Nearing the end of Mandatory Retirement in Canada?

Age is one of the prohibited grounds of discrimination in employment across Canada. Age discrimination applies with respect to training, promotional opportunities, work assignments, performance management, discipline and other terms and conditions of employment. Age discrimination provisions also affect mandatory retirement schemes, which have become a hot topic across Canada.

In certain provinces “age” is expressly defined; in others it is not. Currently, in Ontario and Saskatchewan, age is defined as “18 years or more and less than 65 years”. In British Columbia and Newfoundland, the definition of age is limited in relation to employment discrimination, to between 19 and 65 years of age. In Alberta, only a junior limit of age (18) is provided. Age is not defined in Quebec, Nova Scotia, Prince Edward Island or New Brunswick. The Manitoba and New Brunswick statutes restrict the ambit of age discrimination to persons of the age of majority (18 and 19 respectively). The federal government also restricts the ambit of age discrimination to persons of the age of majority.

No law in Canada requires retirement at age 65. However, many workplaces mandate retirement at that age, even if an employee still wants to work. As noted above, there are currently four provinces in Canada (British Columbia, Saskatchewan, Ontario and Newfoundland) which restrict the definition of “age” to over 18 and under 65. Therefore, employers in these provinces can require employees to retire at 65 and those employees cannot challenge the practice. Mandatory retirement before age 65 must be justified as a bona fide occupational requirement.

The human rights statutes of the remaining provinces and federal government do not restrict the definition of “age” in prohibiting age discrimination with respect to employment. Mandatory retirement in these provinces is therefore deemed illegal. However, the human rights statutes of these provinces permit various exceptions to the blanket prohibition.

Alberta, Manitoba, and Prince Edward Island have established a fairly stringent exception; age discrimination, (and therefore mandatory retirement), is prohibited unless the employer can establish a bona fide occupational requirement that prevents an employee from performing their work after a specific age. Mandatory retirement provisions have been upheld in the case of firefighters and police officers, and in one Alberta case, a school bus driver.

The federal government, New Brunswick and Nova Scotia all permit some form of mandatory retirement beyond a bona fide occupational requirement. For example, in Nova Scotia, a bona fide plan, scheme or practice of mandatory retirement is permissible as long as it is applied uniformly to all employees. New Brunswick permits a “bona fide retirement or pension plan”, and the federal Act provides that it is not a discriminatory practice if an individual’s employment is terminated because that individual has reached the normal age of retirement for similarly
situated employees. In Quebec, where mandatory retirement is prohibited, legislation allows companies to facilitate partial retirement through their pension plans.

Mandatory retirement, which has already been banned in numerous countries, including the United States, is increasingly viewed not only as a human rights issue, but also as an economic issue, as it affects on employees who cannot afford to stop working and companies that cannot afford to lose skilled workers.

Although a number of provinces still allow for mandatory retirement, the trend in Canada certainly appears to be to eliminate the upper limit from the definition of “age”, meaning there will be no opportunity to discriminate on the basis of age over 65. Most notably, the Liberal government in Ontario held nine public consultations throughout the month of September with respect to ending mandatory retirement. The government has announced that it intends to introduce legislation to eliminate mandatory retirement. The New Brunswick Human Rights Commission has also recommended to the government that the specific exception to age discrimination in relation to retirement plans be removed as soon as possible. Prime Minister Paul Martin, who is now 66, has also called for an end to mandatory retirement in the federally regulated sphere.

In a recent decision from the British Columbia Court of Appeal involving the application of the Charter, the Court held that the Supreme Court of Canada case, McKinney et al, upholding a mandatory retirement scheme, was not determinative of the issue and does not relieve public sector employers of the responsibility of establishing the constitutionality of such schemes under the Charter. The Court held that the public sector mandatory retirement policy in this case was not justifiable. The majority of the Court indicated that social and legislative changes may well cast doubt on the extent to which the courts should defer to decisions made over a decade earlier.

Judging by the recent action of the Ontario government, and the statements of B.C.’s Appellate Court, we may expect to see the end of mandatory retirement across Canada in the near future.

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