



Employment Update

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AN UPDATE ON AGE DISCRIMINATION

Elizabeth J. Forster

The *Ontario Human Rights Code* (the “Code”) prohibits discrimination based upon age in the delivery of services, goods and facilities, in accommodation and in contracts and employment.

“Age” is defined in the *Code* as an age that is 18 years or more.

There are not as many cases dealing with age discrimination as there are with some other forms of discrimination such as disability. This is perhaps because it has only been since 2005 that discrimination based on age has been prohibited against those who are 65 or older.

The following article is intended to summarize some of the more important age discrimination cases that have been determined by the Human Rights Tribunal of Ontario (the “Tribunal”) over the past few years.

Services, Goods, Facilities

Notwithstanding the definition of age in the *Code*, there have been cases before the Tribunal involving children. These cases have had mixed success.

For example, in *CM v. York Region District School Board*¹, a policy of the school board that required that elementary school children with lice be sent home until treated was found not to discriminate based on age. In this case, the Tribunal held that age is a legitimate and necessary ground for distinctions among children and that the aim of the *Code* is not to eliminate all difference and treatment. Rather, it aims to eliminate discrimination in the form of disadvantage, prejudice and stereotyping on the grounds set out in the *Code*.

A claim of discrimination because boys and girls over 12 were required to change in separate dressing rooms was not held to be discrimination.² Similarly, a claim that legislation which disallowed public works benefits to children under 18 was not discrimination.³

Conversely, the Tribunal has held that a landlord who refused to rent to a 16 year old was guilty of discrimination based on age. The Tribunal also has allowed an application to proceed on behalf of children with autism who claimed discrimination notwithstanding the fact that they were under 18 because the claim of age discrimination was intrinsically linked to a claim based on disability.⁴

¹ [2010] OHRTD No. 1484.

² *Demars v. Brampton Youth Hockey Assn.* 2011 HRTO 2032.

³ *Hendershott v. Ontario* 2011 HRTO 482.

⁴ *Garbett v. Fisher*, [1996] OHRBID No. 12.

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Elizabeth J. Forster represents employers, trade unions and employees. She has been involved in hearings before the Ontario Labour Relations Board, grievance arbitrations, collective agreement negotiations, Human Rights cases, and prosecutions under Occupational Health and Safety Act.

Elizabeth's work also includes wrongful dismissal actions, actions for breach of fiduciary duties and other employment and employee issues as well as labour-related actions. She advises clients on employment contracts, employment policies, non-competition and confidentiality agreements and employee pension and benefit-related issues.

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Most of the age discrimination cases in employment are based upon claims that a younger candidate was awarded a position over an older candidate. Although the Tribunal has held that age need only be one factor in the hiring decision for there to be discrimination, the vast majority of these complaints have been dismissed on the basis that the employer was able to show that age ultimately did not play a part in the hiring decision.

However, in *Clennon v. Toronto East General Hospital*⁵, the Tribunal found that age discrimination was a factor. When an employee suffered serious performance issues, her employer asked her about her plans for retirement rather than dealing with the performance concerns. It had determined that a performance improvement plan was not appropriate because of her age. Interestingly enough, the Tribunal noted in its award that even with performance management, this employee would not have improved and would have been terminated!

The Tribunal found that there was no age discrimination where an employer refused to allow an employee to withdraw her notice that she would be retiring.⁶

Mandatory retirement in positions where physical abilities are a *bona fide* occupational requirement such as firefighting have been upheld. However, a practice of requesting birth certificates and driver's licences from candidates before an interview for a position of firefighter was found

to be a violation of the *Code* because it caused pre-selection based upon age.⁷

An occasional teacher filed a complaint of age discrimination because she was prevented from being put on an occasional teachers list while in receipt of a retirement pension. The Tribunal held that this was not age discrimination because the refusal to place her on the occasional teachers list was based on the fact that she was receiving a pension, and not upon her age.⁸

Benefits

The Tribunal has held that a rule that allows retiree teachers to work only 20 days per year does not discriminate based upon age. Rather, it is a rule which provides for differential treatment based on employment status.⁹

A pension plan that provided that an employee could transfer their pension funds at age 55, but if he did he lost his LTD coverage was not age discrimination.¹⁰ However, an employer that did not offer an employee LTD coverage based upon her age was found guilty of age discrimination.¹¹

In *Malloy v. OPSEU Pension Trust*,¹² the applicant, a 44 year old member of the pension plan claimed that he was the victim of age discrimination because he had participated in the pension plan for 20 years, but the plan only allowed one to take an early retirement pension if one had participated for 20 years and was over the age of 55. The Tribunal held that pensions

⁷ *Shaw v. Ottawa* 2012 HRTO 593.

⁸ *Law v. Thames Valley District School Board* 2011 HRTO 953.

⁹ *Clarke v. Ontario Teachers' Pension Plan Board* [2010] OHRTD No. 1126.

¹⁰ *Burrows v. United Association of Plumbers & Pipefitters Local 463* 2011 HRTO 2215.

¹¹ *Byers v. Fiddick's Nursing Home* 2012 HRTO 952.

¹² 2011 HRTO 2304.

⁵ *Clennon v. Toronto East General Hospital*, 2009 HRTO 1242.

⁶ *Weiler v. Farncomb Kirkpatrick* 2009 HRTO 528.

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that differentiated based on age could not be challenged under the *Code*.

As the baby boomers reach their 60s and beyond, one can expect there will be more cases of age discrimination before the Tribunal in each of the social areas protected by the *Code*. In cases where an applicant can demonstrate a nexus between his or her age and a distinction or preference, a finding of age discrimination is likely. ■

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