

Ontario Court of Appeal confirms reasonableness of Human Rights Tribunal's reinstatement order where employer failed in its duty to accommodate employee's mental health disability

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In a decision rendered on May 31, 2016, the Ontario Court of Appeal dismissed the School Board's appeal in [Hamilton-Wentworth District School Board v. Fair](#), upholding the decisions of the Human Rights Tribunal ("Tribunal") and of the Divisional Court on judicial review. In doing so, the Court of Appeal confirmed that it was reasonable for the Tribunal to order reinstatement despite the fact that the employee had been out of the workplace for 12 years when the Tribunal issued its remedial order.

Readers of Focus will recall that the issues in this case arose when Ms. Fair, who had been employed in the position of Supervisor, Regulated Substances, Asbestos, went on an approved medical leave of absence from her employment with the School Board in the fall of 2001 (see [Ontario Divisional Court upholds uncommon remedy of reinstatement in human rights case after over 12-year absence from the workplace](#)). The medical leave was necessitated as a result of her having developed a generalized anxiety disorder in response to the highly stressful nature of her job and her fear that, in making a mistake about asbestos removal, she could cause personal injury to others and could be held personally liable for breach of the *Occupational Health and Safety Act*.

When Ms. Fair indicated to the School Board that she wanted to return to work in April of 2003, the School Board sought clarification about her restrictions and limitations first from her treating physician and later from a psychiatrist retained by the Board. Ultimately, however, in July of 2004, two months after receiving an opinion from the independent psychiatrist which confirmed that Ms. Fair was "capable of gainful employment" in a position that did not entail "responsibility for health and safety issues, nor any duties which would leave her at risk for personal liability", the School Board terminated her employment.

The Tribunal upheld Ms. Fair's human rights application finding that the School Board had "failed to actively, promptly, and diligently canvas possible solutions to [Ms. Fair's] need for accommodation." This finding was based, in large part, on the Tribunal's conclusion that the School Board could have accommodated Ms. Fair without undue hardship by placing her in one of two full-time positions that were available during the relevant period, for which she was qualified and which would have met her medical restrictions. In a subsequent remedial award, issued on March 14, 2013, the Tribunal ordered that Ms. Fair be reinstated to a suitable position with the School Board, for which she had the basic general qualifications, which would be equivalent to the level she had when last employed by the School Board and which met her medical restrictions, as

soon as reasonably possible.

The School Board sought judicial review of the Tribunal's decision in the Divisional Court. That application for judicial review was dismissed on the grounds that the Tribunal's findings with respect to both liability and remedy were reasonable. While the Divisional Court acknowledged that reinstatement was uncommon in human rights litigation, it nevertheless noted that it was not an unusual remedy in the labour relations context and highlighted the fact that s. 45.2(1) of the *Human Rights Code* gives the Tribunal broad remedial authority to order remedies that it considers necessary to ensure compliance with the *Code*.

The Ontario Court of Appeal confirmed that the appropriate standard of review in a case involving an employer's duty to accommodate an employee with a disability is reasonableness. The Court considered each of the grounds of appeal raised by the School Board and dismissed them all, finding that the Tribunal's conclusion in respect of each of the issues before it was reasonable. The Court of Appeal expressed the view that the School Board was, in essence, asking the Court to "retry the findings of fact that were made by the Tribunal, in the exercise of its specialized knowledge and discretion, and that were amply supported by the evidence." Ultimately the Court found that, "the Tribunal's conclusion that the School Board failed to accommodate Ms. Fair's disability was fact-driven and one that it was entitled to make based on the evidence before it."

In response to the School Board's attempt to challenge the reasonableness of the Tribunal's and the Divisional Court's treatment of the remedial issue, and the appropriateness of reinstatement in all of the circumstances, the Court of Appeal held as follows:

The passage of years is not, by itself, determinative of whether reinstatement is an appropriate remedy. Rather, the decision as to whether to order reinstatement is context-dependent. In the present case, the Tribunal found none of the barriers to reinstatement that foreclosed reinstatement in the *Ford Motor* case. Specifically, Ms. Fair's employment relationship with the School Board was not fractured and the passage of time had not materially affected her capabilities.

The Court of Appeal's confirmation of the Tribunal's decision in this case, particularly with respect to the appropriateness of reinstatement, should serve as a caution to employers faced with a decision as to whether or not an employee seeking to return to work following a period of disability can be accommodated. This case is likely to be cited as a precedent in terms of what is required to fulfil an employer's duty to accommodate and the appropriateness of reinstatement as a remedy for breach of the *Code*, particularly for large, public-sector employers.

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