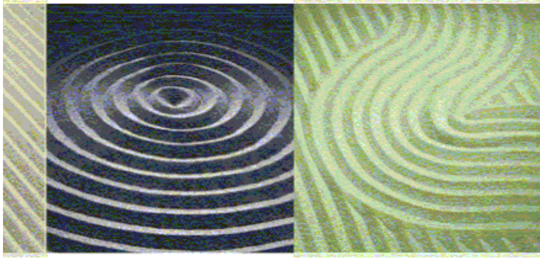
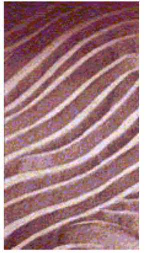


MILLER THOMSON LLP
Barristers & Solicitors, Patent & Trade-Mark Agents



LABOUR AND EMPLOYMENT NEWSLETTER

May 6, 2005

A publication of Miller Thomson LLP Labour and Employment Practice Group

COURT OF APPEAL DECLARES DENYING STATUTORY SEVERANCE TO DISABLED EMPLOYEE IS UNCONSTITUTIONAL

Michael Conradi
Tel. 416.595.8550
mconradi@millerthomson.ca

On May 4, 2005, the Ontario Court of Appeal released its decision in *Ontario Nurses Association v. Mount Sinai*. The Court of Appeal determined that the former *Employment Standards Act* provision that allows an employer to deny statutory severance pay to an employee whose employment has become frustrated due to disability is unconstitutional.

In the Labour and Employment Communiqué dated March 31, 2004, we first raised the facts in this case. 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 *Employment Standards Act 1990* ("*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.

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 Ontario Nurses' Association ("ONA") applied for judicial review to the Divisional Court. The Divisional Court overruled the arbitration decision. The Hospital then appealed that decision to the Ontario Court of Appeal.

The Court of Appeal stated that the issue to be considered is the constitutionality of s.58(5)(c), which creates an exception to an employer's obligation to pay severance pay to employees whose contracts of employment have been frustrated due to illness or injury.

In upholding the Divisional Court's decision, the Court of Appeal considered the purposes of severance pay and whether denying statutory severance pay to a disabled employee is denying an employment benefit due to a discriminatory ground.

The parties differed as to the purpose and characterization of severance pay. The Hospital and the Attorney General argued that the dominant purpose of severance pay is prospective – that is, it is directed toward compensating employees for "capital losses" going forward to find new employment. "Capital losses" included the value of seniority, benefits, and job-specific skills that accumulate with service. The Hospital and the Attorney General argued that 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.

In contrast, ONA argued that the purpose of severance pay is retrospective, and 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 have made valuable contributions and denying severance pay due to disability is discriminatory.

The Court of Appeal acknowledged that severance pay may serve many purposes: to compensate employees for their investment in the employer's business; to compensate employees for the capital losses they experience when their employment is terminated and they start new jobs; to provide funds for job training to assist terminated employees in finding new employment; and to serve as an additional income source while terminated workers look for work, thus acting as a bridge to other employment.

The Court of Appeal, however, rejected the Hospital's argument that employees whose contracts have become frustrated due to illness may be equated with employees who will not work again. Consequently, the Court of Appeal stated that denying severance pay to a disabled employee is based on a discriminatory assumption. The Court of Appeal found that such an assumption is arbitrary and based on an "impermissible stereotype that disabled persons cannot fully participate in the workforce". The Court of Appeal stated that while an employee may be considered disabled in one workplace, he or she may be employable in another. Furthermore, employees with permanent disabilities may undergo training, acquire new skills, and new techniques and devices to assist in accommodation may be developed. Persons with temporary disabilities may recover and be able to return to work even if their condition persisted long enough to result in frustration.

The Court of Appeal further indicated that such a generalization violates equal protection and benefit of the law as provided under s.15 of the *Canadian Charter of Rights and Freedoms*:

> Disabled persons as a group suffer from pre-existing disadvantage and stereotyping. There is no correspondence between the ground of denial and the actual needs, capabilities and circumstances of the grievor and others in the claimant group. The differential treatment has the effect of perpetuating the view that individuals with disabilities, severe and prolonged enough to frustrate their employment, are not likely to be members of the workforce in the future. The denial affects an interest crucially important to one's dignity, namely, equal treatment and equal compensation in employment. I conclude that the denial of severance pay under s. 58(5)(c) is discriminatory.

The Court of Appeal ruled that discriminating against disabled employees cannot be justified in a free and democratic society: "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."

Clearly, the above decision will have an obvious impact on employers with disabled employees. Notably, however, the above award is based on the 1990 version of the *Employment Standards Act* provision. The comparable provision in the *Employment Standards Act, 2000* is worded differently and may still allow an employer to deny statutory severance pay to a disabled employee whose employment is frustrated provided that the undue hardship test under the Ontario *Human Rights Code* is satisfied prior to the termination.

The Court of Appeal did not provide any guidance on whether the above provisions will impact on the common law notion that illness or disability can result in the frustration of an employment contract. Although the Court of Appeal 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.

There is no word on whether any of the parties will seek leave to appeal to the Supreme Court of Canada.

ABOUT THE AUTHOR:

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.

Our Labour and Employment Practice Group is dedicated to providing comprehensive and integrated legal services, and advises management in all aspects of labour relations and employment law. For more information about our Group, visit our website at www.millerthomson.com or contact:

Miller Thomson LLP
2500 – 20 Queen Street West
Toronto, ON M5H 3S1

416.595.8500
416.595.8695 (fax)

Note: This communiqué is provided as an information service to our clients and is a summary of current legal issues of concern to Labour and Employment Clients. Communiqués are not meant as legal opinions and readers are cautioned not to act on information provided in this communiqué without seeking specific legal advice with respect to their unique circumstances. Miller Thomson LLP uses your contact information to send you information on legal topics that may be of interest to you. It does not share your personal information outside the firm, except with contractors who have agreed to abide by its privacy policy and other rules.