NOVA SCOTIA COURT OF APPEAL

Citation: ***Logan v. Nova Scotia (Workers' Compensation Appeals Tribunal)***, 2006 NSCA 88

Date: 20060719
Docket: CA 257902
Registry: Halifax

Between:

Joanne Logan

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal and the Workers' Compensation Board of Nova Scotia

Respondents

- and -

Alliance of Manufacturers & Exporters, Canada, c.o.b. as Canadian Manufacturers Association, Nova Scotia Division ("CME-NS")

Intervenor

Judges:	Cromwell, Saunders and Oland, JJ.A.
Appeal Heard:	April 20, 2006, in Halifax, Nova Scotia
Held:	**Appeal dismissed per reasons for judgment of Cromwell, J.A.; Saunders and Oland, JJ.A. concurring.**
Counsel:	Kenneth LeBlanc and Patricia Dunn, for the appellant Loanne Labelle, for the respondent Workers' Compensation Appeals Tribunal David Farrar, Q.C. and Daniela Bassan, for the respondent, Workers' Compensation Board Peter McLellan, Q.C. and Robert Patzelt, Q.C., for the Intervenor

Reasons for judgment:

I. INTRODUCTION:

[1] Can a wrongful dismissal be an "accident" for workers' compensation purposes? The Workers' Compensation Appeals Tribunal ("WCAT") said it could not and therefore dismissed the appellant's claim for benefits. The worker appeals.

[2] In this case, the ordinary meaning of some everyday words in the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10 ("**WCA**") seems to point towards opposite conclusions. On one hand, everyone recognizes that the workers' compensation system does not deal with compensation for wrongful dismissal; being fired is not an accident for workers' compensation purposes. On the other hand, the **WCA** says that the term "accident" includes stress arising from "an acute reaction to a traumatic event." Being summarily and wrongfully dismissed from long term employment, as the appellant was, could certainly be described in every day language as a traumatic experience. So while it seems odd to think of being fired as a workplace accident, the statute's inclusion of stress arising from a traumatic event could be seen as opening the door to workers' compensation. Hence, the dilemma we face in this case.

[3] To make sense of these two apparently conflicting conclusions, one must interpret the words of the statute in light of its context and purpose. When that is done, it becomes clear in my view that WCAT's approach was sound. I would therefore dismiss the appeal.

II. ISSUES:

[4] The issues to be resolved on appeal are these:

1. What standard of appellate review should we apply to WCAT's decision?
2. Did WCAT commit a reviewable error in finding that:
   (a) a termination of employment cannot be a traumatic event for the purposes of **WCA**?

(b) the events surrounding the worker's termination did not constitute a traumatic event?
(c) whether an event is traumatic should be judged objectively?

III. FACTS AND DECISIONS:

A. Ms. Logan's Dismissal and its Consequences:

[5] The worker, Ms. Logan, claimed workers' compensation benefits arising out of her dismissal from employment in October of 2003. This was a sudden dismissal without cause from long term employment. It had an immediate effect on her. She became extremely upset and was unable to sleep. Her husband wanted to take her to the hospital. After two days of crying continuously and refusing to leave the house, she agreed to go. At the Emergency Room, she was anxious, upset, crying and complaining of numbness and pain.

[6] The appellant filed her initial report of accident in October of 2004, a year after the dismissal. She claimed for chronic depression and anxiety accumulating over a 9 year period. Even before the dismissal, she had experienced problems with stress at work. A psychiatrist had seen her in 1997, diagnosing major depression with co-morbid anxiety disorder. In 1998, the psychiatrist noted that the appellant was not coping well on the job and was being followed for stress management by an employee assistance counsellor. In 2000, she had been off work with single episode major depression, co-morbid with generalized anxiety disorder. In short, there was a history of difficulties with stress in the workplace and even of debilitating stress well before the dismissal in October of 2003.

[7] By the time the claim came before WCAT, a psychiatrist expressed the view that the appellant had been "psychologically traumatized" by the termination. There was medical evidence that, although she had been suffering from generalized anxiety disorder for years, her major depressive disorder and social anxiety disorder only became severe following the termination.

[8] The appellant sued her former employer for wrongful dismissal. The case settled during mediation for $96,000 including $21,000 for what the appellant referred to as "pain and suffering".

[9] As noted, it was not until October of 2004, nearly a year after her dismissal, that Ms. Logan filed a report of accident seeking workers' compensation benefits. The benefits administrator denied the claim and that decision was upheld by a hearing officer. Ms. Logan appealed to WCAT. The issue was whether her injury had resulted from an accident within the meaning of **WCA**.

B. WCAT's Decision:

[10] The focus of debate before WCAT was whether Ms. Logan had suffered an injury by accident arising out of and in the course of her employment. This was a critical issue because **WCA** provides benefits for employees who suffer such injuries: s. 10. The term "accident" under **WCA** includes "disablement ... arising out of and in the course of employment" but does not include " stress other than an acute reaction to a traumatic event." WCAT found that Ms. Logan's injury was excluded because it did not result from a "traumatic event". Following the decision of the New Brunswick Court of Appeal in **D.W. v. New Brunswick (Workplace Health, Safety and Compensation Commission)** (2005), 257 D.L.R. (4th) 594; 2005 NBCA 70, WCAT held that management decisions do not qualify as traumatic events and that whether an event is traumatic is to be determined objectively.

[11] As WCAT put it at p. 10:

> ... a sudden termination is not outside the realm of what is expected or usual within the workplace, and most people do not become disabled due to being fired. Once a management decision is made to terminate a worker, it is often not in the employer's best interest to keep that worker in the workplace, with working notice.
>
> All of the events which the Worker's counsel calls traumatic directly flow from, or are part of the management decision to terminate her employment. They are not accidents for the purposes of workers' compensation.
> (Emphasis added)

[12] WCAT recognized that there might be gray areas around where wrongful dismissal ends and compensable accidents begin. It stated that an event is not automatically excluded from being traumatic within the meaning of the **WCA** "... merely because there is a labour relations context." It gave as an example a discipline meeting during which a worker was suddenly assaulted by the

employer, pointing out that in such circumstances, "... [t]he discipline meeting context would be largely irrelevant to such a ... claim. ...". But it affirmed the general principle that wrongful dismissals are not accidents for workers' compensation purposes.

[13] The Tribunal then went on to consider whether the worker had experienced any "traumatic events" as it had defined them. It concluded that she had not because all of the events which the worker advanced as traumatic ones "flow[ed] from, or [were] part of, the management decision to terminate ...".

[14] WCAT found that its approach was consistent with the "historic trade-off" which is fundamental to workers' compensation legislation. The Tribunal also was of the view that this interpretation best responded to the "mischief" addressed by the legislation. As WCAT put it, "The stress exclusion appears to have been a response to appeal decisions which expanded the traditional approach to stress claims. It is reasonable to interpret the stress exclusion as restoring the traditional approach to stress claims, so that the mischief is addressed." Finally, WCAT was of the opinion that its interpretation led to a reasonable and just result. It said that any other approach "... would lead to employers paying increased assessments for insurance that they did not require. It would lead to an expansive interpretation of accident, when the Legislature clearly intended to prevent expansive interpretations in stress cases ..."

IV. ANALYSIS:

A. Standard of Review:

1. Overview:

[15] There are three issues and different standards of review apply to them. The first two issues concern WCAT's decision to apply an objective test to determine whether there has been a "traumatic event" and its conclusion that a termination of employment cannot be a traumatic event. These issues should be reviewed on appeal for correctness. The third issue – WCAT's decision that the particular events in issue here were not traumatic – should be reviewed for reasonableness. My reasons for these conclusions follow.

2. The Pragmatic and Functional Approach:

[16] The standard of review on WCAT appeals is, of course, determined according to an analysis of the four contextual factors pursuant to the pragmatic and functional approach. The factors relating to the presence or absence of a privative clause and statutory right of appeal and the purpose of the legislative scheme are the same in most WCAT appeals. In view of the many decisions of the Court which address these factors, my discussion of them may be brief.

(a) Privative clause and statutory appeal:

[17] **WCA** provides for a statutory appeal on questions of law and jurisdiction but not on questions of fact. There is no privative clause with respect to questions of law and jurisdiction: s. 256. This tends to support a more searching standard of review of WCAT's resolutions of such questions: see e.g. **Nova Scotia (Department of Transportation and Public Works v. Nova Scotia (Workers' Compensation Appeals Tribunal)(Puddicombe)** (2005), 231 N.S.R. (2d) 390; N.S.J. No. 137 (Q.L.)(C.A.) at para. 16.

(b) Purpose of the legislation and of the particular provisions:

[18] As for the purpose of the legislation, two aspects are particularly important.

[19] The first is the overall purpose of workers' compensation legislation. It is to create a comprehensive scheme for resolving workers' compensation issues outside the court system and without resort to the principles of tort liability: **Nova Scotia (Workers' Compensation Board) v. Martin**, [2003] 2 S.C.R. 504 at para. 52. This tends to support a measure of deference lest "judicialization" of the scheme undermine this fundamental objective.

[20] The second aspect of legislative purpose relates more specifically to WCAT's mandate. It is not, in general, a tribunal that is required to select from a range of remedial choices or administrative responses. Rather, it is a tribunal that in many respects has more in common with the "judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the tribunal" than with tribunals that exercise a broad, policy-laden jurisdiction: **Dr. Q v. College of**

Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226 at para. 32. This aspect tends towards less rather than more deference: **Dr. Q** at para. 31

[21] I turn to the particular provisions. What is the purpose of the definition of accident and, more specifically, the limitation on stress claims to those arising from an acute reaction to a traumatic event? The short answer is that the provisions which set out the inclusions and exclusions from the meaning of the term accident set the limits of both compensation and immunity from suit. The ultimate purpose of these provisions, therefore, is to give effect to the historic trade off which underlies the whole scheme.

[22] At the heart of the workers' compensation system is the historic trade off of no fault compensation to workers in exchange for immunity from civil actions for workplace injuries in favour of employers. The provisions setting out the inclusions and exclusions from the term "accident" are critical to this historic trade off. This is because the requirement for "an accident arising out of and in the course of employment" serves to define both the extent of compensation and the limits of civil actions. It is part of the gateway to the workers' compensation system: what may be compensated is an injury by accident arising out of and in the course of employment. It is also central to the bar to civil actions by workers against employers which lies at the heart of the workers' compensation system. The purpose of the provisions setting out the inclusions and exclusions from the meaning of the term "accident", therefore, are to establish the limits of the historic trade off between no fault benefits for workers and freedom from civil liability for employers.

[23] The exclusion of stress claims from being accidents, unless the stress results from a "traumatic event", plays a role in achieving this overall purpose. The question of what the term "traumatic event" means lies close to the heart of how the workers' compensation scheme should operate.

[24] In my view, the purposes of the provisions setting out exclusions and inclusions from the term "accident" suggest some, rather than no, deference to a highly specialized tribunal such as WCAT which operates daily at the core of that system. It is worth noting that if the issue in this appeal had arisen in the context of whether a civil action was barred by s. 28 of **WCA**, WCAT's determination

would have full privative protection: s. 29(3) and (4). This to me suggests a measure of deference when the issue presents itself as it has in this appeal.

(c) Nature of the questions:

[25] Of the three questions raised on appeal, two are questions of law while the other is a question of mixed law and fact.

[26] The issues of whether a "traumatic event" within the meaning of s. 2(a) of **WCA** should be assessed objectively or subjectively and whether it may include an unjust dismissal are questions of law. They are questions of general application concerning the proper interpretation of the statute. These are also issues which are the subject of judicial precedent – the **D.W.** decision – on which the Tribunal heavily relied in this case. These factors tend to lessen judicial deference where, as here, there is a statutory right of appeal on questions of law: **Canada (Director of Investigation and Research) v. Southam Inc.**, [1997] 1 S.C.R. 748 at para. 44; **Puddicombe, supra** at para. 22.

[27] Questions of law do not invariably attract the correctness standard of appellate review. The nature of the question and its relationship to the purpose of the legislative scheme and the relative expertise of the Tribunal and the Court in relation to the question of law must also be considered: **Ferneyhough v. Nova Scotia (Workers' Compensation Board)** (2000), 189 N.S.R. (2d) 76; N.S.J. No. 342 (Q.L.) at para. 10; **Puddicombe**, **supra**. However, an appeal which turns on the interpretation of **WCA** and the application of principles from the judicial case law usually attracts appellate review based on correctness: **DiPersio v. Nova Scotia (Workers' Compensation Appeals Tribunal)** (2004), 228 N.S.R. (2d) 134; N.S.J. No. 442 (Q.L.)(C.A.) at para. 26.

[28] The third issue raised on appeal concerns whether the events in this case were traumatic. This is a mixed question of law and fact requiring the application of the proper definition of "traumatic event" to the facts as found by the Tribunal. This is a fact-specific exercise, the results of which are likely to be of little precedential value. This suggests more, rather than less, deference: **Southam** at para. 44; **Puddicombe** at para. 22.

[29] So I conclude that the first two issues are legal questions of general application involving the interpretation of **WCA** and the judicial precedents. The other issue is towards the fact-specific end of the spectrum of mixed questions of law and fact.

(d) Expertise:

[30] As noted in **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 1222, expertise must be understood as a relative concept which has three dimensions: the court must characterize the expertise of the tribunal in question; the court must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative tribunal in relation to this expertise: **Pushpanathan** at para. 33; **Halifax Employers Association v. International Longshoremen's Association, Local 269** (2004), 226 N.S.R. (2d) 159; N.S.J. No. 316 (Q.L.)(C.A.) at para. 52.

[31] We have recognized the expertise of the WCAT acquired by its ongoing highly specialized functions within the workers' compensation system. While WCAT does not have greater expertise relative to the Court with respect to legal questions arising under **WCA**, its specialized functions support a measure of deference with respect to certain types of legal questions falling squarely within them: **Puddicombe** at para. 18. When it comes to applying legal principles to the facts of the case, greater deference is due. WCAT's role is to make findings of fact and apply them to the relevant principles. By virtue of its role and specialized functions, it is somewhat better placed than the Court to do so.

(e) Conclusion on standard of review:

[32] Taking all of these factors into account, it seems to me that WCAT's decision to take an objective approach to deciding whether something is a traumatic event and that the implementation of a management decision to terminate cannot be traumatic ought to be reviewed on appeal for correctness. The resolution of these questions requires statutory interpretation and assessment of judicial precedent and the result is a matter of general application. The specialized nature of the tribunal and the centrality of the question to the overall operation of the scheme tend towards a measure of deference. However, I am of the view that the nature of the questions and the existence of a statutory appeal with no privative

protection for questions of law tips the balance in favour of review on the correctness standard.

[33] As to whether a particular fact situation falls within the definition of "traumatic", I conclude that the applicable standard is reasonableness. While not a pure question of fact on which the Tribunal is entitled to the highest degree of deference, the exercise is nonetheless fact-driven, case specific and squarely within its specialized functions.

(f) Defining the standards of review:

[34] To conclude my discussion of standard of review, I will say a word about the two standards which I have selected.

[35] When reviewing a decision for correctness, the court "... undertakes its own reasoning process to arrive at the result it judges correct": **Law Society of New Brunswick v. Ryan**, [2003] 1 S.C.R. 247 at para. 50.

[36] Where, however, the court is reviewing for reasonableness, it "... should not at any point ask itself what the correct decision would have been.": **Ryan** at para. 50. Rather, the court must look to the reasons given by the tribunal and, on the basis of a "somewhat probing examination", determine whether there is any line of analysis within the reasons that "... could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.": **Ryan** at para. 55. Not every element of the reasoning must pass this test, provided that the reasons, read as a whole, are tenable as support for the decision: **Southam** at paras. 56 and 79; **Ryan, supra**, at paras. 55- 56. As Fichaud, J.A said for the Court in **Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)** (2005), 238 N.S.R. (2d) 59; N.S.J. No. 441 (Q.L.)(C.A.) at para. 43, "Under reasonableness ... the reviewing judge does not follow her own reasoning path. She does not ask whether her view is correct, reasonable or preferred. She follows the tribunal's reasoning path. She does not ask whether the tribunal's decision is correct or preferred. She asks whether there is any line of reasoning to support the tribunal's conclusion." If the tribunal's decision does not pass this test, the decision is unreasonable.

B. Can a dismissal be a traumatic event?

1. The issue:

[37] The appellant says that WCAT's decision that a wrongful dismissal cannot be an accident for workers' compensation purposes is an unduly restrictive interpretation of the statute which is not supported by the legislative text.

[38] The resolution of this issue turns on the correct interpretation of the **WCA**. For ease of reference, the relevant provisions follow:

> 2 In this Act,
>
> (a) "accident" includes
>
> (i) a wilful and intentional act, not being the act of the worker claiming compensation,
>
> (ii) a chance event occasioned by a physical or natural cause, or
>
> (iii) disablement, including occupational disease, arising out of and in the course of employment,
>
> but does not include stress other than an acute reaction to a traumatic event;
>
> 28 (1) The rights provided by this Part are in lieu of all rights and rights of action to which a worker, a worker's dependant or a worker's employer are or may be entitled against
>
> (a) the worker's employer or that employer's servants or agents; and
>
> ...
>
> as a result of any personal injury by accident.
> (Emphasis added)

2. Principles of statutory interpretation:

[39] The words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the **Act**, the object of the **Act** and the intention of the Legislature: E. A. Driedger, *Construction*

of Statutes, 2nd ed. (Butterworths: Toronto, 1983) at 87; **Bell ExpressVu Ltd. Partnership v. Rex**, [2002] 2 S.C.R. 559 at para. 26. This purposive and contextual approach developed by the courts is confirmed and reinforced by s. 9(5) of the **Interpretation Act**, R.S.N.S. 1989, c. 235. It directs that every enactment shall be deemed remedial and interpreted to insure the attainment of its objects. Several factors are to be considered, including the occasion and necessity for the enactment, the object to be attained and the history of the legislation on the subject. Workers' compensation legislation, in particular, should be liberally interpreted, consistent with its intention to provide a comprehensive, no fault system of compensation for workplace injuries: see, e.g. **New Brunswick (Workmen's Compensation Board) v. Theed**, [1940] S.C.R. 553 at 574; **Workers' Compensation Appeal Board v. Penney** (1980), 38 N.S.R. (2d) 623 (S.C.A.D.) at para. 7.

3. Application of the principles:

(a) Ordinary and grammatical meaning of the words:

[40] I turn first to the grammatical and ordinary sense of the words. I conclude it does not provide much insight into the specific interpretative issues in this case.

[41] The words "traumatic event" could well be used in their ordinary sense to describe a sudden termination from long term employment. I note that Iacobucci, J. points out in **Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)**, [1997] 3 S.C.R. 701 that "... the loss of one's job is always a traumatic event ..." : and refers to dismissal from employment as "... a time of trauma ... .": at para 95 and 107. However, the word "traumatic" also has an everyday connotation of shocking in the sense of unexpected: see e.g. WCAT decision 98-941-AD. Summary terminations today cannot be said to be unexpected as they are, sadly, a normal feature of the workplace. So the ordinary sense of the words "traumatic event" does not provide much assistance in interpreting those words in the context of the **WCA**.

(b) The immediate context:

[42] I turn next to the immediate context in which the words appear in the statute. Two aspects shed some light. First, the words "other than an acute

reaction to a traumatic event" form a limitation or an exception to the general exclusion of stress claims. This is not consistent with any legislative intent to open some whole, new area, such as wrongful dismissal, to compensation. Second, these words implicitly put in opposition stress of this nature with other kinds of stress. This reinforces the point which, as we shall see, is clear from the legislative history: the provision was intended to make it explicit that slow onset or chronic stress was excluded. Once again, this is not consistent with any intent to open a new area to compensation.

(c) The broader legislative context:

[43] Critical context in this case includes two propositions that no one challenges: first, workers' compensation legislation does not, and was never meant to, cover contractual obligations in relation to dismissal of an employee; second, the exclusion of stress, other than that resulting from an acute reaction to a traumatic event, was intended to address the uncertainty about whether slow onset or chronic stress was covered. In my view, it is simply not plausible to think that by introducing this limitation on benefits for slow onset or chronic stress, the legislature intended to, or did, extend the ambit of workers' compensation into the area of wrongful dismissal.

[44] The appellant argues that, contrary to WCAT's conclusion, the exclusion of stress claims arising from wrongful dismissals would be inconsistent with the historic trade off. While agreeing that workers' compensation legislation does not, and was never meant, to cover contractual claims for wrongful dismissal, the appellant says that the common law does not compensate stress arising from wrongful dismissal. It follows, submits the appellant, that a contractual wrongful dismissal claim is not barred by s. 28 because it does not arise "... as a result of any personal injury by accident." As the appellant put it, the worker's wrongful dismissal action was for breach of contract while the bar in s. 28 shows that she would have to make a claim under **WCA** to receive compensation for her stress injury. While acknowledging that s. 28 might well bar employment related tort claims, such as intentional infliction of mental suffering in the context of a dismissal, the appellant says that recovery of damages for breach of contract, including an enhanced notice period resulting from the manner of dismissal, is not an alternative to workers' compensation benefits for a stress injury suffered as a result of a wrongful dismissal.

[45] While I do not accept the appellant's reasoning on these points, she does identify an important consideration when one interprets the scope of the term "accident" in the **WCA**. As I noted earlier, access to workers' compensation benefits cannot be divorced from the limitation on other remedies which is set out in s. 28 of **WCA**. As that section provides, the rights set out in Part I of **WCA** – that is, compensation for injury by accident arising out of and in the course of employment – "... are in lieu of all rights and rights of action to which a worker ... may be entitled against the worker's employer ... as a result of any personal injury by accident ... ": s 28(1)(a). It is important, therefore, in considering the scope of benefits available also to bear in mind the concomitant bar to other remedies.

[46] It is common ground on appeal that workers' compensation legislation does not and, was never intended, to cover the rights and obligations of employers and workers in relation to contractual claims for wrongful dismissal. However, the appellant's position, if accepted, would result in a wrongful dismissal being an "accident" in some cases and not in others depending on the manner of the dismissal and the employee's reaction to it. This is not a workable approach.

[47] Further, adopting the appellant's position would require us to hold that, while the remedies for breach of contract would not be barred, remedies specifically in relation to the employee's stress would be. This, too, seems to me to be an unworkable approach. The manner of dismissal and its impact on the worker may increase a wrongful dismissal damage award by lengthening the required notice period. They may also, in some circumstances, found an action for the independent tort of intentional infliction of mental harm: **Wallace, supra** and **Prinzo v. Baycrest Centre for Geriatric Care** (2002), 60 O.R. (3d) 474; O.J. No. 2712 (Q.L.)(C.A.). Contrary to the appellant's submissions, I do not think that remedies arising from the fact and manner of dismissal can be divided up so as to leave room for workers' compensation benefits.

[48] As WCAT recognized, there may well be gray areas in which it will not be clear where the right to sue for events related to a wrongful dismissal ends and the right to claim workers' compensation benefits begins. However, that does not cast any doubt on the general principle that a wrongful dismissal is not an accident for workers' compensation purposes. I agree with WCAT's fundamental conclusion

that this result is consistent with – indeed I would say required by – the historic trade off underlying workers' compensation legislation.

[49] That said, I should add that I do not accept all of WCAT's reasoning which led it to this conclusion.

[50] Referring to **Wallace**, **supra**, WCAT noted that the breach of an employment contract through a wrongful dismissal will not generally allow an employee to sue his or her employer for general damages due to mental stress. It reasoned, therefore, that it would be inconsistent with the historic trade off of requiring employers to pay for "insurance" against such suits when they could not be maintained in the first place. If I follow this line of reasoning, it boils down to saying that workers' compensation benefits should be restricted to those claims which employees could assert against their employers in the absence of the scheme. That is where WCAT and I part company.

[51] The workers' compensation system was not established simply to insure employers against claims that could have been advanced by employees at common law. A significant point of the scheme was to undo the common law's restrictive rules of recovery and replace them with no fault compensation determined through an administrative process: see, e.g., **Pasiechnyk v. Saskatchewan (Workers' Compensation Board)**, [1997] 2 S.C.R. 890 at paras. 23 - 27; Garth Dee and Gary Newhouse, *Butterworths Workers' Compensation in Ontario Service*, Vol. 1 (looseleaf, updated to 2006) paras. 1.1 - 1.33. WCAT's reasoning seems to me to overlook this important point. Its reasoning implies that the historic trade off is limited to matters for which the employee would otherwise have a cause of action. That is simply not the case. The trade off was not that precise. The legislation opened up compensation for injuries that otherwise would not have received it. WCAT's reasoning, therefore, is to my mind premised on a serious misunderstanding of the nature of the historic trade off.

(d) Legislative history and purpose:

[52] Robertson, J.A.'s judgment in **D.W.** places the history and purpose of these provisions in a national perspective. He reviews the treatment of stress in the various provincial workers' compensation acts in detail: see paras. 29 - 39. As Robertson, J.A. put it, the exclusion of stress other than when resulting from an

acute reaction to a traumatic event was designed to prevent compensation for chronic and gradual onset stress: para. 40.

[53] This accurately describes the situation in Nova Scotia. The exclusion of stress from the definition of accident was enacted as part of the substantial 1994 - 95 amendments: see **An Act to Reform the Law Respecting Compensation for Workers**, S.N.S. 1994 - 95, c.10. The background to this change was set out in a 1994 ministerial discussion paper. It noted that there had been extensive discussion in the past about how the then current definition of accident should be interpreted in relation to chronic stress and that, since 1991, the WCB had, without express statutory authority, applied a policy of paying for stress claims only where the stress could be attributed to a single traumatic event. The Discussion Paper proposed the exclusion of stress that now appears in the **WCA**: "... to clarify when the WCB will compensate for stress...", noting that this addition would make Nova Scotia's coverage of stress consistent with that of several other provinces: Nova Scotia Minister of Labour, Discussion Paper, "Workers' Compensation in Nova Scotia: Proposals for Reform" (October 6, 1994) at page 14.

[54] The amendment, therefore, was mainly directed to differentiating between, on the one hand, gradual onset or chronic stress and, on the other, stress resulting from an acute reaction to a traumatic event. This legislative history is not at all consistent with any intent to open up a broad, new area of compensation in the area of unjust dismissal.

4. Conclusion:

[55] In my view, WCAT was correct to hold that a wrongful dismissal is not an accident for workers' compensation purposes.

C. Did WCAT Err in Finding The Worker Did Not Experience a "Traumatic Event"?

[56] After having concluded that a wrongful dismissal could not be a traumatic event, WCAT went on to consider whether there were other aspects of, or events related to, the dismissal which could qualify as traumatic events. As noted, it found that there were not.

[57] In my view, WCAT applied correct legal principles to the facts as it found them and offered in its decision a reasonable basis for its conclusion. It did not commit a reviewable error in doing so.

D. Should a Traumatic Event be Assessed Objectively?

[58] The appellant submits that WCAT erred in law when it decided to assess objectively whether an event was traumatic. It ought, submits the appellant, to have employed a test using a combination of objective and subjective factors. Rather than asking, as WCAT did, whether a reasonable person would regard the event as traumatic, the appellant submits that it ought to have asked whether a reasonable person, standing in the shoes of the claimant and possessing the same psychological profile, would have reacted in the same way to the event.

[59] In my view, the text of the provisions, read in the full context of the purpose and scheme of the **WCA**, sustain WCAT's conclusion. It is also supported by the jurisprudence, both within WCAT and in the courts.

[60] This question, must be resolved through interpretation of **WCA**. I have already described the proper approach to the task and set out the provisions and some of the context. I will set out my conclusions at each step of this approach. I emphasize that what follows is concerned only with the meaning of the words "traumatic event".

1. Ordinary Meaning:

[61] The words "traumatic event" are equally consistent with an objective or a more subjective interpretation. As the Tribunal points out, the word "trauma" has at least two senses. One is that a trauma is "a deeply distressing experience" and the other, the medical sense, is that a trauma is a "physical injury." Similarly, the word "traumatic" may be used synonymously with "distressing" or "emotionally disturbing" or in reference to "wounds": K. Barber, *The Canadian Oxford Dictionary* (1998) at 1554. Thus, it seems that a traumatic event may be defined by its emotional impact on the observer ("distressing" or "emotionally disturbing") which is a more subjective view, or by its results more objectively determined such as, for example, in reference to an injury or a wound. The ordinary

grammatical sense, in my view, does not exclude either an objective or a subjective approach.

2. The Immediate Context:

[62] The term "accident" is not exhaustively defined in the statute. Subsection 2(a) sets out three things that are included. The first two of the inclusions listed in the section are objectively defined events, *viz*, a "wilful and intentional act, not being the act of the worker claiming compensation" or a "chance event occasioned by a physical or natural cause". It could not be seriously argued that a subjective view governs whether events of this nature occurred. The statute does not refer to the worker perceiving that there has been a wilful and intentional act or a chance event, but rather requires that, objectively viewed, events of this nature occurred.

[63] The third inclusion in the term "accident" is "disablement". Unlike the other two inclusions, it does not refer to a specific, identifiable event or events. However, the inclusion of "disablement ... arising out of and in the course of employment" is qualified by the exclusion of stress, "... other than an acute reaction to a traumatic event." To be an "accident", the stress must result from "a traumatic event."

[64] This approach to including stress within the definition of an accident is similar to that used in the first two inclusions. Like them, the inclusion in relation to stress refers to the happening of some particular event. The "traumatic event" in this context seems to have more in common with the earlier sense in which the term "accident" has been used in the statute: there must, in fact, be an event that, objectively viewed, is traumatic just as there must be a wilful and intentional act or a chance event.

[65] This seems to me to bring entitlement for stress related compensation more closely in line with the traditional workers' compensation paradigm of compensatory injuries resulting from accidents and to take it away from the broader inclusion for disablement resulting from work.

3. History and Purpose:

[66] In **D.W.**, Robertson, J.A. reasoned that the history and purpose of the legislation suggested that an objective approach to "traumatic event" ought to be taken. The principle basis for his conclusion was that any other approach would effectively undermine the clear legislative intent to eliminate workers' compensation benefits for gradual onset or chronic stress. As Robertson, J.A. points out at para. 51 of his reasons, if a purely subjective test or even a modified objective test were used, "[i]t would not be difficult for the skilled advocate to turn a case of "chronic" or "gradual onset" stress into a claim of psychological injury by focussing on a single incident; the one that broke the camel's back, so to speak. ... [T]o hold otherwise would be to sanction a regime in which the exception to the rule would become the rule."

[67] The record in the present case supports this view. The initial report of accident was filed in October of 2004, a year after the dismissal. As noted by the Board's benefits administrator in his January 25, 2005 decision, the appellant at that time was claiming chronic depression and anxiety accumulating over a 9 year period. The medical evidence in the record, to which I referred earlier, detailed considerable history of difficulties with stress in the workplace and even of debilitating stress well before the dismissal in October of 2003. In such situations, there is a real risk that the exception to the rule would indeed become the rule as Robertson, J.A. suggests.

4. The Authorities:

[68] The appellant relies on several WCAT decisions in support of her position that whether an event was traumatic should take account of subjective factors. In my view, the cases do not support that view. Moreover, there is strong appellate authority for the contrary view.

[69] The WCAT decisions relied on by the appellant fall into four groups.

[70] In the first are decisions in relation to stress claims in the federal sphere. As the federal **Government Employees Compensation Act**, R.S. 1985, c. G-5 does not contain either an express exclusion of stress claims or a qualification in relation to stress arising from a traumatic event, these cases are not helpful:

W.C.A.T. decision 2002 - 601 - AD (set aside on appeal *sub nom* **Canada Post Corp. v. Workers' Compensation Board (N.S.)** (2004), 222 N.S.R. (2d) 191; N.S.J. No. 105 (Q.L.)(C.A.)); W.C.A.T. decision 2000-29-AD; W.C.A.T. decision 2000-698-AD; WCAT decision 98-941-AD.

[71] In the second group are decisions which focus more on the "acute reaction" requirement or with the exclusion of gradual onset or chronic stress: WCAT decision 98-750-AD; WCAT decision 99-039-AD; WCAT Decision 2001-255-AD; WCAT Decision 2001-562-AD. These cases are, therefore, not helpful in relation to the issue before us.

[72] The third category of cases, including WCAT Decision 98-364-AD, simply asserts that whether an event is traumatic is subjective, but does so without analysis or supporting reasoning. It is, therefore, not helpful.

[73] Finally, there are two decisions which contain extensive discussions of the circumstances in which stress is compensable under **WCA**. However, neither has much to say about the precise issue confronting us in this case. Moreover, what WCAT does say on the subject in these two decisions seems to support an objective approach to whether an event is traumatic.

[74] In decision 2003-427-AD, WCAT notes that it had previously defined "traumatic" as being something other that the common workplace experiences of the particular worker. It refers to examples including that of a worker who had been attacked by agitated clients in a rehabilitation facility and of the aggressive assault by a co-worker which was in issue in that case. The Tribunal also refers to the list of potentially traumatic events or stressors in the context of a diagnosis of post-traumatic stress disorder under the *Diagnostic and Statistical Manual of Mental Disorder* (4th) ("DSM IV"). These include natural disasters, criminal acts, and abuse in the form of threats, all of which seem to me to be objective events. WCAT also refers to the evidence of the worker's treating psychologist to the effect that while the definition of a traumatic event has not changed (and I assume the witness was referring to the DSM IV definition), there is more of a focus on the individual's subjective reaction to the event. The Tribunal concludes by noting that the events in issue in that case were "traumatic regardless of which definition (the strict definition in the DSM IV or a more liberal, subjective definition) is applied." (Page 2). I do not see in this approach any significant support from the

Tribunal for anything other than an objective approach to whether an event was or was not traumatic.

[75] I reach the same conclusion with respect to WCAT decision 2002-661-AD which was upheld on appeal to this court: **The Children's Aid Society of Cape Breton-Victoria v. (Nova Scotia) Workers' Compensation Appeals Tribunal** (2005), 230 N.S.R. (2d) 278; N.S.J. No. 75 (Q.L.)(C.A). The Tribunal in that case seems to me to have approached the definition of a traumatic event objectively. As I observed in my reasons for the Court dismissing the appeal at para. 34, "... the facts as found by WCAT support the view that [the incident in question] was traumatic from an objective point of view." I note that the Tribunal specifically rejected the submission made on behalf of the Board in that case to the effect that the worker had not been exposed to anything "...that does not occur in the course of normal living." (Page 4) This seems to me to underline the objective approach taken in the case.

[76] In my view, these decisions do not support to any significant extent the appellant's position on this appeal. WCAT has only rarely considered the precise issue which arises here and, in general, it has applied an objective approach to determining whether an event was or was not traumatic.

[77] The appellant also relies on **Newfoundland (Workplace Health, Safety and Compensation Commission) v. Smith** (2000), 194 Nfld. & P.E.I.R. 159; N.J. No 273 (Q.L.)(S.C.T.D.). However, this case does not, in my view, support the appellant's position.

[78] In **Smith**, the worker had been diagnosed with post traumatic stress disorder and severe depression with suicidal risk. He had been a fisheries officer who had been in the midst of many controversial and stressful situations with no apparent adverse effects. However, in July of 1999, a District Manager for the Department of Fisheries who was also an old fishing friend, came to his house and shared breakfast and then, out of the blue, announced that Smith was suspected of storing illegally caught salmon in his freezer and that he wanted to search the premises. Smith obliged, but immediately afterward became upset, went to see his physician and was placed on anxiety medication. Under the relevant legislation, the term "injury" did not include "stress other than stress that is an acute reaction to a sudden and unexpected traumatic event.": **Workplace Health Safety and**

Compensation Act, R.S.N.L. 1990, c. W-11. In addition, the applicable policy provided the following description of "traumatic event" and "non compensable events and/or conditions":

> Traumatic Event
>
> A sudden and unexpected traumatic event is one which is considered uncommon with respect to inherent risks of the occupation and is usually horrific, or has elements of actual or potential violence.
>
> Examples of traumatic events include but are not limited to:
>
> - witnessing a fatality,
> - being the victim of an armed robbery or hostage-taking incident,
> - being subjected to physical violence (see also Policy EN-06 Psychological Conditions Associated with Physical Injuries),
> - being subjected to death threats where there is reason to believe the threat is serious.
>
> Non Compensable Events and/or Conditions
>
> Claims arising from events that would generally not be considered traumatic but are traumatic to a worker because of a pre-existing psychological condition will not be accepted.
>
> ...

[79] The Chief Review Commissioner found that the worker suffered from work related stress as a result of a sudden and traumatic unexpected event and was, therefore, entitled to compensation. Wells, J. upheld the decision on appeal. He concluded that the Commissioner, following a thorough review of the evidence, found that Mr. Smith's acute illness was precipitated by the traumatic events of July 1999 and that, in light of the applicable standard of judicial review, this conclusion did not disclose any reviewable error. While there is no explicit discussion in the case of whether the applicable test is subjective or objective, the policy seems to require an objective approach and the reviewing Court found that the Commissioner did not fail to apply the policy: para. 20. I find no support in

this case for the appellant's view that whether the event was traumatic should be approached in a subjective manner.

[80] I return now to the leading appellate authority on this subject, the decision of the New Brunswick Court of Appeal in **W.(D.)**.

[81] In that case, the Court held that whether an event was traumatic within the meaning of the **Workers' Compensation Act**, R.S.N.B. 1973, c. W-13 must be judged objectively. The exclusion of stress claims from the meaning of accident in the New Brunswick legislation is similar to the Nova Scotia provision. The relevant part of the New Brunswick provision states that "'accident' ... does not include the disablement of mental stress or a disablement caused by mental stress, other than as an acute reaction to a traumatic event." As expressed by Robertson, J.A for the Court at para. 51, "The question properly formulated is whether the reasonable person would regard the precipitous event as a traumatic one ..."

[82] WCAT relied on and adopted this conclusion in the case under appeal. The appellant submits it erred in doing so. While I recognize that, as the appellant submits, the facts and circumstances of the claim in **W.(D.)** are very different than those in the present case, I do not think that the factual distinctions make the reasoning of the case any less applicable in our circumstances. The real question is whether the decision is right.

[83] On that point, the appellant says that **W.(D.)** erred by failing to recognize that an element of subjectivity is required in defining the term "traumatic event" in the same way as subjective elements must be and are recognized in considering the issues of causation and informed consent. I will address each in turn.

(a) the analogy to causation:

[84] The appellant suggests that a more subjective approach to "traumatic event" is consistent with the scheme of the **Act** and, in particular, with the approach it takes to the necessary causal link among the triggering events, the workplace and the injury. Cases such as **Ferneyhough** and **Metropolitan Entertainment Group v. Durnford** (2000), 188 N.S.R. (2d) 318, N.S.J. No. 343 (Q.L.)(C.A.), it is submitted, confirm the relevance of both objective and subjective factors to the

determination of causation in the workers' compensation system and this same approach, the appellant argues, should govern the definition of "traumatic event".

[85] I do not agree. In my view, **WCA**'s approach to the necessary links among the workplace, the accident and the injury do not suggest that whether there has been an accident should be judged subjectively. In fact, the opposite is the case.

[86] It is well-established that something akin to the common law " thin skull" principle applies in workers' compensation law. That is, generally the fact that a particular worker was more susceptible to injury or was more seriously injured than most people would have been in the same circumstances does not break the necessary causal link between the accident and the injury. In other words, the condition of the worker is generally judged subjectively to the extent that particular susceptibilities or pre-existing conditions do not negate the requirement that an injury must result from an accident arising out of and in the course of employment.

[87] However, that principle does not assist in determining whether there has been an accident in the sense of 'a wilful and intentional act' or a 'chance event' or, in my view, 'a traumatic event'. There must be an objectively determinable accident which arose out of and in the course of employment. I agree with the intervenor that before one gets to the issue of causation, there must be a triggering event - an accident - as described in the statute. As the intervenor put it:

> The relevance of subjective factors in determining causation in these cases incorporates a 'thin skull rule' into the Workers Compensation context. ... . Accidents causing physical injury still require that an objectively determinable accident arose out of and in the course of employment. Workers must still show that the accident objectively made a material contribution to the injury. It is not sufficient for a worker to "perceive" an accident that made a material contribution to the injury.

[88] In my view, an objective approach to defining "traumatic event" is more in keeping with the overall scheme of the **WCA**.

(*b) the analogy to informed consent*

[89] The starting point for the appellant's submission is the Supreme Court of Canada's decision in **Arndt v. Smith**, [1997] 2 S.C.R. 539. The Court adopted a modified objective test in relation to the issue of causation in medical negligence claims based on a physician's failure to give proper advice. In answering the necessarily hypothetical question of whether the plaintiff would have refused to undergo the medical procedure had he or she been properly advised of the risks, the court looked to what a reasonable patient in the circumstances of the plaintiff would have done if faced with the same situation: para 6. The appellant submits that the same approach should be used to determine whether an event was traumatic, reasoning that it "... permits a decision-maker to avoid assigning arbitrary weight to one set of factors over another" and "... promotes the purpose underlying s. 186 [**WCA**], which requires that all decisions, orders and rulings of the WCB shall be based on the real merits and justice of the case."

[90] With respect, the basis for this analogy between determining causation in failure to warn cases and determining whether something is an accident because it was a traumatic event escapes me. The issue underlying the **Arndt** decision was how to determine what a person would have done if properly warned. The Court was concerned that adopting a completely subjective approach would make the case turn solely on the person's after-the-fact, self-serving assertions. But the Court was also concerned that a purely objective test would result in the outcome being governed completely by medical opinion. I do not see any comparable issue or similar concerns underlying the question of how to determine whether an event was traumatic.

5. Conclusion:

[91] In my view, the words of the statute, read in their entire context, lead to the conclusion that whether an event is traumatic is to be assessed from an objective point of view – that of a reasonable person. In my view, WCAT made no reviewable error in reaching that conclusion.

V. DISPOSITION:

[92] I would dismiss the appeal without costs.

Cromwell, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.