

**ONTARIO ARBITRATOR DEEMS DISABLED EMPLOYEE'S EMPLOYMENT TERMINATED  
AND ORDERS EMPLOYER TO PAY STATUTORY SEVERANCE PAY**

*Ontario Nurses' Association v. St. Joseph's General Hospital (March 17, 2006) (Randall)*

*By Natasha L. Savoline*

On March 17, 2006, Arbitrator Randall deemed that an employment relationship between a grievor with a permanent disability and the employer was terminated. Arbitrator Randall ordered the Employer to pay severance pay under the *Employment Standards Act, 2000* (the "ESA, 2000") to the grievor who, at the time of the arbitration hearing, had been unable to return to work for approximately four years due to her disability.

In 2001, the grievor slipped and fell in the workplace, permanently injuring her back. A brief attempt to return to work in 2002 was unsuccessful. While the Union and the Employer canvassed modified work alternatives, no suitable accommodation was available. The grievor completed a labour market re-entry plan with the Workplace Safety and Insurance Board, but remained unable to work due to her injuries.

The Union argued that the grievor was entitled to severance pay under the *ESA, 2000*. The Union asserted that given the Employer was unable to accommodate the grievor, by operation of law her employment was frustrated and thus severed.

The Employer noted that it had taken no positive action to dismiss the grievor. In the circumstances, the Employer argued that the Arbitrator had no authority to deem the grievor's employment terminated and, accordingly, to deem her to be entitled to statutory severance pay. The Employer pointed to the absence of a deemed termination provision in the collective agreement and the existence of a provision that entitled employees such as the grievor to accrue seniority while absent.

Arbitrator Randall found that the grievor had a permanent disability that prevented her from working for the Employer at any time in the foreseeable future. Arbitrator Randall stated that the period of accommodation is not indefinite, particularly where the employee has no reasonable prospect of returning to work. In the circumstances, Arbitrator Randall found that accommodation was exhausted.

Furthermore, Arbitrator Randall found that the absence of a deemed termination provision in the collective agreement was irrelevant, particularly given that the *ESA, 2000* has primacy over the collective agreement. In this case, the *ESA, 2000* was clear and the collective agreement had only "marginal effect".

In making his decision, Arbitrator Randall stated that the severance pay provisions of the *ESA, 2000* require a determination of whether a contract of employment has been frustrated. An active dismissal by an employer is not a precondition to that determination. In addition, Arbitrator Randall noted that O. Reg. 288/01 to the *ESA, 2000* (amended to O. Reg. 549/05)

provides that severance pay is owed where frustration of employment is due to an illness or injury suffered by the employee, a change in the legislation that codified the decisions of the Ontario Divisional Court and Court of Appeal in 2004 and 2005 in *ONA v. Mount Sinai Hospital*.

In the circumstances, Arbitrator Randall deemed the grievor's employment at an end given that her employment was frustrated because of her disability. As a result, the Employer was required to pay the grievor severance pay under the *ESA, 2000*.

Previously, the regulations to the *ESA, 2000* disentitled disabled or injured employees to both termination and severance pay where their employment became frustrated or impossible to perform, subject to the employer's obligations under the *Human Rights Code*. Arbitrator Randall's decision highlights the changes to the severance pay regulations to the *ESA, 2000*, which took effect in October 2005. Notably, similar changes were enacted in respect of termination pay. As the law presently stands, where employment becomes impossible to perform or is frustrated due an employee's illness or injury, the *ESA, 2000* requires that employers provide the employee with both termination and severance pay.

Arbitrator Randall's decision indicates that even where employers continue to employ disabled workers who have no prospect of returning to work in the foreseeable future, arbitrators have the authority to deem the employment frustrated and require that such workers be paid their statutory entitlements.

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