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INJURIES RELATED TO MENTAL STRESS IN THE WORKPLACE – *INSURANCE ANYONE?*

It is easy to think of workers' compensation as being limited to "accidents". That is the common vernacular most people relate to this system which provides benefits to employees injured on the job. However, for the past several years harassment, bullying and workplace stress have come to be recognized as legitimate occupational health and safety hazards, with an impact on the ability to work as real as a broken foot or slipped disc. The questions we are often asked by employers are: What protection is in place for the employee who cannot work due to a mental disorder resulting from events in the workplace? Can that employee recover workers' compensation benefits, or must they sue their employer and/or co-worker? What is better for employers? To understand the issue, it is important to go back in time over a century to the beginning of Canadian law regarding workers' compensation.

The purpose of workers' compensation

Workers' compensation is a compulsory, no-fault insurance mechanism administered by the state. Often referred to as an "historic trade-off", the basic framework of a workers' compensation program is that a worker loses the right to sue his or her employer for damages resulting from a workplace injury, and in exchange receives benefits from a system that does not consider the fault of the employer or its ability to pay. While an employer is required to contribute premiums to the mandatory insurance scheme, it gains insulation from potentially crippling liability.

An employee's right to sue – what's the fuss?

The workers' compensation regime should occupy the space related to workplace injury resulting in disability. It should not be open to an employee whose claim fits under the workers' compensation scheme to instead choose to sue his or her employer for damages, or launch a grievance, simply because the employee has been denied entitlement under the scheme or prefers a wider range of remedies.

This was aptly illustrated by the British Columbia Court of Appeal in the 2012 decision *Downs Construction Limited v. British Columbia (Worker's Compensation Appeal Tribunal).* A female employee alleged she had suffered stress-related injuries as a result of the conduct of a male co-worker. The employee's claim for compensation was denied on the basis the event giving rise to the injury was not unexpected (a legal requirement at the time of the events). She sued her co-worker and employer. The employer asserted a court action was barred as a result of the historical trade-off.

The Workers' Compensation Appeals Tribunal found that the factual circumstances were connected to the workplace; however, since the employee was not successful in obtaining benefits under the insurance scheme there was no bar to her right to sue. On judicial review it was reinforced that the employee was able to sue her co-worker or employer because she hadn't qualified for workers' compensation benefits.

The British Columbia Court of Appeal disagreed with the lower courts, reinforcing the concept that a worker gives up the right to sue the employer for injuries sustained in the workplace in exchange for the no-fault compensation system. According to the Court of Appeal, the determination whether an injury arises in the context of employment is distinct from whether an employee's claim is denied due to a failure to establish

a required element for compensation (in this case, that the injury was not sudden and unexpected). In short, if an injury could be compensable under a workers' compensation scheme but fails to make out the requisite requirements, the employee is not entitled to sue separately in court or bring a grievance against his or her employer.

Ongoing developments

The events underlying the Downs case occurred prior to amendments to the British Columbia legislation. That act was amended in 2012 to loosen the requirements under which an employee can claim entitlement to benefits. A traumatic incident no longer needs to be unexpected and sudden. Rather the worker need only prove the mental disorder was a reaction to one or more traumatic events in the workplace, or was predominantly caused by a significant work-related stressor which may include bullying, harassment or a combination thereof.

That said, there are many provincial regimes that still require a sudden and unexpected work-related trauma. In a recent Ontario decision the court held that the "sudden and unexpected" requirement violates the section 15 equality provision under the *Canadian Charter of Rights and Freedoms* because it creates a more difficult burden to claim benefits for mental illness as compared to physical disability. In this case, a long-standing employee (nurse) was subject to abuse by a co-worker, including yelling and bullying in front of colleagues and patients. The employee sought medical and psychiatric treatment and was diagnosed with a mental illness as a result of the workplace incidents. Her claim for compensation was denied on the basis the illness was not the result of an acute reaction to a sudden and unexpected traumatic event. The Workplace Safety and Insurance Board held that the requirement of suddenness and unexpectedness could not be justified. Although this decision (which may still be judicially reviewed) is not binding on other tribunals, it will be interesting to follow its impact on the cases that follow.

Is this good for employers?

While recent trends suggest a growing number of employees seeking workers' compensation benefits for injury arising out of workplace harassment and bullying, this is not necessarily a bad thing for employers. Yes, there may be legitimate concerns regarding the impact of claims on premiums required to sustain workers' compensation systems across the country. However, for the overwhelming number of employers, the cost of premiums is likely to be far less than that of protracted and unpredictable litigation and grievance arbitration. For these reasons, it is not difficult to see how employers can benefit from the reinforced application of the "historic trade-off". *Insurance anyone?*

To learn more contact a member of the Sherrard Kuzz LLP team.

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