

# The “Historic Trade-Off”: Ontario Divisional Court Considers The Interplay Between The Workers’ Compensation Scheme And Constructive Dismissal Actions Arising From Workplace Harassment



In [Morningstar v. WSIAT, 2021 ONSC 5576](#), the Ontario Divisional Court conducted a judicial review of [Decision No. 1227/19, 2019 ONWSIAT 2324](#) and [Reconsideration Decision No. 1227/19R, 2020 ONWSIAT 1151](#) (the “Decisions”): two decisions of the Workplace Safety and Insurance Appeals Tribunal (the “Tribunal”) that have been widely criticized for their potential to shield employers from the legal consequences of workplace harassment and the failure to adequately respond to it. The Decisions had the effect of funneling constructive dismissal claims based on workplace harassment into a no-fault insurance scheme which is clearly not intended to compensate for such claims, leaving employees with no recourse but to claim relatively modest benefits under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A (the “Act”).

## **Background**

Ms. Morningstar was employed by Hospitality Fallsview Holdings Inc., operating as Hilton Niagara Falls/Fallsview Hotel and Suites (“Hilton”) as a supervisor in the housekeeping department. She is 60 years old and a survivor of uterine cancer.

Over a term of about 15 months, Ms. Morningstar was repeatedly harassed and bullied by her coworkers who, among other things, alleged an odour emanated from her, sprayed her with Lysol and covered the seat of her chair with towels and bathmats.

When Ms. Morningstar complained to her manager, she was met with humiliating suggestions that she use feminine products, shower and wash her uniform—despite her having explained her medical issue. She was made to apologize to one of her harassers and was told to work “*more cohesively*” with team members.

Hilton conducted an internal investigation which concluded that Ms. Morningstar was not harassed by her coworkers or manager, and that her coworkers had acted out of concern for health and safety. The investigation report recommended that Ms. Morningstar be assigned a designated chair at meetings and that her coworkers not

place towels on chairs. Ms. Morningstar went on a medical leave due to the distress and humiliation caused by the internal investigation and its outcome.

Dissatisfied with the internal investigation, Ms. Morningstar lodged a complaint with the Ontario Ministry of Labour, which ordered Hilton to conduct an independent investigation. The report from this investigation concluded that Ms. Morningstar's coworkers and managers did, in fact, engage in workplace harassment. While Hilton directed the harassers to take sensitivity training, it still required Ms. Morningstar to report to the same manager, and to work alongside the same coworkers, who bullied and harassed her for over a year. On the advice of her doctor, Ms. Morningstar took another medical leave and ultimately resigned.

### **Civil Action**

Ms. Morningstar commenced a civil action against Hilton, seeking damages for constructive dismissal, breaches of the *Occupational Health and Safety Act* and the *Employment Standards Act, 2000*, the tort of harassment and/or for a poisoned work environment, as well as aggravated, moral and punitive damages. She alleged that she was forced to resign due to the workplace harassment she was subjected to, which was supported and reinforced by Hilton.

### **"Right to Sue" Application**

In response, Hilton brought a "*right to sue*" application under section 31 of the *Act*, seeking a declaration that Ms. Morningstar's right to commence an action against it was statute-barred, as the relief sought in her action was effectively a claim for chronic mental stress—a compensable injury under the *Act*.

The Tribunal ruled in favour of Hilton, finding that the facts of the alleged workplace harassment and resulting injury were "*inextricably linked*" to a claim for chronic mental stress under the *Act* and were thus statute-barred:

*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. (Decision No. 1227/19, 2019 ONWSIAT 2324 at para. 30).*

Ms. Morningstar's request for reconsideration was flatly denied.

### **Judicial Review**

The key question under review by the Divisional Court may be formulated as follows: *is it reasonable for a classic constructive dismissal claim based in workplace harassment, and the employer's inadequate response, to be barred just because the employee was also injured by the harassment?*

In answering this question, the Divisional Court considered the "*historic trade-off*"

that the scheme of the Act represents, stating as follows:

*The Ontario workplace insurance scheme provides no-fault benefits based on collective employer liability. Under the scheme of the Act, workers receive insurance benefits by proving that their injury or disease is work-related, without having to prove that their employer was at fault for their injury or disease. In exchange, employers are protected against civil suits for work-related injuries by paying into the accident insurance fund, thus diluting, and reducing liability for any individual claim. (Morningstar v. WSIAT, 2021 ONSC 5576 at para. 47)*

Following its review of the Tribunal's statutory bar jurisprudence and the policy underpinning the Act, the Court concluded that the Act is intended to bar tort claims related to workplace injuries, and not to insulate employers from legitimate claims outside of the realm of tort. The Tribunal's jurisprudence has long recognized that *bona fide* claims for constructive/wrongful dismissal should be permitted to proceed, as they are distinct from personal injury claims, and attract damages for which the Act offers no compensation. Such damages include damages in lieu of notice of termination, moral damages and punitive damages. The Tribunal's jurisprudence has also recognized that the Act generally does not bar wrongful dismissal actions, and that it is only in the "exceptional case" (where the circumstances of the claim are "inextricably linked" to a work injury) that such an action will be statute-barred.

Noting that Canadian law permits different causes of action to be advanced based on the same facts, the Court stated that it would be unreasonable to bar a constructive dismissal action simply because the facts underlying that action incidentally supported an action for personal injury.

The Decisions drew a distinction between constructive dismissal and wrongful dismissal for the purpose of right to sue applications, collapsing Ms. Morningstar's constructive dismissal claim to one involving only personal injury, in which her experience of workplace harassment caused her mental distress which led to her resignation. The Court staunchly criticized this distinction as permitting the Tribunal to disregard the fact that Hilton's conduct could be construed not only as harassment, but also an intention to terminate Ms. Morningstar's employment contract. The Court went on to say that the Decisions "unreasonably fail to consider that the claim for wrongful dismissal focuses on a different legal relationship than the claim for harassment and requires compensation for damages not within the purview of the Act" (*Morningstar v. WSIAT, 2021 ONSC 5576 at para. 112*).

Ultimately, the Court quashed the portions of the Decisions barring Ms. Morningstar's claims for constructive dismissal and aggravated, moral and punitive damages, and permitted these aspects of the action to proceed. In doing so, the Court made the following comments on the reasoning behind the Decisions:

*Such reasoning must inevitably lead to unreasonable conclusions, in that it encourages employers not to openly fire unwanted employees and suffer a claim for wrongful dismissal, but rather to make those employees' lives so miserable in the workplace that they can be made to suffer chronic stress and be driven to resign without any fear of legal reprisal, all blithely justified under the banner of the historic trade-off. (Morningstar v. WSIAT, 2021 ONSC 5576 at para. 122)*

## **Conclusion**

This decision corrected what was a big step backwards in the realm of employment law. It serves as a reminder to employers that engaging in or permitting harassment in the workplace comes with a premium far greater than that payable under the Act. An employer's breach of contract, bad faith in the manner of dismissal, reprehensible

and malicious conduct can be brought before the courts and dealt with accordingly.

Source: [MacDonald & Associates](#)

Written By: [Faraz Kourangi](#)