CITATION: Morningstar v. WSIAT, 2021 ONSC 5576
DIVISIONAL COURT FILE NO.: 413/20
DATE: 2021/08/18

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Backhouse and Kurke JJ.

BETWEEN:	
Judith Morningstar Applicant	B. McCutchen and D. Stampley, for the Applicant
– and –	
Workplace Safety and Insurance Appeals Tribunal and Hospitality Fallsview Holdings Inc., Operating as Hilton Niagara Falls/Fallsview Hotel and Suites Respondents	M. Alton and R. Basa, for the Respondent Tribunal G. Griffiths, S. French, and D. Seupersad, for the Respondent Hospitality Fallsview Holdings Inc., Operating as Hilton Niagara Falls/Fallsview Hotel and Suites
-- and –	
Industrial Accident Victims Group of Ontario Intervenor	D. Chan and R. De Fazio for the Intervenor
	HEARD at Toronto (by videoconference): May 31, 2021

DECISION ON APPLICATION

A.D. KURKE J.

Overview

[1] The applicant seeks review of two decisions of the Workplace Safety and Insurance Appeals Tribunal ("WSIAT"): Decision No. 1227/19 ("the first decision") and Reconsideration Decision No. 1227/19R ("the second decision"). By those decisions, the applicant, who claimed workplace harassment and inadequate employer response, is barred from suing the respondent Hospitality Fallsview Holdings Inc., Operating as Hilton Niagara Falls/Fallsview Hotel and Suites ("Hilton") for constructive dismissal as a result of the WSIAT's application of s. 31 of the *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Schedule A (the "*Act*").

[2] On April 2, 2018, the applicant brought a civil claim against her former employer Hilton for damages for harassment, constructive dismissal along with aggravated, moral, and punitive damages and damages for breaches of the *Occupational Health and Safety Act* and the *Employment Standards Act*. The applicant does not dispute the barring of her claims for lost wages during the periods of her medical leaves before her alleged constructive dismissal, for breach of the *Occupational Health and Safety Act*, or for harassment. She asserts, however, that the WSIAT erred in barring her claims for constructive dismissal and the damages that pertain thereto.

[3] Hilton responds that the WSIAT properly barred the applicant's attempts to proceed with an action that is "inextricably linked" to a compensable accident under the *Act* and thereby to skirt the "historic trade-off" that the *Act* represents: for workers, a streamlined scheme of compensation for workplace accidents, but freedom from lawsuits for employers. Hilton asserts that this Court owes substantial deference to the expertise of the WSIAT and submits that the decisions by the WSIAT are not so "fundamentally unreasonable" that the decisions should be quashed.

[4] The following reasons explain my opinion that the decisions of the WSIAT barring the applicant's action for constructive dismissal and attendant damages are unreasonable and must be quashed. The WSIAT found the linkage between the applicant's workplace accident and her claim for wrongful dismissal to be inextricable because it unreasonably failed to resort to the tools offered by the policy behind the *Act*, the wording of the operative provisions of the *Act*, and the WSIAT's own jurisprudence. Had it done so, the WSIAT in this case could and should have been able to extricate the applicant's action in constructive dismissal and permitted it to proceed.

[5] In my view, the aspects of the decisions under review that relate to constructive dismissal and attendant damages are not intelligible or justified. They do not conform to the rationale or spirit of the statutory scheme under which they operate – the "historic trade-off" – but instead unreasonably applied a test that was developed to forestall false attempts to bypass the *Act*, and unfortunately thereby weeded out what is, on its face, a legitimate claim. In so doing, the decisions ignored the careful parsing conducted on many other occasions by the WSIAT, gave little heed to the full constellation of facts in the case, and took away from the applicant in the case the ability to recover damages not available under the regime of the *Act*.

Facts

[6] The following is the background to the applicant's request for review.

The Act and the WSIAT

[7] The *Act* governs the compensation and benefit scheme for Ontario workers who are injured in the course of their employment. It establishes two separate tribunals for adjudicating claims, the Workplace Safety and Insurance Board ("WSIB") and the WSIAT. The WSIAT is the final appellate forum in matters of workplace safety and insurance in Ontario; its primary function is to hear appeals from final decisions of the WSIB. The WSIAT also has exclusive jurisdiction under s. 31 of the *Act* to determine whether a right to sue an employer listed in Schedule 1 of the *Act* has been taken away from a plaintiff worker by operation of the *Act*.

The applicant's problems in the workplace

[8] Hilton operates a hotel in Niagara Falls, and is a Schedule 1 employer under the *Act*. The applicant is 60 years old and a survivor of uterine cancer. Hilton employed the applicant from approximately May 2015 until she left Hilton's employ on February 2, 2018. The applicant worked in housekeeping and was promoted May 2016 to a supervisory role.

[9] From June 2016 the applicant's colleagues conducted a campaign of harassment against her, alleging an odour emanated from her, and they engaged in ongoing long-term cruel and humiliating treatment of her, such as spraying her with Lysol and covering the seat of her chair with towels and bathmats. They spread rumours about the odour and its causes and the applicant's job performance, and they interfered with the applicant's administrative work.

[10] The applicant checked with her doctor, who sought to allay the applicant's fears about a recurrence of her cancer and changed her medication to ensure that there was no odour. The applicant was satisfied that there was no odour, but the harassment continued, and the harassers complained to management about the applicant's odour and continued to treat her in humiliating ways.

[11] Complaints by the applicant herself to her manager were met with indifference or humiliating suggestions that she use feminine products, shower, and wash her uniform, even though the applicant had explained her medical issue. At one meeting with managers the applicant was made to apologize to one of her abusers who had allegedly earlier admitted to wrongdoing. At another meeting, the applicant was told to work "more cohesively" with team members.

[12] At her doctor's recommendation, the applicant took two weeks' medical leave. At another meeting shortly before the applicant's return to work, her manager denied to a personnel manager having made the suggestion about feminine products.

[13] On her return to work, the applicant was given the results of an internal Hilton investigation concluding that there had been no harassment, that the applicant's colleagues had acted out of concern for health and safety, and that the applicant's manager had not harassed the applicant. The report recommended that the applicant be assigned a designated chair at meetings, that her colleagues not place towels on chairs, that workplace complaints should be immediately reported, and that Hilton accommodate "team members", although the applicant denied medical issues requiring accommodation. The applicant went on leave November 8, 2017, as a result of her humiliation and distress caused by this internal investigation and its conclusions.

[14] The applicant complained to the Ontario Ministry of Labour, which ordered Hilton to do an independent workplace investigation. The independent investigation concluded December 20, 2017, but despite repeated requests from the applicant's counsel, Hilton did not disclose the independent investigation's report until January 30, 2018, and then did not disclose the full report. The independent report determined that the applicant's colleagues and managers had engaged in workplace harassment.

[15] In response to the independent report Hilton directed the applicant's harassers to take sensitivity training. The applicant would still be required to report to the same manager and to continue to work alongside her abusers. When Hilton requested that the applicant return to work, the applicant refused, asserting that Hilton had constructively dismissed her by, among other things, failing to take sufficient steps to provide a safe work environment where she would not have to work with and for her harassers. She had an opinion that return to work would be medically inadvisable. The applicant resigned on February 16, 2018.

The applicant's suit against Hilton

[16] The applicant filed suit against Hilton April 2, 2018 for constructive dismissal, breaches of the OHSA and ESA, the tort of harassment and/or for a poisoned work environment. She sought also aggravated, moral, and punitive damages. In the suit, the applicant alleged that her colleagues' harassment, as supported and reinforced by Hilton, had forced her to resign. The applicant asserted that Hilton did not intend to be bound by its employment contract with her, as demonstrated by various facts: it permitted her colleagues and managers to create and continue a hostile work environment which Hilton did nothing to address or respond to for 17 months; it conducted an internal investigation that reinforced rather than addressed the hostile work environment, and during which the applicant was not even interviewed; and it failed to take suitable corrective action after the independent investigation, whose results it did not deliver in a timely manner.

[17] Specifically, in her statement of claim, the applicant claimed in para. 1(a) $25,000 for wrongful dismissal during the applicable notice period, which she asserted to be nine months, in para. 1(c) $5,000 for damages for loss of group benefits and other out-of-pocket expenses during the applicable notice period; in para. 1(d) $150,000 for aggravated and/or moral damages, given that Hilton forced the applicant to work in a poisoned work environment, and given the manner in which it ignored the applicant's complaints and handled her resignation; and 1(f) $150,000 for punitive damages.

[18] The statement of claim deals separately with the applicant's claim for constructive dismissal under a heading "Constructive Dismissal" beginning at para. 55. This section focuses on Hilton's responsibility for the applicant being forced to resign her position on or about February 16, 2018. The applicant points to the "poisoned and hostile work environment created by, among others, her managers, the circumstances of the Internal Harassment Investigation Report, and the lack of corrective action taken by Hilton after the independent investigation."

[19] In para. 57 of the claim, the applicant sets out Hilton's conduct which is at issue, conduct that resulted (para. 58) in her constructive dismissal:

> "57. Specifically, [the applicant] pleads that Hilton:
>
> a) permitted the acts of harassment, bullying and abuse to repeatedly occur over the course of a 17-month period;
>
> b) failed to adequately prevent and/or respond to [the applicant's] harassment complaints;

c) failed to prevent and/or rectify the poisonous and toxic work environment perpetuated by [the various harassers];

d) failed to discharge its duty to [the applicant] to provide her with a workplace free from harassment;

e) failed to investigate [the applicant's] harassment complaint adequately, or at all, including failing to interview [the applicant] regarding her complaint;

f) failed to take any appropriate corrective action following the results of the independent investigation;

g) failed to deliver the written results of the independent investigation in a timely manner; and

h) failed to provide the report of the independent investigation to [the applicant] notwithstanding her repeated requests."

The first decision

[20] In August 2018 Hilton applied to the WSIAT under s. 31 of the *Act* to bar the applicant from bringing any of her civil claims against Hilton. A WSIAT Vice-Chair heard Hilton's application July 10, 2019 and rendered decision October 17, 2019. At the hearing, the applicant relied upon the allegations in her statement of claim, which the WSIAT accepted as true for the purposes of the decision that it had to make. Indeed, that is the usual practice before the WSIAT: see, *e.g*., Decision No. 237/03R, at para. 21.

[21] After summarizing the facts of the case, the Vice-Chair discussed the authority to bar a worker's civil claim against an employer pursuant to ss. 26 and 28 of the *Act*. Although a body of WSIAT decisions concluded that, except in exceptional circumstances, wrongful dismissal actions are not barred by the *Act*, the Vice-Chair barred all of the applicant's claims, including the claim for constructive dismissal. The Vice-Chair held that the applicant's claim, one of constructive dismissal rather than wrongful dismissal, involved those exceptional circumstances.

[22] After citing WSIAT authority that the "matter does not turn on the question of whether the remedies in the two matters are distinct", the Vice-Chair reasoned that the applicant's claim for constructive dismissal, as well as her other claims, derive from her injury. All the damages that she claimed (para. 34):

> … 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 [*Act*], and thus the [applicant's] right to sue is removed in these circumstances.

[23] The Vice-Chair then rejected an argument that "a right to sue may be taken away only where the [*Act*] could have compensated the worker for their damages," holding instead (at para. 37) that:

> … 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 [applicant] claims she sustained as a result.

[24] The Vice-Chair advanced the view of the WSIAT in earlier cases that it was the "fundamental nature of the action" and whether it arises in respect of a work injury that determine whether a civil action should be barred, and held that the applicant's "action is a claim for injury resulting from harassment and bullying in the workplace and is therefore statute barred" (paras. 38-39). In the same vein, "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."

[25] The Vice-Chair further held (at para. 43) that the "allegations of mishandling of the harassment complaint by the employer are a component of the original harm claimed", in that the employer's handling of the applicant's complaints:

> … contributed to, and made worse, the harassment and bullying to which the [applicant] claims she was exposed, and the injuries she suffered, which ultimately resulted in her sick leave and subsequently the termination of her employment.

[26] At para. 44, the Vice-Chair dismissed as hypothetical and speculative the applicant's argument that the applicant would have a claim for constructive dismissal even had she not suffered mental injuries from the workplace harassment.

[27] After citing WSIAT authority for the proposition that "the 'incidental' relationship between the facts underlying a worker's personal injury by accident and those underlying an allegation for wrongful dismissal is not sufficient to support a determination that the action for wrongful dismissal should be taken away", the Vice-Chair held (at para. 48) that the applicant's constructive dismissal action "is rooted in a claim of injury by accident in the form of harassment and bullying in the workplace."

[28] The Vice-Chair also rejected the applicant's argument that her claim for constructive dismissal was separately pleaded and supported independently by facts demonstrating that the employer no longer intended to be bound by its contract with the applicant. The Vice-Chair held that the "workplace injury" must guide the inquiry. In the Vice-Chair's view (at para. 54):

> The issue is whether the [applicant] 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.

[29] The Vice-Chair then rejected the applicant's argument that her claims for aggravated, moral, and punitive damages flowed from the alleged conduct of the employer and should be permitted to proceed as they were not compensable under the *Act*. The Vice-Chair relied on WSIAT authority that claims for punitive damages in tort were barred once the tort action was barred and held (at para. 57) that "it is the nature of the injury that is at issue in determining whether a right to sue is removed…rather than the remedies sought which may or may not be similar to those available under the [*Act*]."

[30] The Vice-Chair concluded (at para. 61):

> In short, for all of the foregoing reasons, I find that the [applicant's] action against [Hilton] 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 *Act* and is barred by statute in these circumstances.

The second decision

[31] The applicant sought reconsideration of the first decision. In the second decision of June 15, 2020, a different Vice-Chair denied the applicant's request for reconsideration.

[32] The Vice-Chair rejected the applicant's argument that the first decision had misapprehended the nature of a constructive dismissal claim, which alleges breach of contract by an employer. The Vice-Chair held that the issue was whether the conduct in question was "inextricably linked to a personal injury arising from a workplace accident," and that the facts in the applicant's claim alleged an accident causing a psychological injury. It was "not relevant" whether the applicant might also have a claim for constructive dismissal.

[33] The Vice-Chair likewise rejected the applicant's argument that the first decision had failed to accept the applicant's allegations about constructive dismissal. The Vice-Chair held that Hilton's actions had properly been held to be an alleged "cause of the claimed psychological injury" which caused the applicant to stop work and were thus inextricably linked to the applicant's alleged injury.

[34] The Vice-Chair also found that the first decision correctly applied WSIAT jurisprudence that the WSIAT does not remove the right to bring constructive or wrongful dismissal claims except in exceptional circumstances. This case was exceptional as the wrongful conduct constituted the accident and the underlying facts "were inextricably linked to the compensable accident, and the framing of the action as constructive dismissal was not determinative.

[35] The Vice-Chair also rejected the applicant's argument that the original decision was inconsistent with the intended purposes of the *Act*, and would serve to shield an employer from its obligation to "effectively investigate and attempt to rectify any wrongdoing which may affect labour-relations between the employer and the worker." This would also disadvantage workers

seeking to sue for wrongful dismissal when their claims involved mental stress. The Vice-Chair held that the original decision properly applied the legislation, which drew no distinction between mental and physical injuries.

Standard of Review

[36] The applicant submitted that in the circumstances of this case, a correctness standard of review should apply. The applicant acknowledges that reasonableness is the "default" position that was re-established in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 30, but argues that the standard should be correctness on the issue before this Court, as relating to a question "regarding the jurisdictional boundaries between two or more administrative bodies": *Vavilov*, at paras. 63-64. Here, the boundary would be that between the WSIAT and the Superior Court, which has jurisdiction over wrongful and constructive dismissal actions. As the panel indicated during oral argument, such a position is difficult to maintain, and I do not accept it.

[37] As a specialized and expert tribunal which hears evidence, finds facts, decides questions of law, and deals with caselaw and policy in the area of workplace safety and the statutory insurance scheme under the *Act*, the WSIAT has been accorded the "highest level of deference" with respect to its decisions: *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, at para. 14; *Lue v. K.& K. Recycling Services*, 2015 ONSC 96, at para. 23. As a consequence, this Court has assumed a highly deferential attitude towards WSIAT decisions and has indicated that a Court will only interfere where there are no lines of reasoning that would support the decision under review: *Blatz v. Workplace Safety and Insurance Appeals Tribunal*, 2016 ONSC 7259 (Div. Ct.), at para. 40.

[38] Moreover, the *Act* gives the WSIAT exclusive jurisdiction in s. 31(2) to determine whether a right of action, as in this case, is taken away. The privative clauses in ss. 123(4) and 31(3) of the *Act* have been described as the toughest in Ontario law: *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719, at para. 22; leave ref'd, 2009 CanLII 23087 (SCC); *Blatz*, at para. 13. These are clear indications that correctness must have been considered as a standard by the legislature in these circumstances and rejected.

[39] Accordingly, decisions of the WSIAT under s. 31 of the *Act* have attracted a reasonableness standard of review: *Chen v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2021 ONSC 1149 (Div. Ct.), at para. 10; *Dicks, (Ontario) Workplace Safety and Insurance Appeals Tribunal v. Bellissimo*, 2013 ONSC 7866 (Div. Ct.) at paras. 12-13. In my view such a standard is appropriate.

Assessing Reasonableness

[40] In light of the decision in *Vavilov*, courts that review administrative decisions must consider all the circumstances of a case to determine whether a decision as a whole is reasonable: *Vavilov*, at paras. 73-75. Such a review looks to whether the decision is transparent, intelligible, and justified: *Vavilov*, at para. 99.

[41] The Court must be satisfied that the decision complies with the rationale and purview of the statutory scheme under which it is adopted, but should, so far as possible, refrain from

deciding the issues itself. Rather, it should determine if the decision arrived at by the decision-maker sits within the range of possible conclusions. If not, it is unreasonable: *Vavilov*, at paras. 83, 108.

[42] Reasonableness looks both to the rationale for the decision and the outcome. Reasons must show an internally coherent and rational analysis that is defensible on the facts and the law: *Vavilov*, at paras. 81-86.

[43] Hallmarks of unreasonableness in a tribunal's decisions can include:

a. logical flaws, circular reasoning, unfounded generalization, or an absurd premise (*Vavilov*, at paras. 102-104);

b. failing to take into account the governing statutory scheme, including by interpreting the scope of delegated authority more broadly than the legislature intended, and by not attending to the language chosen by Parliament to delineate the limits of that authority (*Vavilov*, at paras. 108-110);

c. failing to recognize the constraints that precedent and court interpretations concerning relevant provisions impose or failing to justify a departure from precedent or past decisions (*Vavilov*, paras. 111-114, 129-132);

d. taking an approach to statutory interpretation that is inconsistent with the text, context, and purpose of a provision (*Vavilov*, at paras. 119-124);

e. failing to justify a decision in light of the general factual matrix of a case or failing to account for the evidence before it (*Vavilov*, at para. 126);

f. failing to meaningfully grapple with key arguments or central issues raised by a party (*Vavilov*, at paras. 127-128);

g. failing to consider the significant consequences of a decision for an affected individual (*Vavilov*, at para. 133).

[44] A review necessarily begins from a position of judicial restraint, with due respect accorded the distinct role of administrative decision-makers: *Vavilov*, at paras. 13 and 75. A review looks to the reasonableness of the decision-maker's reasoning process, as well as the result: *Vavilov*, at paras. 81, 83, and 138. A reviewing court does not ask what decision it would have made were it put in the position of the tribunal or attempt to conduct a *de novo* analysis to arrive at a "correct" result: *Vavilov*, at para. 83. Reasonableness, not perfection, is the standard, and minor missteps in a decision do not justify a reviewing court in overturning it: *Vavilov*: at paras. 91, 100.

[45] Generally, where an administrative decision is reviewed and cannot be upheld on a reasonableness standard, it will be appropriate to remit the matter to the decision-making body for reconsideration, with the benefits of the assistance provided by the reviewing court. While courts owe deference to the legislative choice to have an administrative body decide a matter, where it becomes clear on review that a particular result is inevitable, and that remitting the

matter would serve no purpose, such issues as fairness to the parties, delay, costs, and the efficient use of limited public resources can justify a decision not to remit a matter: *Vavilov*, at paras. 139-142.

Interpretative tools: the historic trade-off, the *Act,* and jurisprudence

The policy behind the Act

[46] Any analysis of this issue must begin with the "historic trade-off" that the scheme of the *Act* represents.

[47] 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.

[48] This legislated forfeiture by employees of the right to sue in exchange for a measure of certainty of benefits for workplace injury independent of the employer's solvency or proving the employer's fault at trial was set out in a report into schemes of workers' compensation authored by the Honourable Sir William Ralph Meredith, former Chief Justice of Ontario. It has been called the "historic trade-off" and explained by Sopinka J. in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, 1997 CanLII 316 (SCC), at para. 26, in the following terms:

> **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), 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.

[49] From this, it is reasonable to conclude that the lawsuits that are statute-barred are those for torts causing work-related injuries. This is the "other half" of the historic trade-off, which protects the employer from potentially crippling tort litigation while paying insurance premiums to assist injured workers: *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, at para. 26 (adopting the comments by Professor Peter Hogg); *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25, at para. 51. When Sopinka J. referred to the "costs and uncertainties inherent in the tort system," and to the possibilities of recovering more from a "tort action," and to "injured workers," he was speaking with deliberate precision. The *Act*'s focus is on barring tort claims related to workplace injuries.

The legislative scheme that carries the policy into effect

[50] A workplace "accident" is broadly defined under s. 2(1) of the *Act*, and 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. Section 13(4) extends coverage to chronic or traumatic mental stress. Section 13(1) of the *Act* sets out the scope of what the scheme provides to workers for personal injury: "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."

[51] The legislative enforcement mechanism for the historic trade-off finds its place in ss. 26, 28, and 31 of the *Act.* The relevant provisions in the *Act* read as follows:

> No action for benefits
>
> **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.
>
> Benefits in lieu of rights of action
>
> (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 dependent 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.
>
> Certain rights of action extinguished
>
> **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.

Decisions re rights of action and liability

31 (1) A party to an action or an insurer from whom statutory accident benefits are claimed under s. 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[.]

[52] Two things are immediately apparent about these provisions.

a. A primary focus in s. 26 of the *Act*, both in subsections (1) and (2), is on "benefits under the insurance plan", that is, benefits included in the *Act*, as set out in s. 13(1). Benefits under the insurance plan that stand in place of what could be recovered in a tort action are what the historic trade-off is about, after all.

b. Further limiting the reach of s. 31 is the specific reference in s. 26(2) to workplace "accidents", and that in s. 28(1) to a "worker's injury or disease". This carries into effect the policy behind the *Act* of taking away the ability to sue for personal injury, that is, under the tort regime. Contrary to the broader assertion advanced by Hilton in para. 39 of its factum, the wording "in lieu of all rights of action" in s. 26(2) can only reasonably be understood, in the context of these provisions and their wording, as referring to a tort claim or a claim for benefits available under the *Act*.

[53] In the context of the policy that justifies such legislation as set out in *Pasiechnyk*, and of the words of the provisions in the *Act*, any assessment under s. 31 reasonably begins from a position of restraint on the part of the WSIAT when an application is made to bar a claim that is not in tort. While the "trade-off" enacted in the legislation prevents attempts by employees at seeking to opt out of the scheme set up by the *Act*, employers likewise should not be permitted by the WSIAT to insulate themselves from legitimate claims outside of the realm of tort.

[54] Any failure to at least consider the type of action and the nature of compensation offered and not offered under the *Act* in a s. 31 analysis would appear to involve an unreasonable oversight. This is especially so in the case of damages for constructive dismissal. So, at para. 126 of WSIAT Decision No. 616/21, 2021 ONWSIAT 848, considered below, the Vice-Chair held that "[i]t 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."

[55] This court has long endorsed this principle. In *Nasser v. ABC Group Inc.*, [2008] O.J. No. 453 (Div. Ct.), the moving party defendant in an action for constructive dismissal sought unsuccessfully to overturn a lower court ruling refusing a stay of the civil action, claiming that the employee's redress lay in the *Act*. In drawing a distinction between benefits under the *Act* and damages for constructive dismissal, a breach of contract, the Court held:

> [6] There is ample authority for the proposition that a claim for wrongful dismissal is one for which there is no redress under the

> WSIA. See, for example, Decision 237/03R, 2003 ONWSIAT 1792.
>
> [7] I agree with the finding of the learned motions judge that the plaintiff's claim here is clearly one of damages for breach of contract. The plaintiff does not seek relief for personal injury damages.

WSIAT jurisprudence: guarding against disguised claims for worker's compensation benefits

[56] Given the policy that lies behind the *Act*, the WSIAT generally does not bar actions for wrongful dismissal pursuant to its mandate in s. 31 of the *Act*: Decision No. 237/03R, 2003 O.W.S.I.A.T.D. 1792, at para. 42; Decision No. 237/03 [2003] O.W.S.I.A.T.D. No. 451, at paras. 49-65. As stated in Decision No. 194/16, [2016] O.W.S.I.A.T.D. No. 778, at para. 25:

> The remedy for wrongful dismissal, as has been noted in several of the decisions, is damages in lieu of notice. The [*Act*] does not provide this remedy; a cause of action for wrongful dismissal is therefore not subsumed by the [*Act*].

[57] The WSIAT decisions under review properly acknowledge that it is only in the "exceptional case" that a wrongful dismissal claim will be statute-barred, and only "where the circumstances of the wrongful dismissal claim are inextricably linked to the work injury": the first decision, at para. 29; see the second decision, paras. 47-48, 54.

[58] Nevertheless, the WSIAT must take care to ensure that the bargain struck in the historic trade-off is not undermined by attempts by workers to bring civil suit for workplace injury or to bypass the *Act*'s limits on benefits by disguising their claims for benefits as other forms of action. The purpose of the WSIAT in s. 31 of the *Act* is to bar tort actions and also to root out tort claims that are disguised as other types of actions.

[59] In WSIAT jurisprudence, when non-tort claims are barred, there is often an indication that the plaintiff worker is attempting to improperly disguise a tort action as another kind of action so as to escape the limits of the regime established by the *Act*. The origin of the injury is not decisive, rather, it is the *bona fides* of the civil action. So, in Decision No. 670/97, [1998] O.W.S.I.A.T.D. No. 570, where the WSIAT permitted a wrongful dismissal action to proceed, the WSIAT held (at para. 27):

> 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*. [*emphasis added*]

[60] Thus, in Decision No. 432/88, [1988] O.W.C.A.T.D. No. 1069, where a worker who had fallen in his workplace brought an action both in negligence and breach of contract, allegedly for a failure to train the injured worker properly, and sought similar damages for both, the tribunal held (at para. 26):

> …To distinguish between a contract action and a tort action in the manner proposed to us would result in a worker framing his or her action in contract in order to be able to litigate rather than claim benefits. Such a consequence cannot have been intended by the Legislature.

[61] In Decision No. 132/91, [1991] O.W.C.A.T.D. No. 452, where the injured worker attempted to sue in contract for his employer's failure of its implied contractual duty to train him properly so as not to have an accident such as that he had suffered, the tribunal barred the claim, holding (at para. 16) that the "damages claimed are essentially flowing from the employment-related accident sustained by" the worker.

[62] In Decision No. 1319/01/2, [2004] O.W.S.I.A.T.D. No. 2384, the WSIAT accepted as its starting principle (at para. 42) that "wrongful dismissal actions can lie outside the *Act* as between a worker and an employer." However, in that case, the wrongful dismissal claim was "belatedly tacked on [by amendment] to an action for damages in respect of a compensable injury", leading to a finding that the claim was inextricably linked to the workplace injury and not merely incidentally connected to it. Inherent in the wording is a holding that the wrongful dismissal claim *bona fide*, but rather an effort at finding another route around the scheme of the *Act*.

[63] Similar was Decision No. 1241/16, [2016] O.W.S.I.A.T.D. No. 3448, which involved a worker who brought action against the employer for intentional infliction of mental suffering and breach of contract for failing to provide a safe workplace at a construction site. At paras. 79 and 81, the WSIAT held:

> …[U]nless it can be shown that the nature of the harm that forms the basis of an action for breach of 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, the harm to [the worker] 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.

[64] Section 31 decisions therefore look to ensure that the historic trade-off that informs the *Act* is respected by the would-be plaintiff, and that disguised attempts to side-step the guiding policy behind the *Act* are stopped in their tracks no matter what causes of action they purport to be.

[65] On the other hand, where the actions represent genuine causes of action that do not trench on the tort claims that lie behind the policy of the *Act*, they have been permitted to proceed. Often in these cases, it is the existence of a genuine cause of action for wrongful dismissal or of appropriate damages claimed therefor that informs the WSIAT decision. In such cases, the claims that are permitted to proceed are considered incidental to the personal injury that occurred.

[66] In Decision No. 177/03, [2003] O.W.S.I.A.T.D. No. 213, the worker sued the employer for wrongful dismissal claiming that the employer had fired her as reprisal for complaining about harassment and discrimination that she had suffered in the workplace. The WSIAT permitted the wrongful dismissal action to proceed, holding (at para. 25) that:

> We are satisfied that the claim based on wrongful dismissal as reprisal for complaints of discrimination and harassment in the circumstances set out in the allegations is best characterized as predominantly one of employment relations or breach of contract rather than personal injury arising out of and in the course of employment.

[67] Decision No. 286/96, [1996] O.W.C.A.T.D. No. 1147, was a nuanced decision, in which a worker who claimed that she had been sexually assaulted brought an action for the assault and wrongful dismissal. At para. 39, the tribunal held that the employer had acted independently of the accident (the sexual assault) when it "let [the worker] go. Therefore, an incidental relationship to the compensable injury is not sufficient…to remove the common law right to sue for dismissal." The tort claim was barred, but the wrongful dismissal action was permitted to proceed.

[68] In Decision No. 237/03 [2003] O.W.S.I.A.T.D. No. 451, the worker suffered a hand injury while working at the employer's plant. The worker ultimately returned to work but left his job when he claimed that he had not been sufficiently accommodated by the employer and could not do his assigned job. He sued for wrongful dismissal, and the employer applied for a determination that the claim should be statute-barred. The WSIAT permitted the wrongful dismissal action to continue, holding (at para. 78) that although "the personal injury and the allegation of wrongful dismissal share some factual basis, the connection between the two is nevertheless incidental." The decision further noted (at para. 94) that a claim for wrongful dismissal and a claim for personal injury are generally "separate and remote from each other," and that only where contract and tort actions allege the same misconduct should the contract action be stayed. This decision was upheld on reconsideration: Decision No. 237/03R, 2003 O.W.S.I.A.T.D. 1792.

[69] Just as did this Court in the *Nasser* decision, there are tribunal decisions that note that actions for wrongful dismissal involve damages not offered under the scheme of the *Act*, such as

damages in lieu of notice prior to termination. In Decision No. 846/93, [1994] O.W.C.A.T.D. No. 458, the panel held (at para. 27) that:

> …the purpose of the Workers' Compensation Act is to provide compensation for personal injuries sustained in a workplace accident. The Act also provides certain re-employment rights for workers injured after 1990. The law of wrongful dismissal does not recognize a right to re-employment; it recognizes a right to adequate notice prior to termination of the employment contract. Hence, a wrongful dismissal action will not be barred by the Act unless it is clear that the action, in reality, is a claim arising out of an accident causing personal injury and seeks the kind of remedy provided by the Workers' Compensation Act.

[70] So too in Decision No. 670/97, [1998] O.W.S.I.A.T.D. No. 570, discussed above, the focus of the WSIAT was on the damages claimed for wrongful dismissal. In that case, the WSIAT held (at para. 26) that:

> …[i]t 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.

[71] In Decision No. 1176/97, [1998] O.W.S.I.A.T.D. No. 642, the focus was on the damages or compensation sought, and not simply a connection between the facts of the action and the workplace accident/injury. A school administrator brought action against the employer board for wrongful/constructive dismissal after she suffered stress-related injuries from her employment because of the actions of a secretary at the workplace. Although the WSIAT barred any stress-related damages claim, it permitted the wrongful dismissal claim to proceed, concluding (at para. 45) that the worker "is not seeking damages for disability resulting from the secretary's behaviour or the sexual attack, but for the Board's handling of her complaints in a way which affected her employment situation." In para. 49 of that decision, the WSIAT stated that the worker:

> …alleges that she placed a continuous pressure to have her employment situation corrected, but that the school board either turned a deaf ear or made decisions designed to prevent her from pursuing her course towards redress. She alleges that this led to her dismissal. We find that the issue is completely separate from the compensation to which she is entitled for the impairment caused by

> the injury which was caused by her employment. She has a right to bring these allegations before the courts.

[72] It also bears noting that the WSIAT in Decision 1176/97, in commenting on Decision No. 286/96, [1996] O.W.C.A.T.D. No. 1147, discussed above, stated at para. 48 that "the employer was not shielded by the *Act* in its subsequent decision to allow the worker to resign her employment rather than continue to work in the presence of her aggressor whom the employer refused to dismiss."

[73] In Decision No. 846/93, [1994] O.W.C.A.T.D. No. 458, a worker was barred from proceeding with a negligence action but permitted to carry on with an action for wrongful dismissal after she had suffered a fall in the course of her employment. The tribunal focused on the difference between claims for wrongful dismissal and personal injury, and on the issue of recoverable damages, in holding (at para. 22):

> In the view of the present Panel, a claim for damages for wrongful dismissal is one for which…there is no right of redress under the Workers' Compensation Act. As we understand a claim for wrongful dismissal, it is a claim in which a party seeks damages in lieu of lawful notice prior to termination. In our view, such a claim has nothing to do with 'personal injury'.

[74] Decision 237/03, discussed above, was followed in Decision No. 194/16, [2016] O.W.S.I.A.T.D. No. 778. In that decision, the plaintiff worker sued for harassment and constructive dismissal, alleging that fundamental changes to her employment agreement arose from lewd, sexually suggestive, and inappropriate comments in the workplace, which the employer took no steps to correct. She alleged "embarrassment, loss of self-esteem and loss of self-worth". The WSIAT held that although the facts of the plaintiff's "personal injury" by "accident" and those of her wrongful dismissal might have an "incidental" relationship, the constructive dismissal action could proceed (paras. 18-20). The WSIAT also noted that the remedy for wrongful dismissal, damages in lieu of notice, was another distinguishing feature, as the *Act* did not provide such a remedy (paras. 24-25).

[75] So too can portions of otherwise disguised WSIB claims proceed, as the WSIAT has recognized that even minor damages may not be otherwise compensable under the *Act*. In Decision 3836/17, [2018] O.W.S.I.A.T.D. No. 629, the WSIAT cautioned itself to beware claims disguising themselves as actions for wrongful dismissal "to displace the application of the [*Act*]" (para. 12) and found that the facts in the plaintiff worker's statement of claim were "almost exclusively related to the compensable accident" and were therefore barred (para. 15). However, at para. 17 of that decision, the WSIAT permitted the plaintiff worker's claim to proceed with respect to a claim for $5000 for "lost pay", which appeared to be "more in the nature of pay in lieu of notice". The decision concludes:

> 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.

[76] Lastly, it is worth considering the very recent Decision No. 616/21, 2021 ONWSIAT 848. In that decision, the plaintiff worker claimed that she was yelled at in the workplace in front of customers and that the employer was displeased at a complaint that had been made to head office. The worker was threatened with financial repercussions, and in the ensuing internal investigation her daughter was questioned. The worker went off work for "medical reasons" and never returned. The worker sued her employer for psychological injuries and constructive dismissal, along with aggravated and punitive damages. While the plaintiff's claim for damages relating to mental stress from the "workplace injury" was barred, the plaintiff was permitted to claim for constructive dismissal, which "does not require proof of an injury to establish and is therefore not barred by the WSIA" (at para. 28).

[77] Throughout the WSIAT statutory bar jurisprudence, efforts are made to weed out claims for personal injury or personal injury claims disguised as other causes of action that would otherwise frustrate the historic trade-off. However, the WSIAT and its predecessors have also recognized that *bona fide* claims for constructive/wrongful dismissal should be permitted to proceed, as they are not tort actions and are distinct from personal injury claims, and attract damages for which the *Act* offers no compensation.

Constructive dismissal

[78] As the applicant complains that her claim for constructive dismissal has been improperly barred by the WSIAT, some observations on such a claim are warranted.

[79] An employee can claim constructive dismissal when an employer's conduct demonstrates the employer's intention no longer to be bound by the employment contract. This can come about when an employer engages in conduct that objectively demonstrates the employer's intention no longer to be bound by the contract. There is no requirement that a worker be injured at all: *Potter v. New Brunswick Legal Aid Services Commission*, [2015] S.C.J. No. 10, at paras. 30, 39; *Farber v. Royal Trust Co.*, [1996] S.C.J. No. 118, at paras. 26, 33. Constructive dismissal may arise where the employer's treatment of an employee makes the employee's continued employment objectively intolerable: *Potter*, at para. 33. Courts have found constructive dismissal based on the breach of an implied term or duty that the employer will treat the employee with civility, decency, respect and dignity or that the work atmosphere will be conducive to the well-being of its employees: *Colistro v. Tbaytel*, 2019 ONCA 197, at para. 50. Workplace harassment and the creation of a hostile work environment can ground claims for constructive dismissal: *Colistro*, at paras. 42-48.

[80] Damages in lieu of notice are the principal measure of damages in cases of wrongful or constructive dismissal: *Honda Canada Inc v Keays*, 2008 SCC 39, at para. 50. Additionally, in appropriate circumstances, a court can also award aggravated or moral damages attributable to the employer's bad conduct in the manner of dismissal, and punitive damages for independent actionable wrongs, such as a breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation: *Honda Canada Inc v Keays*, at paras. 59, 62.

Discussion

[81] In my view, in both of the decisions under review, the WSIAT's reasoning and conclusions were unreasonable. It applied the "inextricably linked" test to the facts from the applicant's statement of claim, and determined, twice, that the *facts* set out by the applicant were "inextricably linked" to the workplace injury, and that therefore the applicant's action for constructive dismissal must be barred.

[82] These determinations were unreasonable because the two decisions applied the "inextricably linked" test in a way that ignored the policy behind the legislation and wording in ss. 26, 28, and 31 of the *Act* that offered guidance to their interpretation. In so doing, the WSIAT necessarily disregarded essential facts in the applicant's claim and supported its decisions on inappropriate authorities and failed to consider relevant authorities.

[83] The focus in the decisions under review on the linkage of the facts to the accident in question, rather than on the *bona fides* of a cause of action for constructive dismissal or on the availability of benefits under the *Act*, leads to logical flaws in the decisions and generates a result that flies in the face of the "historic trade-off," and is unreasonable. Although both decisions speak in terms of "inextricable linkage" of facts to the workplace injury, this is a misnomer when the WSIAT unreasonably did not resort to the tools at hand to extricate an apparently viable claim for constructive dismissal. The linkage is only inextricable if the tools that are available to extricate it are unreasonably ignored.

[84] I conclude that no proper lines of reasoning would support the decisions under review.

Inextricable linkage

[85] In para. 29 of the first decision, the Vice-Chair acknowledged what is generally the case, that most wrongful dismissal actions are not barred by the *Act*:

> [G]enerally the Tribunal has found that the right to bring an action for wrongful dismissal has not been removed by the [*Act*]. It is only in the exceptional case that this is 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*.

[86] The Vice-Chair offered three cases as examples of inextricable linkage. With respect, those cases do not support its reasoning or cry out for a more detailed understanding. Decision No. 3836/17 permitted that portion of a claim to proceed that related to damages in lieu of notice for wrongful dismissal. Decision No. 1319/01 2 involved a situation where the claim for wrongful dismissal appeared to be a bad faith addition to a claim for personal injury that must otherwise be barred. And Decision No. 566/00 proves nothing at all. As noted in Decision No. 237/03, at para. 65, Decision No. 566/00 offers no analytical assistance of any kind, based as it is on a skeletal record without any deep review of the particular facts of the case or the plaintiff's claim. Its purpose was merely to put into effect an agreement that had been reached between the parties.

[87] In response to argument by the applicant that the Vice-Chair's reliance on these cases in the first decision was misplaced, the Vice-Chair in the second decision found (at para. 54), "no error in [the] adoption of those legal principles." Instead, the Vice-Chair on the reconsideration held (at para. 55) that WSIAT cases were in "substantive [sic] consensus" that "in the general case, a claim for wrongful dismissal is not taken away by the WSIA; that an exception applies when the facts are inextricably linked to the compensable accident; and that the manner in which the cause of action is framed is not determinative." The Vice-Chair held that the first decision applied these principles, which is accurate but requires comment. For that description of the "consensus" leaves out other elements in these authorities and other WSIAT authorities set out above, that the type of damages at issue and the *bona fides* of the cause of action are also relevant considerations.

[88] Although there were so many other cases available to guide their decisions, the Vice-Chairs relied on decisions whose actual lessons they appear not to have heeded. Nowhere in the decisions under review is there any assertion that the applicant's claim for constructive dismissal was a bad faith attempt to circumvent the historic trade-off. Nowhere in the decisions under review is there an acknowledgement that the fact that the *Act* offers no means of compensating claims for constructive dismissal was an argument in favour of the applicant's claim being permitted to proceed.

The WSIAT's reasoning in the decisions under review

[89] Central to the reasoning of the WSIAT and to the determinations in this case are paras. 30, 34 and 37 of the first decision.

> [30] 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.
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> [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.

[90] In para. 37 of the first decision, the Vice-Chair distinguished the circumstances in Decision No. 237/03, in which the WSIAT had held that "although the personal injury and the allegations of wrongful dismissal share some factual basis, the connection between the two is nevertheless incidental", by holding:

> [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.

[91] The Vice-Chair in the second decision agreed with the holding in the first decision 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 s. 13(4)" which provides for entitlement for chronic mental stress arising in the course of the applicant's employment. The Vice-Chair in the reconsideration held (at para. 31) that "[t]herefore the wrongful acts…are part of the accident itself and not a consequence of the accident. They constitute the injuring process that caused the psychological injury." The Vice-Chair concluded (in para. 32), "Given that finding, it is not relevant whether the facts of the case might also have provided a basis for a claim of constructive dismissal, in other circumstances."

[92] The second decision upheld the interpretation of Decision No. 237/03 that is set out at para. 37 of the first decision on the basis (at para. 52) that "[t]here was no allegation in that case that the actions of the employer were a cause of the injury to the worker that was in issue." The Vice-Chair on the reconsideration summarized the operative facts in this case in this manner (at para. 53):

> …In this case, the alleged wrongful acts of the employer and of the co-workers are claimed to have been the injuring process that led to the mental harm that required the worker to go off work. The

> mental harm is the substantive injury in issue, which caused the worker to go off work. She left work on medical leave. On these facts, the alleged wrongful acts constitute the accident (the injuring process) that caused the injury. Those alleged acts cannot be distinguished from the accident because they are that accident. The employer's actions, if proven, are part of the injuring process, along with the actions of the co-workers.

Compressing the facts

[93] What does it mean for facts to be "inextricably linked" to the workplace harassment, a cause of action whose barring by the WSIAT the applicant does not contest?

[94] An action for personal injury can properly be barred by the *Act*, but it would appear to be unreasonable to bar an action for constructive dismissal simply because the same facts that relate to that action also incidentally support an action for personal injury. Such a test ignores Canadian law permitting different causes of action to be advanced based on the same facts. To focus on the facts as linked to the workplace accident, but to disregard both the claim for constructive dismissal in its own right and the nature of the benefits sought in the action, arrogates to the WSIAT more authority than was ever intended to be granted to it. The policy behind the *Act* and the wording in ss. 26, 28, and 31 of the *Act* require more analysis than a test involving mere "factual linkage" permits.

[95] It is well-established in Canadian law that the same facts can support concurrent liability in more than one cause of action. A plaintiff has the right to assert alternative causes of action that offer advantageous legal consequences unless the plaintiff thereby improperly attempts to avoid some limitation of liability by so doing: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at paras. 48-54. As the general run of WSIAT cases acknowledge, so long as a plaintiff does not sue in constructive dismissal improperly to get around the limitations of the *Act*, the claim should be permitted to proceed, even where tort aspects of a claim are barred. Contrary to the reasoning of other WSIAT decisions in which claims in contract are barred, nowhere in the decisions under review is there any assertion that the applicant is attempting to disguise her injury claim as one sounding in constructive dismissal in order to avoid the limitations of the historic trade-off.

[96] In para. 30 of the first decision, the Vice-Chair drew a distinction between constructive dismissal and wrongful dismissal, which permitted the Vice-Chair to collapse the applicant's claim to one involving only personal injury, in which harassing and bullying conduct of co-workers and management caused the applicant mental distress that led to her taking sick leave and then resigning. But what does the factual compression in para. 30, which is also advanced in paras. 34 and 37 of that decision, permit? Creating a distinction between constructive and wrongful dismissal permits the WSIAT to disregard the applicant's contract of employment with the employer or the way in which the employer's alleged treatment of the applicant or its failure to stem her abuse by her co-workers and managers could be construed not only as harassment but also as an intention to terminate the applicant's contract.

[97] So, para. 34 limited the applicant's claims to the workplace harassment and bullying and the employer's response to "these allegations", resulting in mental stress. To state that all of this

conduct resulted in "the injury sustained" is to trivialize the applicant's many concerns and compress them in such a way that a claim for wrongful termination by constructive dismissal is lumped into the category of a personal injury. In so doing, the Vice-Chair limited the employer's responsibility to one bound up only in personal injury, without also considering what Decision No. 3836/17, cited by the Vice-Chair at para. 29, teaches. The purpose of s. 31 of the *Act* is to bar claims that trench on ground covered by the *Act* – the historic trade-off – but not to foreclose those other claims, or even those portions of other claims, that relate to damages not in relation to personal injury, but to wrongful dismissal.

[98] Taken to its logical conclusion, such reasoning as this must result in the barring of many claims for constructive dismissal in which the employer's conduct contributed both to a worker's workplace psychological stress injury and a constructive dismissal. Such reasoning is unreasonable as antithetical to Canadian common law and to Decisions No. 194/16 and 286/96, which recognize the "incidental" application of the same facts to support separate causes of action. Without being able to resort to the remedies offered by claims for constructive dismissal, workers in the applicant's position face an unpalatable sort of "prisoner's dilemma": either to return to a poisoned work environment or to leave their employment without the damages in lieu of the notice to which they would otherwise be entitled. The WSIAT's failure to consider this effect on workers in the applicant's position is also unreasonable.

[99] Paragraph 30 of the first decision reduced the applicant's claims to only the applicant's chronic mental stress that derived from the workplace harassment by co-workers and managers without any recognition that the applicant's employer stands in a different relationship to the applicant than do the applicant's co-workers, by virtue of the employment contract between the employer and the applicant. Therefore, inconvenient facts that are central to the constructive dismissal claim are inexplicably and unreasonably disregarded. In para. 34, the Vice-Chair sets out the "foundational facts" as the proper focus of the "inextricably linked" assessment. This assessment is irrational and therefore unreasonable, in that it does not acknowledge that the facts in a case may serve more than one purpose and ground more than one legitimate cause of action.

[100] In order to make the facts align with the conclusion that a constructive dismissal is a personal injury, no reference was made in paras. 30 and 34 to the applicant's return to work after her stress leave, the internal and independent investigations and their very different conclusions, the employer's continuing reluctance to disclose the report from the independent investigation, the underwhelming corrective actions taken by the employer and the employer's determination that the applicant must continue to work in the same environment in which she had been made to endure the accident and suffer the injury. The trouble with seeking to wedge a square peg into a round hole is that either the peg or the hole must end up deformed in the attempt. In this case, the applicant's claim is what suffers.

[101] In the second decision, the Vice-Chair rejected the applicant's complaint about the first decision's selective choice of facts from the statement of claim by holding (at para. 40) that facts concerning the employer's conduct as proving the repudiation of the applicant's employment contract were simply "submissions about a legal conclusion", and not facts that the Vice-Chair was required to take into account. This holding once again is unreasonable, as failing to recognize that facts relating to what was done or not done by the employer are capable of sustaining an independent cause of action for constructive dismissal, and of proving the existence

of a different legal relationship between the employer and the applicant than that between the applicant and her colleagues.

[102] Nor is it reasonable for the decisions under review to focus on the fact that the applicant also claimed for harassment, or to limit the applicant's injury to chronic mental stress caused by that harassment in the workplace. Where a claim for constructive dismissal focuses on an employer's conduct, whether a plaintiff suffered a personal injury as a result of the employer's conduct can also serve at common law as an incidental context for the claim: *Allan Etherington v. National Hockey League*, 2020 ONSC 5789, at para. 39. Just so, Decision No. 670/97 permitted a wrongful dismissal claim to proceed even where the workplace injury may have played a role in the dismissal.

[103] Paragraph 37 of the first decision distinguished Decision No. 237/13, a decision that the WSIAT in this case could reasonably have looked to for guidance. Instead, the Vice-Chair failed to recognize that facts alone are a poor surrogate for determining the propriety of a stay in the circumstances described by ss. 26 and 28 of the *Act.* Those provisions set out that in wielding the power of the statutory bar, the WSIAT reasonably should bear in mind the historic trade-off that the *Act* represents, its focus on personal injury, and limits on the availability of damages or benefits under the *Act*. The use of a test that bars claims where facts in issue are "inextricably linked" to a workplace accident will necessarily end more claims than it should. In this case, as there is no assertion that the constructive dismissal claim is a WSIB claim in disguise, full weight should be given to the applicant's pleadings for constructive dismissal, the boundaries of the historic trade-off should be respected, and the "inextricable linkage" test should be recognized as insufficiently precise.

[104] Even more surprising is that the first decision drags Decisions No. 237/03 and 3836/17 into service in aid of its narrow viewpoint. The Vice-Chair in para. 51 cited those cases as standing for the proposition 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.

Many WSIAT decisions state that the cause of action does not determine whether a claim should be barred. It is unreasonable, however, for the Vice-Chair to have disregarded that the cited decisions also reflected respect for the policy behind the historic trade-off and the directives of ss. 26 and 28 of the *Act*. Those decisions looked to those available and essential tools and used them to determine that the circumstances of their cases were not actually "inextricably" linked, and that the fundamental nature of the claims was not such as should be barred under s. 31.

[105] In a summary in para. 43 of the first decision, the Vice-Chair completely neglected to consider the issue of the *bona fides* of the applicant's claim for constructive dismissal and focused again only on a factual linkage that so distorted the claim being advanced by the

applicant. It is therefore made to appear that the applicant only left the employer because of her injury, and not as a result of the employer's alleged disregard of its duty to provide the applicant with a safe and harassment-free workplace, thus voiding the employment contract. The employer's conduct was accorded no different standing than that of the applicant's colleagues:

> [T]hese allegations of mishandling of the harassment complaint by the employer are a component of the original harm claimed [and] the employer's action, or inaction, in addressing the worker's complaints contributed to, and made worse, the harassment and bullying to which the [applicant] claims she was exposed, and the injuries she suffered, which ultimately resulted in her sick leave and subsequently the termination of her employment.

[106] The Vice-Chair went on to liken the situation to Decision No. 371/18, [2018] O.W.S.I.A.T.D. No. 625, in which an action for negligence was stayed when the employer's negligence before and in response to the work accident contributed to and worsened the plaintiff worker's workplace injury.

[107] With respect, Decision No. 371/18 offers no support to this reasoning. In that decision (at para. 13), the plaintiff worker's action alleged that the employer's *negligence* "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.'" The essence of the applicant's allegation of constructive dismissal in this case focuses on the employer's conduct as improperly terminating the applicant's employment, which is an employment issue and not a personal injury claim, unlike the one sounding in negligence in Decision 371/18. The failure to recognize this distinction, which is fundamental to the historic trade-off, and then to use the case to justify barring the applicant's claim for constructive dismissal, further underscores the unreasonableness of the decision.

[108] The reconsideration decision only compounded these problems. At para. 53 of the second decision, the Vice-Chair held:

> The mental harm is the substantive injury in issue, which caused the worker to go off work. She left work on medical leave. On these facts, the alleged wrongful acts constitute the accident (the injuring process) that caused the injury. Those alleged acts cannot be distinguished from the accident because they are that accident.

[109] By eliminating consideration of essential facts related to the employer's conduct in the applicant's statement of claim, this holding, similarly to that in the first decision, has recast the applicant's case into a personal injury claim, and then barred it. It does this by purporting to apply a test of inextricable linkage that downplays or disregards significant facts in the applicant's claim, and unreasonably fails to account for the policy behind the *Act*, the wording of its provisions, and earlier WSIAT jurisprudence.

Constructive dismissal, wrongful dismissal, and damages not covered by the Act

[110] The historic trade-off that the *Act* represents prevents workers from suing in tort. WSIAT jurisprudence has recognized that, generally speaking, wrongful dismissal actions will not be barred under s. 31. This makes sense, as wrongful dismissal involves employment and contract law, not tort law, which is the subject area of the historic trade-off. In order to ensure that workers do not evade the boundaries of the *Act*, the WSIAT also has barred actions where the cause of action appears in reality to be a disguised WSIB claim. However, earlier WSIAT decisions have consistently recognized that what also sets wrongful dismissal actions apart are damages that are not available under the *Act*. Not so the Decisions under review.

[111] The summary of facts and the applicant's construction of her claim beginning at para. 55 of her statement of claim show how the employer's conduct allegedly resulted in the termination of the applicant's contract of employment. The Vice-Chair in the first decision omitted any real consideration of many of the facts relating to the employer's own failures to deal with the applicant's concerns. The Vice-Chair in the second decision dismissed any consideration of the applicant's claims in her "Constructive Dismissal" section as merely submissions about a legal conclusion. However, contained within that statement of claim are also the applicant's claims for damages under various headings in relation to her claim for constructive dismissal.

[112] The holdings in the decisions under review 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*. Sections 26, 28, and 31 encourage the WSIAT to consider issues relating to benefits available under the *Act* and emphasize that it is claims involving personal injury that are at issue. In the decisions under review, the linkage of "all damages claimed" to the "personal injury", sweepingly disregards the pleading for damages in lieu of notice, and aggravated, moral and punitive damages, which are all clearly linked in law to the employer's alleged disregard for the applicant's terms of employment.

[113] The Court has been directed to no provision in the *Act* that is co-extensive with these headings of damages. Hilton points out that there are benefits under the *Act* for loss of earnings, for permanent impairment due to workplace injuries, for health care and treatment for the injured worker, for retirement benefits, and for re-employment assistance and work re-training. At para. 17 of its factum, Hilton calls these benefits "significant", and argues (para. 18) that they "may significantly surpass the entitlements of a worker in a civil court action."

[114] Hilton's submission is beside the point. The issue is not how much the applicant could recover from the benefits under the scheme of the *Act.* Rather, the applicant's concern is that the damages she seeks are not even included under the *Act*. Section 26 of the *Act* makes benefits that are available a touchstone for the operation of the statutory bar, and numerous WSIAT decisions have properly taken that issue into account in their determinations. However, that issue is nowhere addressed in any meaningful way in either of the decisions under review.

[115] Paragraph 30 of the first decision holds that "the other remedies sought by the [applicant] are also claimed on the same facts, of harassment and bullying in the workplace." Paragraph 34 holds that all the damages flow from the harassment and bullying of applicant's colleagues and

the employers' response. Respectfully, this is plainly not the case. Just as the employer must be assessed as a distinct actor from the applicant's co-workers in the claim for constructive dismissal, so too are the remedies sought by the applicant clearly consonant with an allegation of constructive or wrongful dismissal: damages in lieu of notice, moral or aggravated damages, and punitive damages. In dismissing the applicant's various headings in her claim for constructive dismissal, the WSIAT has unreasonably ignored the focus in s. 26 of the *Act* on damages compensable under the *Act.*

[116] As considered above, this Court in the *Nasser* decision held that damages for wrongful dismissal are not available under the *Act*, which justified the claim being permitted to proceed. That principle has been recognized repeatedly in WSIAT decisions. Nor is it only Ontario's courts that focus on this issue as decisive in workers' compensation legislation. While some allowance must be made for peculiarities in the schemes of different provinces, the historic trade-off is a unifying factor, and the authorities are persuasive.

[117] In *Deol v. Dreyer Davison LLP*, [2020] B.C.J. No. 843 (S.C.), at para. 93, the British Columbia Supreme Court held that "general damages for breach of an employment contract stand in place of reasonable notice and are distinct from claims for personal injury," so that the plaintiff's claim for constructive dismissal was permitted to proceed, though her claims for damages for personal injury were left to the worker's compensation tribunal. In *Ashraf v. SNC Lavalin ATP Inc*., 2015 ABCA 78, the Alberta Court of Appeal allowed a claim for constructive dismissal to proceed, as it claimed compensation distinct from that available under the Alberta *Workers' Compensation Act*. The Court noted, at para. 11:

> The *WCA* asserts no jurisdiction to compensate claims for constructive dismissal and it is not suggested that there exists a collective agreement or any statutory scheme which could assume jurisdiction to address that claim. If the judgment appealed from were allowed to stand, the appellant would be left without a forum to advance that claim, as would every other claimant for constructive dismissal who alleged that the workplace abuse leading to termination also caused stress or other psychological injury. With respect, we conclude the chambers judge erred in striking the claim as it relates to the claim for constructive dismissal.

[118] The first decision also dealt unreasonably with the applicant's claims for aggravated, moral, and punitive damages. The applicant had argued that her claim for aggravated, moral, and punitive damages flowing from constructive dismissal should be permitted to proceed, as they existed separate and apart from damages for mental stress, and related to the employer's conduct in the claim for constructive dismissal. In answer to this argument, para. 57 of the first decision makes reference to Decision No. 1878/18, which found that "[p]unitive damages are only available in tort actions if tort liability has been established.", but in that case "all tort claims have been barred from proceeding by virtue of s. 26(2) of the Act. Where a cause of action has been taken away…this extends also to any related claims for punitive damages".

[119] Whatever linkage the claims for moral, aggravated, or punitive damages might have to any tort action subsumed under the *Act*, the common law relating to constructive dismissal demonstrates their relationship to that action in the applicant's claim. Unless that claim is shown to be a disguised claim in tort, the nature of the damages sought, which are not available under the *Act*, should have guided the WSIAT to consider the *bona fides* of the applicant's claim for constructive dismissal, and not simply factual linkage. Not to have done so is unreasonable.

[120] There is another effect to the distinction drawn by the Vice-Chair in the first decision, in that it must lead to an absurd conclusion. At para. 44, the Vice-Chair dismissed as hypothetical and speculative the applicant's argument that "the constructive dismissal claim would exist even if [the applicant] had not suffered mental injuries." To the Vice-Chair, the fact that the applicant did also claim a mental stress injury crippled such an argument and permitted it to be ignored. But considering a hypothetical can be a useful tool to ferret out illogic, such as that involved in the artificial distinction in para. 30 that the applicant's claim is not for "wrongful dismissal in the usual sense, but rather is for constructive dismissal."

[121] During the course of oral argument, Hilton's counsel was asked what would be the result in circumstances such as those alleged by the applicant, but if instead of the applicant resigning, she were called into her manager's office and told, "You smell. You're fired." The response, which appears to accord with the logic in the decisions under review, was that a wrongful dismissal action could proceed. The facts are otherwise identical but for a few words spoken by a manager, but a completely different result obtains. So it is that the blind adherence to a test of factual linkage disregards important facts in the case, the policy and wording of the legislation, and draws a legal distinction where none reasonably exists.

Conclusions

[122] 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.

[123] In this case, the applicant's claim for constructive dismissal was coupled with a harassment claim and other claims. The applicant concedes, and I agree, that the harassment and other claims have been properly barred under s. 31 of the *Act* and cannot proceed. However, the WSIAT in both decisions under review arrived at the unreasonable conclusion that it was also appropriate to bar the applicant's claim for constructive dismissal and attendant damages.

[124] The applicant's claim for constructive dismissal deserves the opportunity to be tested in the courts. There is no indication that the claim is a colourable attempt by the applicant to skirt the historic trade-off; the claim for constructive dismissal does not appear to be a tort claim in the guise of an employment or contract dispute. The damages sought by the applicant are not benefits available under the *Act* and represent headings of damage for constructive or wrongful dismissal that have been recognized in Canadian law.

Decision on review

[125] For the above reasons, on review I would find that those portions of WSIAT Decisions No. 1227/19 and 1227/19R that bar the applicant's claims for constructive dismissal and for aggravated, moral, and punitive damages are unreasonable and must be quashed.

[126] While ordinarily it would be appropriate to remit this matter to the WSIAT for reconsideration, I decline to do so. In my view, a proper consideration of the issues of this case must inevitably lead to the conclusion that the applicant's action in constructive dismissal as against Hilton, and her claims for aggravated, moral, and punitive damages must be permitted to proceed.

[127] No purpose would be served in sending this matter back to a tribunal which twice arrived at or upheld the unreasonable conclusions that justify this review. The applicant brought suit more than three years ago, and her allegations relate to conduct that began more than five years ago. Given the substantial delay in the proceeding to this point, the mounting costs, and the need for both parties to collect and present evidence for the litigation, fairness dictates that the suit finally proceed without further avoidable delays.

[128] There will be an order dismissing Hilton's application pursuant to s. 31 of the *Act* in relation to the applicant's claim for constructive dismissal and aggravated, moral, and punitive damages. The applicant is permitted to pursue that claim and those damages in the Superior Court of Justice.

[129] Pursuant to the agreement of the parties, the applicant, as the successful party, is entitled to her costs fixed in the amount of $12,500, all inclusive.

_____
Kurke J.

I agree _____
Sachs J.

I agree _____
Backhouse J.

Released: August 18, 2021

CITATION: Morningstar v. WSIAT, 2021 ONSC 5576
DIVISIONAL COURT FILE NO.: 413/20
DATE: 2021/08/18

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Backhouse and Kurke JJ

BETWEEN:

Judith Morningstar

Applicant

– and –

Workplace Safety and Insurance Appeals Tribunal and Hospitality Fallsview Holdings Inc. Operating as Hilton Niagara Falls/Fallsview Hotel and Suites

Respondents

-- and –

Industrial Accident Victims Group of Ontario

Intervenor

DECISION ON APPLICATION

A.D. KURKE J.

Released: August 18, 2021