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Peter Israel, General Editor

THE LAW ON

Disability Issues in the Workplace

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VII. Reinstatement as a Human Rights Remedy

Reinstatement is a very powerful remedy. Apart from the order itself, the request for the order will more readily support a lost-income claim to the date of hearing and may also, arguably, be used to buttress a plea for a prospective income loss beyond the date of hearing when the reinstatement order has been denied.

In *Fair v Hamilton-Wentworth District School Board*, the Human Rights Tribunal of Ontario ordered reinstatement.[167] It was found that the employer had treated the applicant unfairly because of a disability by failing to accommodate her disability-related needs.

This is the most significant decision awarding reinstatement for a failure to accommodate a medical disability, plus eight and a half years of salary arrears.

One issue raised by the employer was the tribunal's reference to arbitral case law. There is nothing noteworthy about this, since many fundamental concepts in human rights principles have found their origin in arbitral decisions, including the need to establish a *prima facie* case and the concept of liability being shown by a cause, as opposed to the sole cause. Similarly, the process of evidence by reasonable inference found its initial reasoning from arbitral jurisprudence.

Reinstatement is a common concept in Canadian jurisdictions other than Ontario. The wording of the relevant legislation varies, but it typically provides authority to the human rights tribunal to take such action to remedy the wrongdoing or, alternatively, specifically empowers reinstatement.

The interpretation of a reinstatement provision allows the tribunal to consider in its discretion whether reinstatement is viable in the context of the facts before it.

166 *OPT v Presteve Foods Ltd*, 2015 HRTO 675.

167 *Supra* note 103; the decision was upheld by the Divisional Court and the Ontario Court of Appeal.

It is not a default remedy, as may be expected in arbitral jurisprudence, apart from two cases at the federal level, referenced below, which spoke of the "duty" to attempt to reinstate. These decisions have not been subsequently cited as authorities for this concept.

The comparison also puts the Ontario remedy in perspective. Reinstatement is viewed as a discretionary remedy and has been ordered when considered appropriate with due regard to all factors in play in the other common law jurisdictions.

The complainant appears to have the onus of proof, although this is not specifically defined in the case law; however, given that the remedy is discretionary, this is a fair presumption. The cases are all very much fact-driven, but typically the decision-maker seeks to determine if the remedy is viable by assessing whether the work environment has fallen into an unworkable circumstance by the degree of conflict between the parties. There also usually follows an examination of the relative prejudice caused to either party by a reinstatement order.

Apart from the factual underpinning, the only real contentious issue is whether there should be some consideration given to why any apparent animosity between the parties has come to exist.

One case does speak to this issue where such ill will is caused by the litigation, in that it is the conduct of the wrongdoer that brought about the adversity and hence should be of no moment to the requested relief. This will be particularly so in a case involving allegations of sexual harassment. This does make logical sense. It appears unfair to deny the remedy when the source of a personality conflict emanated from the very wrongdoing that the remedy seeks to redress.

Reinstatement is not considered an unusual remedy under the *Canadian Human Rights Act*. Many decisions have routinely ordered this relief as the means by which the complainant has been restored to his or her former position.[168] In one decision, *Pitawanakwat*,[169] a case of sexual harassment, the panel noted that reinstatement was unworkable owing to apparent bitterness between the parties, at least in the position sought, a conclusion that did not preclude the complainant from reinstatement to an

168 Section 53 of the *Canadian Human Rights Act* provides specifically for such a remedy: *Bernard v Waycobah Board of Education*, 1999 CanLII 1914 (CHRT). Other decisions that have awarded reinstatement under the Act include *Audet v Canadian National Railway*, 2006 CHRT 25, Hadjis; *Chander v Canada (Department of National Health and Welfare)*, 1996 CanLII 778 (CHRT), aff'd (1997), 131 FTR 301; *Eyerley v Seaspan International Ltd*, 2001 CanLII 8494 (CHRT), Sinclair; *Grover v National Research Council Canada*, 1992 CanLII 629 (CHRT); *Grover v Canada (National Research Council)*, 1994 CanLII 189 (CHRT); *Cruden v Canadian International Development Agency & Health Canada*, 2011 CHRT 13, Marchildon; *Parisien v Ottawa-Carleton Regional Transit*, 2003 CHRT 10, Hajdis; *Cremona v Wardair Canada Inc No 3* (1993), 20 CHHR D/398; *McAvinn v Strait Crossing Bridge Ltd*, *supra* note 64; and *Singh v Statistics Canada*, *supra* note 153.

169 *Pitawanakwat v Secretary of State*, 1992 CanLII 7190 (CHRT).

alternative position. The applicant successfully reviewed this decision.[170] She was reinstated. The Federal Court noted that it was the employee who was the innocent party and hence could not be held accountable for the "bitterness" and the "recipe for disaster" noted by the panel.

The tribunal has also spoke to the "duty"[171] to attempt to restore the complainant to "the position she would have been in, but for," in a complaint based on race and colour.

The passing of time seems to be of no consequence. In *Uzoaba*,[172] an order of reinstatement was made 13 years after the termination. In the same case, the applicant was instated to a higher-level position than that which he held previously,[173] based on his argument that he would have been promoted to this position over time. The issue of the inconsequential effect of the passing of time is not a universal truth. In one case, it was determined that the lengthy passage of time would place the applicant in a position superior to current employees then laid off.[174]

This position is in conflict with the basic objective of restoration of the status quo. The decision should reflect that which would have followed. Had the complainant likely been laid off in any event, regardless of the wrongdoing, then the remedy should reflect this.

In British Columbia, the test of reinstatement is generally one that determines whether the relationship remains viable.[175]

In Alberta, the remedy is not reflexive either[176] but, as in BC case law, has been exercised as a matter of contextual discretion. The factors considered will include the degree of any ill will between the parties, whether the relationship remained viable even through the litigation process, the degree of prejudice to be caused by the requested order, and, in one case, the apparent benefit to the complainant, given that she remained unemployed.[177]

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170 The Federal Court allowed her application: [1994] 3 FCR 298.

171 *Nkwazi v Canada (Correctional Service)*, 2001 CanLII 6296 (CHRT), Mactavish; *Desormeaux v Ottawa-Carleton Regional Transit*, 2003 CHRT 2, Mactavish. The latter decision was set aside on a preliminary review and subsequently restored by the Court of Appeal: 2005 FCA 311. The *Desormeaux* decisions did not deal with the issue of remedy.

172 *Uzoaba v Canada (Correctional Service)*, 1994 CanLII 1636 (CHRT).

173 As was upheld by Federal Court on judicial review: [1995] 2 FCR 569.

174 *McLellan v MacTara Limited*, 2004 NSHRC 4. This was not the only reason given to deny the remedy.

175 *Kalyn v Vancouver Island Health Authority (No 3)*, 2008 BCHRT 377, Tyshynski; *JJ v School District No 43 (No 5)*, 2008 BCHRT 360 (tribunal decision set aside on first review and restored by Court of Appeal). See also *Wyse v Coastal Wood Industries*, 2009 BCHRT 180.

176 *Cowling v Alberta (Employment and Immigration)*, 2012 AHRC 12, Heafey.

177 As was stated in *Pitawanakwat*, *supra* note 169, one might question the significance of ill will created by the litigation process, given that it was the employer's action that gave rise to the need to commence the process.

One case weighed the significance of the impact of such an order on the applicant's life.[178]

Saskatchewan again applied the same principles,[179] and in a case involving a disability of cerebral palsy, also considered the application of the "but for" test.[180] The tribunal determined that were it not for the adverse treatment, the employee would have completed his casual employee status and have been transferred to permanent status, as was ordered.

A New Brunswick panel applied the same test, whether the relationship was viable in the absence of any chasm between the parties on a personal level,[181] which presumably would have been a factor in assessing the propriety of reinstatement.[182]

The tribunal noted that the "usual remedy" is to allow reinstatement when a violation of the statute has been found.[183]

The general view is that the remedy must be viable. In *McLellan v MacTara*, the evidence of the complainant, to the effect that he doubted reinstatement would be a positive experience for him, was considered a negative factor in denying reinstatement.[184]

An order of reinstatement can be made even where the applicant does not return to active employment.[185] This can have tremendous significance, as noted below.

178 *Weitmann v City of Calgary Electric System*, 2000 AHRC 1, Bryant.

179 *Merrick v Ipsco Saskatchewan Inc (No 3)* (2008), 65 CHRR D/220 (drug dependency).

180 *Regina (City) v Kivela*, 2004 SKQB 372. An award for lost wages was made for five years, from 1999 to 2003, and the city was ordered to offer re-employment to such a permanent position when one was available. The Court of Appeal upheld the substance of the decision (disability): 2006 SKCA 38.

181 *Way v Department of Education and School District 10*, 2011 CanLII 13074 (NBLEB) (mandatory retirement).

182 A contrary finding was made in *AA v New Brunswick Department of Family and Community Services*, [2004] NBHRBID No 4.

183 *AB v Brunswick News Inc*, 2009 CanLII 74886 (NBLEB). Reinstatement was not ordered in this case.

184 *Supra* note 174. Murray stated (at para 167):

> I have considered and rejected Mr. McLellan's request for reinstatement. I do so for several reasons:
>
> 1. I do not know whether there is a vacant entry position to which to restore Mr. McLellan;
> 2. I have already explained that Mr. McLellan's termination was not exclusively the result of physical disability discrimination. He was terminated with notice; …
> 4. Mr. McLellan doubts that reinstatement would be a positive experience for himself;
> 5. I do not believe that it would benefit the public interest, or serve any instructive purpose for MacTara, in any way.

185 *Hayes v Yukon College* (2009), 67 CHRR D/408 (YKHR Bd Adjud) (liver disease).

V. Ryan Privilege

The question of the *Ryan* privilege arises on a request for clinical notes of the treating physician and the personal journal of the plaintiff when these documents are not covered by other privileges.

The Supreme Court of Canada in *M (A) v Ryan*[52] considered the issue of disclosure of medical records of the communications between a psychiatrist and the victim of a sexual assault by a prior treating psychiatrist.[53] It concluded that the relationship between the plaintiff and her psychiatrist met the traditional fourfold test. The court also noted that, as a policy issue, the common law must be updated to reflect Charter values of privacy and equality before the law.

Once a privilege has been established, it must be found that the benefit of protecting the privilege outweighs the interest of production, which is the fourth branch of the test:[54]

> These criteria, applied to the case at bar, demonstrate a compelling interest in protecting the communications at issue from disclosure. More, however, is required to establish privilege. For privilege to exist, it must be shown that the benefit that inures from privilege, however great it may seem, in fact outweighs the interest in the correct disposal of the litigation.[55]

51 *Ibid* at para 32.

52 *M (A) v Ryan*, [1997] 1 SCR 157.

53 The plaintiff had sought professional advice from Dr Ryan as a teenager. In the course of her treatment, Dr Ryan had sexual relations with her and committed acts of gross indecency. The plaintiff then sought psychiatric treatment with Dr Parfitt, who assured her that all such communications would be confidential. This became the production issue.

54 The onus of proof in this component of the test as being on the party asserting the privilege was affirmed in *Glegg v Smith & Nephew Inc*, 2005 SCC 31, [2005] 1 SCR 724.

55 *M (A) v Ryan*, *supra* note 52 at para 31.

The balancing of the conflicting interests, the court determined, will in most cases result in an order that qualifies the production of documents, reflecting a "partial privilege."

The court essentially concluded that a relationship between a patient and a psychiatrist could lead to a privileged relationship, given the tests above, after which the parties may debate the need to produce individual documents, reflective of the competing interests.

The need for the examination of each document may not be required, when affidavit evidence describing the general nature of the information may suffice.

The Ontario Court of Appeal reviewed the impact of the *Ryan* decision in *F (K) v White*,[56] a case in which the plaintiff and her two children commenced a civil action against the defendant following his conviction for sexual assault. The defendant sought production of the plaintiff's psychiatric records, which was refused at first instance on the grounds of privilege. There was not the required evidence of the promise of, or the need for, confidentiality to uphold the claim for privilege, in that the requested records related to the pre-assault medical history.

A similar order was sought in *Bursey v Sampath*,[57] a case involving a plaintiff who sought psychiatric treatment with the defendant in 1976. The two parties established a 16-year sexual relationship that began when the plaintiff was a patient and continued when she was an employee and later a tenant of the defendant. The relationship ended about a year after she ceased being an employee and tenant, which was two and a half years after the psychiatrist–patient relationship had ended.

The defendant sought counselling from a psychiatrist with respect to the end of this relationship and the allegations made in the claim in the proceeding. The plaintiff sought production of the clinical notes, arguing that a confidential report may contain some observation or finding that might assist her in the case.

The court noted that this request differed from the usual production motion. Nonetheless, the court concluded that the same considerations of determining relevance and privilege should be applied. The notes were examined and found to be irrelevant to the issues.

Conditions are often attached to the production of the disputed medical records. In one arbitral case, *BC v BCGSEU*,[58] the union was allowed to redact communications alleged to be privileged, but the arbitrator allowed the employer to be advised why any deleted materials were refused and that any dispute would be determined by him.

The arbitrator had ordered pre-hearing disclosure of medical records, including psychological records, in a case involving disputed short- and long-term disability

56 *F (K) (Litigation guardian of) v White* (2001), 53 OR (3d) 391 (CA).

57 *Bursey v Sampath* (1999), 177 Nfld & PEIR 171 (NLSCTD), Hickman CJTD.

58 *British Columbia v British Columbia Government and Service Employees' Union*, 2005 BCCA 14 [*BC v BCGSEU*].

benefits, subject to strict conditions on the use of the records. The conditions attached were that (1) only employer counsel and its medical experts may view all the records; (2) any person viewing the records must keep them confidential; (3) the documents may be used only for the hearing; (4) only one copy could be made, and (5) the medical documents must be destroyed at the end of the hearing. The order also allowed either party to reapply to the arbitrator in the event that the order proved to be unworkable. The employer appealed.

The Court of Appeal noted that the standard of review was correctness. The Court of Appeal agreed that the making of the *Ryan* order was not limited to facts that paralleled those of *Ryan* and agreed that the documents in question were subject to a privilege. That finding, however, as the court stated, would not end the analysis because the court must also consider the terms that will protect the privilege as much as possible, yet interfere with the employer's right to defend as modestly as possible.

The court agreed that the order in question could not survive the appellate challenge because it was not "outside the bounds of acceptability."[59]

In *Glegg v Smith & Nephew*,[60] the Supreme Court considered an issue involving the right of the defendant to access a psychiatric record kept by a physician. The action was brought by the plaintiff against the manufacturer of a metal prosthesis and her physicians, one of whom used the device to perform a reduction on her fractured femur.

The court in the first instance had ordered production of the psychiatric record. The Court of Appeal reversed this order, and the Supreme Court restored the initial order. The court recalled that all parties and counsel are deemed to undertake not to use the information that has been received for purposes external to the litigation.

The court also noted the options available to the judge to ensure a fair disposition of the matter in dispute and to protect the contested material. These include requiring the objector to file an affidavit explaining the basis for the objection and to list and describe the documents in controversy. This would allow the judge to review the evidence privately. The judge could also order production of the documents, subject to conditions of confidentiality, or order counsel not to disclose documents to third parties or to the immediate parties in the litigation.

In practice, the common law courts typically will attach privacy terms to materials that are clearly relevant to the issues in dispute. In one case, *AY v Gellately*,[61] the plaintiff suffered injuries in a car accident and sought damages for physical, emotional, and psychiatric injuries. The complicating issue was that the plaintiff had sought treatment prior to the accident for sexual abuse by a close relative when she was five years old.

59 *Ibid* at para 58.

60 *Supra* note 54. The court considered a *Ryan*-style case from Quebec that was decided on the basis of the *Civil Code*, the Quebec *Charter of Human Rights and Freedoms*, and the *Medical Act* of Quebec, which established an immunity from the disclosure of information received by a physician from a patient.

61 *AY v Gellately* (2001), 198 Nfld & PEIR 147 (NLSCTD), Barry J.

The defence sought production of the medical records of the psychiatrist and argued that the damages claimed in the action were not the fault of the driver, but rather were due to the prior childhood abuse.

The court ordered production of the records on certain terms, noting that "I have not been provided with any medical evidence that this will in fact result in any significant physical or mental harm to A.Y.,"[62] which led to the balancing process on the fourth test. The court noted an absence of any evidence of harm that the plaintiff would suffer as a result of the production of the documents, which were ordered with similar conditions attached.

A similar issue was brought to the New Brunswick Court of Appeal,[63] again involving the fourth test. The motions judge, the court ruled, erred in basing his analysis on what the plaintiff and her counsellor perceived to be the likely consequences flowing from the production of the notes of the counsellor.

The motion judge, the Court of Appeal ruled, must assess the reasonableness of the fears in the full light of the implied undertaking rule and the impact of privacy protections, which are typically provided as conditions to the order allowing for production.

The protective order must "ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth," which the Court of Appeal noted was stated in *Ryan*. The Court of Appeal set aside the order of the motions judge and ordered production on comparable terms.

This issue was again raised on this occasion to protect the identity of third parties whom the plaintiff referenced in her discussions with her physician. The redactions were allowed and performed by the judge hearing the motion.[64]

This issue of the contents of personal journals or diaries is raised in the context in which there is an absence of litigation privilege or solicitor–client privilege in the notes.

In an action asserting sexual abuse by her physician, the plaintiff sought privilege on the contents of her personal journal, which she had kept on the advice of her counsellor. The fourth branch of the test failed and the notes were ordered to be produced.[65]

In another case, similar journals were ordered to be produced with redactions.[66]

A motion requesting production of a journal was refused when the court determined that there was other evidence available to lead to the same end and that the journal

62 *Ibid* at para 20.

63 *Clements and Wawanesa Mutual Insurance Company v Fougère and Morin*, 2007 NBCA 4.

64 *Roche v Sameday Worldwide* (2012), 326 Nfld & PEIR 248 (NLSCTD).

65 *McClelland, Woods, et al v Stewart, Asplin, et al*, 2006 BCSC 1948, Masuhara J. This case is post-*Ryan*.

66 *Hannis v Tompkins* (2001), 43 ETR (2d) 208 (Ont Sup Ct J); *Lazin v Ciba-Geigy Canada Ltd*, 1976 AltaSCAD 58.

was not "critical to the truth-finding process." Ironically, such other evidence included clinical notes of the family GP and the psychiatrist, both of whom prepared histories and reports.[67]

As with privilege asserted over medical files, the person seeking to assert privilege over personal journals must lead evidence to show the damage that he or she will suffer, should an order for production of the journals be made.[68]

67 *Bean v Manufacturers Life Insurance* (2005), 43 CCLI (4th) 311, [2005] OJ No 6155 (QL) (Sup Ct J), Master Hawkins.

68 *Gowdie v Warby*, 2011 ONSC 960, in which the production motion was adjourned to allow the party asserting privilege to lead such evidence.