FIELD LAW

Labour and Employment Newsletter

November 5, 2014

Reinstatement Available as a Remedy Nearly Ten Years After Last Day Worked

By: Karen Tereposky

Although reinstatement in the Human Rights context is considered a unique and uncommon remedy, the Ontario Divisional Court recently refused an application for judicial review of a decision of the Ontario Human Rights Tribunal (the "Tribunal") wherein an employee was reinstated almost 10 years after her last day of work. This decision may be indicative of a move by tribunals to consider reinstatement as a remedy in the appropriate case and therefore must be considered by employers when accommodating employees.

Before the Tribunal, the evidence was that the applicant had developed an anxiety disorder in reaction to the stressful nature of her job as "Supervisor, Regulated Substances, Asbestos" with the Ontario School Board (the "Board"). After receiving long term disability benefits and being deemed capable of returning to work, two suitable positions were available with the Board. Instead of offering one of these positions to the applicant, she was terminated on the assertion that the Board was unable to accommodate her by finding a suitable replacement position because of work restrictions related to her disability.

The applicant filed a complaint with the Ontario Human Rights Commission in 2004, but the complaint was not heard. Under transitional provisions in the *Ontario Human Rights Code*, R.S.O. 1990 c H-19 (the "Code"), she was permitted to initiate new proceedings before the Tribunal in 2009. In these new proceedings, the complainant requested reinstatement. The application was heard by a panel of the Tribunal in January and February of 2012. The Tribunal found that, on the evidence, the Board never had a real intention to accommodate the applicant and resultantly failed in that duty. Thus, the Board had discriminated against the applicant on the basis of her disability. The Board argued that an order of reinstatement would be unfair due to the passage of time. The Tribunal found that the delays were not attributable to the applicant and that the passage of time, although it would have had the effect of eroding the applicant's skills, was not enough on its own to establish prejudice to the Board.

When deciding on a remedy, the Tribunal found support in a Supreme Court of Canada decision that held, in a collective bargaining context, that reinstatement should only be avoided where the employment relationship is no longer viable. Animosity between the employer and employee could be an impediment to reinstatement but in the case at hand, the applicant's evidence demonstrated that she held no ill will towards the Board, especially since the individual employees of the Board that were responsible for the decision to terminate her were not still employed there. The Tribunal ordered that the applicant be reinstated to an equivalent position to her previous job, be provided with a reasonable training period, and be compensated for out of pocket expenses, lost wages and benefits, and injuries to her dignity, feelings and self-respect in an amount calculated at approximately $450,000.

On the application for judicial review by the Divisional Court, the Board argued that the remedy of reinstatement should not have been exercised by the Tribunal, as it was meant to be a unique and uncommon remedy and was not appropriate due to the passage of time between the events giving rise to the complaint and the decision. As the applicant was not responsible for the delay, and the decision of the Tribunal was "within the range of reasonable expectation", the Court refused the application for judicial review. The Court noted that the "Code provides the Tribunal with broad remedial authority to do what is necessary to ensure compliance with the Code. It is fair to say that while reinstatement is unusual, there is no barrier or obstacle to this remedy in law". It further awarded $15,000 in costs against the employer in addition to damages awarded by the Tribunal.

Whether this case will be considered by the Ontario Court of Appeal is not yet known, but in the interim and should the decision stand, employers should be increasingly cognizant of the possibility of the use of reinstatement as a remedy by Human Rights Tribunals. Although it will likely remain an uncommon remedy, this decision clearly supports the position that in the appropriate case, where there is no animosity between the parties, reinstatement of an employee terminated due to discrimination in violation of Human Rights legislation will be considered by Human Rights Tribunals. The passage of time will not foreclose the availability of reinstatement as a

remedy. Employers must thoroughly consider whether reinstatement equals undue hardship prior to terminating an employee. Field Law can help employers with this assessment.