

## "Impermissible stereotypes": Court of Appeal upholds ruling that ESA severance provision is unconstitutional

In a decision rendered on May 4, 2005, the Ontario Court of Appeal has upheld a ruling of the Ontario Divisional Court that a provision in the *Employment Standards Act* that effectively disintitled severely disabled employees from receiving severance pay contravened the equality rights guarantee of the *Canadian Charter of Rights and Freedoms* (see "[A question of dignity: ESA severance provision unconstitutional, Ontario court rules](#)"). 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*, concerned the grievance of a neonatal ICU nurse who was terminated after approximately 13 years of service. The nurse had discontinued work in January 1996 and was terminated in June 1998. The hospital, relying on paragraph 58(5)(c), refused to pay her severance under the Act, and the nurse grieved the refusal. Although unsuccessful at arbitration, the union won before the Divisional Court, which quashed the arbitration award.

The Divisional Court applied the test for discrimination articulated by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*. The *Law* case established that three questions must be considered when assessing whether a claimant's equality rights have been breached:

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 or 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 that otherwise has the effect of perpetuating or promoting the view that the claimant 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 of the arbitration board had held that the first two parts of the test were met, but not the third. It had held that paragraph 58(5)(c) did not deprive all disabled employees of severance, but only those whose employment contracts had been frustrated. As the benefit of severance was denied due not to disability but rather to the non-viability of the contract, there had been no violation of subsection 15(1) of the *Charter*.

The Divisional Court disagreed, holding that the differential treatment was based not on frustration of the contract alone, but ultimately on disability. It held that the provision excluded the benefit of severance to "the very group [of employees] 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".

### PURPOSE OF THE PROVISION

Before the Court of Appeal, the parties differed on the purpose of paragraph 58(5)(c). The employer argued that the dominant purpose of severance pay is prospective: severance pay is intended to compensate employees for capital losses going forward as they find new employment. These "capital losses" refer to the seniority, benefits and job-specific skills that accumulate with service and that cannot be transferred to a new workplace. Since employees whose contracts have been frustrated due to illness or injury are unlikely to re-enter the workforce, denying them severance pay is not discriminatory.

The employer relied on the 2002 decision of the Supreme Court of Canada in *Gosselin v. Quebec*, in which the Court upheld the constitutionality of a provincial regulation that provided reduced welfare benefits to persons under 30 who did not participate in various work experience programs. In *Gosselin*, the Court held the purpose of the challenged regulation was not stereotypical or arbitrary, but rather corresponded to the actual needs and circumstances of those under 30. It held further that, while the program's premises did not correspond exactly to the situation of all persons under 30, legislation did not have to correspond perfectly with social reality to comply with the equality provision of the *Charter*. The legislature is entitled to proceed on informed general assumptions without running afoul of section 15 of the *Charter* as long as those assumptions are not based on arbitrary and demeaning stereotypes.

The union argued that the purpose of severance pay is retrospective: severance pay is intended to compensate long-serving employees for their years of service and investment in the employer's business. Employees whose contracts have been frustrated due to illness or injury have made contributions that are of equal value to those of other employees who qualify for severance pay. Therefore, the denial of severance pay to such employees constitutes discrimination.

### COURT OF APPEAL: NOT TRUE THAT SEVERELY DISABLED WILL NEVER WORK AGAIN

The Court of Appeal held that the employer's reliance on *Gosselin* was flawed because, in that case, the Court had found that people under 30 did not suffer from stigmatization because of their age. By contrast, in this case, the assumption underlying the differential treatment in paragraph 58(5)(c) was based on the stereotype that people with severe and prolonged disabilities will not return to the workforce:

"*Gosselin* does not assist the appellant in this case. The legislature may not use employees whose contracts have been frustrated due to disability as a proxy for employees who will never work again because this assumption is based on an impermissible stereotype that disabled persons cannot fully participate in the workforce. Even if this were a case where an informed general assumption were permitted, the [employer's] argument would still fail because the generalization that individuals whose employment has been frustrated by disability are likely to never participate in the workforce again is not true."

The generalization is not true, the Court stated, because, while employees with severe and prolonged disabilities may be unable to be employed in one workplace, they may be able to be employed in another because of differing work conditions, the range of work available or a greater ability on the part of the employer to cope with prolonged absenteeism. Moreover, the situation of

the disabled may change and they may be able to work again despite the frustration of their employment contract with the terminating employer. In fact, the grievor in this case did find new employment following her termination by the hospital.

The Court noted that, even if the provision was consistent with the purpose of compensating employees remaining in the workforce for capital loss going forward, it was not consistent with the other purpose of severance – that of compensating employees for their past contribution to an employer's business. It observed that paragraph 58(5)(d) provided for severance to employees who die before receiving notice of termination, which demonstrated the compensatory, retrospective nature of the severance pay provisions.

### NOT A REASONABLE LIMIT

The Court went on to hold that the provision could not be saved as a reasonable limit on equality rights because there was no rational connection between the objective of granting severance pay to those employees who will rejoin the work force and the denial of severance to those whose contracts have been frustrated due to illness or injury. Rather, the generalization that was offered as the rational connection reflected the stereotypical assumption about the "adaptability, industry and commitment to the workforce" of the disabled employee.

Finally, the Court stated, paragraph 58(5)(c) could not be said to impair the grievor's *Charter* rights as minimally as possible. Although one purpose of severance pay is to provide assistance for employees to rejoin the workforce, paragraph 58(5)(c) denies the benefit of severance pay to all persons whose contracts of employment have been frustrated due to disability without regard to whether or not they attempt to rejoin the workforce.

Accordingly, the Court dismissed the employer's appeal and declared paragraph 58(5)(c) unconstitutional and of no force and effect.

### In Our View

As noted in our report of the Divisional Court's judgment, this decision concerns the previous *Employment Standards Act*. Under the *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:

9. (1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:  
...
2. Subject to subsection (2), an employee whose contract of employment has become impossible to perform or has been frustrated.  
(2) Paragraph 2 of subsection (1) does not apply if,  
...  
(b) the impossibility or frustration is the result of an illness or injury suffered by the employee, and the *Human Rights Code* prohibits severing the employment.

While this provision differs from its predecessor in that it protects employees whose employment has been severed in contravention of the *Human Rights Code*, it is not clear that this distinction would protect the provision from constitutional review. The Court pointed out that, while it may be impossible under the Code for one employer to accommodate a disabled employee due to the range of positions available, the particular working conditions or the employer's ability to tolerate prolonged absences, another employer may be able to do so. As well, the Court noted that an employee whose employment has been frustrated due to disability may be able to work in the future due to retraining, new assistive technologies or because they recover from their illness or injury. On this reasoning, even if a disabled employee's employment was terminated in

compliance with the Code, a regulation that withholds severance pay from all such employees may still violate their *Charter* equality rights.

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