

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Applicant: **[Applicant]**

Respondents: **[Respondent],
The Workers' Compensation Board of Nova Scotia and
The Government of Canada (Fisheries and Oceans Canada)**

SECTION 29 APPLICATION DECISION

Representatives: Kevin Burke and Allison Kouzovnikov for the Applicant, [*]
William J. Chisholm for the Respondent, [*]
Stephen Lawlor for the Workers' Compensation Board and
Melissa R. Cameron for the Government of Canada

Action: [*]

WCB Claim No.: [*]

Date of Decision: February 2, 2009

Decision Summary: The action by Respondent against Applicant is barred by s. 12 of the *Government Employees Compensation Act*, according to the reasons of Chief Appeal Commissioner Louanne Labelle.

BACKGROUND TO THE APPLICATION:

This application was made to the Tribunal on August 28, 2008 by Applicant under s. 29 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended [the *Workers' Compensation Act*"].

Applicant [Applicant] is the defendant in an action brought by Respondent [Respondent] as a result of injuries suffered by Respondent when he was assaulted by Applicant on November 24, 2003. At the time both Applicant and Respondent were employees of the Government of Canada and crewmen on board the Coast Guard vessel [Vessel]. They were both off duty at the time of the assault.

Applicant seeks a ruling that the action against him by the Plaintiff in S.H. No. 289114 and Respondent in this Application, Respondent, is barred by the operation of s.12 of the *Government Employees Compensation Act*, R.S.C. 1985, c. G-8 [“GECA”].

In support of the application Counsel for Applicant submitted copies of several documents including the pleadings in the Supreme Court action; an agreed statement of facts; the WCB Accident Report; and correspondence from the Department of Justice dated May 23, 2006, December 13, 2006, and July 3, 2008.

The Tribunal also provided the parties with relevant documents from Respondent's workers' compensation claim file.

This application proceeded by way of written submissions. Submissions were received from Counsel for Applicant on November 18, 2008. Submissions were received from Counsel for Respondent on November 27, 2008. Submissions were received from Counsel for the Workers' Compensation Board and from Counsel for the Government of Canada on December 5, 2008.

ISSUES AND OUTCOME:

Does this Tribunal have jurisdiction to hear the application made by Applicant under s. 29 of the *Workers' Compensation Act*?

Yes. Although *GECA* does not incorporate s. 28 of the *Workers' Compensation Act*, it does incorporate s.29 respecting actions in the Supreme Court of Nova Scotia.

Is the action by Respondent against Applicant barred by s. 12 of *GECA*?

Yes. Respondent's injuries occurred as a result of an accident arising out of and in the course of his employment. He was therefore entitled to compensation under *GECA* and his suit before the Supreme Court of Nova Scotia is barred against Applicant, a servant of Her Majesty in right of Canada.

ANALYSIS:**Tribunal Jurisdiction:**

Section 29 of the *Workers Compensation Act* gives exclusive jurisdiction to this Tribunal to determine whether an action is barred by operation of the *Workers Compensation Act*.

Respondent has begun an action against Applicant who has in turn applied to this Tribunal for a determination whether the action is barred by operation of s. 12 of *GECA*.

It is acknowledged that Respondent applied for and received benefits pursuant to the provisions of *GECA* as an employee of the federal government as defined in s. 2 of *GECA*.

All the parties in this matter have submitted to the jurisdiction of this Tribunal following a ruling made by Justice Kevin Coady on October 15, 2008, to the effect that the Tribunal had exclusive jurisdiction to determine whether s. 12 of *GECA* barred Respondent's claim.

Section 29 of the *Workers' Compensation Act* sets out the Tribunal's jurisdiction and it reads as follows:

29 (1) Any party to an action may apply to the Chief Appeal Commissioner of the Appeals Tribunal for determination of whether the right of action is barred by this Part.

(2) An application made pursuant to subsection (1) shall be determined by the Appeals Tribunal constituted according to Section 238.

(3) The Appeals Tribunal has exclusive jurisdiction to make a determination of whether the right of action is removed by this Part.

(4) The decision of the Appeals Tribunal pursuant to this Section is final and conclusive and not open to appeal, challenge or review in any court, and if the Appeals Tribunal determines that the right of action is barred by this Part, the action is forever stayed.

Section 29 of the *Workers' Compensation Act* speaks specifically only to whether an action is barred by operation of s. 28 of the *Workers' Compensation Act*. The Tribunal's jurisdiction to determine whether an action is barred by s. 12 of *GECA* must be grounded in *GECA*.

Section 12 of *GECA* sets out the historic trade-off in federal legislation just as s. 28 does in the provincial legislation. It reads as follows:

Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependents to compensation under this *Act*, neither the employee or any dependent of the employee has any claim against her Majesty, or any officer, servant or agent of her Majesty, other than for compensation under this *Act*.

The historic compromise is the underlying principle behind workers' compensation legislation. As pointed out by the Court of Appeal in *Lanteigne vs. Workers' Compensation Board (Nova Scotia)*, 2002 NSCA 156, at paragraph 40, consideration of the definition and scope of the bar of civil actions is an essential feature of the workers' compensation system.

GECA does not provide how the determination under s. 12 is made.

Essentially this Tribunal is asked to determine whether Respondent was entitled to compensation under *GECA* pursuant to s. 4(2) of *GECA* thereby engaging the bar at s.12. Notwithstanding the fact that Respondent applied and received compensation, this is an arguable issue before the Tribunal.

Under s. 4(2) of *GECA*, federal employees "receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed".

The interplay between *GECA* and the *Workers' Compensation Act* has been considered by the Nova Scotia Court of Appeal on several occasions.

The Court in *Cape Breton Development Corporation v. Morrison Estate*, 2003 NSCA 103, referred with approval to the following proposition submitted on behalf of the federal AG:

The Attorney General submits that the interplay between *GECA* and the *WCA* ought to be interpreted as follows:

The provincial workers' compensation scheme governs claims submitted under *GECA* provided that

- (a) the provision in issue is reasonably incidental to a "rate" or "condition" governing compensation under the law of the province, and
- (b) the provision is not otherwise in conflict with *GECA*.

The Court in *Morrison* also referred to the relevant principles of statutory interpretation as summarized by the Court of Appeal in *Thomson v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [(2003) 212 N.S.R. (2d) 81 (N.S.C.A.)], which also dealt with the interplay between *GECA* and the *Act*:

As in any case of statutory interpretation, the Court must strive to give the statute its most appropriate interpretation. The appropriate interpretation is to be arrived at by taking account of the statute's total context having regard to its purpose, the consequences of proposed interpretations and presumptions and special rules of interpretation. The appropriate interpretation is one which is plausible in the sense that it complies with the text of the statute, which is efficacious in the sense that it promotes the legislative purpose and that is acceptable, in the sense that the outcome is reasonable and just. – *Ruth Sullivan (ed.) Driedger on the Construction of Statutes* (3rd, 1994) at 131.

The application of these principles leads me to the conclusion that *GECA* must be interpreted as incorporating the provisions of s.29 of the *Workers' Compensation Act*.

As mentioned in *Morrison*, the Board is responsible for determining compensation, investigating claims and reviewing eligibility of claims for federal employees under the Agreement between the federal government and the Nova Scotia Board. The filing of the claim engages the provincial legislation for all purposes of *GECA* and the *Workers' Compensation Act* [par. 54].

In *Thomson*, the Court considered the interplay between *GECA* and the *Workers' Compensation Act* regarding right of appeal. The Court found that "...it was the legislation's purpose to ensure that cases under *GECA* should be addressed by the same machinery and tribunals as addresses workers' compensation claims within the province." [par 19]. The Court noted that rights of appeal are creatures of statute and any right to appeal to the Court must be grounded in *GECA*, the federal statute [par. 14]. The Court concluded that the interpretation of *GECA* in favour of incorporation of appeals to the Court was the most appropriate interpretation of the statute.

There must be a close nexus between the provincial provision sought to be invoked and compensation.

Although s. 12 of *GECA* may be characterized as dealing more with other claims such as legal actions rather than compensation, I agree with the reasoning of the Workers' Compensation Appeal Tribunal of B.C. which found that it had jurisdiction to certify to the court under section 257 of the B.C. Workers' Compensation Act in a legal action involving a federal employee [see WCAT-2006-01356 (March 23, 2006)]. I acknowledge that the power given to the WCAT in B.C. under s. 257 is limited to making a determination relevant to the action and within the Board's jurisdiction under the Act. However, the reasoning is analogous as the finding would necessarily lead to a dismissal of an action.

In his decision, vice-chair Herb Morton, stated the following:

Upon careful consideration, I disagree with the reasoning expressed in published *Appeal Division Decision #93-0502*. That decision found that an

injured worker cannot apply for compensation benefits under section 11, nor is section 11 part of the appeal process. Rather, it provides a procedure by which parties who wish to sue, or who are being sued, can determine if there is a legal impediment to the action. In my view, however, the certification process established under the former section 11 and the current section 257 may be viewed as complementing the appeal avenues provided under the WCA. It is often the case that a certificate under section 11 or 257 reaches a different conclusion than was provided by the Board officer in the initial adjudication of the claim. In the context of a claim by a person doing work for the federal government, this might involve consideration as to whether the individual is an employee or an independent contractor and whether the individual's injuries arose out of and in the course of their employment. The certificate process provides the parties to a legal action with a means of obtaining a final determination of status, as an alternative to or in substitution for the usual mechanisms for review and appeal. Such a certificate serves to support the further consideration by the Court concerning the effect of section 10 of the WCA and section 12 of the GECA. The right to obtain such a final determination, and to have that status determination provided to the Court, may be viewed as part of the entitlement of a federal employee "to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed". In other words, the injured person has the right to have their status determined by the provincial administrative tribunal with expertise in the field of workers' compensation (rather than by their employer, or by the court). Just as a federal employee has access to the same rights of review and appeal under the WCA, so too does a federal employee have the right to obtain a final determination of their status under section 257 for the purposes of a legal action.

The issues with respect to the status of the injured person are essentially the same whether they arise as part of an appeal to WCAT or in the context of an application for a certificate under section 257. One difference is that a section 257 application may be brought by another party to the legal action or may be based on a request by the court, and the scope of the issues may be broader (as concerning the status of the defendants and any third persons). I do not consider these differences particularly significant, however, compared to the substantial benefits to having status determinations made by the same tribunal which must address issues of entitlement to compensation.

A contrary position was adopted in Ontario (see W.C.A.T. Decision No. 485/90) where the Tribunal found that the corresponding provision dealt primarily with legal actions and not issues incidental to the rate and conditions of compensation incorporated by s. 4 of GECA.

I disagree. The issue to be determined pursuant to s. 28 of the *Workers' Compensation Act* or s. 12 of *GECA* are essentially issues of entitlement to compensation under the respective acts and their impact on a right to use.

In summary, although *GECA* does not incorporate s. 28 of the *Workers' Compensation Act*, as there is the corresponding provision in s. 12 of *GECA*, it does incorporate s.29 when an action in the Nova Scotia courts is engaged.

Statutory Bar

Section 4(1) of *GECA* provides that compensation will be paid to an employee who is caused personal injury by an accident arising out of and in the course of his employment. "Accident" is defined in s. 2 of *GECA* as including a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause.

By their agreed statement of facts, the parties acknowledged that Respondent was assaulted by Applicant on November 24, 2003 at 10:30 p.m. on board the Canadian Coast Guard vessel [*Vessel*]. Both Respondent and Applicant were crewman on board the vessel; both were off-duty at the time. Applicant pleaded guilty to a breach of s. 267 of the Criminal Code, being an assault causing bodily harm. Respondent commenced an action against Applicant on September 10, 2004. The statement of claim evidences that Respondent is attempting to recover for the losses, injuries and damages sustained as a result of the assault by Applicant.

Respondent applied for and received benefits under *GECA*. The Report of Accident dated November 26, 2003 described the mechanism of injury as Respondent being the victim of a personal attack by another employee, having been beaten with fists and pushed into steel bulkheads. The Accident Report indicates that the Worker's employment was of a casual nature. On this particular trip, his employment began on November 1, 2003.

Documentation provided by the Employer indicated that Respondent stayed on board the vessel following the injury as they were offshore, and was paid for that period of time. He left the ship on November 28th. In a Supplemental Accident Report filed by the Employer, the Employer indicated that the Employee worked on a lay day system and earned lay-days off. The usual schedule was 28 days on the vessel, 12 hours a day, then off for 28 days as paid lay-days off.

Submissions

Counsel for Applicant refers to the historic trade-off articulated in s. 28 of the *Workers' Compensation Act* and in s. 12 of *GECA*. Counsel also refers to the case of *Rees v. Canada (Royal Canadian Mounted Police)*, 2005 NLCA 15 where the Court held at paragraph 35 that "...where the employee is "entitled" to compensation under the *Act*, section 12 precludes the claim for compensation other than under the *Act*. The effect of

section 12 is to bar an employee who is entitled to compensation under the Act from electing to proceed with an action in the courts”.

Section 12 in fact bars an employee from suing Her Majesty, or any officer, servant or agent of Her Majesty for injuries resulting from an accident to the employee in the course of his employment in circumstances that entitle the employee to compensation under *GECA*.

Counsel for Applicant concludes her submissions by arguing essentially that Respondent is estopped from taking the action because he has acknowledged that his injuries occurred in the course of his employment. The acknowledgment is inferred from the fact that he applied to the Board for benefits and that the Board accepted his claim.

The Tribunal’s jurisdiction under s. 29 is akin to an appeal or review of any finding the Board may have made on a recognition of a claim. Therefore the mere fact that Respondent’s claim was accepted is not necessarily determinative of the issues when applying s. 28 of the *Workers’ Compensation Act* or s. 12 of *GECA*. The Tribunal may find differently even in the absence of an appeal.

However, if the injuries in this case are found to be as a result of an accident in the course of employment so as to entitle Respondent to compensation, he is subject to s. 9 of *GECA* which prevents him from suing, as he elected to claim under *GECA*, and any action *he might have* is subrogated to Her Majesty [my emphasis].

Counsel for Respondent argues that the criminal assault by Applicant upon Respondent while he was off duty was not an accident in the course of his employment as contemplated by *GECA*.

He argues that the fact that Respondent was on a Coast Guard ship at the time of his assault by Applicant is no different than if Respondent had been assaulted when returning from a grocery store on his day off. Arguably, however, Respondent would not have been in the course of employment at that time.

Counsel for Respondent also refers to case law interpreting the term “accident”, which he suggests should be viewed from the standpoint of an ordinary, reasonable person to see whether it was unexpected, unusual, or unforeseen. I find that the consideration of the definition of accident in the cases cited by Counsel in the context of insurance contracts is not very helpful.

The term “accident” in workers’ compensation has been interpreted broadly in view of the remedial aspect of the legislation. This is not altered because the term is being interpreted in the context of a “right to sue” application. The definition of “accident” under *GECA* clearly includes a wilful and intentional act, not being the act of the employee.

Counsel for the Board submits that the injury sustained by Respondent occurred out of and in the course of his employment. Counsel argues that the fact that both employees were

off duty at the time was irrelevant and had no bearing on the payment of compensation in the circumstances of this case, as Respondent was captive of his employment by virtue of being on board the [Vessel]. But for the employment, Respondent would not have been required to be on the vessel and in close proximity to Applicant.

Counsel refers to Ison's textbook on Workers' Compensation in Canada, 2nd edition, 1989, Chapter 3. Professor Ison states that "an injury to a mariner when at sea is almost always considered to have arisen out of and in the course of employment, and it makes no difference whether the worker was on shift at the time of the injury" [#3.3.14].

Board Counsel also refers to Ison with regard to "fighting" cases. Professor Ison states "where the injured worker was an unwilling participant, the injuries are compensable if the presence of the assailant was part of the employment environment; for example, if the assailant was a co-worker..." [#3.3.20].

Counsel for the Board submits in conclusion that the fact that the worker is on board a ship at sea as part of his employment would create very few instances where an injury would not be compensable whether or not the worker was on duty. The ship would be considered the employment environment.

Counsel for the Department of Justice supports the position taken by Applicant and argues that Respondent's claim is barred by s.12 of *GECA*. Counsel also suggests that to allow Respondent to continue with the action would permit him to seek double compensation for the same injury. I note that the election and subrogation provisions are aimed at preventing such double recovery when an employee is entitled under *GECA*.

Findings

I will summarize my findings; the reasons follow:

- 1) The injuries to Respondent occurred in the course of his employment.
- 2) Under s. 4(1) of *GECA*, Respondent is entitled to compensation.
- 3) Respondent's action against a servant of Her Majesty is barred by operation of s. 12 of *GECA*.
- 4) Alternatively, Respondent received compensation under *GECA*. He cannot sue as he has elected to claim compensation [s. 9 of *GECA*].
- 5) Applicant's criminal assault does not prevent him from raising the bar as a defence.

Addressing the first two findings, s.12 speaks of an accident "in the course of employment" and entitlement to compensation under s. 4(1) of *GECA* speaks of injuries resulting from an accident "arising out of and in the course of employment".

I agree essentially with the analysis put forward by Board Counsel and with the decision of Board adjudicators who accepted Respondent's claim.

Respondent's injuries occurred as a result of an "accident" as defined in *GECA*, a wilful and intentional act by Applicant. The accident, the assault by Applicant, arose out of and in the course of Respondent's employment. He was on board the vessel [*Vessel*] because of his employment. Respondent was assaulted by a co-worker also on board and captive of the employment environment.

Ison, in his text Workers' Compensation in Canada at p. 26, writes, in part:

3.3.6. Relevant variables. While no single criterion is conclusive in classifying an injury as one arising out of and in the course of the employment, various factors are used for guidance. These include:

- whether the injury occurred on the premises of the employer;
- whether it occurred in the process of doing something for the benefit of the employer;
- whether it occurred in the course of action taken in response to instructions from the employer;
- whether it occurred in the course of using equipment or materials from the employer;
- whether the risk to which the worker was exposed was the same as the risk to which he is exposed in the normal course of production;
- whether the injury occurred during a time for which the worker was being paid;
- whether the injury was caused by some activity of the employer or fellow worker.

Ison's analysis stresses the need to establish some substantive connection between the mechanism or circumstances of a worker's injury and the particular requirements of the Worker's employment, in order for an injury to give rise to entitlement to compensation.

As mentioned, in the circumstances of this case, both employees were on board the ship [*Vessel*], even though they were not on duty. Applicant was a co-worker. Therefore, Respondent was submitted to particular risks associated with his employment, that being the requirement to stay on board and to be in contact with other employees. Because the risks he was exposed to were the risks created by his employment, the factors contributing to the accident were employment-related, notwithstanding the criminal assault.

In *Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers' Compensation Appeals Tribunal) (Puddicombe)* (2005), 231 N.S.R. (2d) 390 (C.A.), the Court of Appeal considered the definition of "compensable accident" contained in a Tribunal decision. A snow plow driver, who had a car accident on a snow-covered road

while commuting to work in response to an urgent call outside of normal work hours, was found to have suffered a compensable injury. The Court stated that, generally, a worker will not be acting in the course of his employment while driving to or from work. However, while not performing a work duty, this particular snow plow driver was performing something directly related to his work duties. Also, he was exposed to a special risk different from that posed to the general public when he responded to the employer's call to remove the very snow which caused his accident.

The Court said there is no comprehensive test for when an injury arises out of and in the course of employment. However, it did state at paragraph 27:

... the phrase 'in the course of employment' does not simply refer to things done pursuant to an employment contract, but also to things reasonably incidental to the performance of a contractual duty.

It also quoted with approval this passage at paragraph 37:

The words "in the course of employment" refer to the time, place and circumstances under which the accident takes place. The words "arising out of employment" refer to the origin of the cause of the injury. There must be some causal connection between the conditions under which the employee worked and the injury which he received

In summary, Respondent's accident occurred in the course of his employment as he was on board ship; he was a captive of his employment environment at the time. This activity was reasonably incidental to his employment. It was a risk particular to his employment.

The accident also arose out of employment as it was the result of an action by a co-worker also on board and captive of the employment environment. The contributing factors to the accident were sufficiently work-related to support a finding that his employment made a significant contribution to the event, even though it involved an assault.

Having found that Respondent's injuries resulted from an accident in the course of his employment entitling him to compensation, ss. 9 and 12 of *GECA* are engaged.

Respondent's claim is barred by s. 12 of *GECA* as he is suing a servant of Her Majesty. I note that not all employees as defined by s. 2 of *GECA* would benefit from the protection of s. 12. Alternatively, if for some reason a claim did survive, Respondent is precluded from suing as his rights would be subrogated to Her Majesty under s. 9 of *GECA*.

This leads me to the discussion of the effect of the criminal assault by Applicant. If Applicant were to claim compensation, his claim would likely be denied as his injuries resulted from his own intentional act and would not result from an "accident" under *GECA*.

He may also have acted outside of the scope of his employment (see my colleague's analysis in *Decision 2006-350-AD* (N.S.W.C.A.T., October 31, 2006).

For purposes of argument, assuming that Applicant was unable to claim or was found to have taken himself out of the course of his employment, I see no impediment to his raising the statutory bar under the specific language of s.12. The historic trade-off sees workers benefiting from a no-fault compensation scheme and employers (and their employees) receiving protection from suit. Section 12 protects Her Majesty against a suit, as well as protecting Her Majesty's servants, officers and agents. There is no requirement that both employees be in the course of their employment.

Although it may appear to condone a criminal action, the specific language of *GECA* must be given its meaning which accords with the no-fault principles underlying workers' compensation legislation.

CONCLUSION:

The action by Respondent against Applicant is barred by operation of s. 12 of *GECA*.

DATED AT HALIFAX, NOVA SCOTIA, this 2nd day of February, 2009.

Louanne Labelle
Chief Appeal Commissioner