



# HUMAN RIGHTS TRIBUNAL OF ONTARIO

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**BETWEEN:**

**Fred Leckie**

**Applicant**

**-and-**

**Hamilton-Wentworth District School Board  
John Moffat, Tim Pieprzak and Leanne Sneddon**

**Respondents**

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## CASE RESOLUTION CONFERENCE DECISION

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**Adjudicator:** Mark Handelman

**Date:** May 21, 2009

**File Number:** T-0340-08

**Citation:** 2009 HRTO 668

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

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**APPEARANCES BY**

Fred Leckie, )  
Applicant ) On His Own Behalf  
)  
)

Hamilton-Wentworth District School Board, )  
John Moffat, Tim Pieprzak and ) Jane M. Gooding,  
Leanne Sneddon, Respondents ) Counsel  
)  
)

## **Background and Procedure**

[1] This is an Application filed October 8, 2008 under section 53(3) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”). The underlying human rights complaint was filed with the Ontario Human Rights Commission and abandoned upon filing this Application with the Tribunal.

[2] This hearing was conducted in accordance with the expectation, expressed in the *Code* and the Tribunal’s Rules, that section 53(3) applications proceed in a highly expeditious manner given they are often based on complaints, like this one, which are more than a year old by the time they reach the Tribunal.

[3] Prior to commencement of the Case Resolution Conference, the respondents by motion asked the Tribunal to dismiss this Application as frivolous and vexatious. The motion was not argued before the Case Resolution Conference and not pressed at it. I decided the Application on the merits, after hearing all the evidence.

## **Nature of the Dispute**

[4] The applicant, a head custodian at one of the corporate respondent’s high schools, was injured on the job in June 2005. He alleges that the “accommodation” offered by the corporate respondent was insufficient to meet his needs and that he was harassed by all of the respondents after his injury. He alleged the harassment was because of his employment, disability and age.

## **Decision**

[5] I held that the corporate respondent met its duty to accommodate the applicant’s injuries. I found no harassment or reprisals. The Application is dismissed. These are my reasons.

## **FACTUAL BACKGROUND**

[6] The applicant gave evidence on his own behalf and called two witnesses. The individual respondents gave evidence and the respondents called two additional witnesses.

[7] One of the applicant's witnesses was his friend Mr. Harry Chung. Their friendship centered around meeting frequently at a coffee shop. Mr. Chung described the applicant as a straight shooter. The applicant's other witness was Mr. Gilbert Coutto, who until being fired, was a caretaker at the same school in which the applicant was a head caretaker. Mr. Coutto said the applicant was helpful, funny and got along with everyone.

[8] At the time of this Case Resolution Conference, the applicant was 66 years old. He had worked for the corporate respondent and its predecessor school board for almost 15 years and throughout the period covered by this Application was a Head Caretaker, working the afternoon/evening shift in a high school.

[9] The corporate respondent, the School Board, was the applicant's employer. The individual respondents were board employees. Mr. Pieprzak was an area supervisor. The applicant reported to him. Mr. Moffat held a higher supervisory position and until January 2007 when she left the Board for other employment, Ms. Susan Mawson was one of its disability management coordinators.

[10] On or about June 17<sup>th</sup> 2005, the applicant injured his knee while mopping a hallway floor, which was one of his regular job responsibilities. He reported this injury on or about June 20<sup>th</sup> and was off work for about a month, during which he received Workers' compensation. At a meeting on August 25<sup>th</sup>, the applicant was offered, and accepted, work modifications to accommodate this temporary disability. He had an appointment with a surgeon and everyone recognized that he might need time off around the surgery and further modifications to his work schedule.

[11] The applicant's first consultation with an orthopaedic specialist was September 22, 2005. He had another consultation with another surgeon in January 2006. That latter surgeon wrote that the applicant was able to manage work as accommodated, but that he got more and more uncomfortable. He was put on the waiting list for surgery, which was performed in June 2007.

[12] In the meantime, between August 2005 and June 2007, the applicant performed modified duties. At additional meetings, on October 6<sup>th</sup> and 12<sup>th</sup>, 2005, the corporate respondent offered the applicant further modifications to his duties, to limit the time he spent walking and having to go up and down stairs while on the job. The applicant was also advised to take frequent short breaks from work, rather than the two 15 minute breaks stipulated in his schedule.

[13] While the applicant signed the modified work Offer of August 25<sup>th</sup>, he did not sign the October Offers. Ms. Mawson wrote him on October 18<sup>th</sup> to summarize those two agreements. In addition, she raised concerns that the applicant was working an assistant caretaker's schedule, not a head caretaker's schedule.

[14] Ms. Mawson's concerns resulted from the applicant unilaterally changing his shift from 2 p.m. to 10 p.m. to 3 p.m. to 11 p.m. As well, the applicant entered into a side agreement with two other caretakers, trading some of his head caretaker duties for their regular duties. Ms. Mawson wrote in part on October 18<sup>th</sup> to the applicant,

"A decision was made to return you to the Head Caretaker's schedule. It is this schedule that needed to be modified to suit your limitations."

[15] The applicant's response was a letter dated October 25<sup>th</sup> 2005. He wrote in part,

"Nobody agrees with anything until they see the final letter of agreement and that applies to me, Fred Leckie. I do not agree.

...All afternoon shifts are cleaning shifts except for a small amount of head caretaker duties like rentals, lock-up and maintenance, calls to the office, and emergency maintenance, which I proved at the meetings I did the duties.

...The lock-up, rental, and maintenance duties should be added to the total time.”

[16] The applicant, in his evidence at the hearing, asserted there was no need for him to start at 2 p.m., he could start at 3 p.m. Aside from the fact that he was hired to start at 2 p.m., there were (at least in the eyes of the respondents) valid reasons for starting at 2 p.m. The main one was that there would be an overlap between his schedule and that of the morning head caretaker, so particular problems of the day could be handed off and priorities set for the afternoon shift.

[17] The corporate respondent made other modifications to accommodate the applicant. Most significant was the purchase, for \$13,000, of a “riding Zamboni” To clean hallway and large area floors instead of the “push Zamboni” or mop and pail he used before requiring accommodation. The riding Zamboni was purchased specifically to accommodate the applicant and as at the date of this Case Resolution Conference, remains the only one owned by the corporate respondent. The corporate respondent arranged for the applicant to be trained on it during one of his regularly scheduled shifts and arranged for another caretaker to come in and cover his duties while the applicant was being trained.

[18] The applicant’s reference to total time in paragraph 15 above, relates to how workloads were calculated for caretakers. An eight-hour work shift comprised 430 work minutes, being the total 480 minutes (eight hours) minus a 20 minute lunch break and two 15 minute breaks. The time required for any job was estimated and the total estimates had to equal 430 minutes. Time estimates and job descriptions were set out with the concurrence of Canadian Union of Public Employees, the union to which the applicant belongs. Union representatives also took part in meetings to determine accommodations for the applicant and, although two union representatives attended the whole Case Resolution Conference, they were not called as witnesses and there was no evidence that the union objected to the accommodations offered to the applicant.

[19] Part of the applicant’s harassment claim was that, at times his work schedule required that he do 600 minutes of work in 430 minutes of time. For that, the applicant

wanted overtime compensation paid at time and a half. Questioned on this by respondents' counsel, the applicant conceded that he never worked much more than eight hours a day, but insisted he should receive overtime pay for the workload.

[20] The respondents denied that the applicant's duties ever totalled more than 430 minutes of work per shift. In any event, they said it was understood that there would frequently be times the applicant—or any caretaker—could not get all the work done in a shift. There were a variety of reasons for this, such as special events at the school, particularly messy parts of the building after special events, extra time needed for snow removal, etc. Work was therefore prioritized.

[21] According to all of the witnesses for the respondents, the school board worked on a priority cleaning basis: you started at the top of your list of things to do, worked for eight hours, then left. In his evidence, Mr. Pieprzak (the applicant's direct supervisor) said that no caretaker was ever disciplined or reprimanded for not getting everything done. There was no evidence the applicant was ever disciplined, warned or reprimanded for not completing his schedule.

[22] Beyond asserting that his employer should have better accommodated him by allowing him to work the schedule he wanted, not giving him more minutes of work than there was time to do the work in and allowing him to trade his head caretaker responsibilities to junior employees, the applicant did not identify any particular additional accommodations that should have been made.

[23] However, in his evidence at the Case Resolution Conference, the applicant asserted that the respondent corporation had an obligation to provide him with accommodations that put neither his health nor his safety at risk. He alluded to *The Occupational Health and Safety Act*. He said that his health was protected by the accommodations but not his safety. In support of that, he pointed out that, while on an accommodated work regimen he was injured again.

[24] The applicant injured his back in October 2005. According to him, this was a workplace injury suffered on October 4, 2005. He said this injury was caused by lifting green garbage bags and "spot mopping" floors (cleaning the dirtiest parts only). He filed a claim with the Workplace Safety & Insurance Board ("WSIB"), in which he asserted in part,

"My union and the Board recently changed my shift to a floor shift which is making past injuries worst. (*sic*) More work was added to the shift. The shift is also under accommodation."

[25] WSIB denied this claim, acknowledging the injury but holding it was not caused on the job, a finding I adopt. Nonetheless, the injury was real and the applicant took needed time from work. His doctor wrote a letter, dated November 17, 2005, indicating that he "will be totally disabled from October 17, 2005 through to November 18, 2005. Return to regular work on Monday, November 21, 2005."

[26] Though the applicant returned to work as scheduled with a letter indicating regular work, he was injured and required accommodation for it. He was, until taking time for knee surgery, therefore being accommodated for his knee and his back injuries. Accommodation for this back injury was arranged at a meeting on November 22<sup>nd</sup>, 2005. The applicant signed the corporate respondent's "Offer of Modified Work." He could not, in his evidence, identify any complaint with these accommodations beyond that work was unsafe because he subsequently hurt himself again, he alleged, on the job. Not providing safe employment, he alleged was in breach of The *Occupational Health and Safety Act* and constituted more harassment by the respondents.

[27] Mr. Pieprzak testified that the applicant was treated no differently than any other employee. Much of what the applicant considered harassment was based upon his insistence, with which Mr. Pieprzak disagreed, that the applicant was supposed to do 600 minutes of work in 430 minutes. He said the School Board worked on a priority basis, so caretakers did the important things first, whatever they might be on any particular day, and if things did not get done, everyone understood and no one complained. He also said that the applicant was miscalculating his work minutes and there were never more than 430 in his schedule.

[28] Mr. Danny Catanyag was a witness for the respondents. He was the day shift head caretaker at the Waterdown High School and on occasions when the applicant was off work, such as for knee surgery, Mr. Catanyag worked as afternoon shift head caretaker in the applicant's stead. He said he had no trouble completing the job's responsibilities. Mr. John Potter was the person who replaced the applicant as head caretaker when the applicant was transferred to another school in 2009 also testified. He also said he had no trouble doing the job.

[29] There was a contradiction in Mr. Pieprzak's evidence around the addition of portable schoolrooms and their cleaning. When the applicant pressed him about adding the time to clean them to an already full schedule, the witness reverted to the mantra that there wasn't an addition of minutes to the applicant's schedule because other things were removed from his schedule in compensation and in any event he was being treated fairly because all the other caretakers had the same number of portables to their schedules. In other words, as I understood this evidence, there wasn't an addition of work minutes to the schedule because everyone had work minutes added to his or her schedule.

[30] Ms. Susan Mawson worked for the corporate respondent for 30 years, ending up as a disability management coordinator before leaving the school board in January 2007 to work for WSIB. Until then, she managed the applicant's accommodations. Her successor in that position was Ms. Salvina Burton, who managed his accommodations starting in June 2007. Both testified. Both said the applicant was treated the same as other injured workers. Both said that the corporate respondent did everything reasonable to accommodate the applicant's injuries.

[31] Ms. Mawson wrote the letter referred to in paragraph 13, telling the applicant that the accommodation to which he was entitled related to the job he had, not the job he wanted, which was a combination of head caretaker (the job he had) and caretaker. The respondent school board did not want the applicant unilaterally modifying either his

hours of work to start an hour later or anyone's job descriptions, both things the applicant said were necessary to properly accommodate his injuries.

[32] Ms. Mawson also explained the accommodations made for the applicant. For example, while his knee was injured, he was to clean the boys' change room instead of the atrium and its stairs: stairs are difficult for a person with an injured knee. As well, since walking any distance was difficult for the applicant, he was relieved of the need to walk the whole school building perimeter to secure it. Since there were three other caretakers on the same shift, they divided the building into quarters and each patrolled one. When the applicant complained about back problems, he was offered a referral to The Canadian Back Institute at the corporate respondent's expense, but he declined that.

[33] Whenever accommodations had to be arranged for employees, the meetings involved the employee, a supervisor, the disability management coordinator and union representatives, which in the applicant's case is The Canadian Union of Public Employees. Mr. Pieprzak testified that the union representatives approved all accommodation plans offered the applicant and there was no evidence to the contrary.

[34] There were times caretakers could get overtime work but it was usually not offered to persons on accommodation for injuries out of concern that extra work could exacerbate existing injuries. However, the applicant insisted at one point that this would not happen to him and the corporate respondent put him back on the overtime roster.

[35] The applicant had knee surgery in June 2007 and returned to work March 25, 2008 with no need for further accommodation. His next injury was to his shoulders on January 22, 2009, from spot mopping floors. The applicant said this injury started to bother him in November 2008. As the injury and any consequent need for accommodation was after the applicant filed this application (i.e., it was not a part of the subject matter of the original Application or the previous Commission complaint), I am not adjudicating it and in any event the applicant has a fresh Application to this Tribunal. Given that this is an application made under the transition provisions of the Code, and

for other reasons discussed below, I have determined that the allegations related to this injury would more properly be the subject matter of a fresh application to the Tribunal.

[36] However, the applicant views his transfer from Waterdown High School, where he spent his nearly 15 years working for the School Board, as part of the Board's ongoing harassment against him, particularly since his floor-cleaning Zamboni stayed behind. The transfer was February 15, 2009 to another high school on the other side of the district.

## **ANALYSIS**

[37] To deal with the last points first, if I found an ongoing scheme of harassment that contravened the Code, I would have been entitled to consider incidents occurring subsequent to when this Application was filed, even though the Application was made under the transition provisions of the Code. Because this Application was made under the transition provisions of the Code, my jurisdiction is limited to the subject matter of the original Application. The injury described in paragraph 35 and the applicant's transfer to another school, set out in paragraph 36, were not part of the subject matter of the original Application or the previous Commission complaint. In any event, the applicant has a fresh Application pending before the Tribunal, in which he can canvas those issues if he sees fit. Moreover, I found no ongoing scheme of harassment.

[38] It is important to remember that the Code is not a catchall for everything that goes wrong in society, for every ill befalling an individual. A successful claim under the Code must be based upon the rights it protects.

[39] For the purposes of this application, the relevant sections of The Code are,

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or

by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health

(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.

[40] Applicant's counsel tendered two cases in her submissions. They related to the issue of accommodating a disability. One, *Quackenbush v. Purves Ritchie Equipment Ltd*, 2004 C.L.L.C., 230, was an application to the British Columbia Human Rights Tribunal alleging discrimination in the workplace because of disability. The allegation was that the respondent employer failed to accommodate his physical disability by requiring him to "perform physical tasks as a yardman/truckdriver, rather than allowing him to continue performing the partsman and expediter duties he felt he was capable of performing and had the right to perform." (par. 4).

[41] The British Columbia's Tribunal Decision was that the applicant had been reasonably accommodated. The Tribunal held that the Complainant's refusal to cooperate with the accommodation proposed was unreasonable because he expected a perfect solution. The Tribunal held in part at paragraph 81,

If an employee is reassigned for bona fide reasons, the Respondent does not have an obligation to create a new position, reorganize the workplace, or restructure existing jobs. However, where, as in this case, an

employee can be accommodated in another position, the Respondent still has an obligation to explore all options, to the point of undue hardship, before they will satisfy their duty to accommodate.

[42] The second case tendered was *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970. This was a case of an employee's religious beliefs preventing the employee from working certain scheduled shifts. The British Columbia Human Rights Tribunal held that the need to work on Friday evenings was not a bona fide occupational requirement and that the school board and union both breached their duty to accommodate the applicant's religious beliefs. This decision was reversed on appeal to the B.C. Supreme Court and the Court of Appeal agreed with the lower court. The Supreme Court of Canada, however, agreed with the Tribunal and held that there was a duty to accommodate short of undue hardship.

[43] While *Renaud* is distinguishable factually from this case, certain parallels exist and one comment by Justice Sopinka on behalf of the Court is particularly relevant:

When an employer has initiated a proposal that is reasonable and would if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept a reasonable accommodation. This is the aspect referred to by McIntyre J. in *Simpson-Sears Ltd.* The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

[44] In my view, based upon the materials filed by both parties and the oral evidence of the applicant and other witnesses during the Case Resolution Conference, the applicant's fundamental but unspoken complaint was that he could not design his own job. He wanted to change his hours of work, decide which responsibilities he would assume and which he would not. Two vignettes of the applicant's evidence displayed the extent of his sense of entitlement. He was indignant about being transferred to another school as head caretaker, in particular the fact that the corporate respondent would not let him take the Zamboni with him even though he no longer required it for accommodation purposes. He was also indignant about being off with a work-related

injury and having to top up what WSIB paid him, by 15%, from his own sick day allowance. He said in evidence, "That's my money, I shouldn't have to use it because I'm off work."

[45] In my view, and I so hold, the applicant's disabilities were reasonably accommodated. Each limitation identified by his doctors was met and accommodated. After his first injury, to his knee, the applicant had to limit his walking and use of stairs. The security schedule was changed to accommodate the first limitation. His cleaning duties were changed to accommodate the second—he was relieved of the job of doing the floors in the atrium and the steps leading up to it. He had to limit the amount of time he spent mopping floors so the corporate respondent purchased a "Zamboni" for him. He was urged to take regular "mini-breaks" during his shift, rather than the two 15-minute breaks specified in his job description.

[46] The applicant's argument that the workplace was unsafe and therefore his rights under The *Occupational Health and Safety Act* were breached, resulting in harassment, also fails.

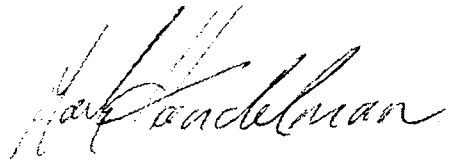
[47] First, there was no evidence the workplace was unsafe beyond the applicant's bald assertion that it must have been because he was subsequently injured on the job. Since the applicant's first back injury was held by WSIB not to have been caused on the job, that injury is irrelevant. The applicant's second injury was a cumulative condition resulting in back pain, arm and shoulder injury over many months, according to him from spot-mopping floors and carrying garbage. He did not assert that the bags were too heavy, only that he had to carry them.

[48] Second, all caretakers had to mop floors and carry garbage. The applicant was not singled out for these jobs, they were part of the job description for all caretakers. He was never assigned additional mopping or garbage bag carrying. There was no harassment or discrimination.

**ORDER**

[49] The Application is dismissed.

Dated at Toronto, this 21<sup>st</sup> day of May, 2009.

A handwritten signature in cursive script, appearing to read "Mark Handelman".

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Mark Handelman  
Member