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ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BLAIR R.S.J., GRAVELY AND EPSTEIN JJ.

APPLICATION UNDER the *Judicial Review Procedure Act*, R.S.O., 1990, c.J. 1, as amended and Rule 68 of the Rules of Civil Procedure;

IN THE MATTER OF an Award of an Arbitration Board dated October 23, 2002 concerning the grievance of C. Tilley, the *Employment Standards Act*, R.S.O. 1990 E.14, s.58 (5)(c) and the *Canadian Charter of Rights and Freedoms*, ss. 15 and 52

B E T W E E N:	)	
	)	
ONTARIO NURSES' ASSOCIATION	)	*Elizabeth J. McIntyre and Amanda Pask*, for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
MOUNT SINAI HOSPITAL	)	*Michael T. Doi*, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD:** October 6, 2003

Epstein J.

REASONS FOR JUDGMENT

[1] Section 58 of the *Employment Standards Act*[1] provides an employee with general entitlement to severance pay upon termination of his or her employment. Subsection 58(5)(c) operates to deny severance pay to employees who are terminated in circumstances in which their contract of employment has "become impossible of performance or frustrated" by illness or injury. The issue in this judicial review application is whether subsection 58(5)(c) of the *ESA* withstands constitutional scrutiny.

[2] On June 15, 1998, Mount Sinai Hospital dismissed Christine Tilley, a neonatal intensive care nurse who had been in the hospital's employ for 13 years. There is no dispute that Ms. Tilley was terminated for innocent absenteeism due to her disability and not for any culpable behaviour on her part. The hospital, relying on subsection 58(5)(c) of the *ESA*, did not pay her severance pay. The union that represented Ms. Tilley, the Ontario Nurses Association, filed a grievance that challenged, among other things, the hospital's failure to pay severance.

[3] The grievance gave rise to arbitration proceedings in which one of the issues before the Board of Arbitration was the constitutionality of subsection 58(5) (c) of the *ESA*. The Association seeks judicial review of the Board's June 4, 2002 decision in which the majority upheld the constitutionality of the section.

The Facts

[4] There are no facts in dispute.

[5] The Association is a trade union that holds bargaining rights for all non-excluded full-time and part-time registered and graduate nurses employed by the hospital.

[6] In June 1985, Ms. Tilley started her employment with the hospital as a neonatal intensive care unit nurse. From August 1995 to November 1995 she was away from work due to illness. After a brief return to modified duties, Ms. Tilley experienced a relapse and discontinued work with the hospital in January of 1996.

[7] At the time of her termination in June of 1998, Ms. Tilley was receiving long-term disability benefits available to her as part of her compensation package negotiated under the collective agreement between the Association and the hospital. Ms. Tilley continued to receive these benefits for a period of time thereafter. Her doctor indicated, just prior to her termination, that she would eventually return to work but he was unable to provide an estimated date.

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[1] R.S.O. 1990, c. E. 14

[8] The Board of Arbitration appointed under the collective agreement heard the grievance that the Association filed on Ms. Tilley's behalf.[2] Before the Board, the Association argued that the hospital should have accommodated Ms.Tilley by maintaining her employment for an indefinite period when she could not have reported for work. The Board rejected this submission and determined that the duty to accommodate did not require the hospital to maintain her employment indefinitely. In its August 17, 2000 award, a majority of the Board concluded that Ms. Tilley's contract of employment had been frustrated within the meaning of subsection 58(5)(c) of the *ESA*, and she was therefore not entitled to severance pay. In that award, the majority of the Board further held that it had jurisdiction to interpret and apply the *Canadian Charter of Rights and Freedoms* [3] in determining the constitutionality of subsection 58(5)(c) of the Act.

[9] The Board went on, in its June 4, 2002 award, to consider the constitutionality of the subsection. The majority of the Board determined that the subsection complied with section 15(1) of the *Charter*.

[10] Ms. Tilley's claim for relief is limited to severance pay under subsection 58(2) of the *ESA*. The August 17, 2000 award is not the subject of judicial review.

The Issues

1. What is the standard of review of the Board's decision of June 4, 2002?
2. Does subsection 58(5)(c) of the Act comply with s. 15(1) of the *Charter*?
3. If not, is the section saved by section 1?
4. If the subsection violates the *Charter*, what is the appropriate remedy?

Analysis

1. Standard of Review

[11] Decisions of labour arbitration boards are entitled to curial deference and subject to the patently unreasonable standard of review where the board is interpreting and applying a provision of a collective agreement or is otherwise working within its constituent statute.

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[2] The Board's authority to determine an entitlement under the *ESA* comes from section 64.5 of the Act that provides that the severance pay provisions are enforceable against the employer as if they were part of the collective agreement.

[3] *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act, 1982*, 1982, c. 11 (U.K.); [R.S. C., 1985, Appendix II, No. 44)] *Constitution Act, 1982*, Enacted by the *Canada Act, 1982* (U.K.), c. 11

[12] However, in the decision under review, the issues before the Board were grounded in the interpretation and application of the *Charter.* In *Cuddy Chicks v. Ontario (Labour Relations Board)* (1991), 81 D.L.R. (4th) 121 (S.C.C.) the Supreme Court held that no curial deference is due to the constitutional decisions of administrative tribunals.

[13] Accordingly, correctness is the appropriate standard of review. The parties are in agreement on this point.

2. The constitutionality of subsection 58(5)(c)

(i) *The Legislation, legislative history and relevant jurisprudence*

[14] The relevant portions of section 58 of the *ESA* are as follows:[4]

Severance pay

(2) Where,

a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years, R.S.O. 1990, c. E.14, s.58 (2); S.O. 1993, c. 27, Sched.

Where location deemed an establishment

(3) Where,

(a) there is a permanent discontinuance of all or part of the business of an employer at a location which is part of an establishment consisting of two or more locations; and

[4] The *ESA* was repealed effective September 4, 2001 and replaced with the *Employment Standards Act, 2000* ("*ESA 2000*"). Severance pay entitlement is dealt with in section 64 of the *ESA 2000*, and the equivalent provision to section 58(5)(c) is now to be found in s.9 of Ontario Regulation 288.01, enacted under the *ESA, 2000.*

(b) fifty or more employees have their employment terminated in a period of six months or less because of the permanent discontinuance,

the location shall be deemed to be an establishment for the purpose of determining the rights of the employees employed at that location under this section. R.S.O. 1990, c.E.14, s. 58 (3); S.O. 1993, c.27, Sched.

Amount of severance pay

(4) The severance pay to which an employee is entitled under this section shall be in an amount equal to the employee's regular wages for a regular non-overtime work week multiplied by the sum of,

a) the number of the employee's completed years of employment; and

b) the number of the employee's completed months of employment divided by 12,

but shall not exceed twenty-six weeks regular wages for a regular non-overtime work week. R.S.O. 1990, c. E.14, s. 58 (4); SO. 1993, c. 27, Sched.

Application

(5) Subsections (2), (3) and (4) apply to,

(a) a regular full-time employee and a regular part-time employee;

(b) an employee whose employment is terminated as a result of a strike or lock-out except where the employer establishes that a permanent discontinuance of all or part of the business at an establishment is caused by the economic consequences of the strike;

(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;

(d) an employee who received or was entitled to receive notice of termination but who died before his or her employment was terminated or would have been terminated if notice of termination had been given;

(e) a permanent discontinuance of all or part of a business at an establishment however caused, whether fortuitous, unforeseen or by act of God;

(f) an employee who loses his or her employment by the exercise by another employee of a seniority right; and

(g) an employee who, upon having his or her employment terminated, retires and is entitled to receive a reduced pension benefit. R.S.O. 1990, c. E.14, s. 58(5).

Exceptions

(6) Subsections (2), (3) and (4) do not apply to,

(a) an employee who refuses an offer by his or her employer of reasonable alternative employment with the employer;
(b) an employee who refuses to exercise his or her seniority rights to obtain reasonable alternative employment;
(c) an employee who has been guilty of willful misconduct or disobedience or willful neglect of duty that has not been condoned by the employer;
(d) an employee who, upon having his or her employment terminated, retires and receives an actuarially unreduced pension benefit'
(e) an employee whose employer is engaged in the construction, alteration, maintenance or demolition of buildings, structures, roads, sewers, pipelines, mains, tunnels or other works where the employee works at the site thereof; or
(f) an employee who is employed under an arrangement whereby the employee may elect to work or not when requested to do so.

[15] The legislative background provides some useful context. The statutory obligation to pay severance pay to employees was first added to the *ESA* in 1981.

[16] Initially, severance pay was only required to be paid to long-service employees who were terminated as part of a mass termination caused by a permanent closure of all or part of a business. Employees whose contracts of employment were terminated as a result of disability were not entitled to severance. For clarity, a provision was added (subsection 40a(2)(c)) that ensured that "an employee who is temporarily absent due to illness or injury" received the benefit.

[17] In 1987 the Act was amended to "broaden the scope of the *ESA* by providing individual workers who are terminated, the right to severance pay".[5] As a result of this amendment, severance pay was payable to any long-service employee terminated from an employer with a payroll in excess of $2.5 million.[6] This would include employees terminated on

[5] Legislative Assembly of Ontario, Official Report of Debates (Hansard), 3rd sess., 33rd Parl., June 15, 1987, at 1351
[6] An Act to amend the Employment Standards Act, S.O. 1987 c. 30 s.5

the grounds of disability but for subsection 40a(2)(c), which was amended at that time to take the form of subsection 58(5)(c).

[18] As can be seen from this analysis, when originally enacted, subsection 58(5)(c), clarified that employees who, at the time of plant closure, were temporarily absent due to illness or injury were entitled to severance pay. When the entitlement was broadened in 1987, the section had a very different effect. It disentitled employees whose contracts were terminated by reason of disability from receiving a benefit to which they otherwise would be entitled.

[19] This legislative history, together with relevant jurisprudence, make it clear that severance pay, (in contrast to termination pay in lieu of notice) is an earned benefit that compensates long-serving employees for their past services and for their investment in the employer's business. It is properly payable for any non-culpable cessation of employment. See: *Telegram Publishing Co. v Zwelling* (1972), 1 L.A.C. (2d) 1, aff'd (1976) 67 D.L.R. (3d) 404 (Ont.C.A.) and *Rizzo & Rizzo Shoes Ltd.* (1998) 154 D.L.R. (4th) 193 (S.C.C.).

[20] The applicable provisions of the *Charter* are:

s. 1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

….

Equality Rights

Equality before and under law and equal protection and benefit of law

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

Affirmative action programs

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantage individuals or groups including those that are disadvantage because of race, national or ethnic original, colour, religion, sex, are of mental or physical disability.

[21] The Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)* (1999) 170 D.L.R. (4th) 1, established that a s. 15(1) *Charter* test involves a contextual inquiry to determine whether a challenged distinction violates a claimant's dignity and fails to respect him or her as a full member of society. A contextual approach, rather than a

mechanical approach, must be adopted to give effect to the "strong remedial purpose" of the equality guarantee.

[22] The analysis under *Law* involves a determination as to whether differential treatment infringes essential human dignity by promoting the view that an individual is less capable or deserving of respect and consideration. Justice Iacobucci put it this way .

> It may be said that the purpose of s.15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concerns, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical applications of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy or recognition or value as a human being or as a member of Canadian society.[7]

[23] In *Law*, the Supreme Court also set out an approach to a section 15(1) analysis that requires three "broad inquiries" to be undertaken in determining a discrimination claim under that section. These three inquiries are as follows:[8]

a) Does the impugned law (i) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (ii) 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?

b) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

c) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical 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?

[7] per Iacobucci J. at p. 23.
[8] per Iacobucci J. at p. 19.

[24] More recently, in *Irshad (Litigation Guardian of) v. Ontario (Ministry of Health)* (2001), 55 O.R. (3d) 43 (C.A.), Justice Doherty, speaking for the Ontario Court of Appeal, refined the *Law* analysis by expressing it through this question.[9]

> Would a reasonable person in the position of the claimant, fully apprised of the context, purpose and terms of the impugned state action, conclude upon a careful and dispassionate consideration that his or her sense of self-worth and entitlement to be treated as an individual who is as worthy and valuable as any other in the community was demeaned or denied by the different treatment afforded him or her by the state action?

(ii) The Reasons of the Majority on the issue of Discrimination

[25] The majority of the Board, after referring to the principles in *Law*, considered whether the subsection drew a distinction between the grievor and others based on one or more personal characteristics. For the purposes of this inquiry, the Board found the appropriate comparator group to be "employees who are absent from work due to illness or injury who qualify for severance pay under subsection 58(5)(c) of the Act, provided their contracts of employment have not become impossible of performance or been frustrated by reason of illness or injury".[10]

[26] From there the Board rejected the hospital's position that subsection 58(5)(c) draws a distinction between the grievor and others based not upon disability but on whether the individual's contract was frustrated. The majority held that subsection 58(5)(c) imposed differential treatment between Ms. Tilley and others, and that the basis for that differential treatment was the nature and extent of Ms. Tilley's disability, an enumerated ground under s. 15(1). The Board therefore held that the first and second inquiries in *Law* must be answered in the affirmative.

[27] The majority concluded, however, that the third branch of the *Law* test was not met because it was unable to conclude "that section 58(5)(c) of the *ESA* withholds a benefit in a manner which reflects the stereotypical application of presumed group or personal characteristics or which promotes or perpetuates the view that persons with severe and prolonged disabilities are less capable or less worthy of recognition as human beings or members of Canadian Society, equally deserving of concern, respect and consideration".[11]

[28] Pivotal to the Board's analysis of the third branch in *Law*, was its observation that the *ESA* does not deprive all disabled employees of severance pay, but rather only those whose contract of employment can no longer be fulfilled. This observation gave rise to the Board's finding that the benefit is denied based on the non-viability of the contract as opposed to the

[9] at para. 113
[10] At p. 13 of the decision of the majority of the Board.
[11] At p. 13 of the decision of the majority of the Board.

disability of the employee. This observation , combined with the Board's finding that there was no accommodation possible that would permit the grievor to perform the essential duties of her job without imposing undue hardship on the hospital, supported the Board's conclusion that the impugned subsection does not violate s. 15(1) of the *Charter*. The majority further held that, since the purpose of severance is to compensate for the investment an employee makes in his or her employer's business, the denial of severance to those whose contracts of employment are frustrated by their disability does not stereotype or devalue persons with severe and prolonged disabilities.

[29] Further, I note that in the final part of the Board's analysis of the third branch of the *Law* test, the majority of the Board specifically observed that at the time of her termination, Ms. Tilley was receiving long-term disability benefits.

[30] On this basis, the majority concluded that there was no breach of s. 15(1) and therefore no need to consider section 1 of the *Charter*.

(iii) *Analysis of the Board's Section 15(1) Determination*

[31] I agree with the majority of the Board that the first two branches of the *Law* test must be answered in the affirmative. There can be no doubt that subsection 58(5)(c) of the *ESA* draws a formal distinction between Ms. Tilley and others on the basis of her disability, an enumerated section under s. 15(1) of the *Charter.* However, in my view, there can also be no doubt that the third branch of the test must also be answered in the affirmative.

[32] The third stage of the s. 15(1) inquiry involves the determination as to whether the differential treatment imposes a burden upon, or withholds 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 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.

[33] In approaching the third branch of *Law*, I start with the basis upon which Ms.Tilley was denied severance pay. Subsection 58(5)(c) of the *ESA* treats severly disabled employees differently from all other employees. It is Ms. Tilley's long-term disabling medical condition that has caused her to be disentitled to severance pay. I reject the hospital's submission that her disentitlement is based on the fact that her contract of employment was frustrated. Section 58 contemplates other instances of frustration of the employment contract and in those cases the employee whose employment is terminated is not disentitled to severance.[12] The differential treatment is based not on frustration of contract alone. It is based exclusively on frustration because of serious and prolonged disability. In any event the non-viability of the contract is irrelevant having regard to the fact that the purpose of severance pay is to compensate the employee for past service.

[12] See subsections 58(5)(d) and (e).

[34] The central question is, therefore, whether the severe disability distinction drawn by subsection 58(5)(c) of the *ESA* imposes a disadvantage upon Ms. Tilley as a disabled person in a manner that constitutes discrimination under s. 15(1) of the *Charter*.

[35] This stage of the inquiry in the s. 15(1) analysis is concerned with substantive equality, not formal equality. The emphasis is on human dignity. The assessment of whether a law has the effect of demeaning a claimant's dignity should be undertaken from a subjective-objective perspective. The relevant point of view is that of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member". This requires a court to consider the individual's or group's traits, history, and circumstances in order to evaluate whether a reasonable person, in circumstances similar to the claimant, would find that the impugned law differentiates in a manner that demeans his or her dignity.[13]

[36] The court is required to examine both the purpose and effects of the law in question. It is clear that a law that has a discriminatory purpose cannot survive s. 15(1) scrutiny. However, a discriminatory purpose is not a requirement for a successful s. 15(1) challenge; it is enough for the claimant to demonstrate a discriminatory effect.

[37] In undertaking the third inquiry as to whether the differential treatment on an enumerated or analogous ground is discriminatory, the Supreme Court of Canada, in *Law*, made it clear that this contextual analysis must take into account relevant factors including: the existence of pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the group or individual at issue; whether the ground of discrimination corresponds to a difference in the claimant's actual capacities or circumstances; whether the impugned legislative provision has an ameliorative purpose or effect for an historically disadvantaged group in the legislative context; and the nature and scope of the interest affected by the statutory provision in question.

[38] The first contextual factor to be examined is the existence of a pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue. While this contextual factor is not determinative, it is "probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory"[14]. Those within our society with severe and prolonged disabilities form a group that has been routinely and consistently subjected to various sorts of discrimination. No support for this proposition is necessary. It is not capable of dispute.

[39] It is true, as the Board observed, that less disabled employees are not deprived of the benefit. However, in *Battlefords and District Cooperative Ltd. v. Gibbs et al.; Council of Canadians with Disabilitities et al.*, (1996) 140 D.L.R. (4th) 1, a case involving a provision of an income replacement scheme in an insurance policy that treated individuals with mental disabilities differently than other medically disabled people, the Supreme Court of Canada held at p.13 that "in order to find discrimination on the basis of disability, it is not necessary that all disabled persons be mistreated equally. The case law has consistently held that it is not fatal to a

[13] *Law* at 533-34
[14] *Law* at 534.

finding of discrimination based on a prohibited ground that not all persons bearing the relevant characteristic have been discriminated against."[15]

[40] 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*.

[41] The second contextual factor is the correspondence, or lack thereof, between the grounds on which the claim is based and the actual needs, capacities or circumstances of the claimant or others with similar traits. The benefit in question is based upon an employee's past contributions to the employer's business during his or her years of service. There is no connection between this benefit and the differing needs, capacities or circumstances of the severly disabled. 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. This perpetuates negative stereotypes and devalues the contributions of this group of employees.

[42] The hospital submits that the needs of the severely disabled are different as employees such as Ms. Tilley are generally financially protected by long term disability benefits. In my view, the fact that the grievor received benefits under her disability insurance plan is irrelevant to a determination of whether or not it is discriminatory to deny her, on grounds of her disability, a different benefit with a different purpose. Moreover, long term disability benefits are negotiated collateral benefits to which disabled employees may or may not be entitled.

[43] Accordingly, denying severance pay to those with severe disabilities does not accord with the needs, capacities and circumstances of individuals with prolonged and serious disabilities. This factor weighs in favour of a finding of discrimination.

[44] The third contextual factor to be considered is whether the impugned law has an ameliorative purpose or effect upon a more disadvantaged person or group in society. The question to be asked is whether the group that has been excluded from the scope of the ameliorative law is in a more advantaged position than the person coming within the scope of the law. In *Law* at 539, Iacobucci J. emphasized that "[u]nderinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination".

[45] The critical question to be asked in relation to this contextual factor is whether severely disabled individuals are in a more disadvantaged position than less disabled or able-bodied

[15] See also *Brooks v. Canada Safeway* (1989) 59 D.L.R. (4th) 321 in which the Supreme Court held that discrimination against a subset of the relevant group, in this case, the severly disabled, may be considered discrimination aginst the relevant group generally.

individuals. As previously stated, the severely disabled are a group who have experienced historical discrimination and disadvantages. There is no question that less disabled members of society are the more advantaged group.

[46] The fourth contextual factor to be examined is the nature of the interest affected by the impugned law. The more severe and localized the effect of the law on the affected group, the greater the likelihood that the law is discriminatory.

[47] 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*. In *Reference re Public Service Employee Relations Act* (Alberta) (1987), 38 D.L.R. (4th) 161 (S.C.C.) at 199 the Supreme Court forcefully set out the importance of conditions of employment to a person's dignity. At p. 199 Chief Justice Dickson identified a person's employment as "an essential component of his or her sense of identity, self-worth and emotional well-being. Justice Dickson went on to say "the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect".

[48] I reject the suggestion that the fact that the hospital's treatment of Ms. Tilley did not violate the *Ontario Human Rights Code* in that it appropriately accommodated the grievor, mitigates the extent to which the denial of severance pay violates the dignity of the employee. There is no logical connection between these two issues for the purpose of the *Charter* analysis. Indeed, if the hospital had violated the *Code*, Ms. Tilley would be entitled to reinstatement and she would not be advancing a claim for severance pay.

[49] Subsection 58(5) 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 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.

[50] Based on the foregoing analysis, the dignity of the severely disabled is violated by their exclusion from being entitled to severance pay. Accordingly, subsection 58(5)(c) of the *ESA* violates s. 15(1) of the *Charter*. The next step is to determine whether this violation can be justified under s. 1 of the *Charter*.

(iv) The section 1 analysis

[51] On November 5, 1999 Notice of Constitutional Question was sent to the Attorneys General of Canada and Ontario advising that the Association intended to question the constitutional validity of ss. 58(5)(c) of the *ESA*, in the arbitration proceedings. The Attorneys-General advised that they would not participate in this matter. No evidence was before the Board concerning section 1 of the *Charter*.

[52] I agree with counsel for the hospital that in constitutional litigation where the Crown chooses not to participate, the burden on the private civil litigant in the position of the hospital is problematic.

[53] However, given that the onus is on the hospital to satisfy me that the discrimination is demonstrably justifiable in a free and democratic society, I find that the impugned provision is not saved by section 1. No pressing or substantial societal need has been identified as justifying the denial of the benefit.

Conclusion

[54] The denial of a benefit that is intended to recognize past service, by reason of severe and prolonged disabilities devalues this group in that it rests on assumptions that the contributions of this group of disabled individuals are worth less than the contributions of employees who do not

fall into the group. The denial of the benefit to a group already disadvantaged by their disability and the loss of their employment by reason of their disability is discriminatory and not demonstably justifiable.

[55] As such subsection 58(5)(c) cannot withstand constitutional scrutiny.

[56] The Board's order is quashed. An order will issue declaring the impugned portion of subsection 58(5)(c), namely, "if the employee's contract of employment has not become impossible of performance or been frustrated by that illness or injury", unconstitutional and of no force and effect. These words are struck from the subsection. Ms. Tilley is therefore entitled to receive severance pay in accordance with ss. 58(2) (3) and (4) of the *ESA*.

[57] Based on counsels' submissions as to costs, the Association is entitled to its costs of this application, fixed in the amount of $4,000 and payable forthwith.

BLAIR R.S.J.

GRAVELY J.

EPSTEIN J.

Date: January 19, 2004