



Failure to Accommodate Under Human Rights Code Can Result in Serious Consequences

It is trite law that employers have the duty to accommodate the Ontario Human Rights Code (“Code”) related needs of employees to the point of undue hardship. While reinstatement is a remedy available to employees under the Code, it is one that is rarely imposed by the Tribunal. However, the recent case of *Hamilton-Wentworth District School Board v. Fair* (2014 ONSC 2411) is a reminder that, in the appropriate circumstances, the Tribunal has the broad remedial jurisdiction to order anything that is necessary to ensure compliance with the Code, including reinstatement.

Ms. Fair worked for the Hamilton-Wentworth School Board for approximately 16 years and, at the time of her termination, she held the role of Supervisor, Regulated Substances, Asbestos. As a result of work-related stress, she was diagnosed with anxiety. She remained away from the workplace from 2001 until 2004 when it was determined that she was able to work again. However, in 2003, when Ms. Fair had requested an accommodated position from the School Board, they refused to discuss an accommodated return to work and failed to offer her alternative, suitable work, despite the fact that such a position did exist. In 2004, she was terminated because the Board took the position that she could not be accommodated without undue hardship.

Ms. Fair successfully brought a complaint before the Tribunal alleging discrimination on the basis of disability and further alleging that the School Board failed to accommodate her. The Vice-Chair left it in the hands of the parties to agree on remedy. The parties were unable to agree and therefore the matter of remedy came before the Tribunal. The Tribunal awarded that the School Board:

1. Reinstatement Ms. Fair to suitable alternative employment and adjust her length of seniority accordingly;
2. Pay back wages to Ms. Fair from June 2003 until the date of reinstatement;
3. Reinstatement Ms. Fair’s years of service with OMERS and pay the employer pension contributions and additional costs associated with the buy-back of service;
4. Remit retroactive payment to the Canada Pension Plan, or compensate Ms. Fair for any losses arising from the lost years of CPP contributions;
5. Pay Ms. Fair for the out-of-pocket medical and dental expenses which would have been covered by the School Board’s benefit plans;
6. Calculate the additional tax consequences flowing from the money owing as a result of the Tribunal’s decision and compensate Ms. Fair for the additional cost;
7. Pay Ms. Fair \$30,000.00 as compensation for the injury to her dignity, feelings and self-respect; and
8. Pay pre and post-judgment interest.

The Tribunal’s decision, including the remedy award, was recently upheld by the Superior Court on judicial review. The Fair case reiterates the importance of employers taking the duty to accommodate under the Code seriously and also reinforces the breadth of the Tribunal’s remedial jurisdiction.

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Kevin Robinson will be speaking at Osgoode Hall on workplace investigations.

