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REDUCED EMPLOYEE BENEFITS AFTER AGE 65 FOUND TO BE DISCRIMINATORY

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A. INTRODUCTION

On May 18, 2018, the Human Rights Tribunal of Ontario ("HRTO") released its interim decision in *Talos v Grand Erie District School Board*,[1] in which the HRTO ruled that subsection 25(2.1) of the Ontario Human Rights Code ("Code") was unconstitutional, as being contrary to the equality rights protections included in the *Canadian Charter of Rights and Freedoms* ("*Charter*").[2] Subsection 25(2.1) of the Code, in conjunction with the *Employment Standards Act, 2000* ("ESA"),[3] and its regulations,[4] allows employers the discretion to terminate benefits for workers age 65 and older. It should be noted that this decision is not a general declaration of constitutional invalidity, as the jurisdiction of the HRTO, as decided in earlier case law, does not permit the HRTO to issue such declarations.[5] However, the HRTO can refrain from applying the impugned section of the Code if, in its view, the section offends the *Charter*.[6] Nonetheless, this decision is important insofar as it serves as an indication of the HRTO's stance towards the reduction of employee benefits for employees over the age of 65.

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[1] 2018 HRTO 680.

[2] Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] SO 2000, c 41 [ESA].

[4] *Benefit Plans*, O Reg 286/01.

[5] See *supra* note 1 at paras 7-8, relying on *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54.

[6] *Ibid* at para 9.

B. BACKGROUND

Mr. Talos is a 71 year old secondary school teacher with the Grand Erie District School Board ("Board") who continued to work after his extended health, dental and life insurance benefits had been terminated when he reached age 65. He claimed that the Board failed to advise him in advance of his 65th birthday so he could apply for health insurance for himself and his wife, who had stage 4 cancer and relied on his benefits.[7]

Mr. Talos brought an application before the HRTO alleging discrimination with respect to employment because of age, contrary to subsection 5(1) of the Code, and seeking compensation of $160,000 for lost benefits as well as compensation for injury to dignity, feelings and self-respect.[8] However, this interim decision only dealt with the constitutional challenge, leaving a decision on the merit and damages for another day.[9]

The constitutional challenge is based on the interplay between provisions of the Code, the ESA and its regulations. Subsection 25(2.1) of the Code states:

> 25(2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder.

And subsection 44(1) of the ESA provides:

> 44(1) **Except as prescribed**, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats any of the following persons differently because of the **age**, sex or marital status of employees: 1. Employees; 2. Beneficiaries; 3. Survivors; 4. Dependants. [Emphasis added]

In this regard, section 1 of O. Reg. 286/01 under the ESA further *prescribes* that age is defined as "any age of 18 years or more and less than 65 years". As well, sections 7 and 8 of O. Reg. 286/01 provide that

[7] *Ibid* at paras 69-71.
[8] *Ibid* at para 1.
[9] *Ibid* at paras 25 and 290.

the prohibition in subsection 44(1) of the ESA does not apply to a differentiation made on an actuarial basis because of an employee's age.[10]

When read together, the HRTO stated, these provisions contemplate a "carving out" of "permissive differentiation based on age" whereby "workers 65 and older can be deprived of workplace group benefits or be differentiated against adversely because of their age, without an employer needing to bring itself within the limited circumstances set out in O.Reg. 286/01 in which age differentiation is permitted or the need for the demonstration of any actuarial basis for doing so."[11]

The HRTO also considered the legislative history of the Code, specifically Bill 211, *Ending Mandatory Retirement Statute Law Amendment Act, 2005* ("Bill 211"),[12] which amended the definition of "age" in section 10 of the Code in order to eliminate discrimination in employment because of age, including mandatory retirement.[13] The HRTO recognized that the stated purpose of Bill 211 had been to "preserved the ability to employers to provide differential benefits and pension plan contributions for workers 65 and older in a bid to maintain the financial viability of those plans",[14] the HRTO reviewed the Hansard records concerning Bill 211.[15]

C. ANALYSIS

After carefully considering the witness evidence before it, and finding that Mr. Talos had standing to bring this constitutional challenge,[16] the HRTO relied on a number of precedents established by the Supreme Court of Canada, including *Tétreault-Gadoury v Canada* ("*Tétreault*"),[17] dealing with the issue of unemployment insurance benefits after age 65, and *Mckinney v University of Guelph* ("*Mckinney*"),[18]

[10] *Benefit Plans*, O Reg 286/01 defines "actuarial basis" as "the assumptions and methods generally accepted and used by fellows of the Canadian Institute of Actuaries to establish, in relation to the contingencies of human life such as death, accident, sickness and disease, the costs of pension benefits, life insurance, disability insurance, health insurance and other similar benefits, including their actuarial equivalents."
[11] *Supra* note 1 at para 30.
[12] *An Act to amend the Human Rights Code and certain other Acts to end mandatory retirement*, SO 2005 c 29 [Bill 211].
[13] The previous definition that was amended with Bill 211 provided that "'age' means an age that is eighteen years or more, except in subsection 5 (1) where "age" means an age that is eighteen years or more and less than sixty-five years".
[14] *Supra* note 1 at para 32.
[15] *Ibid* at paras 32-35.
[16] *Ibid* at para 205.
[17] [1991] 2 SCR 22, 1991 CanLII 12 (SCC).
[18] [1990] 3 SCR 229, 1990 CanLII 60 (SCC).

which dealt with mandatory retirement at age 65. In this regard, it found that subsection 25(2.1) of the Code, its own governing statute, infringes subsection 15(1) of the *Charter*[19] in a manner that cannot be "demonstrably justified in a free and democratic society" under section 1 of the *Charter*.

In the first part of the analysis, the HRTO held that subsection 25(2.1) of the Code is discriminatory because it permits employers to provide unequal benefits to employees age 65 and older, on a non-actuarial basis, compared to employees age 18 to 64. The HRTO also relied on the submission of the Ontario Human Rights Commission ("OHRC") to the Ontario Legislature before Bill 211 was adopted and in which the OHRC stated that provisions that allow for different treatment of employees age 65 and older "reinforce negative and ageist stereotypes and assumptions about the abilities and contributions of older workers".[20]

The Board argued that in this case there was no disadvantage to Mr. Talos, because he had a university education, had received adequate compensation and benefits for 40 years of his work life being a member of a union, and had a generous pension.[21] However, relying on both *Tétreault* and *McKinney,* the HRTO dismissed these arguments, stating that Mr. Talos' income and wealth were irrelevant to the determination of whether his right to equality under the *Charter* had been infringed, and because the approach taken by the Supreme Court of Canada in *McKinney* and other cases was to consider the impact of the challenged provisions on all workers 65 and older to whom the legislation applied, not just the applicant.[22]

In the second part of the analysis, regarding whether the impugned provision of the Code could be justified under section 1 of the *Charter*, the HRTO followed the test established in *Oakes.* In this regard, it considered whether there was a pressing and substantial objective for the impugned provision and whether the means chosen for this objective are proportional and minimally impair the *Charter* right being infringed, known as the "proportionality test".

[19] *Charter, supra* note 2, s 15(1) provides that "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".
[20] *Supra* note 1 at paras 239.
[21] *Ibid* at para 226.
[22] *Ibid* at paras 17 and 229.

The HRTO recognized that the stated purpose of subsection 25(2.1) of the Code, a prior version of which was considered in the Hansard debates regarding Bill 211, was to give employers the flexibility to manage the workplace benefits plans in accordance to the age of the employees to maintain their financial viability.[23] However, in the case of the Board, the HRTO found that it continued to receive the funds from the province to provide benefits to its employees after age 65 but it chose to spend it in other priorities while maintaining the potential availability of these extended benefits as a bargaining chip in its negotiations with the union.[24]

The HRTO further held that subsection 25(2.1) of the Code is not minimally impairing of the equality right of employees age 65 or older because it results in a blanket carve out, similar to that in both *Tétreault* and *McKinney*,[25] which is "all encompassing and is insensitive to whether a particular benefit program is closely related to age in terms of the cost or the need for the benefit for employees age 65 and older."[26] It further held that subsection 25(2.1) of the Code is not proportional because, as per the actuarial evidence submitted "it is not cost prohibitive to provide coverage to workers over age 65 and up to age 79 [and] the Legislature could have devised a less intrusive means to meet the objective of maintaining the financial viability of workplace group benefit plans."[27]

The HRTO did not order a specific remedy in the interim decision. Rather, the HRTO held that subsection 25(2.1) of the Code was not available to the Board as a defence in the proceedings and ordered both parties to advise whether they would be interested in mediation or have the HRTO decide on the merits of the application. We will report in future Bulletins any developments in this case as they become public.

D. CONCLUSION

While employers do not have any statutory or other legal duty to provide group health benefits to employees, this interim decision means that employers may no longer be able to rely upon subsection 25(2.1) of the Code to reduce or eliminate group health benefits once an employee reaches age 65. This decision may be subject to an appeal, given the importance of the issues and the potential impact on

[23] *Ibid* at paras 32 and 249.
[24] *Ibid* at paras 253-254.
[25] *Ibid* at para 265.
[26] *Ibid* at paras 272.
[27] *Ibid* at paras 281.

Ontario employers, including charities and not-for-profits. Should this decision withstand any appeal, Ontario employees may be able to challenge cancellation of group health benefits coverage once they reach age 65. Therefore, this is potentially a significant decision not only for employers and older employees, but also for group benefit providers with respect to the coverage which they offer.

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