

Age Discrimination in Employer's Group Benefit Plans

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In May 2018, the Human Rights Tribunal of Ontario (the "Tribunal") released an interim decision which concluded that exceptions in the *Human Rights Code* (the "Code") which permit the termination of benefits for workers over age 65 infringe the equality rights protected under section 15(1) of the *Canadian Charter of Rights and Freedoms* and are unconstitutional.

The Tribunal's interim decision in *Talos v. Grand Erie District School Board*, [2018 HRTO 680 \(CanLII\)](#) presents a significant shift in the law and may well have ramifications for both unionized and non-unionized workplaces that provide benefit plans with age limitations and exclusions assuming more broad application.

By way of background, Mr. Talos was a teacher employed by the school board. He continued to work on a full-time basis past age 65. In accordance with the collective agreement between the school board and the union, entitlement to extended health, dental, and life insurance benefits ceased at age 65, even if the employee continued to work. When Mr. Talos' benefits were terminated at age 65, he filed an application with the Tribunal alleging that the school board had discriminated against him in respect of his employment on the basis of age.

The Tribunal reviewed the applicable legislative provisions that allow many employers to institute benefit plans which exclude persons over 65 for prescribed reasons, including on an actuarial basis. These are:

- Section 44(1) of the *Employment Standards Act, 2000* ("ESA") states that employers are prohibited from providing benefit plans that treat employees differently based on age, except as prescribed.
- Section 1(1) of Regulation 286/01 under the ESA dealing with benefit plans provides that "age" is defined as persons older than 18 and younger than 65 for the purposes of Part XIII (Benefit Plans) of the ESA.
- Section 25(2.1) of the Code states that "the right...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 *ESA* and the regulations thereunder."

After hearing evidence and submissions, the Tribunal concluded that the legislature had specifically carved out workers who are 65 and older from protections with respect to differential treatment in benefit plans, pension plans and other workplace plans.

The Tribunal explained that even though the *ESA* and its Regulations currently permit differentiation in employee benefit plans with respect to persons aged 18 to 65 on, *inter alia*, an actuarial basis, and the Code and *ESA* permit employers to terminate group benefits – including life insurance and health coverage – for workers when they turn 65, these provisions create a distinction between workers under 65 and those who are 65 and older who perform the same work. Employees aged 18 to 65 are protected by the Code from age-differentiated workplace group benefits, on any basis other than an actuarial basis, while the latter group is not afforded Code protection at all. The Tribunal concluded that a “blanket” exclusion reinforces stereotypes of older workers as less deserving of compensation and equality protection than younger workers.

As a result, the Tribunal held that the school board could not rely on the statutory exemption in section 25(2.1) of the Code as a defence to Mr. Talos’ claim of discrimination.

Take Away Points for Employers

The Tribunal’s decision on the constitutional issue is an interim decision, and is not a finding with respect to the merits of the Applicant’s case of discrimination. Assuming the case proceeds to a hearing, Mr. Talos must still prove his case of discrimination, and the school board will have an opportunity to submit any other defences it may have, including possible undue hardship claims.

In addition, the Tribunal itself noted a few limiting factors to this decision’s future application. First, the Tribunal noted that it cannot make a general declaration of constitutional invalidity. As a result, the decision for now may have limited application to the specific facts of *Talos* and does not necessarily have to be followed by future adjudicators. Second, the decision only dealt with access to group health, dental, and life insurance benefit plans. *The case does not address* long-term disability insurance, pension plans, and superannuation funds.

We will provide you with further updates as this case gets considered, and its implications for your benefit plans.