KOSKIE MINSKY

JUSTICE MATTERS

Pension and Benefits

This is a summary of Pension and Employee Benefits matters of interest.

Talos v. GEDSB: Ontario's Human Rights Code Violates Section 15(1) of the Charter in allowing age discrimination in the provision of workplace benefits in Ontario

The recent Ontario Human Rights Tribunal decision in *Talos v. Grand Erie District School Board* has shifted expectations on the ability of benefits plans to treat workers over 65 differently, on the basis that this is particular type of discrimination is excepted explicitly under the *Ontario Human Rights Code* (the "**Code**").

When Bill 211, "An Act to amend the Human Rights Code and certain other Acts to end mandatory retirement" passed, it ended the exemption in the Code that allowed employers to discriminate based on age when enforcing mandatory retirement provisions for workers 65 or older. The amendments did not, however, change the exemption in the Code that allowed employers to discriminate based on age in the benefits that they provided to workers over age 65. OHRT Adjudicator Grant took exception to this, finding that, at least in these circumstances, that this aspect of the Code violated Talos's *Charter* rights, and was not saved by Section 1.

When Wayne Talos reached his retirement age of 65, he continued to work as a teacher. This decision was made, at least in part, because his wife was seriously ill, and the benefits that he was receiving through his employment were helping to cover the costs of her treatment. Notably, his wife had not have coverage through her own employment, and she had not yet reached the age of 65 where she might have coverage under provincial plans. Unfortunately, coverage under Talos's employer plan was terminated as a result of him reaching the age of 65.

Talos brought an application under s. 34 of the Code, alleging discrimination with respect to employment because of age. He alleged that the school board, which employed him, breached s.5(1) of the Code on the basis of age because it terminated his membership in various employer benefits and pension plans

without any actuarial justification.

On August 13, 2013, Talos filed a Notice of Constitutional Question with the OHRT, indicating that he intended to argue that s. 25(2.1) of the *Code*, in combination with s. 44 of the *Employment Standards Act* (the "**Act**"), creates a distinction between workers under age 65 and those over age 65. The former are protected from age-differentiated workplace group benefits, except in limited circumstances, and then only on an actuarial basis. The latter are not protected by the Code. Talos argued that this exemption to the provisions preventing discrimination based on age violated his rights under s.15 of the *Charter of Rights and Freedoms*, which provides that every individual is entitled to equal protection before the law, without discrimination on several grounds, including age.

Adjudicator Grant found that persons age 65 provide the same labour as those who were 64, and that they would normally be guaranteed equal compensation. Therefore, in the adjudicator's view, any provision that prevents a worker age 65 and older from being able to challenge reduction or elimination from workplace is benefits is age discrimination and *prima facie* a violation of s. 15(1) of the Charter. He also found that it could not be justified under s. 1 of the Charter.

The adjudicator reviewed prior case law that had found the exemptions for age discrimination in the code to be acceptable. She found *McKinney v. University of Guelph* to be of no assistance because it predates Bill 211 and the elimination of mandatory retirement. She found the decision in *Chatham-Kent (Municipality) v. O.N.A. (O'Brien) (Re)* was correct in finding that s. 25(2.1) of the Code infringed the Charter on the basis of age, but disagreed that it was saved by s. 1 of the Charter.

In differing from the decision in *Chatham-Kent*, Adjudicator Grant notes that a key difference is that the actuarial evidence presented in the case at bar differed significantly from that in *Chatham-Kent*. In the s.1 analysis, Adjudicator Grant also differed in finding that s.2(d) protects the bargaining process and not the result, so the fact that age differentiated benefits were bargained for could not determine the issue. However, the actuarial evidence seems to be determinative for Adjudicator Grant. He ultimately preferred the actuarial evidence provided by the Applicant, and noted as follows:

> [281] Given Ms. Whelan's actuarial evidence that it is not cost prohibitive to provide coverage to workers over age 65 and up to age 79, and given both actuaries' evidence that there are various ways to manage plan costs should increases become unsustainable, the Tribunal finds that the Legislature could have devised a less intrusive means to meet the objective of maintaining the financial viability of workplace group benefit plans. I am further persuaded that less intrusive means (other than the blanket denial of ***Code*** protection) was available to the Legislature (for example by requiring the exclusion or diminishment of benefits for workers 65 and older to be reasonable and *bona fide*, as is done in **ss. 11** and **22** of the ***Code*** in other contexts). The AG and OHRC provided the Tribunal with examples of human rights protection in other provinces (e.g. Manitoba, Quebec, Alberta and British Columbia) where there was no "carve out" of workers age 65 and older in the context of workplace benefits, and examples of other provinces where age-differentiation in a benefits plan was

permissible if it was *bona fide* (e.g. New Brunswick, Saskatchewan and Nova Scotia).

...

[283] After considering all of the evidence, I conclude that the age 65 and older group need not be made vulnerable to the loss of employment benefits without recourse to a (quasi-constitutional) human rights claim in order to ensure the financial viability of workplace benefits plans. The government's age limit of 65 for protection from discrimination in the provision of benefit and insurance plans appears unacceptable given the cogent evidence to the contrary that there is no close link to costs and age. As stated above, there are other alternatives available to the Government that would less impair the rights of Mr. Talos and workers age 65 and older, such as requiring any age-based differentiation in a workplace benefits plan to be reasonable and *bona fide* with a protection against undue hardship available to employers.

The release of the *Talos* decision now means that there are competing decisions – with competing actuarial evidence – about the constitutionality of s. 25(2.1) of the Code. The Tribunal in *Talos* did not declare the legislation to be invalid but instead simply refused to apply the exemption. As a result, a similar case may lead to a different result, and until a higher court rules on this issue, or the legislature acts and creates a new exemption which is more defensible under the Charter, a state of uncertainty will exist as to the ability of workplace benefit plans to discriminate against active employees who are older than 65 years of age. Employers and plan managers should be weary of the provision of any benefit that discriminates on the basis of an employee or plan member reaching the age of 65, as the *Talos* decision clearly signals that such provisions may be vulnerable to challenge.

This edition of Pension and Benefits was produced and edited by the following members of the Pension and Benefits Law Group at Koskie Minsky LLP

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