



## Working Knowledge: The Shibley Righton Education eBulletin

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### Ontario Divisional Court Upholds Human Rights Tribunal's \$420,000 Damages Award

In its decision titled *Hamilton-Wentworth District School Board v. Fair*, 2014 ONSC 2411 (CanLII), released on August 29, 2014, the Ontario Divisional Court upheld the Ontario Human Rights Tribunal's findings that the Hamilton-Wentworth District School Board (the "Board") discriminated against an employee by failing to accommodate her disability. Of significant import was that the Divisional Court also upheld the inordinately large \$420,000 award for lost wages and reinstatement of the non-union employee almost *nine years* after the initial termination.

By way of background, Sharon Fair ("Fair") was initially hired in 1998 by the Board as a technician; at the time of her termination she was a supervisor of regulated substances and oversaw asbestos removal projects being carried out by the Board. In 2001, Fair developed anxiety disorder and went on disability leave. While on disability leave, Fair developed depression and post-traumatic stress disorder, caused by the perceived threat of her being personally liable for a violation of the *Occupational Health and Safety Act*.

After approximately two years off from work, Fair's disability benefits ended in April 2004. At this time Fair asked the Board to be placed in a less stressful position for the purposes of accommodation. The Board denied that an alternative position existed; Fair then filed a complaint with the Ontario Human Rights Commission. As a result of the transition provisions, Fair initiated new proceedings before the Human Rights Tribunal in 2009 and, for the first time sought reinstatement despite the fact that it had been approximately five years since the termination and nearly eight years since she had actively worked for the Board.

The Human Rights hearing ended with a finding that the Board had two positions in which Fair could have been placed as early as June 2003 that would have accommodated her disabilities. Following the decision, submissions were made regarding the appropriate remedy; the Board further requested that Vice-Chair recuse herself from the remedy portion of the hearing for several reasons including that the Vice-Chair: 1) made statements that created a reasonable apprehension of bias; 2) the Vice-Chair permitted Fair to file 27 additional books of documents as evidence instead of requiring Fair to call expert witnesses; and 3) the Vice-Chair failed to interpret the Tribunal's rules correctly. The Vice-Chair refused to recuse herself and awarded Fair \$420,000 in compensation for the losses she suffered and further reinstated her to a new position within the Board.

The Board brought an application before the Divisional Court to review the Tribunal's decision arguing, among other things, that the award and the reinstatement constituted an unreasonable remedy.

The Divisional Court dismissed the Board's application and upheld the Tribunal's findings regarding discrimination. Of particular import was that the documentary evidence relied on by the Vice-Chair tended to demonstrate that the Board never had any intention of accommodating Fair. One example of this discussed by the Divisional Court was evidence that, as early as March 2002, the Board had told Fair's insurer that all non-union jobs were

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“demanding”. The Divisional Court further found that the Vice-Chair’s findings could not be faulted; the Court stated that it would be difficult to conclude that Fair was accommodated to the point of undue hardship when the Board refused to assign her to a vacant position that would have accommodated her disability.

In addition, the Divisional Court held that the remedy issued by the Vice-Chair, including both the \$400,000 award in damages and the reinstatement were “within the range of reasonable expectation,” despite the fact that reinstatement is “unusual.” The Divisional Court specifically declined to lower the damages award on the basis that the delay was largely outside of Fair’s control.

In our view, this decision is significant for several reasons. First, the Court looked at the entirety of the Vice-Chair’s reasons in declining to find that there was a reasonable apprehension of bias as alleged by the Board. In addition to finding that the Vice-Chair had not made any untoward comments, the Court’s decision further confirms that administrative bodies have reasonable control over their own procedures. Although allowing 27 volumes of documents in lieu of expert witnesses may have been unorthodox, the Court did not find fault with the process given that the Board was expressly provided with the opportunity to challenge the admissibility of any of the additional documents.

Second, it is significant to note that in ‘traditional’ wrongful dismissal cases, courts are generally reluctant to award more than 24 months’ pay, absent compelling and extenuating circumstances. There is no right of reinstatement in wrongful dismissal cases; therefore Courts do not award loss of wages, regardless of the time it takes to get to trial. However, in cases that involve allegations of human rights abuses, the Courts will endorse, and can even award, reinstatement. Thus, although reinstatement is a rather “unusual” remedy, especially in non-union circumstances, this could become more prevalent in human rights-related matters in the future.

Finally, several recent decisions, including the above-mentioned *Fair* decision including *Kelly v. University of British Columbia (No. 4)*, 2013 BCHRT 302 (CanLII) in which the British Columbia Human Rights Tribunal awarded the complainant \$385,000 in lost wages, *Garrie v. Janus Joan Inc. (Ontario)*, 2014 HRTO 272 (CanLII) in which the Human Rights Tribunal awarded the complainant \$142,124 in lost income puts to rest any argument that Human Rights awards are trivial or necessarily low. More importantly, these decisions demonstrate the importance that employers act promptly in responding to accommodation requests in order to avoid significant consequences.



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