

# BEWARE A FAILURE TO ACCOMMODATE: EMPLOYEE ORDERED REINSTATED WITH BACK PAY AFTER AN 11.5 YEAR ABSENCE

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Most employers are generally aware that they have a duty to accommodate ill or injured employees to the point of undue hardship. The recent decision of the Ontario Human Rights Tribunal in *Fair v Hamilton-Wentworth District School Board* 2013 HRTO 440 demonstrates just how seriously an employer should treat this obligation.

## background

Sharon Fair had been employed by the School Board as the Supervisor, Regulated Substances, Asbestos when she went off work in October, 2001 for a generalized anxiety disorder. She was also ultimately diagnosed with depression and post-traumatic stress disorder which eventually put her on long-term disability in March, 2002. In April, 2004 after two years on LTD, Fair was assessed as capable of re-employment but not in her original position. The School Board took the position that there was no suitable position available for Fair in light of her limitations and accordingly terminated her employment in July, 2004.

Fair filed a complaint of discrimination with the Ontario Human Rights Commission in November 2004. As was its wont, the Commission had not fully dealt with the complaint when the current Human Rights Code amendments came into effect, permitting Fair to make a transitional application respecting the same subject-matter directly to the Tribunal in 2009.

In its decision on the merits of Fair's complaint issued in 2012 (2012 HRTO 350), the Tribunal held that the School Board had breached its duty to accommodate by failing "to actively, promptly and diligently" canvass possible solutions to Fair's need for accommodation, including reinstatement in alternative positions. The termination of her employment constituted unlawful discrimination.

## remedies

When the parties were unable to agree on the appropriate remedy, the matter came back before the Tribunal which last month ordered the following:

1. reinstatement in a suitable position with a reasonable period (up to 6 months) of training;

2. payment of lost wages from June 26, 2003 (the date the Tribunal found a suitable position was first available but not offered to Fair) until the date of reinstatement (less employment income received and non-repayable benefits);
3. recognition of service under the Ontario Municipal Employees Retirement System (OMERS) and payment of the employer contributions and additional costs associated with the buy-back of service;
4. remittance of retroactive payments to the Canada Pension Plan (or compensation to Fair for any losses arising from lost CPP pension contributions);
5. payment of Fair's out-of-pocket medical and dental expenses since her benefits were terminated in August, 2004;
6. compensation for the tax consequences to Fair of receiving a lump sum payment, rather than having earned the income over time;
7. payment to Fair of \$30,000 as compensation for injury to her dignity, feelings and self-respect; and
8. payment of pre-judgment and post-judgment interest.

The Tribunal noted that the remedial objective of human rights legislation is to make the employee "whole". For that reason, reinstatement was held to be the most effective way of righting the wrong. This was particularly so in this case, in the Tribunal's view, because Fair had only been able to find casual and part-time employment since her dismissal by the School Board. Given that the employer in question was a school board, a large employer, it is not difficult to see that reinstatement was a viable remedy. The question is whether it would have been seen to be an appropriate remedy if a much smaller employer had been guilty of discrimination in similar circumstances?

### **what this means for employers**

The important lessons for employers to take away from this decision are (i) treat the duty to accommodate with the utmost seriousness at all times, fully consult with the employee and her medical advisors and carefully and in good faith consider modifications/alternatives, and (ii) understand that the passage of time will not necessarily diminish an employee's right to reinstatement (not to mention significant damages) when she has been discriminated against.

As of this writing it is unclear if the School Board has or will be seeking reconsideration/ judicial review of this decision.

by David Elenbaas

Any member of our [Employment and Labour Relations Group](#) would be pleased to discuss the impact of this decision.

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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