

GOVERNMENT'S RESPONSE TO *MOUNT SINAI*, RECENT AMENDMENTS TO THE
EMPLOYMENT STANDARDS ACT, 2000

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On May 4, 2005, the Ontario Court of Appeal in *Ontario Nurses' Association v. Mount Sinai Hospital* (2005), 75 O.R. (3d) 245 ("*Mount Sinai*") affirmed the Divisional Court's ruling that denying statutory severance pay to employees whose contracts of employment have been frustrated due to disability is unconstitutional. The Court of Appeal's decision was based on the 1990 version of the *Employment Standards Act* provision. The Court of Appeal observed, however, that "An exception [to severance pay] equivalent to s. 58(5)(c) is located in s. 9(2) of regulation 288/01" of the current *Employment Standards Act, 2000* ("*ESA, 2000*").

On October 26, 2005, the government amended section 9(2)(b) of regulation 288/01 of the *ESA, 2000* to comply with the Court of Appeal's decision in *Mount Sinai*.

According to subsection 9(1), paragraph 2 of regulation 288/01:

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.

Prior to the amendment, subsection 9(2)(b) read as follows:

9(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.

As a result of the amendment, subsection 9(2)(b) now reads:

(b) the impossibility or frustration is the result of an illness or injury suffered by the employee.

According to this amendment, an employee whose contract of employment has become frustrated due to an illness or disability is not disentitled from severance pay under the *ESA, 2000*.

Mount Sinai was concerned with the denial of severance pay and not the denial of termination pay. In fact, the Divisional Court noted a distinction between the purpose of severance pay and termination pay. The Divisional Court found that severance pay, in contrast to termination pay in lieu of notice, is an earned benefit paid that compensates a long-serving employee's past service and investment in the employer's business and is therefore, properly payable to employees for any non-culpable cessation of employment, including those employees who are unable to continue their employment due to disability. While the Ontario Court of Appeal did not speak to the lower court's distinction between termination pay and severance pay, the Court of Appeal did not expressly reject it. Nonetheless, the government also amended the exception to termination pay under regulation 288/01.

Prior to the amendment, subsection 2(1), paragraph 4 of regulation 288/01 read as follows:

2(1) The following employees are prescribed for the purposes of section 55 of the *Act* as employees who are not entitled to notice of termination or termination pay under Part XV of the *Act*:

...

4. Subject to the *Human Rights Code*, an employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance.

Following the amendment, paragraph 4 of subsection 2(1) was amended by striking out "Subject to the *Human Rights Code*" and is now subject to a new subsection 2(3), which reads as follows:

(3) Paragraph 4 of subsection (1) does not apply if the impossibility or frustration is the result of an illness or injury suffered by the employee.

As a result of these amendments to regulation 288/01 of the *ESA, 2000*, an employee whose contract of employment has been frustrated due to disability or illness is entitled to receive both severance pay and termination pay.