

Ontario, Canada Appeal Court Affirms Finding That Midwives Were Underpaid Due To Gender Discrimination



In [*Ontario \(Health\) v. Association of Ontario Midwives*](#), the Court of Appeal for Ontario (OCA) was satisfied with the reasonableness of the Human Rights Tribunal of Ontario's (HRTO) finding that the Ministry of Health (MOH) subjected midwives to pay discrimination on the basis of gender, and of the HRTO's remedy in the matter. Accordingly, the OCA dismissed the MOH's appeal of the [decision of the Divisional Court](#), which denied an application for judicial review of the HRTO's [liability](#) and [remedy](#) decisions.

As [previously discussed](#), the HRTO found in favor of the Association of Ontario Midwives (AOM) that the MOH unlawfully underpaid midwives due to gender discrimination, and ordered the MOH to (i) implement a 20% wage adjustment for eligible midwives retroactively to April 1, 2011; and (ii) provide damages of \$7,500.00 to each eligible midwife for injury to dignity, feelings, and self-respect.

With the OCA's finding that both the HRTO's liability and remedy decisions were justified, employers and compensation-setters are reminded of their duty to ensure that their compensation systems and workplace policies and practices comply with Ontario's *Human Rights Code* (Code). This duty is especially important for employers of workers who are sex-segregated or predominantly female, as such workers are particularly vulnerable to discrimination in their compensation.

Background

Midwives in Ontario are almost exclusively women. The province's midwifery program is funded by the MOH. In 2013, after compensation negotiations between the MOH and the AOM failed, the AOM brought a human rights complaint on behalf of 800 midwives alleging systemic gender discrimination. The complaint challenged the MOH's compensation practices back to 1994, when Ontario midwives were regulated, and sought compensation back to 1997.

Liability Decision

The HRTO divided its decision between the years 1993 to 2005, and 2005 to 2013. It found that in 1993 the parties agreed to equitable compensation principles ("1993 Principles") so that the midwives' compensation would not be impacted by harmful

assumptions and stereotypes about the value of women's work. The HRTO concluded that the parties maintained a connection to those principles until 2005 and did not find sufficient evidence of discrimination between 1994 and 2005.

The HRTO found that after 2005, the MOH gradually withdrew from the 1993 Principles and midwives experienced systematic gender discrimination, which perpetuated the historic disadvantage they experienced as sex-segregated workers. A significant compensation gap existed between midwives and family physicians working in Community Health Centres (CHC), used by the HRTO as a male comparator.

Remedy Decision

The HRTO ordered a compensation adjustment of 20% back to 2011, and damages of \$7,500 to each eligible midwife for injury to dignity, feelings, and self-respect.

ODC Decision

The ODC denied an application for judicial review of the HRTO decisions.

The MOH appealed the ODC's decision to the OCA.

OCA Decision

Upon considering the appeal of the ODC's decision, the OCA asked the following: (i) Did the ODC apply the correct standard of review when it applied the reasonableness standard in its review of the HRTO's decision? and (ii) Were the HRTO's findings on liability and remedy, as a whole, reasonable?

The Standard of Review Remains Reasonableness

The OCA confirmed that after the Supreme Court of Canada's decision in [Canada \(Minister of Citizenship and Immigration\) v. Vavilov](#), the standard of review of administrative decisions such as the HRTO's decisions remains reasonableness. In essence, *Vavilov* did not overrule [Shaw v. Phipps](#), which adopted a reasonableness standard of review for determinations of fact, the interpretation and application of human rights law, and remedial decisions. Accordingly, the OCA decided that the ODC applied the correct standard of reasonableness when it reviewed the HRTO's liability and remedy decisions.

Liability Decision

The OCA decided that the liability decision was reasonable, *i.e.*, justified in relation to its factual and legal constraints, transparent, and intelligible. The OCA also analyzed the key issues raised by the MOH and made the following findings:

- *There was a rational chain of analysis*

The OCA found that the HRTO articulated the well-established three-step test a complainant must meet to demonstrate a *prima facie* case of gender discrimination set out in [Moore v. British Columbia \(Education\)](#), *i.e.*, a claimant must show that they are a member of a group protected by the Code; they have been subjected to adverse treatment; and their gender was a factor in the adverse treatment.

The HRTO concluded that the test was met. The midwives were almost exclusively women and members of a group protected from discrimination by the Code; they experienced adverse treatment starting in 2005 when the MOH abandoned the 1993 Principles; and, for a number of reasons, gender was a factor in the adverse treatment the midwives experienced and the compensation gap that developed between them and the CHC

physicians since 2005, including that the MOH abandoned the 1993 Principles after receiving the jointly commissioned Courtyard Report, which confirmed the Principles' continued relevance.

The OCA concluded that the HRT0's reasons, read holistically, revealed "a logical chain of analysis grounded in the record and the relevant jurisprudence" in support of its conclusion of discrimination.

- *It was reasonable for the HRT0 to find that gender was a factor in the compensation of midwives*

The OCA decided that it was not unreasonable for the HRT0 to find that gender was a factor in the compensation. The 1993 Principles were connected to or imbued with gender. Furthermore, the evidence before the HRT0 included evidence referencing pay equity and gender, and other evidence from which it could reasonably infer that the 1993 Principles were designed to address the issue of systemic gender discrimination in the compensation of a highly sex-segregated group."

The OCA also concluded that it was open to the HRT0 to find that the Courtyard Report indicates "that gender discrimination may be an operative factor in the compensation of midwives," and it was reasonable to find that the Courtyard Report was "sufficiently compelling for the MOH to realize that the AOM's claim of gender discrimination may have some validity."

- *The HRT0 did not reverse the burden of proof*

The OCA found that the burden of proof was not reversed by the HRT0; it was only the evidential burden that shifted to the MOH (and the MOH did not meet it).

The HRT0 demonstrated that it understood that the AOM held the ultimate onus when it (a) stated that the onus of proving discrimination "lies with the AOM and that the standard of proof is the balance of probabilities"; (b) stated that in a human rights case, "the burden of proof remains on the applicant throughout"; and (c) quoted a decision providing that, "The question to be decided is whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that the discrimination has occurred."

- *The HRT0 reasonably ignored evidence that the MOH argued demonstrated non-discriminatory reasons for the gap in compensation between CHC physicians and midwives*

The OCA decided that the HRT0 did not unreasonably ignore evidence put forth by the MOH to demonstrate non-discriminatory reasons for the gap in compensation. The HRT0 recognized several factors put forward by the MOH; however, it did not accept that gender was not also a factor in the adverse treatment of midwives. Furthermore, the MOH did not point to any expert evidence that could explain the central findings of fact that drove the conclusion of discrimination.

- *The HRT0 reasonably found that CHC physicians remained an appropriate comparator after they became predominantly female*

The OCA concluded that the HRT0 reasonably found that CHC physicians remained an appropriate comparator after they became predominantly female because their pay had been aligned with a male-dominated group. The OCA noted also that the HRT0 correctly recognized that the Code does not prescribe rules to determine the sex of an occupational group or any methodology for developing a compensation model that is Code-compliant.

- *The HRT0 reasonably imposed a positive obligation on the MOH to compare midwives' compensation to that of the CHC physicians*

The OCA found that the ODC correctly addressed the thrust of the MOH's arguments that the HRT0 unreasonably imposed a positive obligation on the MOH to compare midwives' compensation to that of CHC physicians, and that the HRT0's decision to impose this obligation on the MOH was reasonable.

Remedy Decision

The OCA found that the remedy decision was reasonable. It found that the HRT0 did not impose a novel duty on the MOH when it ordered a retroactive wage adjustment. The OCA also found that when the parties asked the HRT0 to determine the remedy, they did not provide evidence from a compensation expert to inform the award. Accordingly, the HRT0 was left to decide the matter on the best available evidence, and concluded that the best evidence of the move away from the 1993 Principles was the Courtyard Report. According to the HRT0, implementing Courtyard would "[bring] the parties as close as possible" to the "place they would have been but for the discrimination."

The OCA observed that the *Code* provides the HRT0 with broad remedial discretion to order remedies that are fair, effective and responsive to the circumstances of a particular case. The OCA concluded that in exercising its discretion, the HRT0 fashioned a remedy based on the evidence that was before it, and the MOH did not point to any legitimate basis for interfering with the HRT0's discretionary remedial decision.

Bottom Line for Employers

Employers with wage inequities in their workplace are encouraged to proactively address them as their failure to do so could result in a substantial liability finding against them. Such employers are also encouraged to monitor and comply with pay equity principles and obligations on a regular basis to help protect themselves from liability.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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