

A question of dignity: ESA severance provision unconstitutional, Ontario court rules

On January 19, 2004, a unanimous panel of the Ontario Divisional Court ruled that a provision in the *Employment Standards Act* that effectively disentitled severely disabled employees from receiving severance pay contravened the equality rights guarantee of the *Canadian Charter of Rights and Freedoms*. The provision at issue was paragraph 58(5)(c) of the Act, which provided that severance was not owed to an employee who was absent because of illness or injury, if the employee's employment contract had "become impossible of performance, or been frustrated by that illness or injury".

The decision, *Ontario Nurses' Association v. Mount Sinai Hospital*, a judicial review of an arbitration award, concerned the grievance of a neonatal ICU nurse who was terminated after approximately 13 years of service. The nurse had discontinued work in January of 1996 and was terminated in June of 1998. The hospital, relying on paragraph 58(5)(c), refused to pay her severance under the Act, and the nurse grieved the refusal. At arbitration, the union argued that the nurse should have been paid severance because her employment contract was not "impossible of performance" or frustrated by her disability. It also asserted that, although she had been off work for two and a half years and no firm date had been provided for her return, the hospital should have accommodated her in a manner consistent with the *Human Rights Code* by offering to maintain her employment until she was capable of returning to work.

ARBITRATION BOARD: ESA SEVERANCE PROVISION CONSTITUTIONAL

The arbitration board rejected the union's argument, holding that the duty to accommodate did not require the hospital to maintain the nurse's employment indefinitely. It then rejected the union's alternative submission that paragraph 58(5)(c) of the Act violated subsection 15(1) of the *Charter*, the equality rights provision. The majority of the arbitration board turned for guidance to the decision of the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, which set out the test for determining whether a claimant's *Charter* equality rights have been breached. *Law* established that three questions must be considered when making this determination:

1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds of discrimination under subsection 15(1) of the *Charter*?
3. Does the differential treatment discriminate, by imposing a burden upon, or withholding a benefit from, the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has

application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

The majority held that the first two parts of the test were met because paragraph 58(5)(c) did impose differential treatment on the nurse based on the nature and extent of her disability. However, it held that the provision did not withhold a benefit in the manner contemplated in the third part of the test. In arriving at this conclusion, the board majority noted that the provision did not deprive all disabled employees of severance, but only those whose employment contracts had been frustrated. As the benefit of severance was denied, not due to disability but rather to the non-viability of the contract, there was no violation of subsection 15(1).

COURT: LEGISLATION EXCLUDES "MOST DISADVANTAGED"

The Divisional Court, in quashing the award, started its analysis by looking at the legislative history of the severance provision. It concluded that this history made it clear that the purpose of severance - as opposed to termination pay - was to provide an earned benefit to long-serving employees, and that it was "properly payable for *any* non-culpable cessation of employment". [emphasis added]

Turning to the analysis of the third factor in the *Law* test, the Court rejected the hospital's position that the nurse was disentitled to severance because her contract had been frustrated. The Court noted that subsection 58(5) contemplated other circumstances in which, although an employment contract is frustrated, the entitlement to severance remains (such as when there is a "permanent discontinuance of all or part of a business at an establishment however caused, whether fortuitous, unforeseen or by act of God). In the Court's view, the differential treatment was based ultimately on disability, despite the fact that not all disabled employees were disentitled to severance under the provision:

"The differential treatment is based not on frustration of contract alone. It is based exclusively on frustration because of serious and prolonged disability. ... Moreover, the group of disabled employees that the legislation excludes from receiving the benefit is the very group that is the most disadvantaged, since it consists exclusively of those employees who are so seriously disabled that they are not able to continue in their current employment. This exclusion imposes an additional burden within the group of disabled individuals. This fact aggravates the consequences of subsection 58(5)(c) of the *ESA*."

The Court held that it was irrelevant to the analysis of discrimination that, in some cases, severely disabled employees are financially protected by access to long-term disability benefits. Severance is a different benefit for a different purpose. Moreover, not all employees are entitled to long-term disability, which is a negotiated collateral benefit. Noting the importance of employment to a person's sense of identity and self-worth, the Court concluded by holding that paragraph 58(5)(c) had a profoundly discriminatory impact on the most disabled:

"To deprive a person of a benefit of employment relating to their investment in the business for which they have worked, based on severe disability, goes to the very core of the values contemplated in s. 15(1) of the *Charter*. ... Subsection 58(5)(c) singles out the severely disabled to deny them an employment benefit to which they would have been entitled but for their disability. In so doing it devalues their part

would have been entitled but for their disability. In so doing it devalues their past contributions to their employment. The denial of an employment benefit that has been established to recognize a person's contributions to the employer goes directly to the dignity of a disabled person."

Accordingly, the Court quashed the award and issued an order declaring paragraph 58(5)(c) to be unconstitutional and of no force and effect.

In Our View

Please note that this decision concerns the previous *Employment Standards Act*. Under the current *Employment Standards Act, 2000*, the provisions denying severance pay to employees whose contract of employment is frustrated by disability are found in Ontario Regulation 288/01, section 9.

For further developments in this case, see ["Impermissible stereotypes": Court of Appeal upholds ruling that ESA severance provision is unconstitutional](#).

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