

# Early retirement decision is employee's only

*Early retirement incentives are not discriminatory, though employers can risk age discrimination if employees feel pressured to take them*

## BACKGROUND

### Managing the old guard

**UNTIL** a few years ago, employers in Canada were legally permitted to send employees who had reached the age of 65 out to the retirement pasture, whether the employees wanted to retire or not. However, a series of legislative changes in all jurisdictions and concerns about age discrimination have meant employees in most occupations — with a few exceptions where a certain level of physical abilities are required — can work until they're ready to retire, regardless of their age.

Employers are still free to offer incentives to get older employees to move on, but they'd better be careful not to push the matter, or they could get called onto the human rights carpet for age discrimination.

| BY ASHLEY BROWN |

**ALTHOUGH** mandatory retirement was abolished in Ontario in December 2006 — and is no longer in effect in most other jurisdictions in Canada — it is still permissible to use an appropriately formulated early retirement incentive as a means of “encouraging” the voluntary departure of an older worker from the workforce.

From an employer's perspective, an early retirement incentive program can be a useful tool to downsize or revitalize a workplace. It can allow an organization to reduce its staff complement, cut costs, reorganize operations and allow more recently educated employees to make their way up the workplace ladder, all without having to resort to more disruptive measures such as termination or layoff.

Employees also often welcome the opportunity of early retirement and the opportunities it can provide. Yet, despite their inherent advantages,

early retirement incentives have received their share of criticism. Because these incentives are, by their very nature, designed to target older workers, the idea of early retirement is often met with hesitation. The question is whether offering an early retirement incentive to older workers constitutes discrimination on the basis of age in contravention of Canadian human rights legislation.

#### The Ontario Human Rights Tribunal wades in

The Human Rights Tribunal of Ontario considered this question and found the simple act of making an early retirement incentive available to older workers does not, in and of itself, constitute age discrimination. That said, the tribunal's case law also suggests caution must be exercised to ensure the manner in which early retirement incentives are presented does not put undue pressure on eligible employees to accept. Where an

employer's conduct is unduly influential, such that an employee feels forced to consent to the early retirement option, a finding of discrimination may result.

The tribunal's decision in *R. v. Deane* provides a helpful illustration of the distinction between an early retirement offer — itself not discriminatory — and the manner in which the offer is presented, which in this case was deemed to be an infringement of an employee's human rights.

The employee was a 60-year-old woman who had worked for the Ontario Public Service for more than 20 years. When the employee became eligible to retire with an unreduced pension, her supervisor met with her on multiple occasions to discuss retirement where he made comments and engaged in conduct which the employee interpreted as pressure to accept the early retirement option. This included several negative comments about the number of employees working on secondment in her department — of which the employee was one — suggesting the employee would be “foolish” not to retire because she could then receive her pension while working for a different government entity or employer, and arranging an unsolicited teleconference with two of the supervisor's retired acquaintances to discuss the advantages of retirement.

The employee eventually accepted the early retirement option, but later filed an application with the tribunal

## CASE IN POINT: AGE DISCRIMINATION

## Employer's conduct, not intention, matters in communication

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alleging she had experienced harassment and discrimination on the basis of age. At the core of her application was her claim that she had been forced to accept her employer's early retirement offer against her wishes.

The tribunal ruled that while the early retirement offer itself was not problematic, the supervisor's actions had unduly influenced the employee's decision. Even if the supervisor's actions were well-intentioned, his comments and conduct pressured the employee into accepting the early retirement option, amounting to discriminatory treatment on the basis of age, said the tribunal. The employee was awarded \$7,000 for injury to dignity, feelings and self-respect.

Brian Cook, vice-chair of the tribunal, made the following general observations, which are helpful in assessing when the presentation of an early retirement offer may amount to discriminatory conduct.

"Treating an employee as if the employee is going to retire imminently when the employee is not going to retire imminently can infringe a person's code-protected rights because the basis for the treatment is the employee's age," said Cook. "Similarly, encouraging an older employee to take advantage of retirement options might result in discrimination because the

message could be that the older employee is no longer valued as an employee."

#### Tips for employers

The *Deane* case reiterates the tribunal's general view that an early retirement incentive is not, in and of itself, discriminatory. However, this decision also underscores the importance of ensuring an early retirement option is just that: optional. Employees to whom early retirement offers are extended must have the ability to freely and voluntarily accept or reject them. Where an employer overtly or subtly encourages, pressures or coerces an employee into retirement, this activity may run afoul of human rights legislation.

**"Encouraging an older employee to take advantage of retirement options might result in discrimination because the message could be that the older employee is no longer valued as an employee."**


To avoid a situation like the one which arose in *Deane*, employers should consider the following best practices:

•**Neutral communication.** Ensure the early retirement offer is communi-

cated in a neutral way. Discussion should revolve around the employee's eligibility and the details of the offer, not the employer's views or preferences in respect of the employee's acceptance or rejection.

•**Avoid threats or promises.** Do not link the employee's acceptance or rejection of the offer to any particular workplace outcome. Avoid comments such as: "If you do not accept the early retirement offer, we are going to have to issue lay-off notices." Or, "your younger colleagues will be so thrilled to have the opportunity to step into your shoes to continue the work you have started here."

•**Avoid unsolicited commentary.** However well-intentioned, avoid unsolicited editorial commentary about the benefits or advantages of retirement which may be construed as pressure or encouragement.

•**Identify a neutral contact person.** Identify a contact person of whom eligible and interested employees may seek further information about early retirement options. Ideally, this contact person should be someone who is not the eligible employee's immediate supervisor, so as to avoid the perception of managerial pressure. 

**For more information see:**

■*R. v. Deane*, 2011 CarswellOnt 11798 (Ont. Human Rights Trib.).

## Employment law blog

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Recent topics include the one discussed in the above article, retirement incentives, as well as topics such as confidentiality and social media, employment law juries, calling in sick procedures, tough bosses, and the disability threshold.

You can view the blog on [www.employmentlawtoday.com](http://www.employmentlawtoday.com).



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