SEVERANCE PAY AND VALUING DISABLED EMPLOYEES' PAST CONTRIBUTIONS AND INVESTMENTS: *O.N.A.* v. *MOUNT SINAI HOSPITAL*

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Employment standards legislation has proven largely immune to *Charter* scrutiny. Various challenges to this minimum standards legislation, such as a s. 15 challenge involving the denial of minimum wage to patients working in psychiatric facilities in *Fenton v. B.C.* [1991] B.C.J. No. 3056 and the exclusion of domestic workers from overtime provisions in *Re Domestic Workers Union* [1983] 1 D.L.R. (4th) 560 have been unsuccessful. Yet, the recent unanimous decision issued by the Court of Appeal in the *ONA v. Mount Sinai Hospital* case is being hailed as a major milestone. This case affirms the Ontario Nurses Association's challenge to the *Employment Standards Act* (ESA) and represents a real breakthrough for the rights of the ill and disabled, as well as equality rights in general. Specifically, it challenges the constitutionality of a section of the *ESA* that denies severance pay to employees whose contract has been frustrated by illness or injury.

This paper will take you through the facts that gave rise to this constitutional challenge, the evolving history of the *ESA*, the different legal arguments advanced and the judicial history of the case that eventually led to success at the Court of Appeal on May 4, 2005.

Christine Tilley

Christine Tilley was the employee at the centre of this case. She was a neonatal intensive care nurse who began working with premature and critically ill babies in 1985. She went on to work for 13 years with the Hospital. In August 1995, Tilley was involved in a water skiing accident in which she injured her right knee which subsequently triggered a series of medical issues. She underwent knee surgery, was unable to continue her regular exercise program, gained weight, which then resulted in depression and a recurrence of childhood bulimia. Tilley attempted several returns to work that proved unsuccessful. In the last two years of her employment with the hospital, Tilley was approved for long-term disability benefits on the basis that she was "totally disabled from performing the regular duties of any occupation".

Just prior to her termination, Ms. Tilley's doctor indicated that Ms. Tilley would eventually return to work, but was unable to provide an estimated date for her return. On June 15, 1998 Tilley was dismissed for innocent absenteeism resulting from her disability. The hospital, relying on the then section of 58(5)(c) of the former *ESA*, did not provide Ms. Tilley with severance pay.

History of the Legislative Provisions around Severance Pay

The requirement to pay severance pay to employees was first added to the *ESA* in 1981 to compensate employees in certain circumstances for the loss of their employment. From the outset, it was recognized that the purpose of severance pay is to compensate long-serving employees for their past service and for their "investment" through that service in their employers' business.

In 1981, the Minister of Labour made the following statements regarding the nature and purpose of the benefit on the introduction of the ESA's severance pay provisions:

> Severance pay has two elements to it. First, it is compensation for years of service rendered and, second, it is a recognition of the loss of certain seniority rights and other benefits that flow from long-term service...in my view one of the principal reasons for a severance pay scheme of the type proposed relates to compensation in recognition of the past contribution and commitment that an employee has made to the operation of the enterprise. The other main rationale relates to the loss of job-related benefits that occur upon termination.

Initially, severance pay was only required to be paid to long-service employees who were terminated as part of a mass termination caused by permanent closure of all or part of a business. The original severance pay provision of the *ESA* stated in section 40(a)(2)(c) that the benefit applied to "an employee who is temporarily absent due to illness or injury". Within the context of the *Act* as it was in 1981, this provision was benign. It served to expressly confirm the entitlement to severance pay of employees who happened, coincidentally, to be absent from work at the date of a permanent closure by reason of an illness or injury.

At that time, by definition, employees whose contracts of employment were terminated as a result of disability would not have been entitled to severance, since this benefit was available only to employees terminated as a result of the permanent discontinuance of the business. Accordingly, the provision was included in subsection (2) listing those to whom the benefit applies, and not in subsection (3) listing those to whom the benefit does not apply.

In 1987, however, the ESA was amended to provide that severance pay was also payable, subject to certain exceptions, to any long-service employee terminated from an employer with a payroll in excess of $2.5 million. The then Minister of Labour stated, with respect to these amendments:

> The bill is designed to broaden the scope of the *ESA* by providing individual workers who are terminated the right to severance pay....Severance pay recognizes that, over a period of years, a worker develops employer-specific skills, substantial seniority and associated benefits. When a long-serving employee loses his or her job, those employer-specific skills become redundant and those associated benefits are lost. Severance pay is compensation for those losses.

This amendment broadened the purpose of the severance pay provisions of the *Act*, in that severance was now available to individual employees upon termination As a result, severance pay would now be payable to employees terminated on the grounds of disability, were it not for section 40a(2)(c), which was amended at that time to take the form of section 58(5)(c).

Section 58(2) of the former *ESA* states that an employer with a payroll of $2.5 million or more is required to pay severance pay according to a statutory formula to any terminated employee who has been employed for five or more years, subject to certain exceptions. Section 58(5)(c) is the relevant provision that extends entitlement to:

> 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.

This provision has been applied as an exception to disentitle an employee who is so disabled that they cannot return to work under any method of accommodation.

When Mount Sinai denied severance pay on these grounds, ONA, Tilley's union, brought a grievance on her behalf. The union grieved, among other things, that section 58(5)(c) of the ESA violated the equality guarantee under s. 15 of the Charter.

Today, section 58(5)(c) has been replaced by s. 9 of the of the of Ontario Regulation 288/01, enacted under the *ESA, 2000*. It reads as follows:

> Employees not entitled to severance pay
>
> 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,

(a) the impossibility or frustration is the result of,

(i) a permanent discontinuance of all or part of the employer's business because of a fortuitous or unforeseen event,

(ii) the employer's death, or

(iii) the employee's death, if the employee received a notice of termination before his or her death; or

(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. O. Reg. 288/01, s. 9 (2).

While this decision concerns predecessor legislation to the current *Employment Standards Act* 2000, the legislation has changed only in form and not in substance.

THE LEGAL ARGUMENTS: SUMMARIES OF THE PARTIES' POSITIONS

The Ontario Nurses' Association

At arbitration, the Union took the position that Tilley's contract of employment had not become impossible of performance or frustrated by reason of her illness. While there was no firm date of return to work, because there was an indication that she would return to work eventually, the requirements of s. 58(5)(c) of the *ESA* were not met. Interpreting the *ESA* in light of the *Ontario Human Rights Code* was also necessary, and therefore, the duty to accommodate to the point of undue hardship applied. In this case, the Union argued the Hospital had a duty and could have accommodated Tilley by maintaining her employment until she was in a position to return to work. In the alternative, the Union argued that section 58(5)(c) of the *ESA* contravened the *Charter*. After the Board ruled that it did have jurisdiction to determine the Charter claim, the Association argued more specifically that this exception under the *ESA* violated s. 15 of the Charter by differentiating on the basis of disability. Further, this provision could not be upheld under s. 1.

When on June 4, 2002 the majority of the Board upheld the constitutionality of the section, ONA sought judicial review at the Divisional Court. ONA attacked the reasons of the majority relating to the issue of discrimination on five major grounds:

a) that the denial, because it is based on disability, does stereotype, exclude and devalue this group;

b) that discrimination is not lessened by the fact that not all disabled employees would be denied the benefit of severance pay where they do not "frustrate" the employment contract;

c) the fact that the benefit is denied only where the *future* employment contract is no longer viable is irrelevant in light of the purpose of severance pay, compensation for *past* service and investment in an employer's business;

d) that the receipt of other forms of compensation such as long-term disability benefits is not relevant to the discrimination analysis, as it is a different benefit with an entirely different purpose;

e) the denial of severance pay to the severely disabled is no less discriminatory simply because there is no violation of other Human Rights Law, specifically the duty to accommodate under the *Ontario Human Rights Code*.

These arguments were fully adopted by the Divisional Court. At the Court of Appeal, ONA maintained their position that s.58(5)(c) violates section 15(1) of the *Charter.* It denies employees equal protection and benefit of the law on the basis of their disability, in that it excludes terminated employees otherwise eligible for statutory severance pay from entitlement to that benefit simply because they have been terminated by reason of their disability. They argued that the severance benefit compensates long-serving employees for their years of service and investment in the employer's business. Importantly, even while arguing that the central purpose of severance pay was compensation for past service, ONA did not limit their argument on that basis. They took the strong position that differential treatment in light of merely one the multiple purposes of a statute is sufficient to ground a claim of discrimination under s.15 of the Charter.

The Hospital and the Crown

At arbitration, the Hospital argued that Tilley's employment was properly terminated as her record reflected undue absenteeism and she showed no reasonable prospect of a regular return to work. This meant the employment contract was impossible of performance or frustrated within the meaning of section 58(5)(c) of the *ESA*. In response to the duty to accommodate, the Hospital contended that the duty to maintain employment where an employee is unable to attend work for prolonged periods exceeds the duty and is an undue hardship. With respect to the Charter claim, the Hospital initially argued that the Board was without jurisdiction to consider the constitutional validity of section 58(5)(c) of the *ESA*. When the Board June 4, 2002 decision concluded that they had jurisdiction to determine the *Charter* claim, the Hospital defended the constitutionality of the provisions as they related to s.15.

At the Divisional Court, the hospital attempted to uphold the Board's decision on three main grounds which all underpin their argument that the denial of severance pay is not discriminatory or unconstitutional. First, that the basis for the differential treatment under section 58(5)(c) of the *ESA* is based not on disability but rather, on frustration of contract. As such, they argued that s.15 is not engaged. Second, they argued that where one meets the duty to accommodate under the *Human Rights Code*, that such treatment, as set out here under the *ESA*, will pass Charter scrutiny. Since the Board determined that the hospital's duty did not oblige them to maintain Tilley's employment indefinitely, they submitted that their treatment of Tilley should accordingly meet the tests under s.15. Finally, they argued again that the purpose of severance pay was to facilitate the transition into new employment and that severely disabled employees had other forms of compensation for their lost investment such as long-term disability benefits. These arguments were rejected; the hospital brought the case to the Court of Appeal.

While the Crown was not involved at arbitration and chose not to participate at the Divisional Court level, when the case came to the Court of Appeal, the Government stepped in. They chose to defend the denial of severance pay to the severely disabled as non-discriminatory and constitutional along with the Hospital. They argued that the Divisional Court erred by improperly framing the "dominant purpose" of severance pay and in so doing, erred in their discrimination analysis. Although they acknowledged that there were multiple purposes to the legislation, they argued that the law's "dominant purpose" should be the focus when under constitutional scrutiny under s.15. They submitted again that severance pay was primarily meant to act as a financial bridge into new employment. In the same vein, they argued that because employees with severe and prolonged disabilities are not likely to return to the workforce, their financial needs will be met in other ways such as CPP or long-term disability benefits. As such, they argued that the law corresponds to the needs, capabilities and circumstances of the employees and therefore does not violate s.15.

Judicial History of the ONA Tilley Case

The Arbitration Award

At this first level, a Board of Arbitration chaired by Jane Devlin, dismissed the grievance. In a preliminary award on August 17, 2000, a majority of the Board determined that the duty to accommodate did not require the hospital to maintain her employment indefinitely and her contract had been frustrated within the meaning of s. 58(5)(c) of the *ESA*.

In a subsequent June 4, 2002 award, the Board went on to consider the constitutionality of the subsection. While the hospital argued that s. 58(5)(c) drew a distinction based on

contract frustration, rather than disability, the Board disagreed. They stated that the question of whether a disability served to frustrate a contract turned on the extent and nature of the disability, and therefore was itself a distinction based on disability. Therefore, on the first and second branches of the tests set out in *Law v. Canada* [1999] 1 S.C.R. 497, the *ESA* imposed differential treatment , the basis for which was disability.

However, it was at the third branch of the *Law* test that the arbitration board concluded that s.15 was not violated, because:

> we cannot 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.

Due to this finding that there was no breach under s.15, the Board felt no necessity to go on and consider s.1 of the *Charter*. Ms. Tilley's claim for severance pay was therefore dismissed.

However, Board Member Mary Hart dissented and concluded that s. 15 was breached. In particular, Hart felt that the purpose of severance pay was a benefit intended to compensate employees for past service. In this case and those in the situation of Ms. Tilley, employees have made no less contribution to their employer's businesses through their years of work than able bodied employees.

Hart commented that:

> During her years of service with the employer the Grievor contributed and invested her work and energy in the employer's business in the same way as her able bodied colleagues. This past investment is surely of no lesser value simply because at the time her employment was terminated the Grievor was disabled? Having made the same contributions as her colleagues, what would be the perception of the reasonable person in the Grievor's situation? The only possible perception would be that she is being denied a benefit which she earned alongside her able bodied colleagues solely because of her current disability. In my opinion it is this very result that we are directed to avoid. The effect of this provision is to withhold a benefit from an employee on the sole basis of a current disability. In so doing the legislation clearly devalues the contribution this individual made during her working life. The clear impact of this provision is to solidify a view that the individual is somehow less capable,

> less worthy of recognition and that her contributions are less valued than those of her colleagues who do not suffer from a disability. This surely is the very issue that Section 15(1) is intended to address.

The Divisional Court

The award relating to the constitutionality of section 58(5)(c) of the *ESA* was the subject of judicial review. Writing for a unanimous Divisional Court, Judge Gloria Epstein quashed the Board's decision. In disagreeing with the Board's decision, the Court affirmed each of ONA's arguments.

First, with respect to the first two *Law* tests, the Court concurred with the arbitration board. They similarly rejected the Appellant's argument that section 58(5)(c) of the *ESA* draws a distinction based on the fact of contract frustration, as opposed to disability. However, it is on the third branch that the Divisional Court and the Board of arbitration parted ways.

Second, the Court took issue with the flawed discrimination analysis that the Board relied on. That is, that the ESA was not discriminatory due to the fact that the ESA did not deprive all disabled employees of severance pay, but only those whose contracts were frustrated by their disability. Citing the Supreme Court Case of *Gibbs v. Battlefords* [1996] 140 D.L.R. (4th) 1, the Court asserted: "it is not necessary that all disabled persons be mistreated equally....for discrimination on the basis of disability to exist" (at 279).

Further, the Court went on to say that it is the very fact that those disabled employees who need it most are excluded, only serves to aggravate the discrimination, not lessen it:

> the group of disabled employees that the legislation excludes...is the very group that is 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 (at 279).

Third, the Divisional Court reviewed the legislative history and jurisprudence interpreting provisions around severance pay. The Court concluded 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" (at 273-274). The denial of severance pay then, could not accord with the needs, capacities or circumstances of the claimant or others with similar traits because it was aimed at past

service and compensation. In other words, the differing present and future needs of the severely disabled is not connected with their past contribution and the denial of that benefit "cannot help but send a message that the contributions of those employees were not as valuable as the contributions of able-bodied employees".

Finally, the Court rejected the Hospital's "irrelevant" arguments around other types of benefits and the *Human Rights Code* as they do not mitigate the effects of discrimination. Specifically, the court concluded that Tilley's being in receipt of LTD benefits at the time of termination was not relevant to an analysis of whether the benefit accorded with the circumstances of the claimant or those in similar circumstances. It was an entirely different negotiated benefit with a different purpose (at 280). Further, the Court rejected the suggestion that the Hospital did not violate the *Ontario Human Rights Code* in that it properly accommodated Tilley and thereby mitigated the extent to which the denial of severance pay impacts on human dignity. Not only did the Court question this logic, but noted that if the hospital had actually violated the *Code* Tilley would have been entitled to both reinstatement and would not even be before the Court advancing a claim for severance pay (at 281).

In the result, the court declared section 58(5)(c) to be unconstitutional and of no force and effect, quashed the board's decision, and ordered the hospital to pay severance to Tilley.

The Court of Appeal

On May 4, 2005, the Ontario Court of Appeal unanimously affirmed ONA's position and upheld the Divisional Court decision that the denial of severance pay to disabled employees under the *ESA* is discriminatory and unconstitutional.

The Appellant Employer challenged the decision of the Divisional Court on two grounds. First, that the Court erred in its findings as to the purpose of severance pay and second, that the Court erred in its application of s.15(1) of the Charter. However, in the decision written by Justice Jurianz, on behalf of a panel that included Justices Goudge and Lang, the Court of Appeal strengthened and further developed their approach to section 15 as it relates equality rights and pervasive stereotypes about the severely ill and disabled.

In relation to the s.15 analysis, the dispute again centred on the appropriate comparator group which turned on the different characterizations of the purpose of severance pay. To that end, the Court rejected the Hospital and Attorney General's argument that its dominant purpose was to compensate for capital losses going forward. Importantly however, the court did not limit its finding to the "dominant purpose" test. It went on to hold that "where a statute has several purposes, adverse differential treatment in light of one purpose is sufficient to establish a prima facie breach of s.15" (at paragraph 33).

Hence, the fact that the exclusion is inconsistent with one of the purposes of the legislation, such as compensation for past service here, would have been sufficient to ground a s.15 breach.

At the same time, the Court of Appeal did not end the s.15 analysis there. They went to assert that even "assuming for the sake of argument" that the dominant purpose of severance pay is to compensate those employees who will return to the workforce, their defence of the legislation still fails. This is because it rests on the "impermissible stereotype" that those employees whose contracts have been frustrated due to illness or injury may be equated with employees who will not work again and cannot fully participate in the workforce. The Court asserted that:

> ...it cannot be said as a matter of logic and common sense that employees whose employment has been frustrated are not likely to work again. Quite the contrary, the generalization that is offered as the rational connection reflects a stereotypical presumption about the adaptability, industry and commitment to the workforce of persons with disabilities severe and enduring enough to frustrate their employment. The generalization can only have the effect of perpetuating and even promoting the view that disabled individuals are less capable and less worthy of recognition and value as human beings and as members of Canadian Society (at 37).

As on the facts of this case, Ms. Tilley was told that she would eventually be able to return to work. The very fact that Ms. Tilley did find new employment following her termination underscores the misleading nature of the stereotype upon which the *ESA* relies.

The appeal was dismissed, the Divisional Court decision upheld, and the Court of Appeal declared that section 58(5)(c) was unconstitutional and of no force and effect.

Conclusion

The decision of the Court of Appeal marks a decisive victory for Christine Tilley, the rights of the ill and disabled, as well as equality rights overall. The Court affirmed many key equality rights principles and rejected persistent stereotypes around the severely ill and disabled. First, the Court rejected the view that those who are severely ill and disabled lack the desire or the capacity to return to and fully participate in the workforce. Legislators and Employers will need to be mindful of treatment that is allegedly aimed at "meeting the needs" of this group by assuming that employment is not a vital and ongoing part of their lives. Second, this Court's finding that differential treatment in light of one of the purposes of a multiple purpose statute is sufficient to demonstrate a breach of s.15 is a significant development in equality rights jurisprudence. The government will no longer be able to

escape strict *Charter* scrutiny by arguing that the differential treatment does not relate to the "dominant purpose" of the legislation. Denial of benefits or access to a vulnerable and disadvantaged group contrary to even one of the purposes of the legislation is contrary to the spirit and intent of s.15 of the *Charter*.

In the end, decision makers, employers and employees have been given a strong signal from the Ontario Courts. That is, that the rights of the ill and disabled, as well as the contributions they have and will continue to make to their employers must be valued and compensated equally.