

Ontario Divisional Court Upholds Controversial Award Of The Ontario Human Rights Tribunal



In *Hamilton-Wentworth District School Board v Fair*, the Ontario Divisional Court upheld two noteworthy decisions of the Ontario Human Rights Tribunal. In the Tribunal's first decision, it found that the Hamilton-Wentworth District School Board discriminated against its employee, Sharon Fair, by failing to accommodate her disability-related needs. In its second decision, the Tribunal ordered that Fair be reinstated more than nine years after her employment was terminated and it also awarded her damages of over \$400,000 – one of the largest damages awards made by the Tribunal to date.

These decisions serve as a reminder to Ontario employers about the need to canvass all possible alternatives when faced with a request for accommodation, including reinstatement, and to accommodate employees to the point of undue hardship.

Background

Fair was the "Supervisor, Regulated Substances, Asbestos" with the Board and oversaw asbestos removal projects. Fair's position was the source of significant stress and, as a result, she was diagnosed with an anxiety disorder in 2001. In 2002, after being further diagnosed with depression and post-traumatic stress disorder, Fair commenced long-term disability leave. When her disability benefits ended in 2004, Fair looked to the Board to accommodate her to the point of undue hardship by placing her in a less stressful position. The Board denied that a suitable position existed and it terminated Fair's employment in July 2004.

In response, Fair filed a human rights complaint, which eventually reached the Tribunal in 2008. In 2012, the Tribunal decided that the Board failed to

accommodate Fair when it refused to place her in a suitable, vacant position. In 2013, the Tribunal ordered the Board to reinstate Fair despite the lengthy passage of time and to pay her more than \$400,000 in damages for back pay (including approximately nine years of lost wages, banked sick days, pension and CPP contributions and out-of-pocket medical and dental expenses) as well as \$30,000 for injury to her dignity, feelings and self-respect (which is on the high end of general damages awarded by the Tribunal). Though the Tribunal has the jurisdiction to reinstate employees or order compensation in lieu of reinstatement, this power has rarely been exercised.

The Board brought an application before the Divisional Court for judicial review of the Tribunal's decisions. The Board argued the decisions of the Tribunal should be quashed for a number of reasons, including that the award and reinstatement constituted an unreasonable remedy.

The Divisional Court's Decision

The Divisional Court dismissed the Board's application for judicial review finding that the remedy and reinstatement were "within the range of reasonable expectation", though it acknowledged that the award was uncommon. The Divisional Court further found the Tribunal's broad remedial authority to grant reinstatement was not limited by the passage of time and that the Tribunal's decision was intelligible, transparent and justified. Perhaps frustratingly for employers, the Divisional Court did not lower the award even though some of the delay in the hearing of the application was caused by structural changes at the Tribunal.

Lesson for Employers

While reinstatement orders are fairly common in unionized workplaces, these types of orders are rare in non-unionized settings. In dismissing the application for judicial review, the Divisional Court has potentially paved the way for more reinstatement orders to be made by the Tribunal and by the courts in civil proceedings involving wrongfully terminated employees. As such, Ontario employers should be sure to carefully consider reinstatement or a transfer to an alternate position as a viable option for accommodating employees, regardless of how much time has passed since the employees were actively at work.

In addition, the Divisional Court's endorsement of the Tribunal's damages award casts doubt on the commonly held perception that damages awards on human rights applications will typically be low. Indeed, substantial liability can flow from breaches of the *Human Rights Code*, especially where an applicant is insistent on his right to reinstatement. The Divisional Court's decision also serves as a reminder to employers that awards for injury to dignity, feelings and self-respect are on the rise. As such, it is imperative that employers actively respond to accommodation requests as quickly and effectively as possible.

Finally, employers should not presume that delaying the prosecution of human rights applications will be to their benefit on the basis that the claimant will lose interest. This decision demonstrates that the Tribunal and the courts will not excuse any delay when making an award.

