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CAN DISABLED EMPLOYEES BE DENIED STATUTORY SEVERANCE PAY?

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The answer may be "no". The Ontario Superior Court of Justice, Divisional Court, recently issued a decision stating that section 58(5)(c) of the former *Employment Standards Act ("ESA 1990")*, that permitted an employer to deny statutory severance pay to an employee whose contract of employment was frustrated due to illness or injury, is unconstitutional.[1]

The case involved an employee who was hired in 1985 as a nurse by Mount Sinai Hospital ("Hospital"). Due to disability, the nurse discontinued work with the Hospital in January 1996. Shortly afterwards she started receiving long-term disability benefits. On June 15, 1998, the nurse was dismissed from her employment for innocent absenteeism due to disability. The position of the Hospital was that the nurse was not entitled to statutory severance pay by virtue of section 58(5)(c) of the *ESA 1990*. That section states:

> s.58(5)(c): **Application** – [The following are entitled to statutory severance pay],
>
> ...
>
> (c) an employee who is absent because of illness or injury, if the employee's contract of employment has not become impossible of performance or been frustrated by that illness or injury.

The Hospital argued that the employee was not entitled to statutory severance pay under the *ESA 1990* because the employment contract had become "frustrated" due to disability. Generally, for an employment contract to be "frustrated" there must be an unforeseen change of circumstances that makes further performance of the contract either impracticable or radically different from what the parties had originally intended. In short, the employment contract must be impossible to perform. At common law, some of the factors to consider include: (1) the type of illness or disability; (2) how long the illness/disability has continued and the prospects of recovery; (3) the nature of the employment; (4) the size of the employer; and (5) the employee's seniority.

At arbitration, the majority of the Board found that the nurse's employment had indeed been frustrated within the meaning of section 58(5)(c). Therefore she was not entitled to statutory severance pay under the *ESA 1990*.

The Board further held that it had the jurisdiction to interpret and apply the *Canadian Charter of Rights and Freedoms* ("*Charter*"), and determine the

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[1] *Ontario Nurses' Assn*. v. *Mount Sinai Hospital*, [2004] O.J. No. 162 (QL).

constitutionality of sub-section 58(5)(c). At issue was whether the *ESA 1990*, by denying statutory severance to a person with a disability, violated s.15(1) of the *Charter*, which states:

> s.15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The Board was asked to determine whether the *ESA 1990* subsection drew an inappropriate distinction between people with and without a disability thereby depriving people with disabilities from a right or benefit (i.e. statutory severance pay). The Board concluded that while a distinction was drawn, the *ESA 1990* does not deprive ALL disabled employees from receiving statutory severance pay but rather only those whose employment contract can no longer be fulfilled. As a result, the decision to deny statutory severance pay was not due to a disability *per se* but due to frustration of contract that coincidentally arose out of a disability. On this basis, the Board concluded there was no s.15(1) violation. The Hospital applied to the Ontario Superior Court of Justice, General Division, for judicial review of the Board's decision.

On judicial review, the Court rejected the Board's reasoning. The Court held that ss.58(5)(c) violated s.15(1) of the *Charter*, and is therefore unconstitutional. In the decision, the Court stated that the impugned section draws a clear distinction between people on the basis of a disability. The Court rejected the notion that denying statutory severance pay was due to frustration of contract. Instead, it was the employee's disability alone that disentitled her from statutory severance pay.

Further, by drawing that distinction the *ESA 1990* imposes a burden upon, or withholds a benefit from, a person with a disability 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 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." In short, the Court ruled that the impugned law differentiates in a manner that demeans one's dignity. Further, the Court stated that even though the Hospital accommodated the grievor pursuant to the *Human Rights Code* ("*Code*"), this does not mitigate the damage to the employee's sense of dignity that is protected under the *Charter*. In effect, the Court is stating that while the employer may have respected both the *ESA 1990* and *Code*, the *Charter*'s dignity rights were unquestionably violated when the legislature passed a law that allows an employer to deny statutory severance pay to a disabled employee.

Finally, noting that the historical purpose of statutory severance pay is to compensate the employee for past service, the Court stated "denying a benefit based on past contributions to employees who are unable to continue their employment due to disability cannot help but send the message that the contributions of those employees were not as valuable as the contributions of able-bodied employees."

The Court concluded that ss.58(5)(c) singled out the severely disabled by denying them an employment benefit to which they would have been entitled had they not been disabled.

The impact of this decision on the existing law is unclear because the above decision was based on the language of the old *ESA 1990*, which has since been repealed and replaced with the *Employment Standards Act, 2000 ("ESA, 2000")*. Further, the statutory severance pay exception contained in the revised *ESA, 2000*, Regulation 288/01, is not identical to that rejected by the Court in the former *ESA 1990*:

> s.9. **Employees not entitled to severance pay** - (1) [The following employees 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.

Although the wording in the new statutory severance pay exception is similar to the old *ESA 1990*, the critical reference in s.9(1)2 to "illness or injury" has been omitted. As a result, by reading s.9(1)2 alone there is an arguable case that statutory severance pay can be properly denied when the employment contract has become frustrated regardless of whether the cause of frustration is an illness, disability, or some other reason.

Reading section 9(1)2 and 9(2)(b) together, however, creates a different result. Together, these two provisions mean that an employee (who meets the qualifying criteria for statutory severance pay) will be entitled to severance pay even if the contract has become impossible to perform or frustrated, if the reason for the frustration or impossibility was because of illness or injury and the *Code* prohibits the employer from severing the employment. In other words, before the employer can even engage in a determination of whether the employment contract is frustrated, the employer must first demonstrate that it has met its duty to accommodate to the point of undue hardship. This creates two novel arguments.

First, by having to engage in this extra step, there is a case to be made that if an employer must first satisfy the duty to accommodate and then prove that the contract is frustrated then the law provides a *greater* protection to a disabled employee – a benefit that the legislature may not have intended. Second, s.9(2)(b) could mean that an employee whose illness or injury can be accommodated is entitled to severance pay whereas an employee whose illness or injury cannot be accommodated is not entitled. Even if this interpretation is accurate, however, it may nonetheless violate the *Charter*'s equality and dignity provisions.

It is important to note that it is equally arguable that the new *ESA, 2000* statutory severance pay language is merely cosmetic in that the reference to "frustration" may really mean "frustration due to illness or injury" thereby making the new language as constitutionally vulnerable as the old section.

Leaving aside the statutory implications of the Court's decision, this ruling may also impact the long-accepted common law notion that illness or disability can result in the frustration of an employment contract. Although the Court did not discuss this common law aspect, one of the ramifications of the case could be that similar reasons for dismissal at common law are unconstitutional.

We will continue to monitor the legal developments that flow from this important case.

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Michael Conradi is a member of our Labour and Employment Group. He provides legal services and advice to a wide range of clients in the private and public sectors.

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