

Age Discrimination in Employment in the Post-Mandatory Retirement Era

Accommodating Age in the Workplace
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Is Age Different?

Age discrimination has long been treated as different from other prohibited grounds of discrimination, primarily because: (1) everyone ages over their lifetime, meaning the identification of a discreet insular minority was considered problematic¹; and because (2) historically we have come to accept that “age-based distinctions are a common and necessary way of ordering our society”².

Older Workers

Despite reservations about considering age to be a protected ground like the others, the Supreme Court of Canada has consistently recognized the disadvantaged position of older persons, particularly in the workforce, justifies extending protection to this group at least.³

The End of Mandatory Retirement

Ironically, the Court consistently upheld the existence of human rights exemptions allowing mandatory retirement despite its recognition of the seriously discriminatory impact of the practice.⁴ Even though the social facts upon which the Court relied to justify mandatory retirement have been conclusively debunked,⁵ the Court has not subsequently reversed its decision in *McKinney* and due to repeal of all mandatory retirement exemptions in human rights

¹ See generally Pnina Alon-Shenker, “‘Age is Different’: Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting”, 17 *CLEJ* 31; nevertheless the Supreme Court of Canada has consistently recognized the disadvantaged position of the older worker in the workforce

² *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84

³ *Ontario Human Rights Commission v. Etobicoke*, [1982] S.C.R. 202 [“Etobicoke Firefighters”]; *McKinney v. University of Guelph*, [1990] 3 SCR 229 and *Gosselin*, *Ibid.*

⁴ *McKinney* *Ibid.*, and seq.

⁵ *Vilven and Kelly*, 2009 CHRT 24 and 2011 FC 120

legislation across the country, it may not get the opportunity.⁶ The repeal of this legislation, rather than the fact that McKinney has not yet been reversed, should be accepted as signaling that the period of the anomalous treatment of age discrimination is coming to an end. Employers are turning to more sophisticated measures to rid themselves of their older workers and human rights litigation involving discrimination on the basis of age is becoming increasingly comparable to litigation involving discrimination based on the other enumerated grounds.

Is Age Discrimination Limited to Stereotypical Assumptions?

Age discrimination cases, where employers could not avail themselves of the mandatory retirement exemption, were virtually all confined to circumstances where employers engaged in stereotypical thinking, where the employer was unable to demonstrate that the stereotypical assumptions applied to the individual employee.⁷ Even in those cases, where age related safety issues exist and individualized testing is not possible, mandatory retirement was permissible under the bona fide occupational requirement [BFOR] defence.⁸ This defence is not unique to age discrimination.⁹

More Cases Anticipated

The disappearance of mandatory retirement means that age discrimination in other forms will be more frequent and it is reasonable to expect that the jurisprudence will adapt accordingly. Thus

⁶ Kelly and Vilven, 2012 FCA 209 and 2013 SCC 35104; there remain mandatory exemptions for employers with *bona fide* pension plans in New Brunswick [see *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan, 2008 SCC 45* ["*Saskatchewan Potash*"] and age based benefit plans remain exempted in some jurisdictions such as Ontario see *Ontario Nurses Association v. Chatham Kent*, (2010), 88 CCPD 95.

⁷ *Etoibicoke Firefighters*

⁸ *Large v. Stratford (City)*, [1995] 3 SCR 733

⁹ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 1999 CanLII 646 (SCC)

while non-mandatory retirement age discrimination cases have in the past been rare, the author's experience in his practice would indicate that these cases are quickly becoming more frequent and taking on a broader range of attributes.

Circumstantial and Adverse Effects Cases

For example, there have been indications that human rights tribunals will be more willing to accept circumstantial evidence of age discrimination, rather than requiring direct discrimination.¹⁰ In order to recognize the forms that adverse impact age discrimination can take in the workplace, it is anticipated that human rights tribunals will welcome expert evidence based on empirical evidence.¹¹

Old Prejudices and New Accommodations

Barriers deemed discriminatory may not explicitly reference age, indeed they may not even be based on the stigmatized or stereotypical thinking of employers. They may be based on unquestioned assumptions of longstanding, such as automatically terminating employees who are eligible for a pension¹² or the refusal to hire older workers into apprenticeships or entry level positions.¹³ They may be based on the failure to accommodate age related attributes of a worker¹⁴.

¹⁰ *Clennon v. Toronto East General Hospital*, [2009] OHR TD No. 2224 para. 103

¹¹ A redacted expert report by Professor Ellie Berger has been attached, which references her important empirical research into the barriers faced by older workers and the employer attitudes that underlie age discrimination in the workplace. This research usefully identifies the many forms age discrimination can take in the workplace. This research will be set out more fully in her forthcoming book *Agism at Work: Negotiating Age Gender and Identity in the Discriminating Workplace*, to be published by University Toronto Press.

¹² *Salter v. Newfoundland*, (2001), 41 CHRR D/68

¹³ *Canada (Human Rights Commission) v. Greyhound Buslines*, (1984), 6 CHRR D/2512

¹⁴ Pnina Alon-Shenker, "The Duty to Accommodate Senior Workers: Its Nature Scope and Limitations", (2012), 38:1 Queen's LJ 165

Undue Hardship

They may also be based on hard headed economic calculations, such as the impending vesting of pension rights, the higher wage or benefit costs for more senior workers, or assumptions about the returns to be realized on the provision of job training that is necessary for a worker to remain capable of performing the essential duties of their jobs.¹⁵

Intersecting Grounds

Adverse impact analysis will be necessarily applied to address these types of age discrimination cases. Similarly the Supreme Court's application of "intersecting grounds" analysis¹⁶ will see age combined with gender¹⁷, disability¹⁸ and the failure to accommodate family care related responsibilities ["family status"]¹⁹ all lead to a deepening understanding and a broadening application of age discrimination safeguards.

¹⁵ Under US anti-discrimination legislation these are explicitly rejected as BFOR criteria. It will be interesting to see how they are treated as these issues are litigated, as they will be in the near future.

¹⁶ *Withler v. Canada (Attorney General)*, 2011 SCC 12

¹⁷ There have been a lengthening line of American cases starting with television news anchor Christine Craft and her 1983 case against ABC based on gender and age rather than the assertion that crow's feet constitute a disability.

¹⁸ *Silzer v. Chapparel Industries*, (1993), 20 CHRR D/155

¹⁹ *Johnston v. Canada*, 2014 FCA 110 and *Seeley v. CNR*, 2014 FCA 111

**ACCOMMODATING AGE IN THE WORKPLACE: problem 2(b) advising the employee
Beverly**

1. **Beverly is 66 years old:** prime territory for age discrimination claims involving manual labourers in a post-mandatory retirement age world. Whereas formerly an employer may have been willing to “package” such an employee, particularly one with only 10 years experience on the job, human rights wage replacement damages are now potentially much higher than those in wrongful dismissal claims. [See *Fair v. Hamilton-Wentworth District School Board*, 2014 ONSC 2411 (Div. Ct.)] Agreeing on the contents of a “package” is now more difficult because the quantum of wage replacement damages is much more uncertain than is the case in wrongful dismissal claims, meaning the mitigation factor becomes harder to address in advance. This is particularly true for the older worker with a degree of disability, who would be doubly disadvantaged in the marketplace. The reference to employer concern about her “touchy, snippy” behavior, presumably linkable to the potential for serious discipline at some point, suggests a quite subjective assessment, that may be based on age-based stereotypes, appears insensitive to the impact of a failure to accommodate her age/disability based needs thereby leaving her in constant pain, and if acted upon would give rise to a strong circumstantial case of discrimination since it is unlikely such conduct in a younger worker would be addressed without going through progressive discipline.
2. **Accommodation:** Whereas accommodation may make considerable sense as the aging process reduces productivity and the employee begins to experience pain in performing the duties of her current job, it has proven far from simple in Beverly’s case. Even though there is work into which she could be transferred and she is willing to consider making the transition, Beverly must be fully advised of her rights and will have some decisions to

make in this scenario. Firstly, accommodation is to be made as inclusively as possible, [See *CCD v. VIA Rail*, 2007 SCC 15] meaning she should be allowed to remain in her current job with as little restructuring as is necessary to accommodate her disability/age related needs [ie. job substitution should occur only where re-structuring would cause undue hardship], and with no reduction in salary or salary expectations [“red-circling”]. Accommodation arguably need not involve a 100% change into an administrative position.

A second accommodation issue is the denial of training provided to younger persons entering the administrative position. Arguably the refusal is discriminatory based on age; however it could be anticipated that the employer would attempt to argue that providing training in the circumstances would cause it “undue hardship”. In response it could be said that the cost of the training should not be considered when assessing “undue hardship” because it is “inherently discriminatory” since it would be based on stereotypical assumptions about length an individual will stay in a job[see *McKinney* op. cit.], or alternatively it could be argued that a placement into a position in which they are being set up for failure [anticipated termination of Beverly for being incapable of performing the essential duties of the job for lack of necessary training] is not truly an accommodation, or alternatively could be characterized as a bad faith accommodation. Thus while Beverly sincerely wishes to be relieved of her current onerous duties and assume the lighter responsibilities of an administrative job, it would be counsel’s responsibility to point out that acceptance without protest of an accommodation may represent condonation of the age based differential treatment, with the likely outcome

being that the job is short-lived and ultimately results in Beverly being terminated for cause.

3. **Constructive Termination:** Arguably what has already happened to Beverly amounts to a constructive termination. Constructive termination can occur in human rights cases [See *Rulona v. City Housing Hamilton*, 2013 HRTO 603 and *Payette v. Alarm Guard Security Service et al.*, 2011 HRTO 109] as it can in wrongful dismissal cases [“constructive dismissal” see generally *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10]. The issue to be assessed is whether the bad faith offer to accommodate, and the supervisor’s dismissive demeanour in refusing her the training provided to younger workers entering an administrative position amount to a refusal to meaningfully accommodate sufficient to be considered constructive termination. Beverly should consider whether she would be better off to treat the employer’s conduct as a constructive termination and seek an award of damages. Unfortunately she must decide to treat the employer’s conduct as having terminated her employment and leave her facing an interruption of income and assuming some financial risk. If she remains in the position, it could be said that she condoned the employer’s treatment of her. A related issue is whether the employer’s statement that she can remain in her job, with the proposed “accommodation” means that under the circumstances of employer bad faith and high-handed treatment negates her duty to mitigate her losses by remaining in her job. By treating her job with the employer as being at an end Beverly is entitled to reasonable compensation and to pursue employment with an employer who values her as a person.
4. **Process:** Beverly does not have to wait until she has been terminated, as inevitable as this outcome may appear, nor need she elect to treat herself as having been constructively

terminated. She would be well advised to seek legal assistance immediately, in order to consider the numerous options outlined above. It is quite likely that a lawyer would advise advancing a case based on age discrimination under the *Code* by means of a demand letter. Most human rights matters, particularly those involving discrimination in employment, are resolved informally on the basis of a written demand letter and negotiations through counsel. This would allow Beverly to postpone making a decision whether to proceed by way of civil action for wrongful dismissal with a *Human Rights Code* s. 46.1(1) claim attached, or by an application under the *Code*. In theory this should not represent a dilemma for counsel advising Beverly, but currently does because, despite the significant passage of time since the section was added to the *Code*, there is not yet clear precedent confirming that human rights damages for lost income will be available in a civil claim. The absence of such a precedent is delaying the settlement of civil claims and thereby increasing legal expenses [note that costs are available in civil claims unlike human rights applications, subject only to s. 8 of the *Evidence Act*]. Settlement before making the selection of procedure is arguably to the mutual benefit of both parties. The fear of being subjected to retaliation is naturally a concern for an employee registering a human rights complaint against a current employer. Most sophisticated employers recognize the danger of compounding claims by engaging in retaliatory discrimination, but there are a surprising number which do not.

