WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1086/15

BEFORE: R. McCutcheon: Vice-Chair

HEARING: May 28, 2015 at Toronto
Oral hearing
Post-hearing activity completed on September 10, 2015

DATE OF DECISION: September 22, 2015

NEUTRAL CITATION: 2015 ONWSIAT 2107

APPLICATION FOR ORDER UNDER SECTION 31 OF THE *WORKPLACE SAFETY AND INSURANCE ACT, 1997*

APPEARANCES:

For the applicants, Ms. Grady and Honda Canada Finance Inc.: A.G. Honickman, Lawyer

For the respondent, Mr. Zada: C. Tiano, Lawyer

Interpreter: Not applicable

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") by the defendants in an action filed in Brampton, in the Ontario Court in File No. CV-10-01626-00. The plaintiff/respondent, Mr. Zada, brought an action against the applicants/defendants in relation to a motor vehicle accident that occurred on May 29, 2008.

[2] Section 31 of the WSIA provides that a party to an action may apply to the Tribunal to determine whether a right of action is taken away by the Act; whether a plaintiff is entitled to claim benefits under the insurance plan; or whether the amount a party to an action is liable to pay is limited by the Act.

[3] In August 2013, the personal defendant, Ms. Grady, brought an application to this Tribunal seeking a declaration that Mr. Zada's right to sue her is removed by the WSIA. On April 17, 2015, an Amended Applicants' Statement was filed, which added Honda Canada Finance Inc. ("Honda") as a co-applicant in the proceedings. Honda seeks a declaration that Mr. Zada's action against it is barred by the WSIA, or, in the alternative, that Honda is entitled to an order under section 29 of the WSIA limiting the extent of its liability in the civil action. The Amended Applicants' Statement was not filed in a timely manner in accordance with the Tribunal's Practice Direction: Right to Sue Applications.

[4] In *Decision 1086/15I*, I granted Ms. Grady's application, finding that she and the respondent were in the course of their employment at the time of the accident. I reserved a decision on Honda's application to give the respondent an opportunity to file post-hearing written submissions. Counsel for the respondent declined to provide further submissions.

[5] This is a final decision addressing Honda's application.

(ii) Issues

[6] Honda's application gives rise to the following issues:

1. whether the respondent's right of action is removed as against Honda;

2. or, in the alternative, whether Honda is entitled to an order limiting its liability in the action.

(iii) Background

[7] In the interim decision, I found that both Ms. Grady and Mr. Zada were in the course of their employment at the time of the motor vehicle accident that is the subject of the litigation.

[8] Ms. Grady was driving a vehicle that was leased by her employer from Honda. The employer provided it to Ms. Grady as a company vehicle. Mr. Zada was driving his personal vehicle.

[9] As against Honda, the Statement of Claim makes allegations of negligence, including failure to maintain the motor vehicle driven by Ms. Grady.

(iv) Analysis

(a) Whether the respondent's right of action is removed as against Honda

[10] I find that the respondent's right of action against Honda is not barred by the WSIA.

[11] Section 27 of the WSIA provides that sections 28 to 31 apply with respect to a worker who sustains an injury that entitles him or her to benefits under the insurance plan. The issue in this decision turns on the application of section 28 of the WSIA, which states in part:

> **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.
>
> **(4)** Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

[12] Thus, in accordance with section 28, a worker of a Schedule 1 employer is precluded from suing any Schedule 1 employer, subject to the exception set out in subsection 28(4), which applies where the employer supplied a motor vehicle, machinery, or equipment without providing an operator. In this application, there is no dispute that Honda was the lessor of a vehicle supplied to Ms. Grady's employer without supplying an operator for the vehicle. Applying the plain language of subsection 28(4), one would conclude that the exception applies, and the action is thereby permitted to proceed.

[13] However, counsel for the respondent relies upon two Tribunal decisions (*Decisions No. 2221/07* and *251/11*) in support of the proposition that the right to sue Honda is removed by the WSIA. These decisions appear to suggest plaintiffs must adduce evidence before the Tribunal to show that a defect in the vehicle or equipment caused or contributed to the accident in order for the subsection 28(4) exception to apply. I would prefer to follow the prevailing approach taken in the Tribunal's case law, which establishes that this Tribunal does not address questions of negligence, which are properly within the jurisdiction of the Courts.

[14] In this regard, I note *Decision No. 309/90*, an early leading case which interpreted the predecessor provision of subsection 28(4) under previous legislation. The Panel discussed the interpretation of the provision in part as follows:

> The apparent underlying basis for this exception to the subsection 8(9) protection, is an attempt not to involve the compensation system in situations relating only to purchase, lease, or other contractual arrangements concerning property. The legislation is concerned primarily with compensation benefits for injured workers and, unless the equipment is accompanied by a worker who may be injured and thus entitled to benefits under the Act, the employer supplying the equipment is not functioning primarily in its role as an employer of workers for purposes of the compensation legislation. In other words, unless it is also supplying workers to "operate" the equipment, its role for subsection 8(10) purposes is primarily that of a vendor or lessor and not that of an

employer of workers who could be injured. This approach is aptly summarized by the Panel in WCAT *Decision No. 725* (*Robinson et al* v. *Clark et al*) at page 274 where the Panel stated:

> What is the rationale of section 8(10)? It draws a distinction between a situation where an employer merely supplies a vehicle and a situation in which that employer also supplies workers. If the employer also supplies workers section 14 and 8(9) apply and the employer is immune from suit for an injury for which benefits are payable under the Act, and he can be relieved of any portion of assessment which is otherwise liable to be charged against him. These things do not apply where the employer is merely supplying machinery. Without the essential element of the supply of a worker, who can be injured under the Act, section 8(9) does not apply. Why would this be? It seems clear that the reason is that the Workers' Compensation Act is a statute which provides for the compensation of injured workers. It does not provide for the resolution of disputes that relate only to the supply of equipment or a plan for financing automobiles through leasing. It is not a statute which concerns itself with property damage or questions of negligence in the provision of leased vehicles.

[15] *Decision No. 309/90* also addressed the extent to which evidence is adduced in a Tribunal proceeding and when it is appropriate to accept the allegations in the Statement of Claim as pleaded for the purposes of a right to sue application. This Tribunal does hear evidence on issues directly within the Tribunal's purview in a right to sue application, for example, whether a party is a worker or independent operator, whether a party is an employer under Schedule 1 or Schedule 2, or whether an accident arose out of and in the course of employment. Such matters are often not covered by the pleadings and are directly relevant to a right to sue application. The Tribunal does not, however, hear evidence or make findings on the alleged negligence of any party. *Decision No. 309/90* explained the importance of these concepts as follows:

> …[F]acts which may ultimately emerge at trial may not be apparent at the section 15 [now section 31] stage. Panels walk a thin line between encroaching upon the jurisdiction of the courts to determine negligence and making findings which will determine whether the right to sue is taken away. In so doing, panels may place greater emphasis on the pleadings which are designed to disclose the cause of action.

[16] Thus, the Tribunal's leading jurisprudence stands for the proposition that the legislation does not concern itself with property damage or questions of negligence in the provision of leased vehicles. Furthermore, the Tribunal is mindful of the potential for encroaching upon the jurisdiction of the courts to make findings regarding alleged negligence; accordingly, the Tribunal focuses on the pleadings in determining right to sue applications. The interpretation of subsection 28(4) of the WSIA must be considered within the context of these guiding principles.

[17] In this case, the Statement of Claim alleges negligence against Honda, including failure to maintain the vehicle. If I were to accept the argument advanced by counsel for the applicant, the plaintiffs would be required to adduce evidence of negligence against defendants in proceedings before this Tribunal in order to establish that subsection 28(4) applies. I am unable to give effect to this submission for four primary reasons:

- It is inconsistent with the foregoing authorities, which have held that this Tribunal does not concern itself with property damage or questions of negligence in the provision of leased vehicles.

- The argument is inconsistent with the Tribunal's approach to accepting allegations as pleaded. Evidence is heard when necessary to decide issues directly within the Tribunal's jurisdiction in a right to sue application.
- The Tribunal would be at risk of trenching on the jurisdiction of the courts if it were to require parties to litigate issues of negligence in right to sue proceedings.
- Lastly, but equally importantly, this approach does not give effect to the plain language of the statute and the principles of statutory interpretation. Subsection 28(4) of the WSIA sets out clear, unambiguous terms for its application, without any reference to concepts of negligence or the need for any party to prove that a defect in the motor vehicle, machinery, or equipment caused or contributed to the injury at issue.

[18] Furthermore, I note that several Tribunal decisions have held that subsection 28(4) applies in circumstances analogous to this application. I note, for example, *Decision No. 1785/04*, which includes a detailed discussion of the history and interpretation of subsection 28(4). In that case, the defendant Citicapital was a Schedule 1 employer, as it was engaged in the business of leasing trucks. Based on the undisputed fact that Citicapital leased the vehicle involved in the accident to a transport company without providing an operator, the Vice-Chair found that subsection 28(4) did apply to permit the action to proceed against Citicapital. Other examples of this approach include *Decisions No. 2114/10* and *2258/08I*.

[19] This Tribunal has held that the pleadings in the Statement of Claim form the basis for the consideration of right to sue applications. In this application, the Statement of Claim includes allegations that Honda failed to maintain the Defendant's motor vehicle properly, or at all. It is therefore evident that the action against Honda relates to a problem with the motor vehicle supplied. Whether there is sufficient evidence to support this allegation is a matter for the Court to decide, not this Tribunal. This is not an issue for which it is necessary for either party to adduce evidence beyond the pleadings.

[20] The respondent relies upon *Decisions No. 2221/07* and *251/11*. Pursuant to section 124 of the WSIA, the Tribunal is not bound by strict rules of precedent and decides each case on its merits and justice. At the same time, however, the Tribunal recognizes the importance of consistent decision-making. I note that the reasoning relied upon by respondent's counsel was not necessary in both cases; that is, the comments were *obiter*. *Decision No. 2221/07* in particular addressed unique factual circumstances in which the nature of the equipment at issue was complex and required some consideration of whether a motor vehicle, machinery, or equipment was supplied. In my view, the *obiter* comments in these cases must be limited to the context of the unique facts in which they were made.

[21] In addition, it is also relevant to consider the implications of the decision of the Ontario Superior Court in *Kandavanam Maria-Antony* v. *Sritaran Selliah*, 2014 ONSC 4264. While this decision does not directly address the issue in this application, it does suggest that the argument advanced by Honda could have consequences for litigation that proceeds before the courts. The *Selliah* case involved litigation which had been the subject of a decision by this Tribunal in a right to sue application. The Panel in that decision determined that both workers involved in the motor vehicle accident at issue were in the course of employment. The Panel addressed the right of action against several parties, including "FT," which had supplied the truck driven in the motor vehicle accident at issue without supplying workers. The Panel determined that the right

of action against FT was not taken away pursuant to section 28(4) of the WSIA, but was limited pursuant to subsection 29(4) of the WSIA.

[22] In *Maria-Antony* v. *Selliah*, the question before the Court was whether the vehicle owner (FT) could be sued for vicarious liability for the driver's negligence under subsection 192(2) of the *Highway Traffic Act*, which provides:

> (2) The owner of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway, unless the motor vehicle or street car was without the owner's consent in the possession of some person other than the owner or the owner's chauffeur. 2005, c. 31, Sched. 10, s. 2.

[23] O'Marra J. concluded that subsection 29(4) of the WSIA did not preclude an action for vicarious liability against the owner of the vehicle where indemnity against the negligent tortfeasor is barred by the WSIA. In reaching this conclusion, O'Marra J. approved of the following public policy discussion in paragraphs 33 and 34 of *Wadsworth* v. *Hayes*, 1996 ABCA 39 (CanLII):

> The essential argument of the defendant owner here is that s. 18(2) of the Workers' Compensation Act abolishes vicarious liability where that Act covered the plaintiff. Why the Legislature would want to do that, I cannot imagine. The results would be arbitrary and unjust. It is clear why the Act bars a suit by one worker covered by compensation against another worker or employer also covered by the same scheme. They pay premiums to the scheme and get no-fault benefits from it. And it is obvious why the Act bars indirect recovery from such people via third party proceedings. What cannot be done directly should not be done indirectly. However, I can see no reason whatever to bar vicarious liability. Vicarious liability runs so deep in our law that the effects of barring it would be incalculable.
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> Our whole scheme of compensation for automobile accidents through compulsory automobile liability insurance would fall down if there were no vicarious liability. The law does not require drivers to insure; it requires owners of vehicles to insure. The Highway Traffic Act s. 181 imposes liability on vehicle owners for special policy reasons.

[24] O'Marra J. held that subsection 29(4) does not specifically preclude the vicarious liability of the unprotected vehicle owner where indemnity against the negligent tortfeasor is barred by the Act. O'Marra J. found that the purpose of the provision is to eliminate joint liability between protected and unprotected defendants that would otherwise exist, not to eliminate an unprotected defendant's vicarious liability. The "limited" right of action referred to in the Tribunal decision was interpreted to include actions based on vicarious liability.

[25] The decision of the Ontario Superior Court in *Selliah* does not directly address the question in this application, but it does illustrate the potentially broad scope and far-reaching consequences of adopting the approach put forth by the applicant. If the Tribunal were to decline to apply subsection 28(4) on the basis that the plaintiff did not adduce proof of the defendant's direct negligence, the Tribunal could potentially deprive the plaintiff of the opportunity to pursue an issue of vicarious liability in the courts. This lends further support to the Tribunal's prevailing approach to the application of subsection 28(4): questions of negligence are within the purview of the courts to decide, rather than this Tribunal, and the need for evidence in right to sue applications is limited to issues directly within the Tribunal's jurisdiction.

[26] In summary, the Tribunal's jurisprudence stands for the proposition that questions of negligence are generally not considered by the Tribunal in right to sue proceedings. Furthermore, several Tribunal decisions have found that the right to sue is not removed against the supplier of a motor vehicle in analogous circumstances, without requiring the plaintiff to adduce evidence that a mechanical defect caused or contributed to the accident. It is also important to note that the unambiguous language of subsection 28(4) does not stipulate that a party is required to prove mechanical defects or negligence by the supplier of the motor vehicle, machinery, or equipment in order for the exception to apply. Therefore, applying the principles of statutory interpretation, this Tribunal ought to give effect to the plain language of the statute, rather than reading in an additional requirement for a plaintiff to adduce evidence of negligence by the Schedule 1 employer that supplied the motor vehicle, machinery, or equipment.

[27] Therefore, the application is denied on this issue. Pursuant to subsection 28(4), Mr. Zada's action against Honda is not precluded by the WSIA.

(b) Whether Honda is entitled to an order limiting its liability in the action

[28] Section 29 applies to this issue and states in part:

> **29(1)** This section applies in the following circumstances:
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> 1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.
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> […]
>
> **(2)** The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.
>
> **(3)** The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.
>
> **(4)** No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

[29] Subsection 29(3) of the Act provides that the court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer, or other worker. Pursuant to subsection 29(4), no damages, contribution, or indemnity for the amount determined under subsection (3) is recoverable in the action.

[30] There was no dispute that this provision is applicable to this case. Therefore, Honda is entitled to a declaration pursuant to subsection 29(4) of the Act that no damages, contribution or indemnity for the portion of loss or damage determined by the court under subsection 29(3) is recoverable in the action.

DISPOSITION

[31] Honda's application is granted in part as follows:

1. Pursuant to subsection 28(4) of the WSIA, Mr. Zada's right of action against Honda is not taken away by the WSIA;
2. Honda is entitled to a declaration pursuant to subsection 29(4) of the WSIA that no damages, contribution, or indemnity for the portion of loss or damage determined by the court under subsection 29(3) is recoverable in the action.

DATED: September 22, 2015

SIGNED: R. McCutcheon