DON'T DELAY…ACT TODAY: THE RECENT SUPERIOR COURT DECISION OF *DELANTY V. HOGAN*

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The recent decision of *Delanty v. Hogan*, 2023 ONSC 2501, has raised several interesting issues relevant to the personal injury bar. Not only does this decision reiterate that Schedule 1 employees are prohibited from suing Schedule 1 employers and other Schedule 1 employees (i.e. section 28 of *WSIA*); but it also appears to suggest that the WSIAT may have jurisdiction to dismiss derivative *Family Law Act* claims where the primary plaintiff's claim has been barred by virtue of section 28. The decision also provides some guidance by which to *appeal* WSIAT decisions (which must be done on a timely basis) and applies to all parties whether self-represented or not.

BACKGROUND AND PROCEDURAL HISTORY

The plaintiff, Jacqueline Delanty, was involved in a motor vehicle accident on July 8, 2014 involving the defendant, Shannon Hogan, who was operating a vehicle owned by her employer, Heritage Lawn Care Inc. A claim was issued on July 7, 2016 also naming Ms. Delanty's mother pursuant to section 61 of the *FLA*. It was agreed that both parties were Schedule I workers and in the course of their respective employments at the time of the accident.

The pleadings closed on December 21, 2016. The defendants applied to the WSIAT under section 31 for a determination that Ms. Delanty was barred from issuing a claim pursuant to section 28 of the *WSIA*. The Tribunal released its decision on March 17, 2020 finding in favour of the defendants. However, the Tribunal refused to also bar the FLA claim on the grounds that it did not have jurisdiction to do so.

Following the WSIAT decision, the defendants attempted to move the FLA action forward to no avail. The only response from counsel came on September 25, 2020 when the defendants were advised that Ms. Reilly intended to proceed with her action and Ms. Delanty intended to dispute the WSIAT's decision.

For nearly two years after, the plaintiffs took no action. In June of 2022, they served notices to act in person. The motion before Justice Bell was adjourned twice at their request and, the only documents supplied to the Court related to their reconsideration requests of the WSIAT decision. There was no proof that an application for judicial review was submitted.

ANALYSIS AND OUTCOME

Justice Bell dismissed the claims of both plaintiffs. As it pertained to Ms. Delanty, the Court held that her right of action was quashed based on section 28 of the WSIA.

As it pertained to Ms. Reilly, Justice Bell concluded that the derivative nature of FLA claims meant that an FLA plaintiff's right to sue is predicated on the parent's/sibling's/child's right to maintain an action for damages. An FLA claim thus cannot exist independently of the primary plaintiff's claim. The Court thus appears to give jurisdiction to the WSIAT to dismiss FLA claims where it has been determined that the main plaintiff's right to maintain the action has been taken away.

Also of significance is the guidance the Court provided to *appeal* WSIAT decisions; with the result that any type of appeal is limited and must be done on a timely basis. In this regard, Justice Bell reiterated that pursuant to sections 31(2) and (3) of the *WSIA*, WSIAT decisions were "final and not open to question or review in a court". However, under section 129, the Tribunal "may reconsider its decision…if it considers it advisable to do so".

While this finding opens the door for reconsideration requests, it still leaves the decision to grant such requests squarely in the hands of the Tribunal. More importantly however, the decision re-affirms the fact that any such request must be made precisely within 6 months of the decision. In the case at bar, Ms. Reilly's request was made 14 months and Ms. Delanty's 34 months post-decision. Accordingly, "both requests for reconsideration are far beyond WSIAT's six-month guideline for reconsideration" and thus dismissed.

The same reasoning applied where a judicial review of a WSIAT decision was sought; namely, the application for review must be delivered within 30 days of the decision. In either case, a delay (even by a self-represented plaintiff) meant a total bar to reconsideration.

Finally, this decision is of particular interest to the defence bar as it essentially penalized the plaintiffs for failing to move their actions along in a timely manner. Often, self-represented plaintiffs are given the benefit of the doubt where deadlines are concerned. However, Justice Bell set the record straight by concluding that the "inordinate" delay in this case was not adequately explained and would have resulted in a dismissal of both claims even if he had not concluded that the claims were barred by virtue of section 28 of the *WSIA* and 61 of the *FLA*.

TAKEAWAYS

The main takeaway from this decision is for plaintiffs to move their actions along in a timely manner: whether in the regular course of the claim through examinations for discovery, mediation and pre-trial/trial or where appeals are concerned. In essence, the "don't delay, act today" motto was reinforced.

With this decision in hand, it will be interesting to see if the WSIAT will be so bold as to dismiss FLA claims on their own initiative where it has been determined that the primary plaintiff's claims have been barred by the *WSIA*.