

DISABILITY MANAGEMENT: KNOW YOUR OBLIGATIONS



Two recent decisions by the Ontario Human Rights Tribunal highlight the consequences employers could face if they fail to accommodate employees with disabilities. **Stuart MacKay** and **Sean Flaherty** explain

THE DUTY of an employer to accommodate an employee with a disability is a well-worn path in human rights jurisprudence; however, many employers struggle with the practical implications that the duty to accommodate poses for the workplace and the competing interests that an employer must balance.

The recent decisions of *Fair v. Hamilton-Wentworth District School Board* and *MacLeod v. The Corporation of the County of Lambton* demonstrate an emerging trend by the Ontario Human Rights Tribunal to implement its full range of remedial powers and award reinstatement as a primary means of restitution in the employment context. This is a remedy that has historically been awarded only sparingly by the tribunal, but there are significant risks that this trend may pose to employers that fail in their duty to accommodate.

Fair v. Hamilton-Wentworth District School Board

The case of *Fair v. Hamilton-Wentworth District School Board* dealt with an employee, Sharon Fair, who could no longer perform the essential duties of her job as a result of the onset of a generalized anxiety disorder related to her employment responsibilities, and her employment was ultimately terminated on July 9, 2004.

In its decision on liability, the tribunal concluded that the respondent failed to actively, promptly and diligently canvass possible solutions to Fair's need for accommodation.

An interesting element in the *Fair* case was the respondent's refusal to accommodate the applicant through assignment to another position. The respondent fell into a fallacy,

common among many employers, that the duty to accommodate applied only to the applicant's prior position. The tribunal noted that there were a number of alternative supervisor positions that were suited for the applicant, but that the respondent simply refused to entertain them. The decision highlights the risks an employer faces when it becomes entrenched in a certain position and fails to keep an open mind with respect to accommodation.

As a remedy, the tribunal ordered that Fair be reinstated to employment in a suitable position with the respondent, including lost wages, appropriate adjustment to her length of seniority, banked sick days, pension contributions and other employment entitlements, if any. The respondent also was ordered to pay compensation for injury to dignity, feelings and self-respect in the amount of \$30,000.

While reinstatement is not necessarily a new remedy in the human rights sphere, it had been awarded by the tribunal rather sparingly, a fact that was observed by the divisional court in judicial review of the tribunal's decision, which the divisional court ultimately affirmed.

The respondent has obtained leave to appeal the division court's dismissal of the application for judicial review to the Ontario Court of Appeal, and that appeal is currently pending.

MacLeod v. The Corporation of the County of Lambton

The decision of *MacLeod v. The Corporation of the County of Lambton* involved the removal of an employee from his position as the manager of Emergency Medical Services [EMS] with the Corporation of the County of Lambton.

The applicant, Ian MacLeod, was hired by the respondent as the EMS manager in 2005, and he functioned rather well in this position from 2005 to late 2007. In late 2007, MacLeod's medical caregivers took him off certain medications used to treat his bipolar disorder, and began therapeutic trials of alternative medications, which allowed some symptoms of his condition to become more prominent.

While reinstatement is not necessarily a new remedy in the human rights sphere, it has been awarded by the tribunal rather sparingly

While the facts are substantially more complex than there is room to sufficiently address in this article, the respondent ultimately conducted an investigation of concerns that it had with MacLeod's conduct, which resulted in the permanent removal of MacLeod from his role as EMS manager.

The tribunal concluded that much of the conduct relied upon by the respondent to remove the applicant from his role as EMS manager was conduct that was related to his bipolar disorder, and that the respondent took no steps whatsoever to consider whether the applicant's conduct might have been disability-related, or whether he could be accommodated in the EMS manager position without undue hardship. In short, the tribunal concluded that the respondent decided never to return the applicant to the EMS manager position that he had held since 2005 because he had exhibited disability-related behaviour.

The tribunal found that there was no undue hardship to the respondent and ultimately ordered that the applicant be reinstated to his position of EMS Manager, including lost wages. The Tribunal also ordered the respondent to pay \$25,000 in damages for injury to dignity, feelings and self-respect.

The tribunal expressly dismissed any notion that the relationships between the applicant and his coworkers was damaged beyond repair, and found that the most appropriate way to remedy the situation was to reinstate the applicant to his former position.

The significance of the *MacLeod* decision is that while an employer is free to investigate conduct issues in the workplace – in fact, it is obligated to do so – the employer

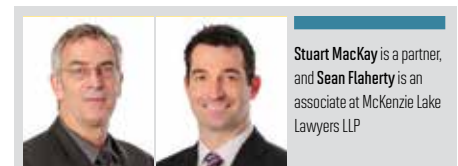
must be cognizant of disability-related issues, and whether such conduct is a product of the disability, which triggers a duty to accommodate. The decision also broke down what sometimes has been a barrier to reinstatement: alleged damaged relationships in a close working environment.

What these cases mean for employers

The decisions of the tribunal in the *Fair* and *MacLeod* cases mark significant warnings to employers of the consequences of their failure to accommodate disabilities. Not only could an employer face significant damage awards, but it also faces the very real prospect of having to reinstate the very employee that it discriminated against.

The lesson to be learned from these two cases is that an employer has a number of duties and obligations to its employees, which can sometimes overlap and/or compete with each other.

In balancing its duties and obligations to its employees, an employer is well served to understand and appreciate any disabilities that its employees may have, and its corresponding obligations under the Human Rights Code. In many cases, the short-term expenditure of resources in obtaining medical, legal or other expert advice early can save the employer the long-term and significant consequences of a breach of its duties under the Human Rights Code. **LRD**



Stuart MacKay is a partner, and Sean Flaherty is an associate at McKenzie Lake Lawyers LLP