

Case In Point

HRTO Orders Significant Remedies in Ontario Midwives Case

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In [*Association of Ontario Midwives v. Ontario \(Health and Long-Term Care\)*](#), the Human Rights Tribunal of Ontario (HRTO) affirmed that those who set compensation rates may be required to take proactive steps to ensure that sex-segregated workers are compensated in a way that is free of sex-based discrimination. It ordered, among other things, that the Ministry of Health and Long-Term Care (MOH) implement a 20% wage increase for eligible midwives to be applied retroactively from April 1, 2011 and that \$7,500.00 in general damages be paid to each eligible midwife. The decision is a reminder to employers that failure to ensure compliance with the *Human Rights Code* (Code) with respect to compensation practices for members of protected groups may result in significant remedial orders.

Background

In 2013, the Association of Ontario Midwives (AOM) filed an application with the HRTO against the MOH on behalf approximately 800 midwives. The application alleged that midwives had experienced a gender penalty in their pay set by the government for almost two decades – from 1994 (the year after midwifery became a regulated health profession) to 2013.

The Interim Decision

The HRTO issued [an Interim Decision](#) in 2018 in which it concluded that there was sufficient evidence to infer that midwives experienced adverse treatment. Sex was more likely than not a factor in the treatment they experienced and the compensation gap that had developed between the midwives and Community Health Clinic physicians since 2005 – but not before this date. Discrimination was therefore established.

It noted that compensation benchmarks adopted by the parties in 1993 had been essential to ensuring an objective evaluation of the work performed by the midwives for the purposes of determining compensation. In 2010, the parties participated in a non-binding joint compensation review (Courtyard Report) which revealed a gradual erosion of the compensation benchmarks and, among other things, recommended a 20% adjustment to the fees individual midwives earned for their services. The MOH disagreed with the findings and methodology of the Courtyard Report and did not implement the recommended changes.

The HRTO concluded that, in essence, the MOH had unilaterally withdrawn from those

benchmarks after 2005, leaving the compensation of midwives exposed to the effects of gender discrimination on women's compensation. Without the compensation benchmarks, this objective evaluation had been replaced by stereotypical attitudes about "women's work". This resulted in the midwives being forced to negotiate in a context where there was no recognition of the potential negative impact of gender on their compensation, thereby denying their substantive equality and undermining their dignity, feelings and self-respect.

The HRTO deferred the issue of remedy for the purpose of giving the AOM and MOH an opportunity to reset their relationship and negotiate the appropriate remedy, including level of compensation, general damages and benchmarks going forward.

The Decision on Remedy

The parties were unable to reach a decision on remedy and returned before the HRTO. The MOH argued that any remedial order should only apply prospectively, not retroactively, that there should be no damages awarded for injury to dignity, feelings and self-respect, and that compensation could only be awarded to proper parties under the Code. The AOM argued for a wide-ranging remedy.

Among other things, the HRTO found:

- The principle that a retroactive remedy may not be appropriate where a decision results in a substantial change in the law ([Canada v. Hislop](#)) did not apply to this case. There was nothing new about the HRTO's Interim Decision, which merely applied longstanding human rights principles and affirmed that compensation setters are ultimately responsible for ensuring their practices comply with the Code.
- A purely prospective remedy would constitute a "hollow victory."
- The qualified public law immunity, which may apply where there is a challenge to legislation, regulations or policies derived from legislation ([Abbey v. Ontario](#)) did not apply to the case at hand. As such, it was appropriate to award compensation for injury to dignity, feelings and self-respect.
- Considering the importance of the relationship between work and dignity and the evidence of the five midwives who testified in support of the AOM's request for damages for injury to dignity, \$7,500.00 per eligible midwife was an appropriate award of compensation for the inherent right to be free from discrimination and injury to dignity, feelings and self-respect. In determining this amount, the HRTO found that the substantial number of midwives who would be eligible for this award did not in any way trivialize or diminish respect for the Code or effectively create a licence to discriminate.

In determining the appropriate remedy, the HRTO said that "to return midwives to the place they would have been, but for the discrimination, is to bring the parties back to a state where they are working together to ensure that midwives are fairly and appropriately paid, using the benchmarks

as their guide, and with the MOH adhering to its obligations under the Code.” In addition to the \$7500.00 for each eligible midwife, as noted above, the HRTTO ordered the MOH to:

- reinstate the compensation benchmarks;
- implement the 20% adjustment as recommended by Courtyard as of April 1, 2011 with retroactive compensation to eligible midwives back to this date; and
- implement various other orders, including a joint compensation study and compensation policies, to promote compliance with the *Code*.

The government has indicated its intention to have the decision judicially reviewed.

Key Takeaways

1. This decision is a reminder that employers, and compensation-setters, have a duty to ensure that compensation practices comply with the Code. This is particularly important in the case of sex-segregated jobs. Employers should proactively monitor the compensation paid to sex-segregated workers. Without taking any such steps, the employer may have difficulty proving, if later challenged, that gender was not a relevant factor in the compensation paid to those workers.
2. The fact that a significant number of parties are entitled to damages resulting from an infringement of their rights under the Code is not a factor considered by the HRTTO as a reason to reduce the quantum of damages for injury to dignity, feelings and self-respect. The clear implication of the decision is that the quantum of the general damages awarded will continue to bear in mind other like-decisions and the factual circumstances of the case. In a representative Application such as this one, the number of recipients on behalf of whom the Application was brought is merely a multiplier.
3. The decision also serves to demonstrate that issues overlapping with pay equity (as it is understood under the *Pay Equity Act*) and concepts of equitable compensation as between female dominated jobs as compared to a male dominated comparator of similar value may be challenged in certain circumstances before the Human Rights Tribunal as opposed to before the Pay Equity Hearings Tribunal. The framing of the issues raised in any challenge will be important in determining which Tribunal has proper jurisdiction. In *Midwives*, the gender discrimination allegations in compensation were sufficiently broader than those issues covered by the *Pay Equity Act* such that the Human Rights Tribunal took jurisdiction.