

2017 ONWSIAT 2760
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 2619/17

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DECISION NO. 2619/17

B. Calvin V-Chair

Heard: August 29, 2017

Judgment: September 11, 2017

Docket: 2619/17

Counsel: D. LeDrew, for Applicants

E. Adams, for Co-Applicant

M. Courneyea, for Respondent

Subject: Employment; Occupational Health and Safety; Public

Headnote

Labour and employment law

B. Calvin V-Chair:

(i) Introduction

1 These are the reasons for the decision of the Workplace Safety and Insurance Appeals Tribunal with respect to an application under section 31 of the *Workplace Safety and Insurance Act* (the "WSIA"). The application is brought by the Greater Toronto Airports Authority ("GTAA"), Compass Canada Support Services ("Compass") and SSP Canada Food Services Inc. ("SSP") who are the defendants in a civil action filed in the Ontario Superior Court of Justice at Toronto, Ontario, as Court Claim No. CV-13-487049. The plaintiff in that action is Ms. Hansra, who is the respondent to the application.

(ii) Background

2 The facts giving rise to this application are not in dispute and are as follows. In 2004, the respondent began working as a rental sales agent for a car rental company operating out of Toronto Pearson International Airport. The Airport is operated by the applicant GTAA.

3 On August 16, 2011, the respondent began her work shift at 6:00 am. Sometime between 8:00 and 9:00 am, she took a coffee break and was walking to a cafeteria in the airport. The cafeteria is for airport employees and is not open to the public. The cafeteria was run by the co-applicant SSP, which leased space from the GTAA and provided food and beverage services in the employee cafeteria. The respondent claims that during the course of her break she slipped and fell as the result of a substance that had been left on the ground.

4 The respondent claims that she sustained injuries in the fall, and she initiated a claim for workers' compensation benefits with the Workplace Safety and Insurance Board (the "Board"). In a decision dated August 19, 2011, a Board adjudicator denied the respondent's claim on the basis that at the time of the accident she was not on her employer's premises, and therefore was not "in the course of employment" when the accident occurred.

5 Subsequently, the respondent initiated a civil action for damages for personal injury. Among the defendants named in the respondent's civil action are GTAA, SSP, and Compass, which is a company that at the time was under contract to the GTAA to provide cleaning services at the airport.

6 The applicants and co-applicant filed defenses against the civil action. In addition, they brought applications to this Tribunal for a determination under section 31 of the WSIA that the respondent's right of action against them is extinguished by the WSIA. The applicants claim that at the time of the accident, the respondent was a worker in the course of her employment and therefore, her right of action against them is taken away by the WSIA. The applicants seek a determination to that effect.

(iii) Issue

7 As noted, the applicants responded to the respondent's civil action by bringing these applications under section 31 of the WSIA. That provision reads as follows:

31(1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 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;
- (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
- (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

(2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

8 The applicants claim that the respondent's right to sue is taken away by section 28 of the WSIA. Sections 27 and 28 prohibit an injured worker who is entitled to benefits under the WSIA from suing, among other persons, a Schedule 1 employer, a director of a Schedule 1 employer, and a worker of such an employer who was in the course of his or her employment. The relevant portions of these provisions read as follows:

27(1) Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.

...

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.

...

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

...

9 Subsection 13(1) of the WSIA entitles a worker to benefits for an injury if that injury results from an accident "arising out of and in the course of employment." Subsections 13(1) and (2) read as follows:

13(1) 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.

(2) If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

10 In the present case, it is not a matter of dispute that all the applicants were Schedule 1 employers at the time of the accident. Also not in dispute is the fact that the respondent was a worker at the time of the accident. Accordingly, the narrow issue on which this application turns is whether or not the respondent was "in the course of employment" when the accident occurred. As noted above, the Board ruled that the respondent was not in the course of her employment when she allegedly slipped and fell.

(iv) Analysis

11 The Board has several policies that deal with the issue of whether or not a worker is in the course of employment. While section 126 of the WSIA requires this Tribunal to apply the Board's policy when deciding an appeal from a decision of the Board, the Tribunal is not bound by the policy when deciding an application under section 31 of the WSIA, because the application is not an "appeal." Nevertheless the Board's policy is often instructive in resolving issues which arise in section 31 applications. This is particularly so when, as in the present case, the section 31 application turns on the question of whether or not a worker was in the course of employment at the time of an accident.

12 The Board's policy entitled *Accident in the Course of Employment* is set out in *Operational Policy Manual Document No. 15-02-02*. It reads as follows:

Policy

A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to *place*, *time*, and *activity* indicate that the accident was work-related.

Guidelines

In determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of *place*, *time*, and *activity* in the following way:

Place

If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment. A personal injury by accident occurring off those premises generally will not have occurred in the course of employment.

If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.

Time

If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

If a worker does not have fixed working hours or if the accident occurred outside the worker's fixed working hours, the criteria of place and activity are applied to determine whether the personal injury by accident occurred in the course of employment.

Activity

If a personal injury by accident occurred while the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

If a worker was engaged in an activity to satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment. Similarly, engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment. In determining whether a personal activity occurred in the course of employment, the decision-maker should consider factors such as

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

In determining whether an activity was incidental to the employment, the decision-maker should take into consideration

- the nature of the work
- the nature of the work environment, and
- the customs and practices of the particular workplace.

Application of criteria

The importance of the three criteria varies depending on the circumstances of each case. In most cases, the decision-maker focuses primarily on the activity of the worker at the time the personal injury by accident occurred to determine whether it occurred in the course of employment.

If a worker with fixed working hours and a fixed workplace suffered a personal injury by accident at the workplace during working hours, the personal injury by accident generally will have occurred in the course of employment unless, at the time of the accident, the worker was engaged in a personal activity that was not incidental to the worker's employment.

The decision-maker examines the activity of the worker at the time of the accident to determine whether the worker's activity was of such a personal nature that it should not be considered work-related.

In all other circumstances, the time and place of the accident are less important. In these cases, the decision-maker focuses on the activity of the worker and examines all the surrounding circumstances to decide if the worker was in the course of employment at the time that the personal injury by accident occurred.

13 Having considered the evidence in this case in light of the provisions of this policy as well as principles enumerated in the Tribunal's jurisprudence, I find that the respondent was in the course of her employment at the time of the accident that gives rise to this application. My reasons for this conclusion are as follows.

14 With respect to the criterion of place, I note that the accident occurred on the premises of Pearson International Airport. The respondent worked at Pearson International Airport. While the accident occurred may not have occurred on her employer's premises, that is, in the small booth owned or leased by the rental car company for whom she worked, it occurred in a public transportation facility where her employer's booth was located. It is reasonable to expect that the worker would have several short breaks during the course of her shift, and it is not reasonable to expect that she would sit in her employer's booth during the course of those breaks. Nor is it reasonable to expect that she would have been able to leave the airport during those short breaks. In my view, the accident occurred in a place in which the worker "might reasonably have been expected to be" during the course of her employment.

15 With respect to the criterion of time, I note that the accident occurred during the worker's shift. The evidence reveals that the worker had fixed working hours, and that the accident occurred during her shift. Further, the evidence shows that the respondent was being paid while she was on her brief coffee break during the course of which the accident occurred. The Board's policy indicates that in the case of a worker with fixed working hours "a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours." That is what occurred in the present case.

16 With respect to the criterion of activity, I am of the view that the activity was not one which "deviated from the worker's regular employment activities." Part of her employment activities included taking short breaks during which she was paid. The duration of her activity was short. Further, the Board's policy acknowledges that "a brief interlude of personal activity does not always mean that the worker was not in the course of employment." The focus is on whether or not the activity was "incidental to employment." While I acknowledge that these Tribunal's decisions are not entirely consistent, there is a lengthy line of cases which stand for the proposition that taking coffee or lunch break is reasonably incidental to employment. For example in *Decision No. 744/03*, the Vice-Chair stated the following:

Generally speaking, activities such as a lunch break or trip to the washroom are considered to be reasonably incidental to employment, unless the worker removes himself or herself from the course of employment by making a distinct departure on a personal errand.

In the present case, there is no indication that the worker made a distinct departure from her coffee break in order to undertake a personal errand.

17 To similar effect is *Decision No. 920/94* where the Panel stated:

Meal breaks and bathroom breaks occur in part, in response to physiological functions. The space Mr. Williams would have us find constituted the employer's premises, had no facilities for meal or bathroom breaks. From the evidence before us, we have inferred that the cafeteria was a designated common area. The cafeteria was convenient and the worker testified that she probably spent 95% of her meal breaks there. In other words, going to the cafeteria was a routine and efficient use of the plaintiff's lunch break (see *Decisions No. 585/93, 355/93, and 1230/87*). In addition, we find that the meal break was incidentally related to her work and the worker was in the cafeteria as a reasonable incident of her work.

Similarly, from the evidence in the present case, I have inferred that there was no facility for coffee or meals breaks in the employer's car rental booth, and therefore, for the respondent, going to the employees' cafeteria was a convenience that was "incidentally related to her work."

18 In *Decision No. 1786/06*, the Vice-Chair considered the case of a train conductor who, after arriving at his place of employment, crossed the street to purchase food that he intended to consume later while aboard the train. The worker slipped and fell while crossing the street. The Vice-Chair concluded that crossing the street to purchase food was an activity reasonably incidental to the worker's employment and therefore the worker was in the course of employment at the time of the accident. The Vice-Chair stated:

I accept that the worker attended the employer's location to begin his work for the train trip. The worker indicated that when he arrived at work he began with some preliminary operational duties prior to the accident.

I accept that it is not uncommon for workers to cross the street to obtain food for trips as the employer provides no facility for this. This custom was clearly related by all of the testimony at the hearing.

Furthermore, I am satisfied that the employer was well aware of the custom activity. The employer did not provide any information that, in my view, would contradict that the custom was authorized by the employer, although without any written formal authorization that the activity in question was under the express authority of the employer.

The crossing of the street to get food for the train trip is an activity reasonably incidental to the worker's employment. The crossing of the street was to obtain food to be eaten during the worker's train trip as a train conductor. The worker attended his employment site for work and was preparing himself to take the train trip which he was scheduled to make. There are no food facilities provided by the employer and no opportunity to obtain food while on the train.

I agree with and adopt the principles and reasoning in the cases cited above.

19 In short, for the reasons set out above, I find that the respondent was in the course of her employment when the accident occurred on August 16, 2011. Since the respondent was a worker who was in the course of her employment at the time of the accident, she is a person who is entitled to claim benefits under the insurance plan established under the WSIA for personal injuries sustained in the accident. Section 28 of that statute extinguishes her right to sue any Schedule 1 employer in respect of injuries sustained in the accident. The applicants are entitled to a determination to that effect pursuant to paragraph 31(1)(c) of the WSIA.

DISPOSITION

20 The application is allowed:

The respondent's right to commence an action against GTAA, Compass, and SSP for injuries sustained in the accident that occurred on August 16, 2011, is taken away by the WSIA.