the substance was the same. The Vice-Chair concluded that the Board could not award damages under Articles 9.1 and 18.1 of the relevant collective agreements for compensable injuries to which the *WCA* and *WSIA* would have applied.

[4] As explained by the Vice-Chair, at para. 107:

This Board cannot award a grievor damages “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” if the alleged accident or disease is or was compensable under the *WCA* or *WSIA*.

The Vice-Chair went on to explain, at para. 111:

The proper question is whether an injury or illness of the sort alleged by the grievor would be or would have been compensable under the applicable statute *if proven*.

[5] The Divisional Court concluded that whether the standard of review applied was reasonableness or correctness, the judicial review application should be dismissed. It found that the decision of the Vice-Chair was thorough and carefully considered, logical and intelligible, justifiable and transparent. We agree. In our view, it makes no difference whether the claim is framed in tort or in contract. It is the substance of the claim that matters. The Vice-Chair was correct in his conclusion that the Board could not award damages under the collective

agreement for compensable injuries to which the *WCA* or the *WSIA* would have applied.

[6] The Union also takes issue with the Divisional Court's endorsement of the Board's comment that clear and careful language is needed in a collective agreement if it is to provide for compensation that supplements *WCA* and *WSIA* benefits for workers with compensable injuries. We view this comment as *obiter* given the issues before the Board, and the outcome. Accordingly, it is in our view unnecessary to address this additional issue.

[7] As a result, the appeal is dismissed.

"W. Winkler C.J.O."
"Paul Rouleau J.A."
"Alexandra Hoy J.A."