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Forum shopping may have met its match –

Important case argued by Sherrard Kuzz LLP results in tossing of employee's human rights application and civil claim…

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As most employers can attest, complaints of workplace harassment are on the rise. Complicating matters is that employees are no longer content to restrict the airing of their complaints to specialized human rights tribunals. Instead, we increasingly see an employee alleging workplace harassment in several *fora* simultaneously – before a human rights tribunal, before a workplace safety and insurance tribunal (seeking compensation for "chronic mental stress"), in the civil courts (seeking damages for "constructive dismissal"), and more recently before provincial labour boards. This "forum shopping" can cause considerable stress and financial burden on an employer that has no option but to respond to each and every claim, or risk a finding of liability.

This is precisely the scenario in which a Sherrard Kuzz LLP client recently found itself. Forced to simultaneously defend essentially the same claim of harassment brought in two different *fora*: the Human Rights Tribunal of Ontario ("HRTO") and in the civil courts.

In a novel approach our client drove the fight to the Workplace Safety and Insurance Appeals Tribunal ("WSIAT"). In two ground breaking decisions argued by the writer and my colleagues Daryl Seupersad and Samia Hussein, our client was successful in having the WSIAT bar the civil constructive dismissal claim on the grounds that it, and a claim the employee could bring under the *Workplace Safety and Insurance Act* ("*WSIA*"), fundamentally related to the same incident of workplace harassment. We also successfully had the application before the HRTO dismissed on a preliminary basis. These are important, positive decisions for employers.

What happened?

Judith Morningstar ("Morningstar") was employed by Hospitality Fallsview Holdings Inc. ("HFH") as a supervisor in the housekeeping department. While still an employee, Morningstar filed an application with the HRTO, alleging harassment and discrimination on the basis of sex and disability (the "Application").

Shortly after commencing the Application, Morningstar resigned her employment and commenced a separate civil action, claiming the workplace harassment and bullying amounted to a constructive dismissal (the "Civil Claim"). Notably, while Morningstar claimed she sustained injuries and damages, she did not expressly allege a breach of the Ontario *Human Rights Code* ("*Code*") or seek any *Code*-related damages. The Civil Claim also sought significant tort, aggravated and punitive damages.

Application dismissed

Once the Civil Claim was filed, HFH requested the HRTO dismiss the Application under section 34(11) of the *Code*, which prohibits the filing of an application with the HRTO if the applicant has also commenced a related civil proceeding seeking an order with respect to an alleged infringement of the *Code*.

Morningstar took the position that, as she did not specifically reference the *Code* in the Civil Claim or seek damages for a *Code* violation, section 34(11) did not apply. The HRTO disagreed, stating:

> Although the applicant did not explicitly seek a remedy under Section 46.1 of the *Code*, the Application and the civil claim have raised substantially the same allegations of harassment and a poisoned work environment and the damages as described in [the civil claim] are similar to the damages available under Section 46.1 of the *Code* for "injury to dignity, feelings and self-respect". I am persuaded therefore that the applicant has sought damages for theses same alleged *Code* violations.

Significantly, in her submissions Morningstar advised the HRTO that HFH had brought an application before the WSIAT to bar the Civil Claim which, if successful, would result in Morningstar losing any remedy she may have for the alleged breach of the *Code*. The HRTO acknowledged this possibility, but held it was outside its jurisdiction given the express language of section 34(11) of the *Code*.

Civil Claim barred under the *Workplace Safety & Insurance Act*

In addition to its request for dismissal of the Application, HFH filed a "right to sue" application with the WSIAT to stop the Civil Claim on the basis it was barred by the *WSIA*.

Under the *WSIA*, an employee whose employer is covered by that act cannot commence a civil action for a work-related accident or injury. Instead, compensable benefits are provided under the *WSIA* in *lieu* of all other rights of action in relation to a workplace accident or injury.

Effective January 1, 2018, the *WSIA* was amended to allow a compensable claim for chronic mental stress arising out of, or in the course of, employment.

HFH took the position the Civil Claim was, in essence, a claim for chronic mental stress under the *WSIA*. As such, the Civil Claim ought not be permitted to proceed. Morningstar took the position the *WSIA* only barred a claim for damages related specifically to mental stress, and not an underlying constructive dismissal claim. In support of its position, Morningstar emphasized that the *WSIA* does not afford the same scope of remedy available in the civil courts (*i.e.*, aggravated or punitive damages).

The WSIAT confirmed the right to commence an action for wrongful dismissal is only removed if such a claim is "inextricably linked" to a work injury. However, on the facts before it, the WSIAT was satisfied Morningstar's claim of constructive dismissal was "inextricably linked" to the harassment and bullying in the workplace, and as such the entirety of her Civil Claim could not proceed:

> … The Respondent's actions 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**… Accordingly, I find the worker's right of action is taken away by the WSIA… (emphasis added)

Lessons for employers

The WSIAT decision establishes an important precedent for employers. The recognition of chronic mental stress as a compensable workplace injury may now prevent an employee from claiming mental stress damages in a wrongful or constructive dismissal action, if "inextricably linked" to a claim of workplace harassment and the related mental distress.

More generally, if an organization receives multiple claims arising out of the same set of facts, it is important to promptly seek legal advice, to proactively consider all of the strategic options.

Morningstar has sought reconsideration of the WSIAT decision, so the debate continues. Until this case is finally resolved, the Morningstar decisions are good news for employers. We will keep our readers apprised.

For assistance, contact Sherrard Kuzz LLP.

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