

COURT OF APPEAL FOR ONTARIO

GOUDGE, LANG and JURIANSZ JJ.A.

B E T W E E N:)
)
ONTARIO NURSES' ASSOCIATION) **Douglas K. Gray and Michael T. Doi for**
) **the appellant**
)
 Applicant)
(Respondent in Appeal)) **Arif Virani for Attorney General of**
) **Ontario (Intervener)**
- and -)
)
MOUNT SINAI HOSPITAL) **Elizabeth McIntyre and Amanda J. Pask**
) **for the respondent**
)
 Respondent)
(Appellant))
)
) **Heard: February 1, 2005**

On appeal from the order of the Divisional Court dated January 19, 2004, reported at (2004) 69 O.R. (3d) 267.

JURIANSZ J.A.:

I. Overview

[1] The issue in this appeal is the constitutionality of s. 58(5)(c) of the *Employment Standards Act*, R.S.O. 1990, c. E.14, 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.¹

[2] The issue first arose before an Arbitration Board that held that s. 58(5)(c) does not violate s. 15 of the *Charter*. The Divisional Court quashed the Board's order and held that s. 58(5)(c) violates s. 15 because it denies disabled employees an employment benefit to which they would have been entitled but for their disability, and in so doing devalues their past contributions to their employer's business.

¹ The Act was repealed effective September 4, 2001, and replaced with the *Employment Standards Act*, 2000. Severance pay is addressed in s. 64 of the new statute, and regulation 288/01 pursuant to it. An exception equivalent to ss. 58(5)(c) is located in ss. 9(2) of regulation 288/01.

[3] For the reasons that follow, I would uphold the decision of the Divisional Court quashing the decision of the Board and declaring s. 58(5)(c) to be unconstitutional and of no force and effect.

II. Background

[4] On June 15, 1998, Mount Sinai Hospital dismissed Christine Tilley due to innocent absenteeism. Ms. Tilley was a neonatal intensive care nurse who had worked at the hospital for thirteen years. In August 1995, she injured her knee in a water-skiing accident. Following the accident, she suffered from depression and bulimia. After a number of unsuccessful attempts to return to work in January 1996, Ms. Tilley experienced a relapse and was approved for long-term disability benefits. Just prior to her termination, Ms. Tilley's doctor advised her that she would eventually be able to return to work, but was unable to estimate when.

[5] Section 58(2) of the *Employment Standards Act* provides that an employer with a payroll of \$2.5 million or more shall give severance pay to a terminated employee who has been with the employer for five years or more. Section 58(5) sets out those classes of employees who are entitled to receive severance pay. Section 58(5)(c) provides that severance pay is payable 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 has been frustrated by that illness or injury." The full text of these sections is set out in Appendix A. Because Ms. Tilley's employment contract had been frustrated as a result of her disability, she did not receive severance pay upon her termination. Ms. Tilley's union, the Ontario Nurses' Association ("the O.N.A."), filed a grievance disputing the termination² and the claiming that the denial of severance pay violated s. 15 of the *Charter*.

[6] Section 15 of the *Charter* provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[7] In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, the Supreme Court of Canada set out the approach for evaluating s. 15 claims. The analysis requires that the following three questions be addressed:

² Strictly speaking a frustrated contract is not terminated. Rather the parties are excused from their obligations because the contract has become impossible to perform. The Act and labour practice treat the employer's decision to consider the employment contract frustrated as a "termination."

1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society, resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?
2. Is the claimant subject to differential treatment based on one or more enumerated or analogous grounds? and
3. Does the differential treatment discriminate by imposing a burden upon or withholding a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?

[8] The Arbitration Board found that Ms. Tilley's contract of employment had been frustrated and upheld her termination. It also upheld the constitutionality of s. 58(5)(c) on the ground that while the impugned law imposes differential treatment on Ms. Tilley because of her disability, this differential treatment is not discriminatory. The key to this result was the majority's conclusion that the emphasis of the legislative distinction was not disability, but rather the "viability of the employment contract." The majority reasoned that severance pay was available to employees who are absent from work because of illness or injury, and the exception applied only those employees with disabilities severe and prolonged enough that their contracts of employment could no longer be fulfilled.

[9] On judicial review, the Divisional Court disagreed with the Board's treatment of s. 15 and found that the subsection violated the *Charter* for the reasons set out above. Mount Sinai Hospital appeals from this ruling. The Attorney General of Ontario, who did not appear before the Board or the Divisional Court, intervened in the appeal to support the constitutionality of s. 58(5)(c).

III. Positions of the parties

[10] Both the Board and the Divisional Court found, and all the parties agree, that the first two steps of the *Law* analysis are satisfied in this case. The Hospital and the Attorney General submit that the Board was correct in selecting as the appropriate comparator group those employees who are absent from work due to illness or injury but whose employment has not become impossible of performance or been frustrated by that illness or injury. The O.N.A. submits that the appropriate comparator group is composed of those employees who are not disabled and receive severance pay. In either case there is a distinction drawn on disability and the first two branches of the *Law* test are satisfied.

The contested issue in this case is therefore the third step of the *Law* analysis, namely, whether this differential treatment is discriminatory.

[11] The positions of the parties on this issue turn on their different characterizations of the purpose of severance pay.

[12] The Hospital and the Attorney General argue that while there are multiple purposes of severance pay, the dominant purpose is prospective, and is directed toward compensating employees for capital losses going forward as they find new employment. 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.

[13] By contrast, the O.N.A. argues 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 or injury have made equally valuable contributions as have other employees who qualify for severance pay. Therefore, the O.N.A. submits the denial of severance pay to these employees constitutes discrimination.

[14] The Divisional Court took the latter view. It concluded that "legislative history, together with relevant jurisprudence, make it clear 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. It is properly payable for any non-culpable cessation of employment."

[15] The Hospital and the Attorney General submit that the Divisional Court erred in describing severance pay as an "earned benefit." They assert, correctly, that severance pay is not payable "for any non-culpable cessation of employment" as stated by the Divisional Court. Rather, they point out that the legislation provides a number of exceptions to an employer's obligation to provide severance pay, regardless of the role played by the employee in the termination. For example, severance is not available to employees in the construction industry, or who retire on a full pension, or who are terminated as a result of the sale of a business but are hired by the purchaser. These exceptions, they submit, make it clear that severance pay is not available for every non-culpable cessation of employment.

[16] The Hospital identified four purposes of severance pay: compensating employees for their investment in the employer's business; compensating employees for the capital losses they experience when their employment is terminated and they start new jobs; providing funds for job training to assist terminated employees in finding new employment; and serving as an additional income source while terminated workers look for work, thus acting as a bridge to other employment. The Attorney General mentioned

other possible purposes as well, such as to provide an incentive to employers to provide pensions, and to discourage plant closings.

[17] Of these various purposes, the Hospital and the Attorney General submitted that the most important purpose of severance pay is to compensate terminated employees who remain in the workforce for their capital losses as they seek and take up new jobs. The capital they refer to is the value to employees of their seniority, benefits and job-specific skills that accumulate with service. They relied on Michael J. McNeil's description of the capital loss an employee suffers from the loss of employment as follows:

Certain benefits relating to a job cannot be transferred to a new workplace. Many of these accrue over the length of time the employee is associated with a particular job or employer. Seniority, control over shift selection and job assignment, pension benefits, longer vacation periods and accumulated sick leave are all fringe benefits which may result in significant loss if the employee is forced to move from one job to another. If the employee loses his seniority rights, he will have less security at a new job because those with less seniority are likely to be let go earlier in cases of cutbacks. Unless there are arrangements for full portability of pension plans, losses may result from having pensions from two or more employers rather than a single continuous plan. It is clear that an employee suffers substantial losses of both economic and social benefits when terminated from a job.

(M.J. MacNeil, "Plant Closings and Workers' Rights" (1982), 14 Ottawa L. Rev. 1 at 27-28.)

[18] The Attorney General also notes that long-serving employees have a better understanding of the employer's operations and are therefore more proficient and more valuable to their employer. As a result, these employees often earn higher-than-market compensation. Severance pay therefore also addresses the capital loss, in the form of reduced wages, which a long-serving employee suffers when terminated.

[19] The appellant and the Attorney General conclude that since the dominant purpose of severance pay is to compensate employees for their capital losses as they find new employment, the denial of severance pay to employees who will not return to the workforce and whose financial needs will be met in other ways is entirely in accord with that purpose. In support of this argument, they point out that employees retiring on a full pension would probably have the longest service with the employer, and would have made the greatest investment in the employer's business, and yet they do not receive severance pay. According to the appellant and the Attorney General, this makes sense

because seniority and job specific skills are of no value to these employees upon retirement, and their financial needs will be met in other ways.

[20] Similarly, the appellant and the Attorney General argue, employees whose contracts have been frustrated due to illness or injury are not likely to return to the workforce, and their financial needs will be met through CPP payments, disability benefits, or both. They submit that denial of severance pay to employees whose contracts are frustrated because of disability is consistent with the dominant purpose of severance pay, and also corresponds to the actual needs, capabilities and circumstance of these employees.

ANALYSIS

[21] While the Hospital's and the Attorney General's rationale for why the Act denies severance pay to retirees on full pensions is compelling, the next step of their argument is more problematic. Assuming for the sake of the argument that the dominant purpose of severance pay is to compensate those employees who will return to the workforce, the Hospital and the Attorney General must then establish that employees whose contracts have been frustrated due to illness or injury may be equated with employees who will not work again.

[22] The appellant and the Attorney General attempt to do so by invoking *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429. In *Gosselin*, the majority of the Supreme Court found that a provincial regulation, which provided reduced welfare benefits to individuals under the age of thirty who were not participating in training or work experience employment programs, did not infringe the equality guarantee in s. 15 of the *Charter*. McLachlin C.J. writing for the majority found that the purpose of the challenged distinction, far from being stereotypical or arbitrary, corresponded to the actual needs and circumstances of individuals under thirty. In acknowledging that the program's premises may not apply to some people under thirty, McLachlin C.J. wrote:

I add two comments. First, perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the Canadian Charter. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. As Iacobucci J. noted in *Law*, supra, at para. 105, we should not demand "that

legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the Charter”...

Second, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected, from the mere failure of the government to prove that the assumptions upon which it proceeded were correct. Bastarache J. argues that the distinction between people under 30 and older people lacks a “rational basis” because it is “[b]ased on the unverifiable presumption that people under 30 had better chances of employment and lower needs” (para. 248). This seems to place on the legislator the duty to verify all its assumptions empirically, even where these assumptions are reasonably grounded in everyday experience and common sense. With respect, this standard is too high. Again, this is primarily a disagreement as to evidence, not as to fundamental approach. The legislator is entitled to proceed on informed general assumptions without running afoul of s. 15, Law, at para. 106, provided these assumptions are not based on arbitrary and demeaning stereotypes.

[23] Relying on these comments, the Hospital and Attorney General submit that the severance pay provisions of the Act make a reasonable assumption as to who will re-enter the workforce and who is unlikely to work again. They say there is no duty on the legislature to establish by evidence that employees whose contracts are frustrated due to disability do not rejoin the workforce. Rather, they say the legislature must be given considerable leeway to tailor specific benefits on policy grounds, and perfect correspondence between a program and the actual needs and circumstances of a claimant group is not required.

[24] This argument fails. In *Gosselin*, the Chief Justice wrote that the legislature is entitled to proceed on informed general assumptions without running afoul of s. 15, *provided these assumptions are not based on arbitrary or demeaning stereotypes*. In that case, the differential treatment based on age was not based on such a stereotype; on the contrary, it was premised on the idea that people under thirty are better equipped to find employment than are people over thirty. By contrast, in this case the differential treatment based on disability is premised on the stereotype that people with severe and prolonged disabilities will not return to the workforce.

[25] Moreover, in *Gosselin*, the court found that people under thirty did not suffer from pre-existing disadvantage and stigmatization because of their age. By contrast, an important contextual factor in this case is that people with disabilities have historically been undervalued in Canadian society generally, and in the area of employment in

particular. Where, as in this case, the individuals who are treated differently by the legislation suffer from pre-existing disadvantage, vulnerability, stereotyping and prejudice, then as the Supreme Court made clear in *Law* (at para. 63) it is logical to conclude that “further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a severe impact upon them, since they are already vulnerable.”

[26] *Gosselin* does not assist the appellant in this case. The legislature may not use employees whose contracts have been frustrated due to disability as a proxy for employees who will never work again because this assumption is based on an impermissible stereotype that disabled persons cannot fully participate in the workforce.

[27] Even if this were a case where an informed general assumption were permitted, the Hospital’s and the Attorney General’s argument would still fail because the generalization that individuals whose employment has been frustrated by disability are likely to never participate in the workforce again is not true.

[28] First, although an employer has a duty under the *Human Rights Code* to consider disabled employees’ personal characteristics in accommodating them to the point of undue hardship, accommodation may not be possible for reasons unconnected to their personal characteristics, such as the range of other work available and working conditions in the workplace, and in the case of innocent absenteeism, the employer’s ability to cope with the employee’s prolonged absence. It follows that employees with severe and prolonged disabilities, while unable to be employed in one workplace, may be able to be employed in another.

[29] Second, things change. Employees with permanent disabilities may undergo retraining and acquire new skills, and new devices and techniques of accommodating special needs may be developed. Employees with temporary disabilities may recover and be able to return to work, even if their conditions persisted long enough to result in the frustration of their former employment contracts. For example, in this case, Ms. Tilley was told she would eventually be able to return to work, but the exact timetable was unknown. As already mentioned, Ms. Tilley did in fact find new employment following her termination by the Hospital.

[30] In summary, this is not a case in which the government can rely on a generalization about the presumed characteristics of employees whose employment has been frustrated by disability to avoid a finding that the differential treatment violates s. 15 of the *Charter*. It treats the grievor and others in her position differently than others whose employment has not been frustrated. 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.

[31] I also note that, even if I was to find that the exclusion in s. 58(5)(c) was consistent with what the Hospital and the Attorney General submit is the dominant purpose of severance pay, the fact that the exclusion is inconsistent with other purposes of severance pay would have been sufficient to ground a s. 15 breach.

[32] As the Hospital acknowledges, one of the other purposes of severance pay is to compensate employees for past contributions to the employer's business. The O.N.A. points out that s. 58(5)(d), which grants severance pay to employees who die before receiving notice of termination, is an expression of this compensatory purpose. The fact that such employees receive severance is not consistent with providing compensation to employees who remain in the workforce. It is only consistent with compensating employees for their past contributions to the employer's business during their years of service. However, by virtue of exclusion in s. 58(5)(c), employees whose employment has been frustrated by disability are not compensated for their years of service and investment in the employer's business. This devalues their contribution and treats their years of service as less worthy than others'.

[33] In my view, where a statute has several purposes, adverse differential treatment that is discriminatory in light of one purpose is sufficient to establish a *prima facie* breach of s. 15. The fact that the differential treatment may correspond perfectly with another purpose of the statute is a matter to be considered under section 1.

Section 1 of the Charter

[34] A detailed analysis under section 1 is unnecessary in this case because the Hospital and the Attorney General rely on the same "reasonable assumption" I have already rejected in order to ground their s. 1 arguments.

[35] The Hospital argues that limiting employees' entitlement to severance pay only to those situations in which it is appropriate is a pressing and substantial legislative objective. The Attorney General submits that the objective of the severance pay provisions in the *Act* is to "ease the financial needs of those who lose their jobs but who are likely to find alternative employment albeit at a reduced compensation." The Attorney General also submits that in reviewing legislative choices in the areas of economic and social policy, courts should show substantial deference.

[36] While I agree that the government is entitled to balance the interests of employers and employees by limiting the availability of severance pay, I am not convinced that this

objective is sufficiently compelling to override the right of disabled persons to equal treatment in employment. However, regardless of my disposition of this issue, the appellant's argument fails at the next stage of the s. 1 analysis because there is no rational connection between the objective of granting severance pay to those employees who will rejoin the workforce and the law which denies severance pay to employees whose contracts have been frustrated due to illness or injury.

[37] For the reasons discussed above, 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.

[38] Further, to the extent that severance pay is intended to ease the transition of terminated employees to other employment, the need of disabled employees for support in retraining and the acquisition of new skills may be even more pressing than that of other terminated employees. Denying them the benefit of severance pay therefore does not further the objective of severance pay identified by Attorney General. To the contrary, it frustrates it.

[39] Finally, s. 58(5)(c) does not impair the grievor's *Charter* rights as minimally as possible. First, to the extent that compensating terminated employees for their past contributions to the employer's business is one purpose of severance pay, employees who are not likely to return to the workforce are entitled to be compensated for their past contributions to the employer's business in the same way as other employees who receive severance pay. Second, even if disabled persons who are denied severance pay receive other government benefits as a result of their disabilities, this does not minimize the extent to which their rights to equal treatment in employment are impaired by the impugned law. Finally, to the extent that one purpose of severance pay is to provide assistance for employees to rejoin the workforce, s. 58(5)(c) denies its benefits to all persons whose contracts of employment have been frustrated due to disability without regard to whether or not they attempt to rejoin the workforce. Section 58(5)(c) therefore cannot be justified as a reasonable limit on s. 15.

Conclusion

[40] For the foregoing reasons, I would dismiss the appeal and uphold the decision of the Divisional Court declaring that s. 58(5)(c) is unconstitutional and of no force and effect.

[41] I would award the Association costs against the Hospital fixed at \$10,000 inclusive of G.S.T. and disbursements.

“R.G. Juriansz J.A.”
“I agree S.T. Goudge J.A.”
“I agree S.E. Lang J.A.”

RELEASED: May 4, 2005

APPENDIX A

Employment Standards Act, R.S.O. 1990, c. E.14

PART XIV TERMINATION OF EMPLOYMENT

Severance pay

58 (2) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of \$2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years. R.S.O. 1990, c. E.14, s. 58 (2); S.O. 1993, c. 27, Sched.

Where location deemed an establishment

(3) Where,

(a) there is a permanent discontinuance of all or part of the business of an employer at a location which is part of an establishment consisting of two or more locations; and

(b) fifty or more employees have their employment terminated in a period of six months or less because of the permanent discontinuance,

the location shall be deemed to be an establishment for the purpose of determining the rights of the employees employed at that location under this section. R.S.O. 1990, c. E.14, s. 58 (3); S.O. 1993, c. 27, Sched.

Amount of severance pay

(4) The severance pay to which an employee is entitled under this section shall be in an amount equal to the employee's regular wages for a regular non-overtime work week multiplied by the sum of,

(a) the number of the employee's completed years of employment; and

(b) the number of the employee's completed months of employment divided by 12,

but shall not exceed twenty-six weeks regular wages for a regular non-overtime work week. R.S.O. 1990, c. E.14, s. 58 (4); S.O. 1993, c. 27, Sched.

Application

(5) Subsections (2), (3) and (4) apply to,

(a) a regular full-time employee and a regular part-time employee;

(b) an employee whose employment is terminated as a result of a strike or lock-out except where the employer establishes that the permanent discontinuance of all or part of the business at an establishment is caused by the economic consequences of the strike;

(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;

(d) an employee who received or was entitled to receive notice of termination but who died before his or her employment was terminated or would have been terminated if notice of termination had been given;

(e) a permanent discontinuance of all or part of a business at an establishment however caused, whether fortuitous, unforeseen or by act of God;

(f) an employee who loses his or her employment by the exercise by another employee of a seniority right; and

(g) an employee who, upon having his or her employment terminated, retires and is entitled to receive a reduced pension benefit. R.S.O. 1990, c. E.14, s. 58 (5).

Exceptions

(6) Subsections (2), (3) and (4) do not apply to,

(a) an employee who refuses an offer by his or her employer of reasonable alternative employment with the employer;

(b) an employee who refuses to exercise his or her seniority rights to obtain reasonable alternative employment;

(c) an employee who has been guilty of wilful misconduct or disobedience or wilful neglect of duty that has not been condoned by the employer;

(d) an employee who, upon having his or her employment terminated, retires and receives an actuarially unreduced pension benefit;

(e) an employee whose employer is engaged in the construction, alteration, maintenance or demolition of buildings, structures, roads, sewers, pipelines, mains, tunnels or other works where the employee works at the site thereof; or

(f) an employee who is employed under an arrangement whereby the employee may elect to work or not when requested to do so. R.S.O. 1990, c. E.14, s. 58 (6); S.O. 1993, c. 27, Sched.

Severance pay in addition to other payment

(7) Severance pay under this section is payable to the employee in addition to any other payment under this Act or contract of employment without set-off or deduction, except for,

(a) supplementary unemployment benefits payable to and received by the employee; or

(b) payments made to the employee under a contractual severance pay scheme under which payments for loss of employment based upon length of service are provided. R.S.O. 1990, c. E.14, s. 58 (7); S.O. 1993, c. 27, Sched.

Prior employment included

(8) Employment before the 1st day of January, 1981, shall be taken into account in calculating the years of employment of an employee to whom this section applies.

Employment not included

(9) A year of employment for which an employee has been paid severance pay shall be excluded in any subsequent calculation of severance pay for that employee. R.S.O. 1990, c. E.14, s. 58 (8, 9).

Sale of a business

(9.1) If an employer who sells a business within the meaning of section 13 purports to pay severance pay to an employee employed by the purchaser and if the amount paid at least equals the amount of severance pay to which the employee would have been entitled had he or she not been employed by the purchaser, the amount paid shall be treated as severance pay for the purposes of subsection (9).

Same

(9.2) Subsection (9.1) applies with respect to payments made before or after that subsection comes into force.

Election by employee

(10) Where an employee who is entitled to severance pay under this section has a right to be recalled for employment under the terms and conditions of employment, the employee may elect to be paid the severance pay forthwith or may elect to maintain the right to be recalled.

Effect of election to accept severance pay

(11) Where the employee elects under subsection (10) to be paid the severance pay forthwith, the employee shall be deemed to have abandoned the right to be recalled.

Effect of election to maintain right to recall

(12) Where the employee elects to maintain the right to be recalled or fails to make an election, the employer shall pay the severance pay to the Director in trust to be paid by the Director,

(a) to the employer, where the employee accepts employment made available under the right of recall and in such case the employee shall be deemed to have abandoned the right to severance pay; or

(b) to the employee in any case other than a case mentioned in clause (a), including the case where the employee renounces the right to be recalled, and, upon payment, the employee shall be deemed to have abandoned the right to be recalled.

Where employee resigns

(13) Where an employee who receives notice of termination resigns from employment during the statutory notice period and provides the employer with at least two weeks written notice of resignation, the employee shall,

(a) where the employee has been given notice of termination because of the permanent discontinuance of all of the employer's business at an establishment, be deemed to have had his or her employment terminated by the employer on the date the notice of termination was to have taken effect; and

(b) in any other case, be deemed to have been laid off by the employer commencing on the date the notice of termination was to have taken effect.

Calculation of severance pay

(14) The amount of severance pay for an employee who is entitled to severance pay under subsection (13) shall be calculated on the employee's length of employment up to the date on which his or her notice of resignation takes effect.

Instalment payments

(15) Despite subsections (2) and (12) and section 7, where the Minister so recommends, the Director may, on an application by the employer, approve the employer's plan to pay severance pay by instalment and, where such approval has been given, the employer shall be deemed to have complied with subsections (2) and (12) and section 7.

Where employer fails to comply with plan

(16) Where an employer fails to comply with the approved plan and the Director does not approve another instalment plan within thirty days of such failure, all unpaid severance pay shall be deemed to have become due and payable on the date the Director approved the original instalment plan.

Maximum period for payment of instalments

(17) No instalment plan shall extend payment of severance pay for a period longer than three years from the date on which such severance pay became due and payable.

Where agreements made by trade union

(18) Despite section 3, where an employee who is entitled to severance pay under this section is represented by a trade union, the trade union may enter into an agreement with the employer which includes a settlement of all severance pay claims, in which case this section does not apply.

Director to be notified

(19) The parties to an agreement under subsection (18) shall forthwith notify the Director in writing.

Proceedings terminated

(20) Where there is an agreement under subsection (18), any proceeding under section 68 or 69 to determine severance pay is terminated with regard to the employees represented by the trade union. R.S.O. 1990, c. E.14, s. 58 (10-20).

Failure to pay severance pay

(21) If a trade union has entered into a settlement agreement under subsection (18) and the employer does not pay the severance pay agreed to or the trade union demonstrates that the agreement was made as the result of fraud or coercion, an employment standards officer may make an order under section 65 as to what action, if any, the employer shall take and may make an order to compensate the employee for the severance pay that is owed.

Calculation of severance pay

(22) For purposes of subsection (21), the amount of severance pay an employee is entitled to in an order under section 65 is the amount as calculated under subsection (4) or as negotiated in the collective agreement, whichever is the greater. S.O. 1991, c.16, s. 4.

No offence

(23) An employer does not commit an offence under subsection 78(1) when his, her or its employees are deemed to have been terminated under subsection (1.1) and the employer does not comply with subsection (2). S.O. 1995, c. 1, s. 75 (2), part, deemed to be in force September 7, 1995 (Act, s. 86 (3) 2).

Same

(24) An officer, director or agent of a corporation or a person purporting to act in any such capacity does not commit an offence under subsection 79(1) when the corporation is an employer whose employees are deemed to have been terminated under subsection (1.1) and the corporation does not comply with subsection (2). S.O. 1995, c. 1, s. 75 (2), part, deemed to be in force September 7, 1995 (Act, s. 86 (3) 2).

R.S.O. 1990, c. E.14, s. 58; S.O. 1991, c.16, s. 4; S.O. 1993, c. 27, Sched.; S.O. 1995, c. 1, s. 75; S.O. 1997, c. 21, s. 3.