

# Workplace Stress and Employment Law

Mary Mackinnon, Barrister & Solicitor

October 28, 2004

According to statistics, workplace stress is on the rise. Its effects are reported in general interest and health publications, and seen in many workplaces. However, it remains a somewhat intangible concept for many employers, unions and employees.

This presentation will do the following:

- provide definition to the concept, "Workplace Stress";
- identify the effects, financial and human;
- describe how stress has been dealt with at common law;
- itemize how stress is handled under employment statutes, including health and safety, employment standard, employment insurance, and workers' compensation legislation;
- compare treatment of stress-related employment issues at common law with treatment by grievance arbitrators
- outline suggestions by health organizations for preventing or dealing with workplace stress.

## **Workplace Stress Defined**

- "job stress can be defined as the harmful physical and emotional responses that occur when the requirements of the job do not match the capabilities, resources, or needs of the worker Job stress can lead to poor health and even injury".  
United States National Institute of Occupational Health and Safety, 1999.
- "the emotional, cognitive, behavioural and physiological reaction to aversive and noxious aspects of work, work environments and work organizations. It is a state characterised by high levels of arousal and distress and often by feelings of not coping".  
European Commission, Directorate General for Employment and Social Affairs.
- "stress is the reaction people have to excessive pressures or other types of demand placed on them".  
United Kingdom Health and Safety Commission, London, 1999.

Stress does not necessarily result in *distress*. According to a 2001 survey conducted by the Canadian Mental Health Association, 41% of respondents felt that stress had a *positive* impact on their work performance. Manageable amounts of stress can give people motivation and energy to accomplish tasks.

COMPAS survey, 2001.

Some stress is normal and necessary. If stress is intense, continuous or repeated, or where people face damaging types of stressors, the effects and costs can be tremendous.

## **Financial Costs of Damaging Stressors**

The following recent estimates are given for the organizational/employer costs of work-related stress:

- in the United Kingdom, it is estimated that over 40 million working days are lost each year due to stress-related disorders;
- in the United States, over half of the 550 million working days lost each year due to absenteeism are stress-related;  

---

Research on work-related stress, European Agency for Safety and Health at Work, 2000.

- in Canada, the annual cost of work time lost to stress is estimated at \$12 billion.  

Statistics Canada, 2000.

These figures do not take into account less easily measurable costs, such as reduced productivity or job performance, which may also be influenced when stress affects employees.

## **Health/Individual Effects**

There are a number of stressors that have been identified as safety/health hazards. These include: lack of control/influence over work; work overload and time pressure; lack of training or preparation; too little or too much responsibility; ambiguity in job assignments; lack of appreciation; discrimination; harassment; poor communication; neglect of safety.

The stressors which have been medically recognized as creating the highest risk are:

1. low control/high demands
2. high effort/low reward

Studies have shown that people in low control/high demands jobs, when compared to people in high control/high demands or low demand/high control:

- have more than double the rate of heart and cardiovascular problems
- have significantly higher levels of depression
- have significantly higher levels of anxiety
- have significantly higher levels of alcohol, prescription and over the counter drug use;
- have significantly higher levels of susceptibility to infectious diseases.

People in high effort/low reward jobs have more than triple the rate of cardiovascular problems and significantly elevated anxiety and depression, when compared to a normal population sample.

As a group, people in either high effort/low reward and/or low control/high demand jobs have three times the rate of back pain and a higher incidence of RSIs.

Both groups are implicated in the precipitation of colorectal cancer. As a group, people with jobs with these stressors have five times the rate of

colorectal cancer than a normal population sample.

*Best Advice on Stress Risk Management in the Workplace*, Dr. Martin Shain, Health Canada, 2000.

### **Common Law treatment of stress**

At common law, the issue of workplace stress has generally been addressed in two types of cases:

1. cases involving claims of constructive dismissal due to workplace stress, which may take the form of harassment, workload or change in nature of work, or exposure to a shocking or traumatic event.
2. cases in which an individual is terminated and seeks damages for wrongful dismissal, claiming that culpable behaviour resulted from stress.

#### 1. Constructive dismissal cases:

*Rees v. Canada (RCMP), NLSC, Thompson J., 2004*: An RCMP officer had been asked by superiors to provide a written statement dealing with alcohol-related work issues of an immediate supervisor. The supervisor was also known to be a fairly blunt/belligerent manager, lacking in management skills. The immediate supervisor was referred to mandatory alcohol treatment. On his return to work, the immediate supervisor was assigned to the same detachment as the reporting officer. The supervisor retaliated against the officer by swearing at him swearing while giving orders, calling him at his residence, monitoring his work, referring to him as a rat, ordering him to perform tasks that were not within his responsibilities and which were demeaning (eg. changing light bulbs). The officer became suicidal and quit his employment. The court found that it was reasonably foreseeable that reassigning the supervisor to the detachment Rees was working at, would result in harm to the employee. It was found that Rees had been constructively dismissed; he was awarded damages for loss of income, loss of future income, mental suffering, and aggravated damages.

*Drescher v. La Societe de Les Enfants, BCSC, Ralph J., 2004*: A co-director of Metis Family Services developed a personal relationship with her co-

director. When the relationship broke down, their employment relationship became strained. The Plaintiff's stress led to the inappropriate actions including: repeated telephone calls to the co-director, attendance at the offices when she was on sick leave and had been advised not to attend; attending at work and behaving in a loud, rude manner toward staff; making death threats on the co-director, applying \$5,000 of Society funds toward the purchase of property. The employer offered her a new position with the same salary. They also provided her with a sick leave of four months. Some of the inappropriate behaviour occurred during the sick leave. At the end of five months the Plaintiff was terminated. It was found that the Plaintiff had not been constructively dismissed. The employer had tried to accommodate her stress. Some of the behaviours could be attributed to stress and could not have formed justification for dismissal; however purchase of property held in her own name with Society funds could not be attributed to her stress and justified dismissal.

## 2. Claims for wrongful Dismissal, stress excusing culpable behaviour

There is a split in the case law on this issue. The leading case holds that incapacity to work or poor work performance due to stress-related illness cannot justify dismissal without notice, because the performance issues or behaviour of the employee is not wilfully caused.

However, other cases have dismissed claims for damages for wrongful dismissal where an individual's performance suffers due to stress-related factors; holding that there has been a fundamental breach of the terms of employment due to the culpable or non-culpable inability to do the job.

*Rivest v. Canfarge Ltd., Alta S.C., 1977*: 19 year construction supervisor, huge increase in workload (double what had been budgetted); labour unrest including illegal work stoppages; weather slowing work down, working extremely long hours with travel; no holidays taken for two preceding years. Employee took 2 "personal days"; manager raised as concern, asked him for work progress reports, and assigned another supervisor to one of his crews (without plaintiff's knowledge). Employee became stressed; did not eat or sleep; daughter took to hospital. Off work for three days without reporting to manager. Terminated. Court found absence of three days in circumstances was stress-related; company should have offered stress leave and not terminated; damages equivalent to one year's pay plus benefits awarded.

*Cardenas v. Clock Tower Hotel, NSSC, 1993*: 5 year employee, room service captain, saw memo from former superior which he viewed as interfering in his department. Confronted in office, yelled slur at him, shook buspan which resulted in former supervisor becoming wet. Employee had become frustrated with coworkers who were not performing tasks as effectively as he; was described as moody when short staffed or busy; short tempered and sometimes losing control. Had been prescribed antidepressants and sleeping medication. Held, momentary lapse due to stress did not justify summary dismissal. Employer should have suspended for ½ month. Damages of four ½ months' pay, plus medical benefits for notice period awarded.

*Redfern v. District of Elkford, BCSC, Melnick J., 1988*: Plaintiff CAO for District. Had hostile dealings with minority of council. Council members were suing one another. Highly charged poisonous atmosphere resulted in stress for Plaintiff. Minority member became mayor. Plaintiff saw doctor who put him off on stress leave. Doctor then recommended return to work. Plaintiff, not wanting to return under new mayor, made threat of suicide and killing mayor; threat withdrawn later that day. Doctors did not view threat as serious. However, District Council terminated. Held, employer knew CAO depressed and in state of anxiety at time, therefore comment did not justify termination. Damages awarded based on salary and benefits to end of three year contract.

Contra.

*Elliott v. Parksville, B.C.C.A., 1989*: 9 year municipal clerk. Layoffs occurred due to financial difficulties for municipality. Friction resulted between plaintiff and her immediate supervisor. In 1985, she began to have problems with tardiness, work performance/completion, and insubordinate comments. There was a fall election. One candidate said if elected mayor he would let supervisor go. The plaintiff allowed herself an unauthorized salary increase as election returns officer. The candidate lost and a judicial recount ensued. The Plaintiff was hospitalized shortly after. Her psychiatrist certified her unfit to manage her affairs. He diagnosed stress induced affective disorder, with manic and depressive components. The Plaintiff received a letter from Council, who knew she had been hospitalized, asking for a meeting to discuss her employment. She sent a resignation letter, which was accepted. The Plaintiff argued she had been without capacity when she resigned; and that she had been dismissed without cause. She was denied disability benefits as a result. Held, by the trial judge and appeal court, notwithstanding her stress condition, the plaintiff's conduct was wilful.

Dismissal was justified.

There is a potential third avenue of that should be mentioned. As will be discussed later, most workers' compensation legislation excludes claims for mental stress. However, according to *Wallace*, a plaintiff can successfully claim damages for mental distress caused by bad faith or unfair manner of dismissal.

The ratio in *Wallace*, combined with the exclusion in workers' compensation legislation, leaves the door open for common law tort claims for chronic mental stress as a result of bad faith or unfair dealings within the employment relationship.

There is settled law in the United Kingdom that would support this kind of claim. There, courts have found a duty of care to prevent the risk of psychiatric injury or illness (cf. *Walker v. Northumberland County Council* [1995] ICR 702 (QB, Mr. Justice Colman, November 16, 1994, and *Page v. Smith* [1996] AC 155). The principles are as follows:

- the employer is under a duty of care to prevent harm, which extends to psychiatric harm
- psychiatric harm must be reasonably foreseeable
- the employer must have breached the duty
- the claimant must have a diagnosed psychiatric illness/disability.
- The injury must have been caused by or materially contributed to by the employer's breach of duty.

In *Walker v. Northumberland*, a child social worker for 17 years suffered a mental breakdown due to increased work load and increase in child abuse cases. He took a four month medical leave. He returned to work, and was to have been assisted by another employee. After one month that assistance ended. Five months later he had a second breakdown and was forced to retire. The court found that it was reasonably foreseeable upon his return to work, that if the plaintiff was exposed to the same workload, there was risk he would again sustain mental illness, and that a second breakdown would result in the end of his career. Council, in choosing to continue his employment but eliminate his assistance, acted unreasonably and in breach

of its duty of care.

Difficulties in advancing these claims may include: proving a breach of the duty of care where there are systems in place to assist employees (eg. EAP programs, regular work monitoring); proving that the workload was the cause of damage (where an individual has stressors arising outside the workplace); defences of contributory negligence where an employee fails to ask for help, refuses to attend counselling, fails to delegate, or fails to take vacations.

Further support for a claim founded on the employer's duty of care, are recent cases outlining the standard of care (in a contractual case), for example:

39 Does this persistent conduct, which led Mr. Lloyd to leave his employment, constitute a constructive dismissal? The answer is yes. The vulgar name calling, the failure to schedule holidays and the suggestions of inappropriate sexual conduct with female subordinate workers would not support this conclusion by themselves. It is the repeated and continuous incidents of yelling and screaming at Mr. Lloyd by Mr. Noiles in the workplace and the repeated threats to terminate his employment that support this finding. These two separate but interrelated patterns of behaviour form the basis of the case made out by the Plaintiff. The other types of behaviour add to the overall strength of the Plaintiff's case but it is not dependent upon them.

40 It is well-recognized that in the absence of cause, any fundamental breach by the employer of a major term of the employment relationship allows the employee to take the position that a constructive dismissal has occurred. In order for a constructive dismissal to exist, the breach must be in relation to a fundamental term of the employment relationship rather than just a minor or incidental term. There must be a fundamental breach of a fundamental term of employment before one can claim to be constructively dismissed.

41 A fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect, and dignity. The standard that has to be adhered to by the employer is dependent upon the particular work environment. This appears to be part of the trend to establish a duty upon an employer to treat employees "reasonably" in all aspects of the labour process. (Employment Law in Canada 2nd Edition, Christie, England Cotter (1993) at p. 561 and 562; The Law of Dismissal in Canada, Howard Levitt, 2nd Ed. (1992) at p. 117; O'Neil v. Hodgins (1988), 88 C.L.L.C. 14, 040 (N.B.Q.B.); Shepherd v. Sobeys Inc. (1995), [127 Nfld. & P.E.I.R. 199](#); 396 A.P.R. 199 (Nfld. Supreme Court Trial Division).)

*Lloyd v. Imperial Parking Ltd., 1996 A.J. No. 1087*

## **Occupational Health and Safety**

The Ontario *Occupational Health and Safety Act*, R.S.O. 1990, c. O-1 in imposing a duty of care on employers, appears in s. 25(1) to primarily concern itself with physical safety of employees.

However, s. 25(2)(h), expands the duty to prescribe that employers shall,  
take every precaution reasonable in the circumstances for the protection of the worker.

It could be argued that this prescription establishes the employer's legal duty to abate health risks caused by workplace stressors.

In Ontario, there are very few cases decided under the *OHSA* in which the risk alleged was a risk due to stress or workload.

*Timmins Police Services Board, OLRB 1999, C. Albertyn*: Prior to 1980, there had been a separate police dispatcher. In 1980, the municipality took over all emergency services dispatching. Dispatchers were dealing with seven dispatch radio channels, as well as 7 phone lines. From the outset of the change, they complained of workload, stress and overwork. One dispatcher was off due to work stress. The police association also raised a health and safety issue due to delay or failure to respond to calls. The Occupational Health and Safety Inspector ordered that there be a dedicated police dispatch service. The Police Service Board appealed. The Labour Board upheld the order, based on the workload/stress and based on the requirement for police officers to have ready communication service.

*CAW Local 112 and de Havilland, 1988, Director of Appeals E.J. Smith*: the issue raised by the union was a risk of stress caused by excessive noise in the plant. The appeal was dismissed as the individual employees did not have documented stress-induced symptoms which the expert physicians said could result.

Quaere whether the dearth of case law is due to the primary physical focus of the legislation. The Ontario legislation can be contrasted with the Saskatchewan Occupational Health and Safety legislation, which contains a broader definition of risk than Ontario's:

2(1)(p) "**occupational health and safety**" means:

- (i) the promotion and maintenance of the highest degree of physical, mental and social well-being of employees;
- (ii) the prevention among workers of ill health caused by their working conditions;
- (iii) the protection of workers in their employment from factors adverse to their health;
- (iv) the placement and maintenance of workers in working environments that are adapted to their individual physiological and psychological conditions; and
- (v) the promotion and maintenance of a working environment that is free from harassment.

Saskatchewan Adjudicators' decisions are not available via QL, Canlii, or the Saskatchewan Labour Ministry website, so I was not able to determine whether the broader definition resulted in more claims for work-related stress.

## **Employment Standards and Stress**

Workplace stress is addressed in two types of scenarios by Employment Standards Officers, and on appeal by the Ontario Labour Relations Board.

One scenario involves claims by individuals who take maternity leave and on return to work are not reinstated to their original or similar positions. In these cases, the Employment Standards adjudicators and now the Board have confirmed orders to pay including damages for mental distress, generally in the range of \$1,500 to \$5000, depending on the quality of and effects of distress, and whether there is confirmation via medical evidence.

The second type of scenario addressed in the decisions involves constructive dismissal issues, similar to the issues raised in the civil cases outlined above. However, it appears that the Labour Board/ Adjudicators have taken a narrower approach or imposed higher standards on claimants who allege constructive dismissal based on workplace stress.

*Henderson, Johnson, Farrier and Hammond, 1992, Office of Adjudication:* a secretary at a law firm complained that stress arose when her work responsibilities increased due to lay off of one real estate clerk. There was evidence of a personality clash with a major client of the firm. The adjudicator found that her decision to resign was not related to workload stress but to her clash with the client; and that there was no constructive dismissal.

*Teck Corona, 1994, Office of Adjudication, R. Palumbo:* an individual off work due to stress caused by a practical joke was held not to have quit or engaged in workplace misconduct by virtue of her failure to report back to work. There was evidence that she was under continuing care of mental health professionals, and thought that her treating physicians had advised the employer of such.

*Alexander, 1994, Office of Adjudication:* workplace stress did not excuse repeated profanity towards a supervisor; therefore the decision not to order termination pay was upheld.

*Dr. Kashani, 1995, Office of Adjudication, D. Leighton:* the husband of a physician confronted her secretary and indicated that she took too long on the phone with patients, and that the office contents had been photographed and nothing had better go missing. The secretary was upset and frightened

and advised her employer that she could not return if the husband was going to continue to attend the office daily and harass her. The adjudicator found that the employee did not quit but was constructively dismissed due to the confrontation.

*Apollo Real Estate, 1996, Office of Adjudication, Wacyk:* The employer failed to pay the employee on her regular pay day, sent the employee home three days in a row, and interrogated her regarding her work. The adjudicator found that the employee had suffered stress due to intolerable working conditions and that she had been constructively dismissed and had not quit.

*Starmail Flyer Distributors, 1999, Office of Adjudication, R. Palumbo:* Workplace stress consisted of the employer repeatedly yelling and swearing, banging on furniture, and waving around the resumes of recent college graduates who he said would do the claimant's job for less money. The claimant became stressed out and resigned. The Adjudicator held that the workplace environment, leading to the claimant's stress, resulted in constructive dismissal, and upheld an order to pay termination pay.

*Re Garbo Group, 2003, OLRB, Serena:* a 13 year data entry clerk was given added duties associated with accounts receivable. She quit, advising that she felt overworked and stressed due to her employer telling her that she was not working fast enough. However, there was evidence that the employer had informed her that the additional A/R duties were temporary until additional staff was hired. The Board found that the employee had quit and was not entitled to termination pay.

*St. Thomas- Elgin General Hospital, January 15, 2004, OLRB, T. Wacyk:* the issue was whether or not a physiotherapist had quit or been constructively dismissed as a result of unreasonable stress related to inability to deal with patient needs. The physiotherapist had been assigned patients from two departments, where previously he had dealt with one department. The Employment Standards Officer had not made an order to pay severance and termination pay. The Vice Chair upheld that decision. There was evidence that the employer had attempted to arrange for additional assistance for the claimant, which he had refused. They had suggested changing his work schedule and having another physiotherapist help with his workload. The Board found that the claimant's inability to adjust to a new work situation did not lead to constructive dismissal. In this, the case followed the decision in *Queensway Hospital, 1997*, in which a nurse argued that having been assigned cross-training in more than one department resulted in stress, leading to constructive dismissal.

## **Employment Insurance**

Section 30 of the Employment Insurance Act provides that employees are disqualified from receiving any benefits if they voluntarily leave without just cause.

Just cause is defined in s. 28 of the Unemployment Insurance Act, (which section remains in force), as:

- 28(4) where, having regard to all the circumstances, including any of the following circumstances, the claimant had no reasonable alternative to leaving the employment:
- a) sexual or other harassment;
  - b) obligation to accompany spouse or dependant child to another residence;
  - c) discrimination on a prohibited ground of discrimination within the meaning of the Canadian human Rights Act;
  - d) working conditions that constitute a danger to health or safety;
  - e) obligation to care for a child or a member of the immediate family;
  - f) reasonable assurance of other employment in the immediate future;
  - g) significant modification of terms and conditions respecting wages or salary;
  - h) excessive overtime work or refusal to pay for overtime work;
  - i) significant changes in work duties;
  - j) antagonistic relations between an employee and a supervisor for which an employee is not primarily responsible;
  - k) practices of an employer that are contrary to law;
  - l) discrimination with regard to employment because of

membership in any association, organization, or union of workers;

- m) undue pressure by an employer on employees to leave their employment;
- n) such other reasonable circumstances as are prescribed.

In deciding whether just cause exists, various factors including those enumerated are considered; however, no particular factor automatically gives rise to just cause for resignation.

The burden of proof is on the Employment Insurance Commission to prove that the leaving was voluntary. Once voluntariness is established, the onus shifts to the claimant to prove there was just cause.

Intolerable work conditions have been found, and leaving employment justified, where the claimant takes all reasonable steps to alleviate the concern, or where the conditions are so intolerable that the employee has no other choice but to find other employment.

Where the employee does not try to rectify the condition, there will be no cause for quitting where: the employee was working 70 hours per week; overwork or overtime; lead to anxiety, depression, or other emotional problems.

The fact that a claimant is treated unfairly, or rudely, by the employer, fellow employees, or customers, may establish just cause. An employee who is verbally and publicly mistreated will likely establish just cause for leaving.

Just cause will be found where there is an attempt to force the employee to do work beyond his ability or competence.

The cases impose a duty on the employee to take steps to deal with overwork, stress, workload, or interpersonal issues, before leaving employment, in order to qualify for benefits.

## **Workers' Compensation**

Generally, stress-related disabilities are classified into three categories:

1. Mental/Physical: the stress is mental, and the resulting injury is physical, for example, a heart condition, ulcer, some asthma conditions;
2. Physical/Mental: the stress or injury is physical, and the resulting injury is mental, for example where an amputated limb or facial disfigurement leads to depression, panic reactions or anxiety;
3. Mental/Mental: the stress and the injury are mental, for example seeing a coworker killed or seriously injured, resulting in psychological trauma.

The first and third categories are usually further categorized in terms of whether the stressor or initial injury is chronic or traumatic.

An example of a chronic mental/physical injury would be where an employee under constant harassment or pressure develops a skin condition or ulcer. An example of a chronic mental/mental injury would be an employee suffering from burnout as a result of working at a highly stressful job for a number of years.

All workers' compensation systems in Canada compensate for physical/mental claims. Mental/physical injuries are also compensable in most Canadian provinces; the difficulty in advancing these claims is generally an evidentiary one. Often there are problems proving causation as there are non-work mental stressors, or underlying conditions.

For example, see *Decision 607/00* of the WSIAT, in which a worker who suffered a heart attack was not entitled to benefits. He alleged that he had been under a great deal of stress for four years at work. The week before his heart attack, he was assigned a less senior employee's job, while that employee performed his. He talked to his supervisor and thought the roles would be reverted; however, when he reported to work Monday morning, the situation was the same. After 1 ½ hours, he suffered a heart attack, had a triple bypass, and could not return to work. A medical report noted that he had an underlying condition, but that he might not have had a heart

attack for several years if not for the recent stress at work.

The WSIAT denied his appeal. They found that the stress occurred the week prior. However, his acute symptoms arose after only 1 ½ hours work, *after* he had had a full weekend away from the stresses. There was no convincing evidence that the type of work situation he had run into could aggravate coronary heart disease.

New WSIB policy modifies this decision. Policy 15-03-10 in the Board's Operational Policy Manual indicates that the Board will allow claims for heart conditions either for traumatic injury, or for conditions arising from unusual physical exertion or acute emotional stress with no significant delay in the onset of symptoms.

Most Canadian jurisdictions, including Ontario, will compensate for mental/mental injuries if the injury is acute and can be linked to a traumatic workplace event. However, since 1998 the Ontario statute explicitly excludes compensation for stress caused by, for example, changes in workload or working conditions:

- 13(4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.
- 13(5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

The Board in 2003 slightly relaxed the application of this legislative provision, due to concerns raised by police and firefighters' associations, and women correctional officers, that limited claims to a single traumatic event, rather than a stress reactions to a cumulative series of stressful exposures, including criminal acts, harassment, or horrific accidents. Now, if the worker's reaction is related to the most recent unexpected traumatic event, coverage may be provided even if the worker ordinarily experienced the events as part of his or her job and was able to cope with them in the past. Entitlement may now be accepted even if the most recent event was not the most traumatic.

Where a claim for mental stress is accepted, the Loss of Earnings payment will be based on the WSIB ratings schedule for psychotraumatic disorders, attached.

This, again can be compared with the legislation in Saskatchewan, in which some chronic mental stress or burnout claims can be allowed, provided that the WCB feels that the occupation of the worker is stressful in and of itself.

As mentioned above under "Common Law", as the Ontario legislation excludes claims by employees for burnout or mental stress not caused by traumatic events, it may be possible to make these claims via court actions. Although s. 26 of the Ontario Act indicates that entitlement to WSIB benefits is in lieu of all other rights of action, there is jurisprudence involving unionized employees, that suggests that actions outside the WSIB regime for workplace stress may not be barred by s. 26, due to the specific exception in s. 13.

## **Unionized Employees: Stress at Arbitration**

Arbitrators will ordinarily deal with three situations, comparable to those involving non-unionized employees, in which workplace stress may be an issue:

1. situations where stress is raised as a mitigating factor justifying removal or reduction of a penalty imposed for workplace offence;
2. cases in which workload or stress form the basis for complaints or claims under the OHSA or related collective agreement provisions;
3. grievances for mental distress where claims are made for damages for situations arising out of the workplace.

### Stress as a Mitigating Factor

*Ajax/Pickering Transport, 2003 OLAA 511, P. Craven*: a bus driver was dismissed for making the following threatening comment; "what do I have to do to get someone to pay attention to me, shoot someone?". The incident arose shortly after the OCT inquest. The employee was stressed out about his casual status after 10 years' employment, not successfully resolved with the union or company. At meetings regarding this, he was observed as flushed, upset, talking loudly. He later complained to a supervisor that a number of coworkers were, "out to get him". The employee denied that the supervisor suggested he access EAP. The arbitrator found that the employer should have been aware that this was an employee at risk and addressed his issues; he substituted a suspension for the discharge, and required that the employee provide medical certification of fitness to return to work.

*CBC v. Media Guild, 2004 C.L.A.D. No 59 (B.C., Glass)*: A radio announcer in Nelson, B.C. broadcast a story about an anti-government cuts organization. The head of the organization contacted him indicating his displeasure with the story, and the announcer provided him with the name of the CBC ombudsman and his supervisor. The organization head then made statements at a public meeting, and submitted a letter to the newspaper editor indicating that the radio announcer was a toady and untrustworthy. The grievor became distressed about these comments, which he felt that people around town began to believe. He smeared raw chicken on two chocolates in a box of chocolates and then arranged to mail the chocolates to the organization head. He later called the recipient to avert harm. he was dismissed. The grievor sought counselling and anger management from the

EAP. He indicated that he was under stress due to workload and due to his wife's pregnancy and kidney stones. The arbitrator found that the behaviour was aberrant; that due to treatment the grievor was unlikely to repeat; and that a three-month suspension should be substituted for discharge.

Even in cases involving serious misconduct, or a pattern of poor performance, the onus is on the employer to establish that discharge is appropriate. If the employee can substantiate a mental health condition arising from stress, which caused the work issues, the employer will have to prove that the stress-related condition is likely to recur and likely to impair the employee's continued employment. The employer will also have to demonstrate that it met its duty to accommodate any mental health condition to the point of undue hardship.

### Workload and OHAS

*Robitaille and Correctional Service of Canada [1991] CPSSRB No. 114:* correctional officer ordered three times to admit inmates to his area. He refused at first instance, stating, "you can shove your order up your ass". Only after the third order did he indicate he was exercising his right to refuse under the Canadian Labour Code s. 133. The grievor testified that for security reasons he could not admit more than 30 inmates to his area. The employer argued this was a workload, not a health and safety issue. The arbitrator agreed, and upheld a one-day suspension.

*OPSEU (Baron et al) and Ministry of Community and Social Services, GSB 2968/91 (Kaplan):* probation officers grieved under health and safety clause of collective agreement, claiming improper workload distribution. Some of the probation officers were off on stress leave due to workload. The employer made a preliminary objection that a workload issue fell within management rights and could not be arbitrated. The union argued that if the workload issue led to a health and safety problem, the arbitrator had jurisdiction to hear the matter. Held, preliminary objection dismissed.

While arbitrators have jurisdiction to address workload issues as health and safety issues, the union will need to adduce evidence of risk arising from workload, rather than just a bare claim or bare work refusal.

### Mental Distress Claims via Grievance

The WSIAT and grievance arbitrators have found that unions' and employees' rights under collective agreements are not statute barred by virtue of s. 26

of the *WSIA*.

*Welland County General Hospital and ONA, 5 W.C.A.T.R. 9*: a nurse had lost two days work when a patient kicked her resulting in injury. The grievor believed her absences were due to an earlier non-work related injury, and therefore did not file for WSIB benefits. The employer filed with the WSIB, believing her injuries were compensable. The WSIB denied the grievor's claim. She was awarded sick leave benefits in an arbitration award, when the arbitrator found that, as the WSIB determined that the injury was non-compensable, there was no conflict between the collective agreement and the WCA. The employer appealed to the WCAT for a determination that the grievor's right to arbitrate her claim for sick leave benefits was lost due to the WCA. The case is important for the WCAT's comments on the ability for unions to pursue an employee's grievance under the collective agreement. The WCAT found that there was a difference between a limitation on the employee's right of action, and the union's right to pursue a grievance under the collective agreement. It held that there was nothing in the WCA that prevented a union and employer from negotiating terms in a collective agreement in addition to the WCA, which could include additional supplementary benefits, or job modification, or sick leave benefits.

*OPSEU (Smith/Bergounhon) and MPSS, GSB 1598/96 (Abramsky)*: the grievors claimed damages for mental stress. The grievances alleged that the employees had been harassed and assaulted by managers at work during a strike, who allegedly were consuming alcohol, endangering their health and safety. Their applications for workers' compensation had been denied as they were not compensable under the Act, as the stress was not acute stress arising from a sudden, shocking and life threatening event, the only stress then compensable under the WCA. The employer argued a preliminary objection that the GSB was without jurisdiction to deal with the grievances by virtue of s. 26. The arbitrator found that the arbitration board had jurisdiction on the basis that not all injuries that occur at work are covered by the WCA. As there are gaps in the legislation, the WCA did not pre-empt the entire field of claims of damages arising from work related events.

Therefore, a union is not barred from pursuing claims where the employee's claim, for example for mental stress, is not covered, and not compensable under the legislation.

## **Recommendations for Stress Abatement or Prevention**

Given the organizational costs, and potential damage claims, that may arise from workplace stress, many health organizations and agencies have made recommendations to try to reduce or prevent workplace stress.

Many recognize that employee wellness programs may assist some individuals. Stress management is useful, but only focuses on part of the problem, the causes of stress over which the employee as an individual may have some control. However, given that low job control and perception of low rewards are two of the worst stressors, some experts have recommended moving to a more "participative management" model as the first line of prevention. This model involves employees in the organization and design of work, provides room for input, and adopts employee suggestions. It establishes partnerships, external and internal, including functioning OHAS committees, and EAP facilities. It requires education of managers regarding a) how to deal with employees so as not to increase stress; b) noticing "at-risk" individuals and taking steps to help them.

There is no set template or model for organizational stress abatement. It depends on the size and complexity of the organization.

Given the range of complaints, causes of action, and multiple fora; the potential for damage claims; and the non-litigation costs, prevention may be the best medicine.

Sources (not already cited above):

Health Canada Website:

[www.hc-sc.gc.ca/hppb/ahi/workplace/pdf/stress\\_risk\\_management\\_1.pdf](http://www.hc-sc.gc.ca/hppb/ahi/workplace/pdf/stress_risk_management_1.pdf)

[most medical references]

"The Aftermath of United Grain Growers—Time to Revive the Employer's Contractual Duty to Provide a Safe Workplace?" (2000) 27 Man. L.J. 415-446.