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Reinstatement: The quintessential "make whole" remedy or a fiction?

Like the mythical sasquatch, the Loch Ness monster, or the abominable snowman, most of us have heard of it and some of us have read about it, but never have we seen the remedy of reinstatement in section 79(2)(b) of the *Employment Standards Act* (the "*Act*") actually occur.

Section 79(2)(b) provides:

> 79
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> …
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> (2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:
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> …
>
> (b) reinstate a person in employment and pay the person any wages lost because of the contravention

Colloquially described as a "make whole" remedy, section 79(2)(b) gives the Director of Employment Standards (the "Director") the discretion to order an employer to reinstate an employee and pay he or she any lost wages, if the employer has contravened one or more of sections 8 (employment-related misrepresentations to the employee), 83 (termination of employment in retaliation for an employee's enforcement or an inquiry as to his rights under the *Act*), or Part 6 of the *Act* (refusal to allow an employee to return to work following a statutorily mandated pregnancy leave[1], parental leave, family responsibility leave, compassionate care leave, reservists' leave, bereavement leave or jury duty).

While reinstatement is not a remedy that is ordinarily available at common law, it is more commonly sought and awarded in a union context, where an employee grieves an unjust dismissal. This remedy, undoubtedly a powerful one if awarded, enables the employee to make up not only their past wage loss and to continue to receive the economic benefits of their employment in the future, but also restores any psychological benefits they derive from their job. Therefore, the transference of the remedy of reinstatement from the union experience to the non-union sector in British Columbia, in the form of a statutory remedy under section 79(2)(b) of the *Act*, at first glance should be a welcome option for employees in the non-union sector as providing a comparable remedy to reinstatement available to their counterparts in the union sector.

However, in practice, in British Columbia, the statutory remedy of reinstatement has yet to make an appearance in an award by the Director or the Employment Standards Tribunal (the "Tribunal"), although dismissed employees have sought it in several cases. Partly, the absence of this remedy may be attributed to the limited circumstances in which it may be available or can be

sought in the non-union sector in British Columbia, namely, it may only arise if the Director is satisfied that one or more of sections 8, 83 and Part 6 of the *Act*[2] were breached (limitations that do not exist in the union sector). It may also be that in some cases it is impossible or impractical to order reinstatement of the wrongfully discharged employee who otherwise satisfies one or more pre-requisites of the reinstatement remedy in section 79(2)(b) of the *Act.* Examples of this would include circumstances where the employer ceases operations[3] or the employee has secured alternate employment[4] after filing a complaint or left B.C., and not expressed any interest in being reinstated to their former position[5].

In such cases, there is an alternative "make whole" remedy that can be found under section 79(2)(c) of the *Act*, i.e. to pay a person compensation instead of reinstating the person's employment - which the Director has been relatively more willing to award. The Tribunal in *Afaga Beauty Service Ltd.*[6] delineated a list of non exclusive factors in determining appropriate compensation for loss of employment which included: "length of service with the employer, the time needed to find alternative employment, mitigation, other earnings during the unemployment, projected earnings from previous employment and the like." While clearly not as extensive and as fulsome a remedy as reinstatement under section 79(2)(b) of the *Act*, the remedy under section 79(2)(c) seeks, as far as is economically possible, to return the employee to the position he or she would have been in had the employer's misconduct not occurred. As described by the tribunal in *Photogenis Digital Imaging Ltd./PDI Internet Café Incorporated*[7], the compensation awarded under this section "must be commensurate, in an economic sense, with reinstatement".

Having said this, in my view, the apparent reticence of the Director in declining to grant the remedy of reinstatement cannot be fully attributed to the rationale offered earlier or the existence of the alternative to the remedy of reinstatement available in section 79(2)(c). If one refers to the Director's online *Interpretation Guidlines Manual* (the "*Guidlines*") for the *Act,* published on the website of the Employment Standards Branch[8], the following explanation in relation to the reinstatement remedy in section 79(2)(b) is offered:

> Reinstatement is rarely appropriate as the relationship is usually too damaged for reinstatement to be successful. Therefore, to create a "make whole" solution to a contravention of these provisions, the director considers the following
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> - wages lost; which may include wages from previous employer or due to missing another employment opportunity
> - recovery of reasonable out-of-pocket expenses caused by the contravention and the search for employment. Out-of-pocket expenses does not include the cost of obtaining legal advice, or of retaining legal counsel.

It would appear that the Director has a somewhat somber perspective on the reinstatement remedy in the *Guidelines* that favours the alternative in section 79(2)(c)- lost wages *sans* reinstatement. Admittedly, it is hard to refute that in most, if not all cases, where an employer has dismissed an employee the relationship between the parties is, at

some level, bruised or fractured and there is undoubtedly a loss of trust and confidence between the parties and reluctance, whether large or small, by the employer to take the employee back even where a determination has been made that the employee was dismissed under harsh, unjust or unreasonable circumstances, contrary to one or more of sections 8, 83 or Part 6 of the *Act*.

In the cases considered in preparing for this article, it was difficult to find any one case that stood out as a clear example of a "relationship… too damaged for reinstatement" in contradistinction to the "ordinary" case of a bruised relationship between an employee and their employer who terminated their employment in contravention of the *Act*. In a few cases the Tribunal delineated the Director's reasons for the determination in greater detail offering more insight into why the Director decided against reinstatement such as in *Photogenis Digital Imaging Ltd./PDI Internet Café Incorporated*[9] where the Tribunal pointed out that the principal of the employer was "angry" or "accusatory" towards the two employees who filed complaints against the employer and berated one of them before terminating the employment of both as a retaliatory measure. However in most other cases the Tribunal simply reports, with little or no explanation, that the Director concluded the "relationship had broken down"[10] or the "employer did not want the employee"[11] or "reinstatement of the employee was not appropriate in this case"[12], and in two cases stating that the Director could have made the employee whole by way of a reinstatement order coupled with an order to recover lost wages[13] but instead ordered compensation in lieu of reinstatement. The lack of sufficient explanation why the reinstatement remedy was not awarded in most cases may very well be because the Tribunal did not find any real analysis or explanation for why the Director opted against the reinstatement remedy in the reasons for the determinations under appeal.

In the writer's view, to deny the reinstatement remedy (where the employee wants it and has otherwise met the requirements of section 79(2)(b)) only because the employer is reluctant to take back the employee, or does not want the employee, or because there are some bruised feelings between the parties will only serve to reinforce the conclusion that the reinstatement remedy is a fiction and detract from any deterrent value the remedy may have with employers, who otherwise might be inclined to dismiss employees in contravention of the *Act* (particularly in circumstances contemplated in section 79(2)(b)). Surely the legislators in enacting this very powerful remedy must have envisaged that it would have "teeth."

Having said this, it would be irresponsible to end this paper without mentioning two empirical studies by academicians on how the remedy of reinstatement has fared in the non-union sector. While not suggesting by any means that either of the studies, methodologically or otherwise, should be uncritically accepted, the findings in both are interesting and contribute to one's understanding of what could make reinstatement, in the non-union sector, a more attractive remedy. The first is a study of the post-reinstatement experience of non-union federal workers in Quebec conducted in circa 1991 by Professor Trudeau[14] of the Faculty of Law at the Université de Montréal. In his study, Professor Trudeau reported that a survey of non-union employees reinstated under the federal *Canada Labour Code* (the "*Code*") revealed that only 54 percent of the employees returned to work; 67 percent of those believed they were "unjustly" treated by their employer after returning to work; and approximately 38 percent had thereafter resigned from their employment at the time of the study. Professor Trudeau hypothesized that the apparent ineffectiveness of the reinstatement remedy in the non-union sector was

due to the lack of union presence to monitor and oversee the employer's conduct and protect the reinstated employee from harassment and discrimination.

Professor Eden[15] of the School of Public Administration at the University of Victoria conducted a subsequent empirical study to assess the effectiveness of reinstatement of non-union employees under the *Code* from the perspective of the employer. In her study, written questionnaires were sent to employers whose cases had been decided by an adjudicator under the Code and reinstatement was ordered. Out of 106 awards between January 1, 1983 and December 31, 1991, she received responses from 37 employers (or about 35 percent). She summarized the responses of the employers as follows:

> In summary, out of 37 employer respondents, just over one-half indicated that complainants either did not return to work (12 respondents) or were reemployed for less than three months (7).
>
> Of those who returned to work (25), 14 respondents rated reinstatement unsuccessful. Only seven evaluated as successful. Thus, overall, the remedy of reinstatement appears to have been effective in only 30 percent of the cases.

Professor Eden concluded that her study supported Professor Trudeau's conclusion that the remedy of reinstatement "has not fulfilled its promise in the non-union sector." She also concludes, "(t)he presence of a union may be a key variable in the effectiveness of reinstatement as a remedy."

If, in British Columbia, the Director at all shares the concerns articulated in the conclusions of Professors Trudeau and Eden, and if those concerns are factors influencing him from refraining from employing the reinstatement remedy in section 79(2)(b), then perhaps a statutory presumption in favour of reinstatement in the *Act*, combined with an enforcement or monitoring mechanism may serve as an equalizer or substitute for the missing watchful eyes of a union in the non-union sector. In this regard, the constructive comments of Professor Eden below are apt and I would argue her recommendations equally apply in context of the reinstatement remedy in the *Act*:

> In the absence of a union, workers ordered reinstated to the workplace would have to be provided with greater support. To some degree, this may be achieved through a follow-up mechanism directed by the governmental agency that administers the statute. For example, the same inspector who tried to resolve the dispute between the parties prior to adjudication could contact the complainant after issuance of the adjudicator's order to ensure employer compliance with the reinstatement order. Failure to comply on the part of the employer would result in this agency, not the complainant, initiating the procedure for enforcing the remedy…

Having an enforcement mechanism such as that suggested by Professor Eden to monitor and oversee the compliance of the reinstatement remedy after it is given will only add to its effectiveness as a remedy and perhaps bring it out of obscurity in British Columbia in the non-union sector.

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[1] In the case of pregnancy and other leaves permitted under Part 6 of the *Act*, section 54 of the *Act* additionally imposes on the employer specific duties not to terminate the employee's employment and to return her to her position at the end of the leave:

54. (1) An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.

(2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,

(a) terminate employment, or

(b) change a condition of employment without the employee's written consent.

(3) As soon as the leave ends, the employer must place the employee

(a) in the position the employee held before taking leave under this Part, or

(b) in a comparable position.

[2] *Re Irina Berezoutskaia,* BC EST #D082/08; *Jim Pattison Chev-old, A division of Jim Pattison Industries Ltd.,* BC EST #D643/01; *Re Allan Pope*, BC EST #D007/05

[3] *Wang Wei-Ming also known as Wendy Wang carrying on business as Ming Spa*, BC EST #D012/11

[4] *VCS Hytek Air-Conditioning Inc.,* BC EST #D201/98; *The Cash Store Inc.,* BC EST #D087/09

[5] *Afaga Beauty Service Ltd*., BC EST #D318/97

[6] *Ibid.,*, p. 5; *W.G. McMahon Canada Ltd.*, BC EST #D386/99

[7] BC EST #D534/02

[8] http://www.labour.gov.bc.ca/esb/igm/esa-part-10/igm-esa-s-79.htm

[9] *Supra*, footnote 7, p. 7.

[10] *Quigg Development Corporation,* BC EST #RD047/08 Reconsideration of BC EST #D014/08; Rose Miller, Notary Public, BC EST #D062/07

[11] In *The Cash Store Inc.*[11]*, supra*, footnote 4, it is noteworthy that the Tribunal, in upholding the lost wage award of the Director made to the employee whose employment was terminated for requesting a family responsibility leave pursuant to section 52 of the *Act*, observed that the Director dismissed reinstatement as a viable remedy not simply because the employee had secured an alternative employment but also because the employer "did not want her back".

[12] *Skyline Estates Ltd. doing business as "Traveller's Inn",* BC EST #D210/03; *Maltesen Masonry Ltd.,* BC EST #D070/10

[13] *Rite Style Manufacturing Ltd. and M.D.F. Doors Ltd.,* BC EST #D105/05; *Orr Hotel limited and Golden Tree Lumber Inc, Associated Companies pursuant to Section 95 of the Employment Standards Act, operating as Dominion Hotel and Lamplighter Pub*, BC EST #D094/01

[14] G. Trudeau, *"Is Reinstatement a Suitable Remedy to At-Will Employees?"* (1991), 30 Ind. Re. 302

[15] G. Eden, *Reinstatement in the Nonunion Sector: An empirical Analysis"* (1994), 49 Ind. Re. 87