

Former Field Hockey Coach Takes a Whack at Reinstatement

by M. Norman Grosman

"I want my job back."

Very few individuals utter those words following a termination of employment, but those who do are typically passionate, often for a variety of reasons, about reinstatement. Putting the employment relationship back together is remarkably challenging in the best of circumstances. However, events surrounding a termination of employment typically do not constitute the best of circumstances. It is for this reason that reinstatement is invoked on an exceptional basis, where permitted, and in many circumstances is not even available.

Recently, in *Milkovich v. Field Hockey Canada*, 2013 BCSC 486, 2013 CarswellBC 747 (B.C. S.C.), the British Columbia Supreme Court had occasion to deal with an individual who sought to have his termination of employment rescinded or declared a nullity, and to be reinstated. Peter Milkovich was hired by Field Hockey Canada ("FHC") in September 2011 as coach of its Women's World Junior national team. One of his key aspirations, which he described as "a coach's dream opportunity", was to take the team to the Junior World Cup finals in 2013. However, in August 2012, FHC advised Mr. Milkovich by letter that his employment would be terminated effective October 8, 2012. He was terminated "without cause" on the basis of his employment agreement which provided [at para. 14]:

"Either party may agree to terminate this contract upon reasonable notice, with a minimum time of 2 weeks written notice."

Mr. Milkovich argued that throughout his employment he was treated with a lack of fairness or justice in FHC's conduct towards him. Following termination, he sought an interlocutory injunction from the court to reinstate him and permit him to take the team to the World Cup finals. Prior to termination, it was clear that the relationship between FHC and Mr. Milkovich had become turbulent, with issues relating to his "inappropriate behaviour" resulting in the suspension of his employment at one point (although the parties disagreed as to whether or not the suspension occurred in error).

During the working notice period afforded Mr. Milkovich, from August 2012 until October 8, 2012, the national team participated in the Pan-American Championships and qualified for the 2013 Junior World Cup. Mr. Milkovich filed a grievance with FHC following the termination of his employment and asked the British Columbia Supreme Court for an interim order to permit him to coach the team at the World Championships.

The court concluded that there was a serious issue to be tried as between Mr. Milkovich and FHC. However, although Mr. Milkovich argued that to not grant him the injunction would result in irreparable harm, the court concluded that any harm to him occasioned by the termination was compensable in monetary damages. The court went on to observe [at paras. 45-56]:

In a non-union workplace, employment is a matter of contract. It has been recognized that damages is an adequate remedy for wrongful dismissal.

Courts have been wary of requiring an employer to reinstate an employee. The reason for this reluctance is that the continuation of the employment relationship requires the continuation of a personal relationship, which the court is unable to enforce.

The court went on to comment that on rare occasions reinstatement is granted in the labour arbitration paradigm because statutory and contractual obligations between the parties are in place prohibiting an employer from dismissing an employee without cause. Even in those circumstances, an arbitrator typically is not bound to grant the remedy of reinstatement. The court observed [at para. 52]

No such obligation exists for an employer in a non-union setting. Generally, non-union employees may be terminated without cause and with adequate notice or pay in lieu of notice.

Finally, in analyzing and commenting upon the balance of convenience, the third requirement in any test to obtain injunctive relief, the court stated [at paras. 64-67]:

FHC maintains that it has lost confidence in Mr. Milkovich's suitability for the position. Furthermore, the circumstances surrounding the termination, including Mr. Milkovich's pursuit of a grievance as well as his commencement of this action and an action of defamation against FHC, demonstrate that reinstatement would impose an untenable relationship.

The new coach has been in place since October 2012 and it would be disruptive to switch coaches at this time.

Mr. Milkovich has failed to establish that the balance of convenience favours his reinstatement as Head Coach...

And so, notwithstanding Mr. Milkovich's strenuous argument of commitment to the national team, and his dream of attending the World Championships, the court snuffed out the dream by declining to reinstate him to the position of coach. This is consistent with the current state of the law. Reinstatement is only available in extraordinary circumstances,

which typically confine themselves to the union statutory and contractual paradigm, and under the *Canada Labour Code* unjust dismissal provisions. Beyond those limited and unique circumstances, courts have uniformly declined to attempt to put the employment relationship back together through the vehicle of reinstatement.