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Can An Employer Discontinue Employee Benefits at Age 65? The Human Rights Tribunal of Ontario Weighs In

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In 2006, the Ontario *Human Rights Code* (the "*Code*") was amended making it illegal to require an employee to retire at age 65. However, the *Code* still allowed an employer to treat an older employee differently for the purpose of an employee benefit, pension, superannuation or group insurance plan. In other words, after 2006, while it was no longer legal to require an employee to retire at 65 years of age, it was still permissible to cease benefits coverage at that age.

A recent decision of the Human Rights Tribunal of Ontario (the "Tribunal") has concluded this differential treatment violates the *Canadian Charter of Rights and Freedoms* (the "*Charter*") as it relates to extended health, dental and (some) life insurance coverage for employees over age 65.

What happened?

Mr. Talos, a teacher, alleged his employer-school board violated his right to be free from discrimination on the basis of age when it terminated his membership in the school board's group health, dental and life insurance benefit plans upon his reaching age 65, despite the fact he continued to be actively employed. Talos' wife, who was younger and without access to her own employer-sponsored benefit plan, had a significant medical condition and Talos continued to work, in part, to allow him access to the health benefits required for his wife's medications.[1]

Talos also filed a Notice of Constitutional Question, arguing section 25(2.1) of the *Code*[2], the provision permitting for age-based distinctions in benefit coverage, was unconstitutional.

[1] Talos v. Grand Erie District School Board, 2018 HRTO 680
[2] Which incorporates section 44(1) of the Ontario *Employment Standards Act, 2000* and its relevant regulation.

In a decision issued on November 26, 2013, the Tribunal held Talos' allegation of discrimination based on age had no reasonable prospect of success because section 25(2.1) of the *Code* was a complete defense.[3] However, the Tribunal allowed the application to proceed on the constitutional issue.

Is section 25(2.1) of the *Code* unconstitutional?

The Tribunal addressed the following two questions: (1) does section 25(2.1) of the *Code* infringe the right to equality under section 15 of the *Charter* and (2) if so, is section 25(2.1) justified under section 1 of the *Charter*?

Section 15(1) of the *Charter* provides an individual the right to equal protection and benefit under the law, without discrimination based on a number of factors, including age:

> 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.

Section 1 of the *Charter* allows the government to limit a right or freedom under the *Charter* if the limit is reasonable and justified:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Tribunal concluded it was "apparent on the face of the impugned *Code* section that a distinction is created between workers under the age of 65 who are members of workplace group benefit plans, and those who are 65 and older who perform the same work but suddenly lose a portion of their compensation". This distinction amounted to *prima facie* discrimination based on age.

The Tribunal did not accept the school board's arguments that Talos suffered no disadvantage given the "generous" nature of his pension, his membership in the union, and that his transition to government funded programs at age 65 adequately substituted for the benefits previously enjoyed. Said the Tribunal: "Talos was denied the protection of the *Code*, not because he had a long successful career or was unionized, but *because* he was over age 65". The Tribunal also noted that section 25(2.1) of the *Code* had the effect of perpetuating and reinforcing negative stereotypes about older workers, namely that older workers are less deserving of compensation and equality protections than younger workers.

As for whether the discrimination could be "justified" under section 1 of the *Charter*, the Attorney General sought to defend section 25(2.1), arguing its purpose is to ensure workplace benefit plans remain financially sustainable after the abolition of mandatory retirement.

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[3] Talos v. Grand Erie District School Board, 2013 HRTO 1949

However, expert evidence led before the Tribunal called into question whether financial sustainability was a legitimate concern. The expert evidence appeared to suggest the added cost of insuring older workers is offset by government benefits, and can be further offset by structuring the benefit on a sliding scale. For example:

- While health care costs increase with age, so too do government benefits. As a result, the cost of providing group health and dental benefits to an employee age 65 or older is comparable to the cost for an employee aged 40-49.

- While, actuarially, there may be increased risk, and therefore higher premiums, to insure an employee as he or she ages, an insurance plan could offset the higher premium by providing a reduced life insurance benefit to an older worker calculated on an actuarial basis. For example, coverage could be structured along the lines of a retiree benefit that provides a benefit equivalent to 25% to 50% of earnings.

At the end of the day, the Tribunal held section 25(2.1) of the *Code* could not be justified under section 1 of the *Charter*. The Tribunal found the financial viability of a workplace benefit plan could be achieved without making those age 65 and older vulnerable to the loss of benefits, and the impugned sections of the *Code* did not minimally impair the rights of older workers:

> In the intervening years since involuntary (mandatory) retirement was eliminated in 2006, societal views of workers over age 65 have changed significantly, compensation packages have also changed, and the experience of claims and costing for a decade are particularly relevant today to the justification age-differential benefits and the financial viability of workplace plans that include workers age 65 and older.
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> After considering all the evidence, I conclude 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**. **I find that the impugned provisions do not minimally impair the rights of these older workers, as an employer is not required to demonstrate that their exclusion from employment benefits is reasonable or *bona fide*, or justified on an actuarial basis, or because their inclusion would cause undue hardship**.
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> [emphasis added]

Significantly, the Tribunal was clear its conclusions related only to the constitutionality of the *Code* as it related to the obligation to continue group health, dental and (modified) life insurance benefit coverage beyond age 65. The Tribunal left open whether an employer may continue to rely on section 25(2.1) to make age-based distinctions regarding a disability benefit, pension plan or superannuation fund.

What does this mean for employers?

It remains to be seen whether this decision will be appealed or reviewed. Until then, the decision applies to any employer regulated provincially in Ontario, whose benefits coverage ceases for employees age 65 and older. Employers should therefore discuss with their insurance providers ways to continue extended health and dental coverage beyond age 65 and to provide modified life insurance coverage at a level that will not significantly impact plan costs. The insurance industry will also want to re-examine its programs and plans, and whether there is an age, beyond 65, at which there does exist an actuarial basis to deny coverage to an employee who elects to continue working beyond the traditional age of retirement. In the absence of this analysis, employers may have an uphill battle defending the cessation of benefits coverage after age 65 on the basis of "undue hardship".

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