

Case In Point

The Divisional Court Affirms Employers May Face Substantial Penalties for Failing to Respond to Sex Discrimination and Gender Pay Inequity

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In its recent decision [Ontario v Association of Ontario Midwives](#), the Ontario Divisional Court upheld two decisions of the Human Rights Tribunal of Ontario pertaining to sex discrimination and pay equity, reaffirming that employers have an obligation to take proactive steps to ensure that sex-segregated workers are compensated free from sex discrimination and that a failure to do so may result in considerable monetary remedies being awarded against an employer.

In decisions rendered [on liability](#) (2018) and [remedy](#) (February 2020), the Tribunal found that the Ministry of Health had violated the *Human Rights Code* when, among other things, it failed to correct a compensation gap that had developed between Ontario midwives and Community Health Clinic physicians since 2005. The Tribunal ordered the Ministry of Health to, among other things, implement a 20% increase to midwives' service fees and pay each eligible midwife \$7,500 in damages for injury to dignity, feelings, and self-respect (for a summary of the remedy decision, see our earlier [Case in Point blog post](#)).

The Ministry sought judicial review of both the Tribunal's decisions on liability and remedy at the Divisional Court.

The Divisional Court dismissed the Ministry's review application and upheld both Tribunal decisions, finding them to be reasonable. The Divisional Court was not persuaded by the Ministry's arguments challenging the Tribunal's decisions, writing:

[10] The MOH submits that the Tribunal erred in finding that the AOM met its onus of establishing that midwives have been subject to adverse treatment in their compensation and that sex was a factor. It submits that occupational differences and differences in bargaining strength between CHC physicians and midwives explained their differences in compensation and the Tribunal should have found that the MOH had provided reasonable non-discriminatory explanations for the compensation gap.

[11] Despite MOH's extensive arguments that the Tribunal's decisions are unreasonable and should be quashed, we have concluded that the MOH's arguments mischaracterize the history of compensation negotiations with the AOM, fail to engage with the allegations of adverse gender impacts on midwives and ignore the systemic dimensions of the claim. We are not persuaded that

it was unreasonable for the Tribunal, based on the record before it, to find that the MOH's policies and conduct towards the midwives led to systemic gender discrimination in compensation.

In its 250 paragraph decision, the Divisional Court, among other things:

- reviewed the evolution and regulation of midwifery in Ontario
- set out the various methodologies used by the parties over the years to calculate the compensation of Ontario midwives and reviews the Tribunal's decisions with respect to these methodologies' compliance with the *Code*
- discussed the Ministry's unilateral decision to depart from the parties' past practice of calculating compensation and to restrict midwives' compensation
- remarked upon the Tribunal's finding that the Ministry is not required by the *Code* to engage in any one proactive strategy to monitor, identify and redress discrimination in the compensation of midwives. However, it "must take steps which are effective and proportional to its obligations under the *Code* to both prevent and remedy discrimination" and its failure to do so "compounded the adverse impact on midwives..."
- confirmed that the Tribunal's decisions were entitled to "substantial deference" as the issues in the case involved a specialized tribunal that has institutional expertise and the interpretation of its home statute (i.e. the *Code*) and expressly rejected the Tribunal's argument that *Vavilov* changed the standard of review to patent unreasonableness
- reiterated that the *Code* "...is directed at achieving substantive equality and enshrines positive rights, not just access to a remedy where a breach can be found"
- reviewed the Tribunal's application of the discrimination test set out in *Peel Law Association v Pieters* to the facts in detail and found that the Tribunal's analysis was sound and reasonable, rejecting several arguments put forward by the Ministry in the process, and
- upheld the Tribunal's decision on remedy, stating that the decision was rational and logical.

The Divisional Court's lengthy decision reaffirms both the deference that will be afforded to the Tribunal's expertise in discrimination cases and the importance of employers taking a proactive approach to sex discrimination and gender pay equity.