

AWARD

The grievors in this matter are permanently disabled and in receipt of WSIB benefits. It is agreed they are permanently unable to return to work. The Ontario Nurses Association (ONA) alleges that the grievors meet the test of innocent absenteeism without any prospect of returning to work and should be deemed terminated from their employment, thereby entitling them to severance pay in accordance with the Employment Standards Act, 2000, S.O. 2000, c. 41 (ESA). The Hospital agrees that the grievors are permanently disabled and unable to return to work, but that it has never terminated employees on long term absences and has no reason to change its position. The Hospital maintains there are collective agreement benefits for employees unable to return to work and the Hospital is not obliged to sever the disabled employees and pay severance pay. The grievors are also in receipt of WSIB benefits until age 65 that are tax-free; \$46,000.00 per year in the case of Jane Lormand, and \$36,000.00 per year in the case of Donna Boksa; the Hospital is charged for and pays a portion of those costs.

ONA argues that the employment relationship between the individual grievors and the Hospital is frustrated due to the grievors' injuries, but since the Hospital has not terminated the grievors' employment they should be deemed to be terminated entitling them to severance pay. ONA submits that pursuant to Sections 63(1) and 64(1) of the ESA the Hospital is "unable to continue employing" the grievors since they are unable to work, and accordingly, the Hospital is required to pay them.

The Hospital argues that it has the exclusive right to determine whether and when to

discharge an employee and also there is a deemed termination provision in the collective agreement which previously applied in the case of long term absences, but no longer does so. The inference is that the parties intended that long term absences should not result in employees being terminated. The Hospital submits the collective agreement contemplates that employees who are on long term absences remain in the employment of the Hospital. The Hospital also submits that the collective agreement confers substantial benefits on disabled employees, but does not contemplate severance benefits and that the ESA properly interpreted does not result in a deemed termination where an employee is unable to return to active employment.

The relevant provisions of the ESA and Regulations are as follows:

1. (b) “employment contract” includes a collective agreement.

What constitutes termination

56. (1) An employer terminates the employment of an employee for purposes of Section 54, if,

- (a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;

What constitutes severance

63. (1) An employer severs the employment of an employee if,

- (a) The employer dismisses the employee or otherwise refuses or is unable to continue employing the employee;

64. (1) An employer who severs an employment relationship with an employee shall

pay severance pay to the employee if the employee was employed by the employer for five years or more, and

(b) the employer has a payroll of \$2.5 million or more, c. 41, s. 64(1)

When collective agreement applies

99. (1) If an employer is or has been bound by a collective agreement, this Act is enforceable against the employer as if it were part of the collective agreement with respect to an alleged contravention of this Act that occurs,

(a) when the collective agreement is or was in force.

Ontario Regulation 288/01

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.

9(2) Paragraph 2 of subsection (1) does not apply if,

(b) the impossibility or frustration is the result of an illness or an injury suffered by the employee, and the Human Rights Code prohibits severing the employment.

In this case, pursuant to Section 99(1), the legislature has made the "...Act enforceable against the employer as if it were part of the collective agreement with respect to the alleged contravention of this Act...". Accordingly, the primary purpose of a Board of Arbitration is to enforce the Act. Section 99(1) makes the Act part of the collective agreement for enforcement purposes only. It does not incorporate the Act by reference into the collective agreement for any wider purpose. The collective agreement must be interpreted in light of the Act.

I now turn to consider the legislation. First, the Supreme Court of Canada has determined that the ESA should be interpreted in a broad and generous manner. In Rizzo and Rizzo Shoes Ltd. (Re) (1998), 154 D.L.R. (4th) 193 (S.C.C.) the Court stated:

"The ESA is a mechanism for providing minimum benefits and standards to protect the interests of the employee. It can be characterized as benefits conferring legislation and ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant. The purpose of the Act is to protect the interests of the employees".

Second, the Courts have also determined that one of the purposes of severance pay is to compensate terminated employees for their past contributions to and investment in the employer's business, and for their years of service. Rizzo and Rizzo Shoes Ltd. (Re) supra, Ontario Nurses Assn. v. Mount Sinai Hospital, (2005), 75 O.R. (3d) 245 (Ont. Ct. Appeal). Accordingly, disabled employees have an interest in severance pay arising from their past contributions and service to the employer which is entitled to protection. The only issue, therefore, is when is their interest triggered or payable.

Third, contrary to the Hospital's argument, employees whose employment has been frustrated are entitled to severance pay pursuant to the ESA. The concept of frustration occurs where a contract becomes impossible to perform without fault by the party seeking to invoke the doctrine.

Section 63 (1) of the ESA provides that:

“An employer severs the employment of an employee if the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee”

I determine the section should be read disjunctively, “in a broad and generous manner” and any difficulties should be resolved in favour of the grievors. The language of the first part of Section 63(1) requires active conduct by the employer to dismiss or refuse to employ an employee, whereas by comparison there is no explicit language requiring active conduct by the Employer where the Employer is “unable to continue employing the employee”. Also, Regulation 9(2)(b) of the ESA exempts employees from disentitlement if the contract of employment has been frustrated or impossible to perform as “the result of an illness or injury suffered by the employee”. The Regulation reflects and is consistent with the language of Section 63(1). A careful reading of both the Act and Regulations clearly indicates active conduct by the employer is not required to terminate the employment contract where the employer is unable to continue employing an employee whose contract is frustrated due to illness or injury.

Further, the language of the Court of Appeal in the *Mount Sinai Hospital* case, is explicit in indicating that the doctrine of frustration applies to severance matters under the ESA and

accordingly, it is not necessary to finally determine, as the Hospital argues, whether the doctrine of frustration applies to the collective agreement per se.

Fourth, the language of the ESA does not restrict the employer's obligation to pay severance to employees who have been actively terminated. In *Rizzo and Rizzo Shoes Ltd.(Re)*, supra, the Supreme Court of Canada determined that the provisions of the ESA were triggered by operation of law, i.e. an act of bankruptcy. The occurrence of a frustrating event, such as illness or injury, also brings an employment contract or relationship to an end forthwith, without more and automatically. Accordingly, the frustrated contract or frustrated relationship also ends by operation of law where a person is disabled from permanent employment as the result of injury or illness. Accordingly, there is no requirement for active termination by the employer. *Fibrosa Spolka Akeyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A. C. 32 at 70, [1942] 2 All ER 122 at 140, *Universal Cargo Carriers Corp. v. Citati*, [1957] 2 QB 401 at 435, [1957] 2 All ER 70 at 83.

I now turn to consider the facts of this case in the light of the principles discussed. It is agreed that the grievors, because of illness or injury are permanently unable to return to work. This is not a case where there is some possibility of return. The essence of the relationship between the Hospital and the grievors is that the grievors shall perform services and the Hospital is to pay for services. However, since the grievors are unable to perform the requisite services for the Hospital and are permanently disabled by illness or injury from doing so, subject to possibility of other terms of the collective agreement continuing the contract or relationship, the essence of the relationship between the Hospital and the grievors is frustrated.

The disability of the employees as the result of injury or illness is an event which automatically by operation of law triggers their right to severance pay because the contract is frustrated. However, all the terms of the collective agreement must be considered in light of the circumstances in order to ascertain whether there are other or wider contractual terms that continue to subsist and which make the continuance of the relationship operative so as to negate the frustrating events of illness or injury. In that respect, the Hospital has submitted that there are other portions of the collective agreement that keep the contract or relationship alive so that it is not frustrated and automatically terminated, and I now turn to consider those provisions relied upon by the Hospital.

First, the service and seniority provisions do not assist the Hospital. The purpose of service is to fix the level of compensation on the salary grid and to determine vacation pay and seniority is a consideration for the purpose of filling vacancies and ordering layoff and callback. *Ontario Nurses Assn. v. Orillia Soldiers Memorial Hospital et al* (1999), 42 O.R. (3d), 692. Therefore, since the grievors cannot avail themselves of those provisions, the continuation of seniority or service relied upon by the Hospital does not assist the grievors. The doctrine of frustration referred to in the cases and legislation overrides the seniority/service provisions of the collective agreement.

The Hospital has also referred to the Hospitals of Ontario Income Disability Pension Plan. (HOODIP) and the Hospitals of Ontario Pension Plan. However, neither of these plans continue the contract or relationship in the event of a permanent disability due to injury or illness. HOODIP is a

plan established by the Ontario Hospital Association to provide uniform sick pay and long term disability benefits for employees of participating employers. The Hospital pays premiums, but is not the insurer for the grievors. Also, according to the Plan, the grievors' membership in the plan does not terminate once the grievors employment terminates; since they are totally disabled on the date their membership in the plan terminates they continue to remain entitled to benefits, subject to the terms and conditions of the Plan.

The Hospitals of Ontario Pension Plan is administered by the Board of Trustees of the Hospitals of Ontario Pension Plan and not by the employer Hospital. Section 7 of that plan entitles a member who ceases to be an employee with termination options. Also, Section 9(3) of the Plan provides that if a member's employment is terminated and the member, is at a minimum partially disabled, the member continues to qualify as an employee and continues to receive contributing service subject to the conditions under Section 9(3). These grievors are more than partially disabled and therefore continue to qualify under the Plan. Accordingly, I determine, both with respect to HOODIP and the Hospitals of Ontario Pension Plan, that a member's rights exist under both those plans independent of the collective agreement. Accordingly, those benefits do not provide an impediment to the contract or relationship being frustrated under the ESA.

The WSIB benefits received by the grievors is also not an impediment to receipt of the ESA benefits. The Court of Appeal in the *Mount Sinai Hospital* case stated that while disabled persons "receive other government benefits as a result of their disabilities, [it] does not minimize the extent to which their rights to equal treatment are impaired by the impugned law". I infer from those

comments, and particularly in the total context of the remarks by Jurianz, J.J.A., that receipt of WSIB benefits which are government benefits would not impair a disabled persons right to ESA benefits. Moreover, the provisions of the ESA are separate from the collective agreement and the parties cannot derogate from the provisions of the ESA and regulations. Parry Sound (District) Social Services Administration Board v. O.P.S.E.U. Local 324 (2003), 230 D.L.R. 4th, 257 at p. 272, [2003] 2 S.C.R. 157 at p. 176. Nor am I able to find, as urged by the Hospital, that the bundle of benefits under the collective agreement are either of a similar character for comparison purposes to the severance pay provisions, or constitute a greater benefit within the meaning of the Act. Re: Queen's University and Fraser et al (1955), 51 O.R. (2d) 140 (Div. Ct.)

In the result, I determine that the contract or relationship between the grievors and the Hospital has been frustrated and is automatically terminated by operation of law. The Hospital is unable to continue employing the grievors within the meaning of Section 63 of the ESA and the Regulations and there is no requirement for active termination by the Hospital. Accordingly, the grievors are entitled to severance pay in an amount to be agreed upon. Failing agreement, I will remain seized of that issue.

The grievances are allowed.

Dated at Toronto this 27th day of January, 2009.

Owen B. Shime