HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Sharon Fair

Applicant

-and-

Hamilton-Wentworth District School Board

Respondent

DECISION ON REMEDY

Adjudicator: Kaye Joachim

Date: March 14, 2013

File Number: TR-0326-09

Citation : 2013 HRTO 440

Indexed as : **Fair v. Hamilton-Wentworth District School Board**

APPEARANCES

Sharon Fair, Applicant	)	Ed Canning, counsel
Hamilton-Wentworth District School Board, Respondent	)	Mark Zega, counsel

Introduction

[1] This is an Application made under s. 53(5) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), dated May 18, 2009. The underlying complaint was filed with the Ontario Human Rights Commission (the "Commission") on November 24, 2004.

[2] In a prior decision, 2012 HRTO 350 ("decision on liability"), I found that the respondent discriminated against the applicant because of disability contrary to ss. 5 and 9 of the *Code*, by failing to accommodate the applicant's disability-related needs from April 2003 and then by terminating her employment on July 9, 2004.

[3] This decision addresses the remedy arising from that discrimination and a jurisdictional challenge. After opening statement, the respondent brought a motion asking that I recuse myself on the basis of a reasonable apprehension of bias. I declined to do so. My reasons for doing so are found at the end of this decision.

[4] The remedial provisions of the *Code* are found in section 45.2:

> 45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
>
> 3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act

[5] For the reasons that follow, I conclude that the applicant's employment should be reinstated with the respondent and she should be financially compensated for all losses arising from the breach of the *Code*.

Factual Findings Made in the Decision on Liability

[6] The applicant was employed by the respondent school board from October 24, 1988 to July 8, 2004. From September 1994, she became a permanent employee in the role of Supervisor, Regulated Substances, Asbestos.

[7] In the fall of 2001, the applicant developed a generalized anxiety disorder. Her disability was a reaction to the highly stressful nature of her job, and her fear that, in making a mistake about asbestos removal, she could be held personally liable for a breach of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended.

[8] The applicant received long-term disability benefits ("LTD") through the Ontario Teachers Insurance Plan ("OTIP") until April 3, 2004, when she was assessed as capable of gainful employment.

[9] From April 2003, the respondent failed to take steps to investigate possible forms of accommodation. From June 2003, the respondent failed to offer the applicant available, alternative work.

[10] On June 26, 2003, an area supervisor in the plant announced that he was leaving effective July 7, 2003. This is a position that could have been offered to the applicant, as she was a qualified area supervisor.

[11] The respondent advertised a position of Staff Development Supervisor on June 26, 2003. This was a non-union supervisory position at the same salary grade as the applicant. Further, it was in the same department as the applicant had been volunteering in during her work-hardening program. The fact that the applicant

appeared to be qualified for the position is demonstrated by the fact that the respondent invited her for an interview.

[12] I will make further factual findings arising from the evidence heard during this stage of the hearing.

Reinstatement

[13] The applicant is seeking reinstatement. The remedial objective of human rights legislation is to make the applicant "whole." In this case reinstatement is an appropriate tool to place the applicant back in the position she would have been in had the discrimination not occurred. Had the respondent properly accommodated her, the applicant would have been returned to full-time employment as an area supervisor or Staff Development Supervisor since June 26, 2003.

[14] I adopt the remedial principles of the Supreme Court of Canada *in McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at paragraph 341:

> It should be noted that the rights of the appellants which have been infringed pertain to their dignity and sense of self-worth and self-esteem as valued members of the community, values which are at the very centre of the Charter. It would be insufficient, in my view, to make any order which does not seek to redress the harm which flows from the violations of this interest. Reinstatement is clearly the most effective way of righting the wrong that has been caused…

[15] Based on the evidence before me, which was not seriously contested, I find that the applicant has searched assiduously for alternative work, although she has only been able to find casual and part-time employment. The loss of full-time employment has affected and will continue to affect her financially going forward until retirement.

[16] I find that, based on a balance of probabilities the applicant would have continued to remain employed with the respondent, had her employment not been terminated, contrary to the *Code*.

[17] The Supreme Court of Canada has confirmed, in the arbitral context, that, "[a]s a general rule, where a grievor's collective agreement rights have been violated, reinstatement of the grievor to her previous position will normally be ordered. Departure from this position should only occur where the arbitration board's findings reflect concerns that the employment relationship is no longer viable," see: *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28, [2004] 1 S.C.R. 727 at para. 56. In some cases, animosity between the parties can impede the potential for a successful reinstatement. This is not a bar in this case. The applicant has testified that she holds no ill will toward the respondent as a whole and believes she could return to work there. The few individuals who were responsible for the decisions leading the termination of her employment are no longer in the employ of the respondent. The respondent is a very large employer with a sophisticated management structure. The reinstatement of the applicant would not cause any hardship.

[18] The respondent opposed the request for reinstatement.

[19] The respondent submitted that my decision on liability found only a procedural breach of the duty to accommodate, not a substantive one. More specifically, the respondent submitted that the evidence did not establish that the applicant could have been accommodated in the available positions I identified, because the available medical evidence indicated that she could not work in *any* position involving liability for health and safety issues. The area supervisor position and the Staff Development position both involved some liability for health and safety. As I found in my earlier decision, any work opportunity exposes the employee to risk of being named as a respondent for violating an employment law and the respondent bore the responsibility to seek clarification for this ambiguity.

[20] The respondent pointed out that the applicant had not demonstrated that she was medically fit to have returned to the available positions identified. I disagree. The Staff Development position was one which the applicant testified she had discussed with her family doctor who agreed it was suitable. With respect to an area supervisor

position, the applicant's own willingness to return to such a position, so long as it did not involve asbestos removal, is strong evidence that she would have been medically cleared to return to that work, had the respondent sought the appropriate medical confirmation. The nature of the applicant's anxiety disorder was related to the dangers associated with asbestos removal. It was her personal phobia of returning to work in her previous position which caused the anxiety disorder. The applicant testified that the work involved in other area supervisor positions was significantly different than her work in asbestos removal and did not cause her anxiety. In my view, this is sufficient evidence that the applicant could medically have returned to work as either an area supervisor or Staff Development Supervisor.

[21] The respondent submitted that it would be unfair to permit the applicant to lie in the weeds over the years and then seek the remedy of reinstatement, precluding the respondent from mitigating its losses. I do not accept this argument. When she filed her application with the Tribunal in 2009, she specifically listed reinstatement as a remedy. Further, the remedy of reinstatement is always an option in human rights cases and the respondent ought to have been aware of that possibility.

[22] The respondent submitted that it would be unfair to order reinstatement in light of the length of time which has passed. The applicant's employment was terminated in July 2004; it is now 2013, approximately eight and a half years later. The delay cannot be attributed to the applicant. She filed a human rights complaint in November 2004, four months after her employment was terminated. The complaint had not been dealt with by the Commission by 2008, and therefore the applicant applied to this Tribunal in May 2009.

[23] The respondent submitted that the applicant could have filed a human rights complaint in June 2003, challenging the failure to give her the position of Staff Development Supervisor, instead of waiting until November 2004. Of course, in June of 2003 the applicant was still actively seeking re-employment with the respondent in an accommodated position. In my view the fact that she continued to participate in good

faith with the employer in seeking an accommodated position does not give rise to a delay that would now preclude her from obtaining a remedy for the respondent's infringement of her rights under the *Code*. The respondent also submitted that the applicant could have applied to the Tribunal as early as 2008. However, the Tribunal Rules at the time encouraged those applicants with more complex cases to wait until after January 2009. Indeed, it would have been entirely speculative in 2008 whether the applicant's complaint might have been resolved more quickly by remaining in the Commission process or transferring her complaint to the new Tribunal process by way of a fresh application. There is nothing in the timing of this decision that could give rise to an argument of delay on the part of the applicant.

[24] The delay in processing the application since May 2009 has not been unreasonable, in light of the complexity of the issues.

[25] I find that the passage of time, in and of itself, is not sufficiently prejudicial to the respondent to justify refusing reinstatement.

[26] The most significant impact of the delay relates to the erosion of the applicant's skills over the intervening years. However, the applicant's assiduous efforts to find alternative employment, and the casual and part-time employment she has engaged in, indicate that she is still capable of returning to full-time employment.

[27] I conclude that the applicant should be reinstated (with appropriate adjustment to her length of seniority, banked sick days and other employment entitlements, if any) to a suitable position with the respondent as soon as reasonably possible. A suitable position is one which is at or equivalent to the PASS level 6, which is the level she was at when last employed with the respondent. The only medical restriction is that the position should not involve exposure to personal liability for health and safety similar to the potential liability caused by working with asbestos. The applicant should possess the basic general qualifications for the position, assuming a training period of up to six months.

[28] The respondent shall provide a reasonable period (up to six months) of training, as required to prepare the applicant for the position.

Financial Compensation for Loss Arising out of the Infringement

Lost Wages

[29] In *Airport Taxicab (Malton) Assn. v. Piazza* (1989), 10 CHRR D/6347 (Ont. C.A.) the Ontario Court of Appeal stated:

> The purpose of compensation is to restore a complainant as far as is reasonably possible to the position that the complainant would have been in had the discriminatory act not occurred.

[30] In this case the loss arising out of the infringement includes the full-time wages the applicant would have earned from June 26, 2003 (the date the Staff Development Supervisor position was posted), to the date of reinstatement, less any income and non-repayable benefits she received.

[31] There are numerous human rights cases awarding full compensation for the entire period of unemployment or underemployment resulting from a discriminatory termination. In *McKee v. Hayes-Dana Inc.* (1992), 17 CHRR D/79 (Ont. Bd. Inq.), a case in which a respondent had breached the *Code* in terminating employment, the Tribunal ordered a respondent to compensate a claimant for lost wages and benefits from age 57 to the date of his 65th birthday.

[32] The applicant submitted a calculation showing the annual salary scale of PASS Level 6 employees, less wages earned, showing a total wage loss from June 26, 2003 to 2012 as $419,283.89. The respondent did not dispute the reasonableness of this method of calculating wage loss, although it disagreed with the length of time for which compensation was claimed. I accept that this is a suitable formula for determining wage loss. The applicant noted that monies from employment insurance and OTIP were not deducted from those figures, as they may need to be repaid. I leave it to the parties to

determine the amount of repayment to employment insurance (including tuition repayment of a skills development program) and OTIP, if any, and make adjustments accordingly. The parties will need to calculate the final figures to the date of reinstatement.

Duty to Mitigate

[33] In determining the applicant's wage loss, the Tribunal must consider the applicant's duty to mitigate. However, the onus to prove that the applicant failed to take reasonable steps to mitigate her loss lies on the respondent (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324).

[34] The applicant submitted detailed evidence of her assiduous attempts to find employment. She continued to look for full-time employment after accepting part-time employment. I find that the applicant took reasonable steps to mitigate her losses.

Pension Adjustments

[35] Had the applicant remained continuously employed with the respondent, she would have those years of service credited to her under the Ontario Municipal Employees Retirement System ("OMERS"), and the respondent would have made annual contributions on her behalf. She would have been obliged to make contributions as well.

[36] The respondent shall take steps to have the applicant's years of service with OMERS reinstated, and make the employer pension contributions they would have made, including any additional costs associated with the buy-back of service with OMERS. The applicant is responsible for the employee contributions.

CPP adjustments

[37] The respondent shall remit retroactive payments to the Canada Pension Plan, or,

if that is not permissible, shall compensate the applicant for any losses arising from the loss of CPP pension contributions.

Health Benefits

[38] The respondent shall compensate the applicant for out-of-pocket medical/dental expenses incurred since her benefits were terminated by her employer in August 2004, in accordance with the benefit plans in place at that time.

Insurance Benefits

[39] The applicant seeks to be compensated for the loss of the spousal life insurance plan which ended when her employment ended. The applicant's spouse has since developed serious health issues which may affect the premium of spousal life insurance when she is reinstated. In my view, this loss is too speculative to be calculated. Further, the applicant did not mitigate this loss by purchasing insurance after her employment was terminated. The applicant did not demonstrate that the family unit was financially incapable of mitigating this loss.

Tax Consequences

[40] The applicant seeks compensation for the loss which will arise from receiving the above amounts in a lump sum, rather than having been paid out in accordance with an ongoing employment relationship. The respondent is ordered to calculate those tax consequences and compensate the applicant accordingly.

Financial Compensation for Injury to Dignity, Feelings and Self-Respect

[41] The applicant sought $50,000 for compensation for the injury to her dignity, feelings and self-respect.

[42] In the case of *ADGA Group Consultants Inc. v. Lane*, 91 O.R. (3d) 649, 2008

CanLII 39605 (ON S.C.D.C.), the Divisional Court confirmed that an award to compensate for the "experience of victimization" is predicated upon a number of considerations, including: the impact of the infringement; the duration, frequency and intensity of the offensive conduct; the vulnerability of the complainant; the objections to the offensive conduct; and knowledge that the conduct was unwelcome. The principles discussed *in Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 at paras. 52-54, have also been frequently applied in determining an appropriate award for compensation for injury to dignity, feelings and self-respect:

> I turn now to the relevant factors in determining the damages in a particular case. The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 at para. 16 (CanLII).
>
> The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at paras. 34-38.

[43] The applicant set out her feelings of victimization and vulnerability in an email sent to the respondent disability management co-ordinator while she was seeking to return to work: "This entire experience has been humiliating, degrading and very hurtful." The applicant's frustration to the respondent's evident reluctance to accommodate her was apparent and understandable. The failure to accommodate

carried on from April 2003 until July 2004. The respondent caused additional hardship to the applicant by submitting an inaccurate Record of Employment, indicating that the applicant had quit. This was false information which led to a delay in the payment of unemployment insurance benefits. The applicant also testified about the distress caused by the loss of employment and the long process of seeking alternative employment and the hardship posed by the resulting financial stresses. In the circumstances, I find that an award of $30,000 as compensation for the injury to her dignity, feelings and self-respect is appropriate and consistent with the jurisprudence.

Interest

[44] The respondent shall pay to the applicant prejudgement interest on all damages from the date of the original complaint to the date of the decision, pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[45] The respondent shall pay to the applicant post-judgement interest on all amounts from the date of this decision, pursuant to the provisions of the *Courts of Justice Act*.

Reasonable Apprehension Bias

[46] After opening statements the respondent made a motion asking me to recuse myself on the basis of a reasonable apprehension of bias based on comments I made during opening statements. The following comments indicated to the respondent that I did not have an open mind on the requested remedies, especially since reinstatement was so highly contested. First, I did not distance myself from the applicant's comments to the effect that the Tribunal's decisions with respect to remedy had been inadequate in the past and essentially gave respondents a licence to discriminate. Second, I cautioned the respondents that the lack of available positions would not be accepted as a basis for not reinstating the applicant promptly, if I determined that reinstatement were an appropriate remedy. Importantly, but inaccurately, the respondents allege my caution included a reference to "when" rather than "if" reinstatement was found to be an appropriate remedy. The respondents interpreted this comment to mean that I had

already made up my mind about reinstatement and concluded that the applicant was qualified for the positions without having heard any evidence. Third, I made a reference to judicial review, which caused the respondent to conclude that I was going to order reinstatement and they should be prepared to take my decision to court. Finally, I admitted the parties' brief of documents into evidence at the commencement of the hearing without waiting to hear if there were any objections to any of the documents on the basis of hearsay.

[47] The combined effect of these comments, the respondents argued, indicated a predetermination or preference to reinstatement.

[48] I declined to recuse myself. In my view, the above comments would not cause a reasonable person to conclude that I did not "hav[e] an open mind which is open to persuasion (*Wewaykum Indian Band v. Canada,* [2003] 2 S.C.R. 259 at paragraph 58).

[49] I had no obligation to distance myself from the applicant's opening comments about the inadequacy of the Tribunal's remedial jurisprudence. Counsel is entitled to his opinion. My comments about the available positions did not indicate a closed mind about the possibility of reinstatement, merely a caution to the respondents to be prepared for the possibility of reinstatement by keeping open potential opportunities for reinstatement. The reference to judicial review, as I explained to the parties, was based on my mixing up this case with another. In February 2012 I issued two decisions, this one and *Berger v. Toronto (City)*, 2012 HRTO 335, both of which indicated the parties should contact the Tribunal if they wished to pursue a hearing with respect to remedy. Parties in both applications contacted the Tribunal to make arrangements for a remedial hearing. A party in the Berger case indicated that they may judicially review my decision. My reference to judicial review was in regard to that letter. I explained this mix-up to the parties, which in my view would have led a reasonable person to conclude that this comment was not an indication of either prejudgment or a closed mind. Finally, marking the documents as exhibits (which I did in the previous hearing as well) was done without prejudice to the parties' right to challenge any document as inadmissible

during the hearing while the witnesses were giving evidence. I note that the respondent did not in fact make any subject objections during the hearing.

[50] For the reasons above, I conclude that the comments, even if taken together, do not meet the threshold for reasonable apprehension of bias as set out in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at page 394:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not the [decision-maker], whether conscious or unconsciously, would not decide fairly."

Summary of Order

[51] The respondent shall:

a. reinstate the applicant to suitable alternative employment as set out in paras. 27 and 28, including adjusting her length of seniority accordingly;

b. calculate the applicant's loss of wages from June 26, 2003 until the date of reinstatement in accordance with the formula referred to in paragraph 30 and pay that amount to the applicant;

c. reinstate the applicant's years of service with OMERS and pay the employer pension contributions and additional costs associated with the buy-back of service;

d. remit retroactive payment to the Canada Pension Plan, or compensate the applicant for any losses arising from the lost years of CPP pension contributions;

e. pay the applicant for out of pocket medical and dental expenses which would have been covered by the applicable benefit plans;

f. calculate the additional tax consequences flowing from the money owing as a result of this decision and compensate the applicant for the additional cost;

g. pay the applicant $30,000 as compensation for the injury to her dignity, feelings and self-respect;

h. pay pre-judgment interest on all monetary damages from November 24, 2004, the date of the original complaint, to the date of this decision, at the rate of 2.3% per year, pursuant to s. 127 of the *Courts of Justice Act*; and

i. pay post-judgment interest on all damages from the date of this decision, at the rate of 3%, pursuant to s. 127 of the *Courts of Justice Act.*

Dated at Toronto, this 14th day of March, 2013.

"Signed by"

_____

Kaye Joachim
Member