

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

## DOES FAIR GO TOO FAR?

Nine years and \$500,000 later, a supervisor is headed back to work.

Ms. Fair was a "Supervisor, Regulated Substances, Asbestos" with the Hamilton-Wentworth District School Board. In the fall of 2001, she left the workplace on a medical leave of absence due to a generalized anxiety disorder related to the stressful nature of her job and fear that she could be held personally liable for a breach of the *Occupational Health and Safety Act*, R. S. O. 1990 c. O.1, ("OHS").

In 2004, Ms. Fair was still incapable of returning to her old position but she was apparently capable of gainful employment. The Applicant's medical information stated that she "...would not be able to function in a job which entailed responsibility for health and safety issues, nor any duties which would leave her at risk for personal liability."

The School Board interpreted this to mean that she was unable to work in her old position, or in her old department, as all supervisors faced potential liability under *OHS*. From mid-2003 onwards, the School Board did not offer Ms. Fair alternative work.

The School Board eventually sought an expert opinion which confirmed that Ms. Fair would not be able to function in her old job and subsequently terminated her employment.

The Human Rights Tribunal of Ontario (the "Tribunal") took issue with the employer's actions. Despite the lapse of time, the Tribunal concluded that the School Board failed to "actively, promptly, and diligently" canvass possible solutions, failed to accommodate Ms. Fair, and breached its obligations pursuant to the Ontario Human Rights Code (the "Code").

While the Tribunal conceded that Ms. Fair's medical restrictions were ambiguous, it was up to the School Board to make further inquiries and to assess the suitability of alternative, available positions.

Further, despite the fact that the Applicant had not been cleared to return to work, the Tribunal determined that the School Board ought to have offered the Applicant available, even temporary positions until her limitations were clarified.

The Tribunal determined that Ms. Fair's employment should be reinstated with financial compensation for all losses arising out of the breach of the Code. In one of the Tribunals' highest damages awards to date, Ms. Fair was entitled to lost wages equal to \$419,283.89, representing the time between 2003, when the Tribunal believed she ought to have been offered a position, until 2012.

Additionally, she was entitled to pension adjustments, CPP adjustments, losses for health and dental expenses, indemnity for insurance benefits, and \$30,000.00 for injury to self-respect, feelings, and dignity, all plus interest.

This case is a good reminder of the risks associated with failing to accommodate an employee to the point of undue hardship. It is also a good opportunity to review an employer's obligations and best practices in addressing requests for accommodation and medical information:

1. If the medical information is unclear about what the employee can and cannot do, ask for further information;

### OUR LAWYERS

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### IN THE MEDIA

Daniel Lublin recently hosted a live Google Video hangout with the Globe & Mail, answering workplace law questions such as being let go while on maternity leave, how to judge your severance package, how to handle non-compete clauses and much more. This video can be watched on our blog.

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David Whitten was interviewed by "Succession Planning", a supplement published by The Lawyers Weekly and The Bottom Line by LexisNexis Canada, regarding the legal challenges surrounding employees when a business is sold. Find out what needs to be discussed first and what can happen to existing employees in the article "Human Assets".

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David Whitten was interviewed by 24 Hours newspaper regarding intern abuse in the workplace. (24 Hours Toronto, Issued on May 6th, page 18)

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2. If the information is still unclear, consider getting an expert opinion;
3. Offer the employee available positions, even on a temporary basis, even if the employee has not been cleared to return to work. Let the employee determine with his or her physician whether the position is a possibility based on the employee's abilities and restrictions;
4. Document your efforts in communicating with the employee, your efforts to obtain additional information, and keep track of the accommodation options or alternative positions presented to the employee - remember, an employee is not entitled to a perfect solution but rather accommodation that is reasonable in the circumstances; and
5. Reach out. Accommodation, disability, and medical leaves are complicated areas rife with potentially expensive pitfalls. If you would like further information on formulating an accommodation plan, call us. We're here to help.

## UPCOMING EVENTS

### June 4th

The House of Commons' Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities has invited David Whitten to appear as an expert before the Committee in Ottawa on June 4, 2013 to share his views on its study, "Engaging Experience: Opportunities for Older Persons in the Workforce".

This study will focus on employment opportunities for older persons and support available to them through the federal government. His objective is to address topics such as barriers to employment for older persons in the labour force, ways to encourage companies to continue employing older workers, the participation rate for older and retirement age groups, what makes older workers choose to retire, and ways to encourage them to remain in the labour force.

### June 18-21st

David Whitten will be presenting at the Canadian Payroll Association Annual Conference from June 18 to 21, 2013, in the beautiful city of Vancouver!

David has been asked to present twice at the conference. His first presentation will explore the differences between employees and independent contractors from a payroll perspective. It will delve into the analysis used by the CRA with a view to best practices to avoid liability. The second presentation will deal with managing legal risk in terminations.

David will be presenting on Thursday, June 20th, 2013 at The Westin Bayshore Hotel, Vancouver, BC.

## LAW BLOG

Violence at work  
 Daniel Lublin's Globe and Mail video hangout  
 Got a Workplace Law Question?

Read more at  
<http://blog.toronto-employmentlawyer.com/>

## LATEST NEWS ON TWITTER

In a case you missed my Google video hangout @Globe\_Careers you can watch it here <http://bit.ly/Z99864>

What to do when violence erupts in the workplace? See in my @globeandmail column from today <http://bit.ly/11k5LZK>

Tomorrow 12pm I will be online to answer your questions in a Google video hangout @Globe\_Careers <http://bit.ly/15mFP3L>

Do you have a workplace law question for me? Join me live in a Google video chat Friday at noon <http://bit.ly/15mFP3L>

Rights Commission dismisses former Sportsnet anchor's claim tying his firing to anti-gay remarks <http://natpo.st/13gLi4> via @nationalpost

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## CONSULTATIONS

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 please call us at

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 online request at

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