

# ONTARIO DIVISIONAL COURT ALLOWS EMPLOYEE TO SUE FOR CONSTRUCTIVE DISMISSAL IN *MORNINGSTAR*

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In the recent [decision](#) in *Morningstar v WSIAT*, the Divisional Court overturned a surprising Workplace Safety and Insurance Appeals Tribunal (“**WSIAT**”) decision and held that a constructive dismissal claim for chronic mental stress arising from a poisoned work environment, as well as claims for related aggravated, moral and punitive damages are not statute-barred by the *Workplace Safety and Insurance Act* (“**the WSIA**” or “**the Act**”).

## **Background**

Hospitality Fallsview Holdings Inc. (“**the employer**”) employed Ms. Morningstar (“**the employee**”) in its housekeeping department. In 2018, she resigned from her employment and filed a claim for damages for harassment, constructive dismissal and breaches of the *Occupational Health and Safety Act* and the *Employment Standards Act, 2000*. In particular, she alleged that the harassment, bullying and abuse she endured during the course of her employment, as well as resulting mental distress, forced her to resign from her position.<sup>[1]</sup>

In response, the employer filed an application under section 31 of the WSIA for a declaration that the employee’s civil action was statute-barred as it was effectively a claim for chronic mental stress governed under section 13(4) of the WSIA. Section 13(4) provides that “a worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker’s employment.”

In [Decision No. 1227/19](#), the WSIAT agreed with the employer and held that the fundamental nature of the employee’s civil action was a claim for personal injury arising from a work accident consisting of alleged workplace harassment and the employer’s failure to address it.<sup>[2]</sup> As such, the claim fell within the jurisdiction of the WSIA and was statute-barred. In its decision, the Tribunal noted that the “right to sue” an employer for wrongful or constructive dismissal is not removed by the WSIA; however, this right could be taken away where the cause of action is “inextricably linked” to a workplace injury governed under the WSIA. The employee applied for reconsideration in [Decision No. 1227/19R](#), where a different Vice-Chair denied the request and upheld the initial decision.

## **Divisional Court Decision**

The employee applied to the Divisional Court for judicial review, where she argued that the WSIAT erred in barring her claims for constructive dismissal and the pertaining aggravated, moral, and punitive damages. In a unanimous decision, the Court partially quashed the WSIAT rulings and held that “the applicant’s claim for constructive dismissal deserves the opportunity to be tested in courts” [3].

The Court examined the policy behind the Act, including the purpose of the historic trade-off (to prevent injured workers from suing in tort for damages) as well as a range of WSIAT decisions on “right to sue” applications involving wrongful and constructive dismissals. The Court concluded that the reasoning and conclusions of the Tribunal in this matter were unreasonable because they focused on the “factual linkage” between the constructive dismissal action and the workplace injury, ignoring that Canadian law permits different causes of action to be advanced on the same facts. [4] Rather, the “inextricable linkage test” should have been applied to analyze the “*bona fides* of a cause of action for constructive dismissal or the availability of benefits under the Act” [5].

Notably, the decision emphasized that the compensatory regime stipulated in the WSIA does not bar claims and remedies founded in employment or contract law. The Court stated that “...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” [6]. The employee was permitted to pursue her constructive dismissal action in the Ontario Superior Court of Justice because the type of claim and remedies she was seeking were not available under the WSIA. Moreover, it was not “a colourable attempt to skirt the historic trade-off” by making a constructive dismissal claim appear as a tort claim “in the guise of an employment or contract dispute”. [7]

### **Takeaway for Employers**

The Divisional Court ruling has overturned the principle set by the WSIAT decisions, concluding that employees *do* have the “right to sue” employers for constructive dismissal where the fundamental nature of their claim is chronic mental stress arising from workplace harassment. Although a compensatory entitlement for this type of injury exists in the WSIA, this decision clarified that there is a legal distinction between seeking compensation for the personal injury of chronic or traumatic mental stress arising out of and in the course of employment [8], and damages for breach of contract for an employer’s failure to take proper actions to prevent it.

The previous WSIAT decisions marked a significant development in favour of employers, allowing litigation strategy to consider whether claims for workplace harassment and consequential chronic mental stress were better suited to be pursued under the WSIA regime. However, given the recently rendered decision of the Divisional Court, employers should note that constructive dismissal arising from this issue would not be barred

by the WSIA, unless it is an improper attempt to skirt that Act's limitations.

[1][ps2id id='1' target=''] Decision No. 1227/19, 2019 ONWSIAT 2324 at para 3.

[2][ps2id id='2' target=''] Ibid at para 61.

[3][ps2id id='3' target=''] *Morningstar v WSIAT*, 2021 ONSC 5576 [*"Morningstar"*] at para 124.

[4][ps2id id='4' target=''] Ibid at para 94.

[5][ps2id id='5' target=''] Ibid at para 83.

[6][ps2id id='6' target=''] Ibid at para 95.

[7][ps2id id='7' target=''] Ibid at paras 124 and 128.

[8][ps2id id='8' target=''] *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sched. A, s 13(4).

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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