

# ONTARIO COURT OF APPEAL UPHOLDS LANDMARK HUMAN RIGHTS DECISION: REINSTATEMENT WITH FULL BACK PAY AFTER A 14 YEAR ABSENCE

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Back in April 2013, we reported on the decision of the Human Rights Tribunal of Ontario to order the reinstatement of a dismissed employee with full back pay and other significant monetary remedies following what was then an 11.5 year absence. The Tribunal had held that the employer had breached the Ontario Human Rights Code in failing to take reasonable steps to accommodate the employee's disability following a lengthy sick leave: [beware a failure to accommodate: employee ordered reinstated with back pay after an 11.5 year absence](#). The Divisional Court dismissed the employer's application for judicial review in September, 2014.

Last month the Ontario Court of Appeal dismissed the employer's appeal of the Divisional Court's judgment: see *Hamilton-Wentworth District School Board v. Fair* 2016 ONCA 421: [Hamilton-Wentworth District School Board v. Fair, 2016 ONCA 421](#)

In rejecting the employer School Board's appeal, the Court found that the Tribunal's determinations both with respect to the failure to accommodate and the remedy of reinstatement were reasonable. On the failure to accommodate to the point of undue hardship, the Court stated that the Tribunal's decision was "fact-driven and one that it was entitled to make based on the evidence before it". As for the remedy, while noting that reinstatement is rarely used in the human rights context, the Court found that the Tribunal has broad remedial authority under the Code as well as "specialized expertise" that "is accorded a high degree of deference". The passage of several years was found not to be determinative in itself. The decision as to whether reinstatement ought to be ordered is "context-dependent". In this case the employment relationship was not fractured nor had the delay materially affected Fair's capabilities, in the Tribunal's view.

Of particular interest was the Court's comment that in an appropriate case an employer may be obliged to place a disabled employee in a position for which the employee "is qualified but not necessarily the most qualified". It favourably cited a 1991 grievance arbitration decision, noting that the employer's obligation to accommodate under the Code prevailed over the seniority rights of the grievor who was competing for a

vacant position.

Absent a successful application for leave to appeal to the Supreme Court of Canada (there has been no indication as yet by the School Board of such intention), Fair will be reinstated and receive hundreds of thousands of dollars in back pay and interest, along with other material monetary payments, following what is now a 14 year absence.

### **What Employers Should Know**

This decision makes it clear that Ontario courts will give Tribunal decisions great deference. Further, the Tribunal's remedial authority is extremely broad and it includes potential reinstatement where circumstances warrant.,

As the Tribunal said in its original decision, the duty to accommodate should be addressed "actively, promptly and diligently". When assessing a genuine accommodation request, an employer must proceed in good faith and consider all reasonable steps including modifications to the employee's position (or other conditions of employment depending on the nature of the request) or looking for alternative jobs if the original position cannot be modified without undue hardship. This is a serious and sometimes tricky business and ought to be treated as such. It is a process that usually involves significant consultation and certainly detailed documentation. While the delay in the Fair case was anomalous, depending on the complexity of the situation an employer should not hesitate to seek input from its legal advisors or risk exposure to significant liability.

### **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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