

Arbitrator rules age-based distinctions in employee benefits not a violation of the *Charter*

Arbitrator Etherington in *Ontario Nurses' Association and Municipality of Chatham-Kent* (October 2010) ruled that age-based distinctions in employee benefit plans are a reasonable limit on *Charter* equality rights.

The background to this case originates with the 2006 amendments to the Ontario *Human Rights Code* (the "Code") which abolished mandatory retirement in Ontario. Prior to the amendments, the Code prohibited discrimination in employment for workers between the ages of 18 and 65 only. The 2006 amendments removed the upper age limit of 65, thereby removing the protection for mandatory retirement at age 65. However the Ontario government added a provision to the Code stating that the right to equal treatment without discrimination on the basis of age is not infringed by benefit plans that comply with the *Employment Standards Act, 2000* (the "ESA"). The ESA continued to define "age" as between 18 and 65 years old. The combined effect of these provisions is that employee benefit plans that essentially discriminate against workers over age 65 in the provision of benefits nevertheless comply with the ESA. They are therefore deemed not to violate the Code.

As can be seen, it was only a matter of time before this legislative scheme was challenged. In June 2008 the Ontario Nurses' Association (ONA) filed grievances against the Municipality of Chatham-Kent (the "Employer") based on the fact that the collective agreement between the parties provided different benefits depending on the age of the employee. Under the collective agreement, nurses aged 65 years or older were entitled to 60 days sick leave per year. For nurses under the age of 65, the entitlement was 119 days per year. A similar disparity existed in the provision of life insurance benefits. Nurses aged 65 or older received \$5,000 in life insurance, while nurses under the age of 65 were insured for twice their annual salary. Finally, nurses aged 65 or older were denied LTD and AD&D insurance – coverage that was provided to nurses under the age of 65.

Despite having negotiated these benefits, ONA asserted that these provisions, by virtue of their discriminatory treatment of older employees, were in violation of s. 15 of the *Charter*. Section 15 states:

Every individual is equal before and under the law and has the right to 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.

A VIOLATION OF THE *CHARTER*

Arbitrator Etherington commenced his analysis of whether there was a violation of s. 15 by applying the test set out by the Supreme Court of Canada in *Andrews v. Law Society of B.C.* (1989). The test consists of the following two questions:

- 1) Does the law create a distinction based on enumerated or analogous grounds?
- 2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

The Arbitrator found that the first part of the test was met – the impugned legislation did in fact create a direct distinction based on the enumerated ground of age. On the second question, the Arbitrator concluded that the impugned legislation perpetuates the notion that older workers are less valuable members of society. This notion is reflected by the fact that workers aged 65 or older can be paid less compensation (in the form of benefits) than younger workers doing the same work. He concluded that the challenged legislative provisions did in fact constitute a violation of s. 15 of the *Charter*.

A REASONABLE LIMIT UNDER SECTION 1 OF THE *CHARTER*

Although a legislative provision may violate s. 15 of the *Charter*, it may nevertheless be upheld as constitutional if it falls within s. 1 of the *Charter*. Section 1 of the *Charter* allows a *Charter* right to be limited if the limit is reasonable and can be demonstrably justified in a free and democratic society. Legislation that is discriminatory can be “saved” under s. 1 if two tests are met – the *Ends Test* and the *Means Test*.

The *Ends Test* requires the objective of the legislation to be pressing and substantial, and of sufficient importance to justify overriding a *Charter* right. In this case the government’s objective was to end

mandatory retirement and to ensure that, in doing so, existing benefit plans would not be undermined. ONA conceded, and the Arbitrator agreed, that this two-fold objective was pressing and substantial and therefore satisfied the *Ends Test*.

The *Means Test* requires the means chosen to attain the objective to meet the following three criteria:

- Rational Connection: the legislative means must be rationally connected to the government's objective or purpose.
- Minimal Impairment: the challenged provision must not impair the right any more than is reasonably necessary to attain the governmental objective.
- Proportionality: the negative effects of the challenged provision on the *Charter* right must not outweigh the objective and benefits of the legislation.

The Arbitrator held that the government's decision to allow employers and employees to agree to benefit plans that provide age-based distinctions was indeed rationally connected to the goal of preserving existing benefit plans, while simultaneously ending mandatory retirement. The Arbitrator also held that the legislative scheme minimally impaired the *Charter* right since employers, employees and insurers were provided with the flexibility to adapt to the negative impacts flowing from the abolition of mandatory retirement. These negative impacts were primarily the increased cost, and reduced viability, of employer-sponsored pension and benefit plans for older workers.

In applying the proportionality test, the Arbitrator weighed the deleterious effects of the legislation against its benefits. The major benefit of the legislation is that it allows workers who were previously faced with the prospect of mandatory retirement to choose to continue to work past age 65 for as long as they are willing and able. The legislation also permits existing benefit and insurance plans to continue in place without being compromised. Finally the legislation allows employers and employees the flexibility to negotiate their own terms of employment. In light of these benefits, the Arbitrator held that the legislative scheme satisfied the proportionality test.

The Arbitrator went on to dismiss the grievances after holding that the legislative scheme in the *Code* and the *ESA* were not in conflict with

the *Charter*. The collective agreement provisions which provided age-based distinctions in benefits were upheld.

In Our View

Arbitrator Etherington's ruling, if followed, will be a very positive decision for employers. Much of the evidence tendered by the Employer in the arbitration related to the increased costs, and the reduced availability, of benefit plans for older workers. In light of these market factors, employers will have the flexibility to provide different benefit packages to employees over the age of 65. Employees and employers will be able to continue under existing benefit plans which have such age-based distinctions, and they will have the ability to negotiate future benefit and group insurance plans that are best suited to the needs of their particular workforce.

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