

## Termination of Benefits Coverage at Age 65 Declared Unconstitutional

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This decision has been anticipated for quite some time. Although the Ontario *Human Rights Code* (Code) was amended to remove the upper limit on age discrimination and prohibit mandatory retirement in 2006, discrimination in connection with benefit and pension plans based on age continued to be permitted by the Code and the Benefits Regulation under the *Employment Standards Act, 2000* (ESA). These distinctions were rationalized based on advice from insurers and independent studies that pension and benefits plans would suffer because of the costs increases expected to be associated with providing coverage for older workers.

The Human Rights Tribunal of Ontario (HRTO) has now considered whether this rationalization is justified. The facts of the case involve a teacher who continued to work past age 65 and then claimed that it was discriminatory for his employer, the Grand Erie District School Board, to terminate his benefits coverage – as per the collective agreement negotiated with the teacher’s union – because of his age. The teacher sought \$160,000 in lost health and dental benefits (incurred due to his wife being gravely ill) plus compensation for injury to dignity, feelings and self-respect. As the teacher’s application wound its way through the HRTO’s process, the teacher filed a notice of constitutional question claiming that the Code and the ESA permitted distinction at age 65 infringed his right to equality under the *Canadian Charter of Rights and Freedoms* (Charter). Subsection 15(1) of the Charter provides that “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.” The Charter applies to all government-related agencies, including school boards. The rights conferred by subsection 15(1) are subject only to section 1 which permits “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

After considering expert evidence and the submissions of, not only the school board, but the Ministry of the Attorney General, the Ontario Human Rights Commission and various unions who intervened in the case, the Tribunal agreed with the teacher. According to the Tribunal, employees who work after age 65 provide the same labour as they did prior to turning 65 and would normally be guaranteed equal compensation, including benefits coverage. The Tribunal did not accept either of the School Board’s arguments that the teacher had suffered no disadvantage because he became entitled to a generous pension at age 65 or that he was able to transfer to government funded benefits programs at age 65. The Tribunal similarly did not accept that the teacher’s long career and membership in a profession and a union were relevant to its proper consideration of all workers age 65 and older to whom these provisions apply.

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The Tribunal concluded that “the financial viability of workplace benefits plans can be achieved without making the age 65 and older group vulnerable to the loss of employment benefits without recourse to a (quasi-constitutional) human rights claim.” These workers were found to be vulnerable and their rights were found to be more than minimally impaired. The Tribunal concluded, perhaps surprisingly given the \$160,000 in lost benefits sought by the teacher, that the evidence before it demonstrated no close link between health and dental benefits costs and age. The Tribunal determined that there were other alternatives available to the government that would impair the rights of workers age 65 and older to a lesser degree. The example cited was to require that any age-based differentiations in benefits plans be reasonable and bona fide with a protection against undue hardship available to employers. Accordingly, the infringement of rights was not saved under section 1 of the Charter.

The Tribunal was careful to note that its decision is limited to group health, dental and life insurance benefits plans and that long-term disability insurance and pension plans were not included in the constitutional challenge. Stay tuned for further developments and, given the importance of the issue, the expected appeal of the Tribunal’s decision.

For further information, please contact Kristin Taylor or any other member of the Employment & Labour Group.

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