BULLETIN
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Benefits for Older Employees – Can They be Excluded?

By: Lindsey Taylor | Vancouver

As we have discussed in previous editions, mandatory retirement across Canada is becoming a relic of the past. And employers are beginning to face the ripple effects. One of those ripple effects is benefits entitlement – can employees over 65 be excluded from benefits? The answer is not clear. As a handful of recent arbitration cases suggest, the answer may depend on what you have negotiated with your union or employees.

Peace River School District

In *British Columbia Government and Service Employees' Union v. Peace River South School District No. 59*, the arbitrator considered whether an employer could terminate its unionized employees' health benefits at age 65, after mandatory retirement was abolished in British Columbia. Although the collective agreement said that benefits would be provided to "all employees", there was evidence that the parties' originally negotiated terms of insurance coverage included termination at age 65. Thereafter, they agreed that there would be no change in these terms when they later agreed to change insurers.

In this case, the arbitrator said that the abolishment of mandatory retirement did not override the contractual agreement between the union and the employer. As such, benefits for those over the age of 65 *could* be terminated. However, because the union did not make any such argument, the arbitrator did not consider the impact of human rights legislation or the *Canadian Charter of Rights and Freedoms.*

City of London

In *Canadian Union of Public Employees, London Civic Employees, Local 107 v. London (City)* the union filed a policy grievance alleging that termination of benefits for employees upon reaching the age of 65 violated both the benefits and non-discrimination sections of the collective agreement. Here, the collective agreement extended benefits to "all employees". But, unlike *Peace River*, there was no extrinsic evidence of the parties' intentions. As a result, the arbitrator relied on the clear language of the collective agreement and concluded that the employer could *not* restrict benefits for its older employees.

The arbitrator also considered the insurance exemptions in the Ontario *Human Rights Code* - that allow age-based distinctions in benefits. But he said that the exemptions did not mandate age-based distinctions in the face of clear contractual language.

Municipality of Chatham-Kent

Most recently, the issue was considered in *Ontario Nurses' Association v. Municipality of Chatham-Kent and the Attorney General of Ontario*, by the same arbitrator as *City of London*. Unlike his previous decision, the arbitrator decided that reduced benefit coverage for employees over 65 in this case *was* permissible. The difference? In this case, reduced benefit coverage for workers aged 65 and older was expressly contemplated in the collective agreement.

The arbitrator also considered whether the collective agreement provision in question violated the *Canadian Charter of Rights and Freedoms* or human rights legislation. In short, he said no. With respect to human rights, the exemptions in the Ontario *Human Rights Code* for *bona fide* insurance plans allow employers to reduce benefit coverage for workers aged 65 and older.

Cold Comfort for Employers?

Although the employer was successful in two out of these three decisions, these decisions should not provide too much comfort for employers. These cases only dealt with unionized employees, and were only favourable to employers when the collective agreement was clear. They do not deal with non-union employees at all. Indeed, there is virtually a complete absence of decisions by human rights tribunals or courts. Not only that, but there are also often subtle yet important distinctions between provinces with respect to any specific legislative exemptions on which an employer may rely. Restrictions on benefits that are acceptable in Ontario may be distinguished on the basis of a subtle difference in the language of the exemption in another province. Will each province take a different approach? Will a human rights tribunal take a different approach? These questions are yet to be answered.

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In the interim, employers should revisit their benefits plans and seek legal advice on the specific language and content of their plans. Further, employers may wish to investigate the cost and feasibility of providing benefits to employees over the age of 65. It may not be as cost-prohibitive as it once was. Above all, stay tuned…

For more information on the subject of this bulletin, please contact the author:

Lindsey Taylor
604 631 4814
ltaylor@fasken.com

Contacts

VANCOUVER

Kevin P. O'Neill
604 631 3147
koneill@fasken.com

Charles G. Harrison
604 631 3132
charrison@fasken.com

CALGARY

Katie Clayton
403 261 5376
kclayton@fasken.com

TORONTO

Karen M. Sargeant
416 868 3475
ksargeant@fasken.com

Brian P. Smeenk
416 868 3438
bsmeenk@fasken.com

OTTAWA

Stephen B. Acker
613 236 3882
sacker@fasken.com

OTTAWA / MONTRÉAL

Dominique Monet
514 397 7425
dmonet@fasken.com

MONTRÉAL

Dominique Launay
514 397 5240
dlaunay@fasken.com

QUÉBEC CITY

Jasmin Marcotte
418 640 2030
jmarcotte@fasken.com

LONDON

Cerys Williams
+44 207 917 8599
cwilliams@fasken.co.uk

Michael McCartney
+44 207 917 8669
mmccartney@fasken.co.uk

PARIS

Judith Beckhard-Cardoso
+33 1 44 94 96 98
jbeckhard@fasken.com

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