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Section 257 of the Workers Compensation Act and Related Employment Litigation

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SECTION 257 OF THE WORKERS COMPENSATION ACT AND RELATED EMPLOYMENT LITIGATION

I. Overview

This paper will focus on the use and impact of a "Section 257 Certificate" in the context of civil actions brought by employees against their employers. In particular, it will focus on actions where employees are seeking damages for mental disorders caused by workplace conduct such as bullying and harassment.

Pursuant to section 257 of the B.C. *Workers Compensation Act* ("*WCA*"), any of the parties to an action (or the court) can ask Workers Compensation Appeal Tribunal ("WCAT") to make certain determinations with respect to the status of the parties and the character of plaintiff's injuries. WCAT's conclusions are summarized in a "Section 257 Certificate", which is filed with the court. The determinations contained in the certificate may result in the action being barred, either in whole or in part, against the defendant and/or third parties on the basis that the issues raised are within the jurisdiction of WorkSafeBC.

II. Introduction

A. History

Section 10(1) of the *WCA* prevents a worker from suing his or her employer for an injury that arises out of and in the course of his or her employment. This statutory bar to legal action is often referred to as the "historic compromise". Essentially, it provides an employee with the right to claim workers compensation benefits, which are no-fault and paid for (via premiums) by the employer and administered by WorkSafeBC, in exchange for the employee's waiver of any right to sue their employer with respect to the injury entitling the employee to benefits. For this bar to legal action to arise, the plaintiff must be a "worker", the defendant must be a "worker" or "employer", and the plaintiff's injuries and the defendant's conduct must "arise out of and in the course of employment".

B. Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal, 2012 BCCA 392

The decision of *Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal*, 2012 BCCA 392 ("*Downs*") is a seminal decision about the impact of a Section 257 Certificate in the context of an action involving allegations of a workplace mental stress injury. The plaintiff in this case had made an unsuccessful application to the Workers Compensation Board (the "Board") (now WorkSafeBC) for compensation for post-traumatic stress disorder, which she alleged was caused by the conduct of her supervisor. She also commenced a civil action against her employer, alleging negligence and breach of contract. In defence, Downs Construction relied on section 257 of the *WCA* and applied to WCAT for a Section 257 Certificate. WCAT decided that the denial of compensation must also mean that her injury did not arise out of and in the course of her employment, linking causation and compensability. WCAT issued a certificate stating that the injury did not occur in the course of her employment, effectively allowing the civil claim to proceed. On judicial review, the B.C. Supreme Court agreed with WCAT on the basis that the employer's interpretation would leave the plaintiff without a remedy under the *WCA* or in tort, effectively creating a "black hole" for workers.

This reasoning was rejected by the B.C. Court of Appeal, which emphasized that the determination of whether an injury arises out of and in the course of employment (*WCA,* section 5(1)) is a question of fact that is separate and apart from the determination of whether a worker is entitled to compensation for the injury (*WCA,* section 5.1). It allowed the appeal and substituted a determination that the worker's mental stress injury arose out of and in the course of her employment. The court's rationale was that employers should not be exposed to lawsuits based on claims which may be compensable under the *WCA*. This decision was significant because the worker was prevented from pursuing the civil action and she was denied compensation by the Board because she did not satisfy the criteria in section 5.1 for a compensable mental disorder.

C. Compensation for Mental Disorders Post-Downs

Section 5.1 of the WCA has been amended since Downs. At the time Downs was decided, a mental disorder was only compensable if it was an acute reaction to a sudden an unexpected traumatic event arising out of and in the course of employment. In 2012, section 5.1 was amended to broaden

the scope of compensable "mental disorders".[1] Workers can now make claims to WorkSafeBC if they have a diagnosed mental disorder caused by either a "significant work-related stressor, including bullying or harassment" or "a cumulative series of significant work-related stressors". Since this amendment to the WCA, bullying and harassment has been in the spotlight at WorkSafeBC, which has since issued several associated practice directives and policies.[2]

The broadened scope of section 5.1 means that civil actions where the plaintiff is seeking damages for mental stress, mental injury, or mental disorder resulting from workplace conduct, may be barred on the basis that the claim is within the exclusive jurisdiction of the *WCA.*

Despite the amendments to section 5.1, Downs remains good law and it is regularly cited by WCAT panels. WCAT has been clear that whether a mental disorder is compensable under section 5.1 of the WCA is not relevant for the purposes of a Section 257 Certificate.[3] This is because an application for a Section 257 Certificate is not an application for workers' compensation benefits. The applicant is asking WCAT to determine, in part, whether the physical injury or mental disorder "arose out of and in the course of employment", which is a separate and distinct question from whether the mental disorder is ultimately compensable. WorkSafeBC may determine that a mental disorder arose out of and in the course of employment but that workers compensation benefits are not payable because one or more of the section 5.1 requirements are not met.

Since WCAT does not consider the requirements of section 5.1 when making its Section 257 determinations,[4] this paper will not focus on the substantive elements of that section or its related policies. For a detailed summary of the 2012 amendments to section 5.1 and a review of Review Division and WCAT decisions showing how section 5.1 has been interpreted and applied, see two earlier CLE BC papers: Mental Disorder Claims: The Bill 14 Amendments to the Workers Compensation Act and Related Issues by Peter Eastwood, Jennifer Roper and Marino J. Sveinson (May 2013), and Addendum to Mental Disorder Claims: The Bill 14 Amendments to the Workers Compensation Act and Related Issues by Marino J. Sveinson and Michael Manhas (November 2013).

III. Basics of a Section 257 Application

A. Starting an Application

The application is commenced by submitting An Application for Section 257 Determination form to WCAT.[5] The application should enclose all pleadings, the Notice of Trial (if a trial has been scheduled), and all evidence the applicant seeks to rely on, which may include witness statements, business records, affidavits, or testimony from a WCAT hearing. If examinations for discoveries

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1 The term "mental stress" was replaced with "mental disorder" in the amendments to section 5.1. This amendment was made to reflect what was considered more appropriate and current terminology.

2 See Practice Directive #C3-3 and Policy Item C3-13.00 of the Rehabilitation Services and Claims Manual, Vol. II (Section 5.1 – Mental disorders); OHS Policy Item D3-115-2 (Re: Employer Duties – Workplace Bullying and Harassment); OHS Guideline G-D3-115(1)-3 (Bullying and Harassment).

3 *WCAT-2014-02249 (Re)*, 2014 CanLII 92643 at para. 52.

4 *WCAT-2014-02287 (Re)*, 2014 CanLII 92855 at para. 94; *WCAT 2014-00075* at para. 63.

5 http://www.wcat.bc.ca/research/forms/WCAT_66W.pdf.

have been completed at the time the application is filed, then the transcripts should be enclosed with the application.

The application must also set out the determinations requested of WCAT. Generally, the determinations sought include:

(a) whether the plaintiff was a worker at the time that the cause of action arose;

(b) whether the defendant was a worker or employer at the time that the cause of action arose; and

(c) whether the injury or death arose out of and in the course of the worker's employment.

In most cases, the main dispute is whether the injury "arose out of and in the course of the worker's employment".[6] This was addressed in Northern Thunderbird Air Inc. v. BC (Workers Compensation Appeal Tribunal), 2016 BCSC 1216, which was recently affirmed by the B.C. Court of Appeal.[7] Northern Thunderbird Air Inc. ("Northern Thunderbird") owned and operated a plane which crash landed in Richmond on the way to Kelowna in October 2011. The passengers commenced an action against Northern Thunderbird alleging that they suffered injuries and losses as a result of the accident, and that the accident was caused by Northern Thunderbird's negligence. The passengers were flying to Kelowna to attend a retreat organized by a peer advisory group, TEC Canada Ltd. ("TEC"), of which the passengers were members. Northern Thunderbird applied for a Section 257 Certificate. WCAT concluded that the passengers were "workers" for the purpose of the WCA but that the injuries did not arise out of and in the course of their employment because their participation in TEC activities was not part of their normal work activities. This meant that they were not precluded from continuing with their civil actions against Northern Thunderbird.[8] This decision was upheld by the B.C. Supreme Court on judicial review.

B. Timing of the Application

There is no deadline for making an application for a Section 257 certificate. A party can apply at any time after a legal action has been commenced. However, submitting an application too close to a trial date may be problematic for a number of reasons. Applications for Section 257 certificates are addressed on a first come, first served basis. While the WCAT Manual of Rules of Practice and Procedure states that WCAT requires at least 180 days from the date of an application to issue a determination,[9] there is no guarantee that the determination will be made within 180 days since WCAT is not required to issue the certificate within a certain time period pursuant to the WCA.[10]

This means that a defendant in a civil action seeking to rely on a Section 257 Certificate should file the application with WCAT well in advance of the trial date. This will ensure that there is sufficient

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6 See Policy Item C3-14.00 of the Rehabilitation Services and Claims Manual, Vol. II for detailed guidance on what is meant by "arising out of and in the course of employment.

7 *Northern Thunderbird Air Inc. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 60.

8 *WCAT-2015-00533, WCAT-2-15-00534.*

9 WCAT *Manual of Rules of Practice and Procedure*, sections 18.3.2.

10 *WCA*, section 257(3).

time to prepare for a trial in the event that WCAT does not find the claim to be within the exclusive jurisdiction of the *WCA*.

It is also important to note that a party can apply for a Section 257 Certificate even if the plaintiff has not filed an application for compensation with WorkSafeBC. If the employee has made a claim for compensation with WorkSafeBC, then WCAT will have access to that file in making its determinations.

C. Effect of a Certificate

In most cases, WCAT will make the determination(s) on the basis of written submissions alone. A party who wants an oral hearing must request one by way of written submissions. Once WCAT has made its decision, it will issue a certificate and written reasons for its decision. WCAT will then file the certificate and decision in the court registry.

If the parties agree on the effect of the Section 257 Certificate on the action, they can proceed by consent. The pleadings be amended, or the action may be dismissed in its entirety. If the parties cannot agree on the effect of the Section 257 Certificate, then the defendant will have to make an application asking the court to determine the effect of WCAT's determinations on the action.

It is the court, not WCAT, which decides how the determinations in the Section 257 Certificate will affect the action, including whether the plaintiff should be barred from proceeding with the action because of section 10 of the WCA.11 Note that this is not the same approach taken in other provinces. For example, the Alberta Workers' Compensation Board has the jurisdiction to determine whether the statutory bar in the Alberta Workers' Compensation Act, R.S.A. 2000, W-15 applies to an action.

If the plaintiff disagrees with WCAT's determinations, he or she will have to appeal by way of judicial review of the WCAT decision. Employee counsel should be aware that if the reviewing court decides that the action is barred by virtue of section 10 of the *WCA*, and the plaintiff has not yet filed an application for compensation with WorkSafeBC, then the plaintiff may be outside of the one year limitation period for filing an application for compensation. If at that point the plaintiff still wants to make an application for compensation, the plaintiff will have to show that special circumstances prevented him or her from filing a claim within the prescribed period.

IV. Review of Recent s. 257 WCAT decisions

In this section of the paper, we have summarized a few WCAT decisions post-*Downs* that have concerned applications for Section 257 Certificates in the context of actions involving claims for mental disorders and other workplace injuries.

Some important takeaways from these cases are:

- A Section 257 Certificate does not automatically mean that the plaintiff will not be entitled to aggravated and/or punitive damages in the civil action. The plaintiff may still be entitled to such damages if they relate to a breach of contract.
- Section 257 will be interpreted broadly by WCAT in wrongful and constructive dismissal actions where it appears that the plaintiff is claiming a personal injury

11 *Clapp v. Macro Industries Inc.*, 2007 BCSC 840 at para. 36.

(which includes a mental disorder) as a result of workplace conduct or environment. WCAT is inclined to certify any personal injury in such cases and leave it to the Court to make the ultimate decision as to the portion, if any, of the personal injury resulting from the wrongful or constructive dismissal.

- Substance is more important than form in pleadings for the purpose of a Section 257 Certificate. Where the pleadings refer to bullying, harassment, and/or the creation of a toxic work environment, the fact that the plaintiff has not explicitly claimed to have suffered a personal injury (including a mental disorder) is not determinative. WCAT may interpret the references to bullying, harassment and/or the toxic work environment as potentially involving a claim for personal injury due to work-related stressors.
- Defendants should consider filing a Jurisdictional Response (Form 108) at the time of filing a Response to Civil Claim. Failure to file a Jurisdictional Response at this time does not mean that jurisdictional arguments cannot be raised later. For example, a party may file a Jurisdictional Response prior to making an application for a stay, or if making an application to dismiss the action after a Section 257 Certificate is issued. In the cases summarized below, Jurisdictional Responses were only filed in two of the actions.[12]

(1) *WCAT 2014-00075* (January 13, 2014)

In September 2012, the plaintiff commenced a wrongful dismissal action against her employer. She alleged breach of contract and claimed that her former employer was vicariously liable for the independent tortious conduct of her supervisor, Mr. Greenwood, and the chair of the school trustees, Mr. Pankhurst. Her pleadings identified a toxic work environment and claimed damages for breach of contract, for breach of duty of good faith, and for intentional or negligent infliction of mental suffering. She claimed that the conduct of Mr. Greenwood and Mr. Pankhurst constituted an independent actionable wrong. The defendant argued that the claim for damages arising out of alleged harassment or the work environment was barred by sections 5.1 and 10 of the *WCA* and *Downs*.

On March 4, 2013, the plaintiff set down the matter for a trial commencing in March 2014. On September 19, 2013, the defendant made an application to WCAT for a Section 257 Certificate. At the time of the application, the plaintiff had not submitted an application for workers' compensation benefits in relation to any mental stress injury.

The WCAT panel found that the plaintiff's claim for mental suffering due to the defendant's employees' tortious conduct involved a claim for personal injury, and as such, was a claim for which certification of status under section 257 could be provided.[13] However, WCAT decided that the certificate did not cover the breach of contract claim or any claim for aggravated and punitive damages related to the breach of contract.

On April 17, 2014, the parties agreed to adjourn the trial generally by consent. Five days later, the defendant applied for a consent order dismissing the action without costs, which was granted on June 10, 2014.

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12 WCAT-2015-00129 (Court File No. VLC-S-S-134741); and WCAT-2015-00666/WCAT-2015-00667 (Court File No. VLC-S-S-135668 and VLC-S-S-136699).

13 *WCAT 2014-00075* at para. 39.

(2) WCAT-2014-02249 (Re) (supplemental decision - WCAT-2014-02477) (July 25, 2014 and August 22, 2014)

In September 2011, the plaintiff commenced a legal action for wrongful and/or constructive dismissal and sought damages for breach of contract, damages for intentional infliction of mental distress, *Wallace* damages, and aggravated and punitive damages. Following her termination, the plaintiff had been diagnosed as suffering from a Major Depressive Disorder. In her pleadings, she stated that the defendant's conduct constituted harassment designed to cause her emotional harm and distress. In response, the defendant argued that to the extent that the plaintiff was claiming damages arising out of harassment or the work environment, such claims were barred by sections 5.1 and 10 of the *WCA* and *Downs*. In August 2013, the plaintiff filed a Notice of Trial, setting down a trial starting in October 2014.

On September 23, 2013, the defendant made a Section 257 application to WCAT. The defendant did not take issue with the court's jurisdiction over the wrongful and/or constructive dismissal claim, but did dispute its jurisdiction over the plaintiff's tort claim, arguing that it fell within the scope of the *WCA*. The Plaintiff submitted that her legal action was for breach of contract and that the personal injury was simply "consequential damages".

WCAT found that the plaintiff's alleged injury due to the intentional infliction of mental distress arose out of and in the course of her employment. In a supplemental decision, it determined that any action or conduct of the employer which caused the alleged breach of duty of care arose out of and in the course of employment. WCAT separated the plaintiff's claim for damages for breach of contract and for intentional infliction of mental distress, finding that WCAT had jurisdiction to certify her status in respect of the latter claim.[14]

The WCAT panel then dealt with the issue of the effect of WCAT's certification, to the extent that the plaintiff's claim also involved a claim for personal injury as a consequence of the workplace events on which the wrongful/constructive dismissal claim was based. The panel expressed its discomfort with limiting WCAT's jurisdiction to cases where personal injury was claimed as a direct result of the defendant's negligent breach of a duty of care or intentional tort, and excluding cases where the personal injury was a consequence of breach of contract. Its unease was based on not wanting to usurp the court's jurisdiction to determine the effect of a Section 257 certification on an underlying legal action (i.e. the scope of the section 10 statutory bar).

With respect to the plaintiff's consequential damage point, the Court remarked that, "[i]t would seem strange if a worker could claim workers' compensation benefits for such an injury or bring a legal action against the employer (or fellow worker) for such an injury so long as the injury was characterized as being consequential in nature…".[15] According to WCAT, the scope of protection from legal action provided to employers under the WCA should not be dependent on the way the plaintiff has framed his or her pleadings, and a wrongful or constructive dismissal action does not exclude the possibility that some part of the claim may involve an injury arising out of and in the course of the plaintiff's employment.[16]

In cases where a plaintiff claims that workplace events resulted in both a wrongful or constructive dismissal and a mental stress injury, there may be some overlap between a claim for benefits under

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14 *WCAT-2014-02249 (Re)* at para. 26.

15 *WCAT-2014-02249 (Re)* at para. 32.

16 *WCAT-2014-02249 (Re)* at paras. 33 and 37.

the WCA and a claim against the employer for wrongful or constructive dismissal. As such, it will not be as clear if the section 10 bar applies. Since it is for the Court and not WCAT to determine the effect of section 10, the WCAT panel supported a broad interpretation of section 257 broadly and decided that it should certify where any personal injury is claimed in the legal action.[17] It will then be up to the court to determine whether any of the personal injury results from the wrongful or constructive dismissal, and apportion the disability accordingly.[18]

On September 19, 2014, the defendant applied for a consent order dismissing the action, which was granted on October 23, 2014.

(3) WCAT 2015-00129 (January 15, 2015)

This was another wrongful dismissal action in which the plaintiff alleged workplace harassment and claimed damages for wrongful dismissal, "damages for harassment", and aggravated and punitive damages in relation to the manner of termination. The plaintiff claimed that she was harassed by the defendant's employees and directors, for which the defendant was vicariously liable.

On January 24, 2014, the defendant filed a Jurisdictional Response in the civil action and made a Section 257 application to WCAT. In February 2014, the defendant filed an amended Response to Civil Claim, claiming that all claims made by the plaintiff for aggravated, punitive, any other damages arising out of any personal injuries suffered in the course of her employment, any breach of duty of care, harassment, or any other act or omission by the defendant or its employees, were barred by sections 5.1 and 10 of the *WCA*.

At the time of the defendant's Section 257 application, the plaintiff had not submitted a claim to WorkSafeBC for workers' compensation benefits in relation to an injury due to mental stress. She argued that she was seeking compensation for breach of contract and that her legal action was not based on personal injury.

WCAT found that the mental stress injury suffered as a result of the alleged harassment arose out of and in the course of the plaintiff's employment. It decided that the substance of the claim was one for disablement by personal injury due to mental stress and that any injury suffered by the plaintiff arose out of and in the course of her employment.[19]

Following WCAT's decision, the defendant sought an order declaring the court without jurisdiction over the plaintiff's claims of harassment and the duty to accommodate and striking these claims from the plaintiff's pleadings. This hearing was adjourned by consent. On May 25, 2015, the defendant applied for a consent order dismissing the action, which was granted two days later.

(4) *WCAT 2015-00666/00667* (February 26, 2015)

In this case, the defendant made a Section 257 application with respect to actions commenced by two of its former employees, Sandra Kuzyk and Laura Legg. Ms. Kuzyk commenced her wrongful dismissal action in July 2013. Ms. Legg commenced her constructive dismissal action in September 2013. They both claimed that they were bullied and harassed during their employment. Neither Ms. Kuzyk nor Ms. Legg had filed an application for workers compensation benefits with WorkSafeBC.

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17 *WCAT-2014-02249 (Re)* at para. 31.

18 *WCAT-2014-02249 (Re)* at para. 40.

19 *WCAT 2015-00129* at para. 28.

At the time that the defendant made the Section 257 application (September 3, 2013 in the Kuzyk action and December 2, 2013 in the Legg action), no examinations for discovery had been held and none of the parties submitted any written statements or affidavits. Thus, WCAT made the determinations solely on the basis of the pleadings and the parties' written submissions. It decided to address both applications in the same decision due to similar jurisdictional issues being raised and the fact that the plaintiffs and defendant were represented by the same counsel in each action.

Ms. Kuzyk sought damages for breach of contract, aggravated and punitive damages and pled that she was relying "on the common law principles concerning harassment". She claimed that the president of the defendant had harassed her and that his behaviour had created a hostile and toxic work environment. Ms. Legg sought damages for breach of contract, as well as aggravated and punitive damages. Ms. Legg's Amended Notice of Civil Claim also alleged defamation and identified the defendant's conduct as constituting an independent actionable wrong. In response, the defendant pled that all claims made for aggravated, punitive and any other damages arising out of any personal injuries suffered in and out of the course of employment, and as a result, any breach of the duty of care, harassment or other act or omission by the defendant or any of its employees, were barred by sections 5.1 and 10 of the *WCA*.

Upon reviewing Ms. Kuzyk's pleadings, WCAT found that it was not evident that she had made any direct claim for personal injury or disablement due to an occupational disease resulting from employment. However, the panel noted that there was a valid question as to whether her claim might involve a claim for personal injury in light of her claim for general damages and her reliance on the common law principles concerning harassment as a legal basis for her action.[20] It held that any personal injury (including a physical or mental stress injury) or disablement by occupational disease suffered by Ms. Kuzyk in connection with the alleged abuse and harassment, up to the point of her termination of employment, arose out of and in the course of her employment.

In assessing Ms. Legg's pleadings, WCAT interpreted her references to having suffered damage, to having been rendered incapable of working for the defendant, and to the defendant having committed an independent actionable wrong, as potentially involving a claim for personal injury due to abuse and harassment, even though Ms. Legg had not expressly framed her pleadings as such.[21] The panel then reviewed decisions from other jurisdictions and commented that:

> [71] The decisions summarized above from other jurisdictions support a conclusion that the manner in which a statement of claim is drafted is not determinative and an action may be found to be barred in whole or in part based on the extent to which it relates to a work-related injury and disability. Secondly, in those jurisdictions, an action for wrongful or constructive dismissal may proceed even where a worker has suffered disability as a result of his or her employment, but may not include a claim for damages relating to the work-caused disability.

The panel placed particular emphasis on the plaintiff's pleading of being "incapable" of working for the defendant, which it noted could be interpreted as referring to disablement due to personal injury or occupational disease.[22]

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20 *WCAT 2015-00666/00667* at para. 26.

21 *WCAT 2015-00666/00667* at para. 53.

22 *WCAT 2015-00666/00667* at para. 74.

In response to both of the plaintiffs' arguments that the WCA did not apply because they had not pled that they had suffered a personal injury arising during employment, the WCAT panel noted that denying certification in all cases involving indirect claims for personal injury arising out of and in the course of the employment would be prejudicial to employers and inconsistent with legislative intent described by the BCCA in Downs. It decided that any ambiguity as to whether the actions were based on a personal injury should be resolved in favour of providing certification, and allowing the court to determine the effect of the certification on the legal action.[23]

On February 3, 2016, the defendant filed an amended Notice of Application asking the court to declare itself without jurisdiction over Ms. Kuzyk's claims of harassment, negligent hiring and damages for personal injury, and seeking to have certain paragraphs struck from the plaintiff's pleadings. Ms. Kuzyk was given the opportunity to file a further Amended Notice of Civil Claim. Counsel for Ms. Kuzyk filed a Notice of Trial on August 29, 2016, with the trial set to commence on February 19, 2018.

There have been no steps taken with respect to Ms. Legg's action since March 18, 2014.

(5) WCAT-2014-02287 (July 29, 2014)

In December 2011, the plaintiff Craig Anderson, commenced a civil action against his employer Ellett Industries, and his colleague Al Skene, alleging that Mr. Skene assaulted him at work resulting in personal injuries. He made claims for defamation, mental stress injury, and negligent investigation of workplace events. Mr. Anderson claimed that his mental stress injuries resulted from his employer's investigation and response to the incident. On February 22, 2013, the defendant made a Section 257 application to WCAT. WCAT held an oral hearing in January 2014. In February 2014, the plaintiff set down a trial commencing in August 2015.

WCAT decided that some of the matters claimed by Mr. Anderson were not within its jurisdiction, such as the claim for injury to his reputation arising from the alleged defamation. However, it found that the alleged mental stress injuries were within its jurisdiction, whether or not the alleged injuries met the test in section 5.1 of the WCA.[24] It then found that the injuries were at least partly caused by Mr. Skene and that the physical injuries and mental stress suffered by Mr. Anderson as a result of the incident arose out of and in the course of employment. With respect to the allegations of negligent investigation, the panel found that the investigation and discipline that was imposed on Mr. Anderson were connected to the defendant's supervision and control of its workers' conduct in the workplace, and as a result, any mental stress injuries sustained by Mr. Anderson as a result of its investigation of, and disciplinary response to the incident, arose out of and in the course of the plaintiff's employment.[25] WCAT's decision was upheld by the B.C. Supreme Court on judicial review.[26] This decision effectively limited Mr. Anderson's civil action to his defamation claim.

Following the judicial review, the parties entered into settlement discussions and on November 6, 2015, a consent dismissal order was granted dismissing the action against the Defendants without costs.

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23 *WCAT 2015-00666/00667* at para. 76.

24 *WCAT-2014-02287* at paras. 93-94.

25 *WCAT-2014-02287* at para. 161.

26 *Anderson v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2015 BCSC 1443.

V. The Intersection of Section 257 Certificates and Claims for Damages in Wrongful Dismissal Claims

The purpose of a section 257 application is the achievement of the protection afforded by section 10 of the *WCA*.

Section 10(1) of the *WCA* reads as follows:

> 10 (1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part. [Emphasis added]

While it may seem unfair (at least to plaintiffs' counsel), the historic trade-off may sometimes result in the employee being without a remedy. While the Court of Appeal's comments in *Downs* with respect to this issue are technically *obiter dicta,* their view is apparent:

> [24] In my view, it would undermine the core policy of the scheme to have employers exposed to lawsuits based on the scope of compensable claims afforded to workers under the legislation. This would result in uncertainty and a patchwork system of compensation. It would result in a proliferation of litigation to determine what is and what is not covered by the scheme in the context of the protection afforded to employers.
>
> [25] Whether the reach of the immunization extends to claims that are not available under the legislation is not a matter that must be determined on this appeal, but that would appear to be a result consonant with the scheme.
>
> [26] I see little value in opening for debate whether particular claims not accepted for compensation should be available to workers as common law actions against an employer. In my view, that could be destructive of the basic framework of workers' compensations schemes.

WCAT also appears to have accepted the potential for such a gap (again *obiter dicta*) [27]*:*

> [112] While not necessary to my decision, I note the recent British Columbia Court of Appeal (BCCA) decision in *Downs Construction Ltd. v. WCAT*, 2012 BCCA 392. The BCCA concluded that if the factual events giving rise to the claim for a mental disorder arose out of and in the course of the employment, then a legal action is barred irrespective of whether the requirements of section 5.1 of the Act are met. The requirements of section 5.1 are not relevant in determining whether a claim for a psychological injury/mental disorder is one arising out of and in the course of a plaintiff's employment. Accordingly, my certification would be the same even if I had found that the requirements of section 5.1 were not applicable or were not met. The factual events giving rise to the legal action arose out of and in the course of the plaintiff's employment (including the medical treatment provided as a consequence of his employment-related allergic reaction).

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27 *WCAT-2013-00048*.

WCAT has also generally expressed reluctance to make any comment as to whether a Section 257 Certificate has any impact on a plaintiff's claim for breach of contract and/or claim for aggravated and punitive damages. However, in *WCAT 2014-00075,* the panel made a determination that the Section 257 Certificate would not extend to the plaintiff's claim for aggravated or punitive damages related to the claim for breach of contract. In a number of cases which followed that decision, discussed above, WCAT made it clear that the impact of the certification was properly dealt with by the court hearing the plaintiff's claim.

In *WCAT 2014-00075*, reference was made to an earlier decision of the Appeal Division of the WCB[28]. That decision regarded a claim for defamation by an employee. The employee claimed physical and emotional stress and injury. The Appeal Division found, based on a 1966 report on the *Workmen's Compensation Act* of Justice Tysoe, that section 10 was meant to bar claims only for personal injury where the personal injury was the essence of the action, and was not meant to bar claims where the personal injury was merely "consequential" damage. The Appeal Division concluded that any personal injury the employee may have suffered as a result of the defamation was consequential and therefore the application for a certificate was denied.

This reasoning does not appear to have ever been tested in any court in Canada, nor has any court been asked to consider whether the historic trade-off applies to claims for aggravated damages awarded for mental distress.

As we know from the Supreme Court of Canada's decisions in *Fidler v. Sun Life Assurance Co of Canada,* 2006 SCC 30 and *Honda Canada Inc. v. Keays,* 2008 SCC 39, damages for mental distress are not only recoverable in tort: they may also be recoverable in breach of contract. Entitlement to such damages requires the plaintiff to prove that they have suffered a loss.

The Court in *Fidler* observed that there are two different types of "aggravated damages". First, "true aggravated damages, which arise out of aggravating circumstances"[29]. These damages may be awarded in cases where the plaintiff establishes mental distress resulting from a separate cause of action (usually a tort), such as defamation. Second, "mental distress damages which do arise out of the contractual breach itself"[30]. These damages do not depend on aggravating circumstances but instead on what the parties intended when they formed the contract. The Court comments that with respect to the latter, the term "aggravated damages" may itself be unnecessary and confusing.

The Court in *Honda* went one step further:

> [59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in

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28 *WCAT-2014-00075* at para. 23, referencing Appeal Division Decision #97-0829

29 *Fidler v. Sun Life Assurance Co of Canada*, 2006 SCC 30 at para. 52, [*Fidler*].

30 *Fidler, supra* note 29 at para. 53.

> dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100). [Emphasis added]

This brings us to the question of whether a claim for damages for mental distress made in the context of a breach of employment contract fall within section 10 of the *WCA.*

No court appears to have addressed this particular issue. However, the Alberta Court of Appeal in *Ashraf v. SNC Lavalin ATP Inc.,* 2015 ABCA 78 did consider the jurisdiction of the Courts with respect to allegations of workplace harassment in the context of a claim of constructive dismissal.

It is worthy of note that the Alberta equivalent of section 10 of the *WCA,* Section 21(1) of the Alberta *Workers' Compensation Act,* is phrased quite differently than section 10:

> 21(1) No action lies for the recovery of compensation under this Act and all claims for compensation shall be determined by the Board.
>
> (2) This Act and the regulations apply instead of all rights and causes of action, statutory or otherwise, to which a worker, the worker's legal personal representatives or the worker's dependents are or might become entitled against the employer of the worker by reason of any accident happening to the worker, and no action in respect of that accident lies against the employer.

The plaintiff Mr. Ashraf brought an action against SNC Lavalin in which he alleged that he had been subjected to abuse, harassment and bullying by his supervisor and other members of management. He alleged that as a result, he suffered mental anguish that caused or exacerbated his illness or injuries and resulted in pain and suffering. He also claimed that he was unable to maintain employment as a result, although he did not frame his claim in constructive dismissal. Rather, he claimed compensation for lost income and benefits, and for pain and suffering.

SNC Lavalin sought an order striking the claim on the basis that the court had no jurisdiction under the Alberta *Workers' Compensation Act.* After that application was made, Ashraf amended his claim to include constructive dismissal. The Court of Queen's Bench concluded that even with the addition of the claim for constructive dismissal, the essential character of Ashraf's claim arose out of an "accident" as defined in the *Workers' Compensation Act.* Therefore, the Workers' Compensation Board had jurisdiction over the entirety of the claim. Ashraf appealed.

It is also worthy of note that throughout the proceedings, Mr. Ashraf was self-represented. As such his pleadings were not drafted somewhat uniquely, although the thrust of his claims was clear:

> 3.68 The above events were not only intended to frustrate Mr. Ashraf in order to get rid of him but SNC Lavalin's systematic campaign of hate and animosity was well plotted to paralyze Mr. Ashraf's life and drive it to destruction.
>
> 3.69 The abusive and bullying conduct, the intolerable and hostile working environment of which Mr. Ashraf complains were allowed within the context of a toxic corporate environment fostered and condoned by SNC-Lavalin, which were to frustrate Mr. Ashraf to leave the corporation. None of the events under the complaint were random but part of a systemic campaign of harassment and abuse to constructively dismiss Mr. Ashraf. None of the events were as part of inherent hazard of employment or as part of employer's normal activities or inherent liability for work related circumstances.
>
> .....

> 3.71 The actions and [conduct] of SNC-Lavalin and its management team in creating and in failing to rectify the hostile working environment resulted in repudiation of the terms of Mr. Ashraf's employment and his right to a workplace free of harassment and thereby effectively constituted constructive dismissal.

The Court quoted (at para. 9) from the Supreme Court of Canada's decision in *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners,* 2000 SCC 14 (para. 39) with respect to the determination of the "essential character" of a claim:

> To summarize, the underlying rationale of the decision in *Weber*, *supra*, is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature.

The Court of Appeal concluded (at para. 11) that the *Workers' Compensation Act* "asserts no jurisdiction to compensate claims for constructive dismissal". Thus, if the Court rejected jurisdiction, the plaintiff would be left without a remedy. Therefore, the Court concluded that the *Workers' Compensation Act* had jurisdiction over Ashraf's claim for physical and psychological injuries sustained in the workplace but no jurisdiction with respect to his claim for constructive dismissal.

The BC Court of Appeal in Downs was clearly not as concerned about a gap in remedies. While we still do not know how strictly Downs will be applied in future, particularly to claims for wrongful dismissal in which mental distress (aggravated) damages are sought, the decision in Ashraf does not really provide much guidance. In his paper presented to the 13th Annual Conference of the Canadian Association of Counsel to Employers (CACE), Gavin Marshall said that in his view, "the Ashraf case appears to establish that there are limits to what the courts will be willing to concede, and that the courts will be reluctant to relinquish jurisdiction over claim that flow from, or are inextricably linked to, contractual rights".[31] However, section 10 of the Act seems to contemplate that the claim may be grounded in breach of contract. Perhaps the more appropriate question is whether the "essential character" of a claim for mental distress (aggravated) damages is a claim for "personal injury".

VI. Use of Stay Proceedings

Simply pleading that the plaintiff's claim is statute-barred pursuant to section 10 of the *WCA* does not result in a stay of proceedings. Unless the parties agree otherwise, the civil action and all associated pre-trial processes will continue in the normal course. As mentioned earlier in this paper, WCAT does not have a statutory timeline for rendering a Section 257 Certificate, but parties are advised to apply for a certificate at least 180 days in advance of the set trial date. If the application to WCAT is made less than 180 days before the commencement of the trial, or in cases where WCAT takes longer than expected to issue the Certificate, parties will often agree to adjourn the trial pending WCAT's Section 257 determination.

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31 Marshall, Gavin, *It's Groundhog Day: Bullying and Harassment – The Jurisdictional Issue,* CACE 13th Annual Conference, 2016 Presentation Paper.

If the parties cannot agree to an adjournment of the trial pending WCAT's decision, the applicant may want to consider making an application to stay the action to avoid incurring unnecessary pre-trial expenses preparing to litigate issues which may end up falling within the exclusive jurisdiction of the *WCA*.

Applications for a stay pending a Section 257 determination are common in cases involving motor vehicle personal injury claims, but are less common in the context of wrongful or constructive dismissal actions.[32] The law with respect to the granting of a stay of proceedings in this context was set out by the B.C. Supreme Court in a motor vehicle case, Hazell v. Toews, [1997] B.C.J. No. 2495 (S.C.). In that case, the Court held that when the issue of whether a claim falls within the WCA is raised on "any conceivable grounds", the action should be stayed and referred to the Board (now WorkSafeBC) for a determination.[33]

There is no guarantee that a stay will be granted simply because a Section 257 determination is pending at WCAT. This is especially the case where an application for a stay is made where the trial date has not been set, or where it is more than six months away (and thus, within WCAT's expected decision-making time period). In Lin and R & J Honeyland Inc. v. Tham, 2007 BCSC 1862 ("Tham") the defendant asked for an order that the action be stayed pending a decision by WCAT on its Section 257 application. At the time the application was heard, the trial was approximately seven months away. The Court declined to grant a stay on the basis that the trial was more than six months away and it appeared that WCAT would make its determination in advance of the trial date.[34] It commented that granting a stay seven months in advance would mean that the trial would be delayed even if the WCAT Certificate was in the plaintiff's favour well in advance of the set trial date. However, it allowed the defendant to amend its statement of defence (to plead that the plaintiff's claim was statute barred), and held that the defendant could renew its application for a stay or an adjournment of the trial if WCAT had not made a decision by June 2, 2008 (approximately one month before the start of the trial).

It is not only defendants in civil actions which may want to consider applying for a stay pending WCAT's determinations, as seen in the case of *Dhanoa v. Trenholme*, 2009 BCSC 1787. The defendant in this case appealed a Master's decision to grant only partial costs on the basis that the defendant had taken unnecessary steps in proceeding with the civil action in light of the fact that its "primary objective" was to obtain a Section 257 ruling from WCAT. The defendant had made a Section 257 application but continued to prepare for trial in the regular course. Examinations for discovery took place with the parties agreeing that the discoveries would be limited to the issue of liability and the workers' compensation board issues. The plaintiff requested that it not have to pay for the cost of the discovery if the defendant was successful in its WCAT application. The defendant did not agree to this request. Three months later, the Section 257 Certificate was issued in favour of the defendant and the parties applied to dismiss the action and settle the costs issues.

The BC Supreme Court disagreed with the Master. It found that it would be unfair for the plaintiff to actively participate in an ongoing action without asking for a stay, and then after having the action statute-barred, arguing that defendant is not entitled to costs because there should have been

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32 *Hommel v. Cooke et al*, 2005 BCSC 658. See also *Chau v. Crawford*, 2015 BCSC 1756 for an example of a stay granted upon the application by a strata corporation seeking the staying of third party proceedings.

33 *Garritty v Richmond Kinsmen Home Support Society*, 2016 BCSC 2204 at paras. 31-32, [*Garritty*].

34 *Lin and R & J Honeyland Inc. v. Tham*, 2007 BCSC 1862 at para. 18.

a stay.[35] The Court noted that if the plaintiff does not want the defendant to incur costs while waiting for WCAT to make its determinations, then the plaintiff should make an application for a stay.[36] The court found that in this case, it was not clear whether the section 10 defence would be successful, and so counsel for the defendant had a duty to properly prepare for trial in the event that it was unsuccessful with respect to the Section 257 Certificate.[37] It decided that the steps taken by the defendant were legitimate and so the defendant was entitled to costs for all items requested.

Interestingly, the Court commented that in the alternative to seeking a stay, if steps taken in a proceeding after a party raises a section 10 defence are "unfair", the court can deny costs to the successful party. The Court did not elaborate on what is meant by "unfair", noting that a blanket rule is unnecessary in light of the court's discretion.[38] This is something to keep in mind when faced with counsel who have unreasonably refused to adjourn trial dates, for example, or who have taken other unreasonable positions pre-trial pending a Section 257 determination by WCAT.

A stay application can also be made *after* judgment has been rendered in a civil action. This arose in the case of *Davidson v. Kokanee Park Marine*, 2001 BCSC 940, where the defendants sought a stay of execution following a trial in which a jury awarded the plaintiff damages of $826,000. This case was complicated by the fact that initially, the defendants had taken a position before the Board that the plaintiff was <u>not</u> a "worker" and so was disentitled to benefits. Several months later, the plaintiff commenced a civil action claiming damages in negligence and under the *Occupiers Liability Act*. The defendants then pled that the action was statute barred by section 10 of the *WCA*, and that they wanted to resubmit to the Board the question of whether the Board had jurisdiction over the plaintiff's claims. The defendants asked for a stay of execution pending another decision by the Board as to whether the plaintiff was a "worker" at the time of the incident and whether he was injured in the course of his employment.

Humphries J. remarked that it would be "foolish" to put the parties through the expense of further litigation over the recovery of a judgment if the plaintiff had no standing to bring the action.[39] Execution of the judgment was stayed for approximately five months from the date of Humphries J.'s decision, until December 7, 2001. The Board issued a Certificate on December 6, 2001, finding that the plaintiff was a "worker". As a result, in March 2003, the defendants made another application to vacate the orders, declare the action without jurisdiction and to enforce the statutory bar under section 10 of the WCA. The plaintiff applied to lift the stay of execution. The Court held that the Certificate deprived it of jurisdiction over the action, and as a result, the action was a "nullity" and the judgment obtained was unenforceable.[40] The Court ordered that the execution of the judgment be stayed until all challenges to the certificate were complete.

Garritty v Richmond Kinsmen Home Support Society, 2016 BCSC 2204 ("*Garritty*") is a recent case in which the defendant successfully applied for an interim stay of the action pending WCAT's Section 257 determination. It should be looked at carefully by employers who are considering whether a stay is appropriate and/or likely to be granted. In this case, the plaintiff alleged that the

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35 *Dhanoa v. Trenholme*, 2009 BCSC 1787 at para. 10, [*Dhanoa*]

36 *Dhanoa, supra* note 35 at para. 11.

37 *Dhanoa, supra* note 35 at para. 20.

38 *Dhanoa, supra* note 35 at para. 21.

39 *Davidson v. Kokanee Park Marine*, 2001 BCSC 940 at para. 25.

40 *Davidson v. Kokanee Park Marine Ltd.*, 2003 BCSC 1209 at para. 24.

defendant condoned bullying and harassment by a colleague in the workplace and created a hostile work environment. She claimed to have suffered physical and emotional stress as a result. She sought damages for breach of contract, aggravated damages for mental distress, and punitive damages. In its Response to Civil Claim, the defendant argued that all claims made by the plaintiff for damages arising out of any personal injuries allegedly suffered during her employment, and as a result, any breach of duty of care, harassment, or any other act or omission by the defendant, were barred by sections 5.1 and 10 of the *WCA*. The defendant also filed a Jurisdictional Response disputing the court's jurisdiction over the defendant. In August 2016, the defendant filed a Section 257 application with WCAT.

In October 2016, plaintiff's counsel took a number of steps to promptly set the matter down for trial. Counsel served an appointment to examine the defendant's representative that same month, and filed a Notice of Trial setting down a four day trial commencing on August 21, 2017.

In November 2016, counsel for the defendant then applied for a stay of the action pending WCAT's section 257 determination. With reference to the three-part test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the defendant relied on the following points in its Notice of Application:

(a) the plaintiff's pleadings clearly set out allegations which occurred in the course of employment, and fell within the bullying and harassment provisions of the *WCA*;

(b) if the action proceeded without the Section 257 determination, the parties would expend unnecessary time and resources in pre-trial preparation;

(c) since the trial date was ten months away, delaying the action would still allow for sufficient time to reschedule examinations for discovery;

(d) if a stay was not granted, and WCAT later decided that part of the action is within the exclusive jurisdiction of the board, then the plaintiff's pleadings would have to be amended, which would impact on the scope of examinations for discovery;

(e) if a stay was not granted, and WCAT later decided that all of the action is within the exclusive jurisdiction of the board, then the plaintiff's pleadings would have to be struck and any examinations for discovery would have been pointless and have resulted in unnecessary expenses; and

(f) a stay would prevent a multiplicity of proceedings.

In the Application Response, the plaintiff claimed that there was no basis for WCAT to determine that any portion of the constructive dismissal claim was barred by virtue of section 10 of the *WCA*.

The Court held that WCAT had the exclusive jurisdiction to determine whether the plaintiff's claim, or any portion of it, was statute-barred. The Court concluded that there were "conceivable grounds" for arguing that at least part of Ms. Garritty's claim fell within the WCA, and that it was further conceivable that WCAT might decide that her claim of workplace bullying and harassment fell within WorkSafeBC's jurisdiction.[41]

The Court also commented that if it were to refuse a stay, the defendant would likely incur costs relating to examinations for discovery and pre-trial preparation that would be wasted if WCAT then determined that the plaintiff's claim, in whole or in part, falls within the WorkSafeBC's

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41 *Garritty, supra* note 33 at para. 37.

jurisdiction. The Court found that the inconvenience to the plaintiff should be minimal since WCAT normally makes a decision within six months and the trial date was set for August 21, 2017.

The *Garritty* decision shows an increased willingness (compared to *Tham*, for example) to grant a stay where doing so will avoid duplicitous proceedings and conserve judicial resources.

In light of *Garritty*, employers seeking a stay pending a Section 257 determination should make sure that they can point to grounds on which the plaintiff's claim, at least in part, might fall within the exclusive jurisdiction of the *WCA*. Employers will also need to explain how they will be prejudiced if such a stay is not granted. Prejudice will be greater if the employer has not yet incurred significant pre-trial expenses such as those associated with examinations for discovery. Finally, employers must also be able to show that the employee will not be prejudiced by a stay, which argument will be strengthened if there is still ample time prior to the trial to allow for a rescheduling of examination for discovery dates and any other pre-trial processes.

VII. Conclusion

The *WCA* does not completely immunize employers from liability for workplace bullying and harassment. However, with employees now able to make claims for compensation to WorkSafeBC as a result of "work-related stressors", including bullying and harassment, it is likely that courts will see more jurisdictional arguments in wrongful and constructive dismissal actions. While there remains uncertainty around the extent that courts will go in barring workplace bullying and harassment claims from being litigated pursuant to section 10 of the *WCA*, a Section 257 application should be seriously considered in any employment litigation involving claims of mental stress, mental disorder, and/or psychological injury. The determinations from WCAT may result in the civil action being barred against the defendant, or at least result in a narrowing of the issues.

If the only remedy sought by the plaintiff employee in a civil action is damages as a result of the employer's tortious conduct, which has triggered a mental disorder, a Section 257 Certificate is likely to result in the discontinuance or dismissal of the civil action. However, if the plaintiff is also seeking damages for breach of contract (including aggravated and punitive damages relating to a breach of contract), then while a Section 257 Certificate may narrow the issues in the civil action, it may or may not prevent the plaintiff from litigating his or her breach of contract claim.