

Human Rights Tribunal Powers: The “Big Stick” of Reinstatement



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UNLIKE OUR COURT, THE *ONTARIO HUMAN RIGHTS TRIBUNAL* HAS THE POWER TO REINSTATE EMPLOYEES TO THEIR EMPLOYMENT IN APPROPRIATE CASES. NORMALLY, A REINSTATEMENT ORDER WILL ALSO BE ACCOMPANIED BY SOME FORM OF COMPENSATION AWARD IN RESPECT OF LOST WAGES OR “BACK PAY”. IN THE PAST, THIS POWERFUL REINSTATEMENT REMEDY HAS ONLY BEEN VERY RARELY ORDERED BY THE *TRIBUNAL*. IN A RECENT CASE, HOWEVER, THE *TRIBUNAL* HAS DEMONSTRATED ITS READINESS TO AWARD REINSTATEMENT AND BACK PAY, AND IN DRAMATIC FASHION.

In *Fair v. Hamilton Wentworth District School Board*¹, the Tribunal ordered not only that Sharon Fair be reinstated to her employment with the Hamilton Board, but that she also be compensated for the entire nine year period of her unemployment between 2003 and her ultimate reinstatement in 2012. The Tribunal ordered the payment to Ms. Fair of approximately \$420,000.00 in damages representing lost wages, interest, pension adjustments and reimbursement of benefits.

Fair had been employed by the Board as Supervisor, Regulated Substances, Asbestos. The stressful nature of her job and her fear of making a mistake in the area of asbestos removal caused Fair to develop a generalized anxiety disorder. In a 2012 decision, the Tribunal found that the Board had failed to adequately accommodate Fair's disability leading up

to the termination of her employment in 2004.

In determining that reinstatement was the appropriate remedy in the circumstances, the Tribunal relied on the decision of the Supreme Court of Canada in *Alberta Union of Provincial Employees v. Lethbridge Community College*², where in the context of a unionized (grievance arbitration) environment, the Court held that “as a general rule, where a grievor's collective agreement rights have been violated, reinstatement of the grievor to her previous position will normally be in order. Departure from this position should only occur where the arbitration Board's findings reflect concerns that the employment relationship is no longer viable.”

The Tribunal's decision is potentially very important for two reasons.

¹ *Fair v. Hamilton Wentworth District School Board*, 2013 HRTO 440

² *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28

1. The Tribunal has adopted a test from the unionized environment that would indicate reinstatement, as a rule, to be the appropriate remedy in most cases, unless it can be demonstrated that continued employment is not viable.
2. The Tribunal has also demonstrated its willingness to award significant damages as compensation for back pay where even “extraordinary” delay has occurred, so long as the delay is not directly attributable to the Applicant.

This decision could well mark a turning point in the Ontario Human Rights landscape. The extent to which the Fair case influences the frequency of future awards of reinstatement by the Tribunal remains to be seen in future cases. Employers faced with allegations of Human Rights violations should nonetheless be aware of the power of this remedy, and the Tribunal’s recently illustrated willingness to swing the “big stick” that it has always wielded but seldom previously used.