MANDATORY RETIREMENT AT AGE 65 IN QUESTION

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More than a decade ago, the Supreme Court of Canada ruled that policies requiring mandatory retirement at age sixty-five are constitutional and enforceable. The British Columbia Court Appeal has opened the door to a new challenge to mandatory retirement policies, however, and has called on the Supreme Court of Canada to revisit its earlier decisions.

First, a bit of background. Section 16 of *The Saskatchewan Human Rights Code* prohibits an employer from discriminating with respect to employment because of age. “Age” is defined as “eighteen years or more, but less than sixty-five years.” This means that under *The Code* a policy requiring a person who has reached age sixty-five to retire would not be illegal unless the policy was unconstitutional; i.e., unless it violated *The Canadian Charter of Rights and Freedoms.*

Human rights legislation was previously challenged in the Courts. In two decisions in 1990, the Supreme Court of Canada found the legislation to be constitutional. That meant policies requiring mandatory retirement at age sixty-five are constitutional and enforceable: *McKinney v. University of Guelph* and *Harrison v. University of British Columbia*.

With the validity of mandatory retirement policies at age sixty-five put to rest, employers and courts then grappled with other issues around mandatory retirement, such as how policies would fit with the common law of wrongful dismissal. Over the years certain principles developed:

1. A policy requiring mandatory retirement at age sixty-five is constitutional and can be enforced by the employer.
2. To be enforceable, the mandatory retirement policy must become a term of the employment contract. The policy must be clearly communicated to the employee such that the employee accepts the policy. This can be done at the time the employee is hired. It can also be imposed later, as long as it is clear that the employee agreed to accept the policy or that adequate notice of the policy was provided.
3. A mandatory retirement policy cannot be imposed on an employee unless the employee is given the reasonable notice of termination to which the employee would otherwise be entitled at common law. In other words, if an employee would be entitled to one year’s termination notice, the employee cannot be given six months notice of mandatory retirement. The full amount of reasonable notice must be provided.
4. If the employee, for some reason, works beyond the agreed upon mandatory retirement date, the employer cannot automatically terminate the employee at any time just because the mandatory retirement age has been reached. The employer must give reasonable notice of termination in accordance with common law principles.

While Saskatchewan Courts are not required to follow the courts of another province, the implications of the October 5, 2001 B.C. Court of Appeal decision in *Greater Vancouver Regional District Employees’ Union v. Greater Vancouver Regional District* could be far reaching.

The *Coutts* case involved the mandatory retirement of a waste plant operator, Ray Coutts, at age sixty-five, pursuant to a fifteen-year-old unwritten policy. The union grieved the

retirement and an arbitrator found in favour of Coutts on the basis that as a public body, the *Charter* applied directly to the employer. Therefore, the policy was discriminatory under Section 15 of the *Charter* which prohibits discrimination on the basis of age. Because the policy was discriminatory, the employer was required to justify it as a "reasonable limit prescribed by law…" under Section 1 of the *Charter*. The employer had not done so.

The majority of the B.C. Court of Appeal distinguished the earlier *McKinney* case and agreed with the arbitrator. In a 2-1 decision, the Court held that mandatory retirement policies of public bodies violate Section 15 of the *Charter* and must be justified on a case by case basis. Employers cannot stand behind the provisions of human rights legislation. While on its face, the major implications of this decision are for the public sector, Justice Prowse ended her judgment with a plea to the Supreme Court of Canada to revisit the issue of mandatory retirement generally:

> "… I would urge the Supreme Court of Canada to reconsider this issue. Eleven years have now passed since McKinney was decided. The demographics of the workplace have changed considerably… . At least two other countries, Australia and New Zealand, have abolished mandatory retirement. Recent studies have been done on the effect of abolishing mandatory retirement in Canada and elsewhere. …The extent to which mandatory retirement policies impact on other equality rights and on the mobility of the workforce, have become prominent social issues. The social and legislative facts now available may well cast doubt on the extent to which the courts should defer to legislative decisions made over a decade ago. The issue is certainly one of national importance."

At the time of writing, it is unknown whether Vancouver will seek leave to appeal the *Coutts* decision to the Supreme Court of Canada or whether the Court will revisit the validity of mandatory retirement policies. For the time being, employers in Saskatchewan can continue to apply policies requiring mandatory retirement at age sixty-five as they have in the past, subject to the principles set out above. Employers would be prudent, however, to consider what reasonable justification may exist for such a policy in their particular workplace, as it may not be long before there is new word from the Supreme Court of Canada on this issue.

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