



HOW PUBLIC EMPLOYERS PAID THE PRICE FOR FAILING TO ACCOMMODATE

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The nature of the duty of an employer to accommodate an employee with a disability is a well-worn path in human rights jurisprudence; however, many municipal and public employers continue to struggle with the practical implications that the duty to accommodate poses for the workplace, particularly in light of the multiple functions public employers must perform in addition to the competing interests that must be balanced in the workplace.

The recent decisions of *Fair v. Hamilton-Wentworth District School Board (Fair)* and *MacLeod v. The Corporation of the County of Lambton*—both involving public employers, demonstrate an emerging trend by the Ontario Human Rights Tribunal (the Tribunal) to implement its full range of remedial powers and award reinstatement as a primary means of restitution in the employment context, and highlight the significant risks inherent to employers that fail in their duty to accommodate.

I. FAIR V. HAMILTON-WENTWORTH DISTRICT SCHOOL BOARD (HRTO)

The case of *Fair v. Hamilton-Wentworth District School Board* dealt with the accommodation of an employee, the Applicant, Sharon Fair, whom 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 whose 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 the Applicant's need for accommodation.

An interesting element in *Fair* was the Respondent's refusal to accommodate the Applicant through assignment to another position, despite many alternatives for which the Applicant was well suited. The Respondent acted based on a false belief, common among many employers, that the duty to accommodate applied only to the Applicant's prior position. The decision highlights the danger of becoming entrenched in a narrow view of an employer's duty to accommodate instead of keeping an open mind.

In its decision on remedy, the Tribunal ordered that the Applicant be reinstated to employment, with lost wages, appropriate adjustment to her length of seniority, banked sick days, pension contributions and other employment entitlements, if any, to a suitable position with the Respondent. The Respondent was also 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, for which appeal is pending.

II. MACLEOD V. THE CORPORATION OF THE COUNTY OF LAMBTON

The decision of *MacLeod v. The Corporation of the County of Lambton (MacLeod)* 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 well in this position from 2005 to late 2007. In late 2007, the Applicant's medical caregivers took him off certain medications used to treat the Applicant's bipolar disorder, and began therapeutic trials of alternative medications, which allowed some symptoms of the Applicant's condition to become more prominent.

While the facts are substantially more complex than there is room in this article to sufficiently address, the Respondent ultimately conducted an investigation of concerns that it had with the Applicant's conduct, which resulted in the permanent removal of the Applicant 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 was 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 not to reinstate the Applicant to the EMS Manager position that he had held since 2005 because he had exhibited disability-related behaviour. The Tribunal ultimately ordered that the Applicant be reinstated to his position of EMS Manager, with lost wages. The Tribunal also ordered the Respondent to pay damages in the amount of \$25,000 for injury to dignity, feelings, and self-respect. The Tribunal expressly dismissed any notion that the relationships between the Applicant and his coworkers were damaged beyond repair, and found that the most appropriate way to put the Applicant back into the position he would have been, but for the discrimination, 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.

III. CONCLUSION

The decisions of the Tribunal in *Fair* and *MacLeod* mark significant warnings to employers of the consequences of their failure to accommodate. Not only does an employer who fails in its duty to accommodate face significant damage awards, but it also faces the very real prospect of reinstatement of the very employee that it discriminated against. In the case of a public employer, community interest and adverse media attention may also be an unforeseen consequence of a human rights complaint, which may or may not be present in the private sector.

While public employers face the difficult task of balancing a number of obligations and competing interests, often through the use of public funds, a public employer remains an employer just like any other in the eyes of the Tribunal. A public employer is accordingly well served to appreciate and understand its obligations under the Human Rights Code, and to work positively with its employees whom may require accommodation for a disability. 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*.



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