FTR Now

Human Rights Tribunal Upholds Mandatory Retirement at Age 60 for Firefighters

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In an important decision issued December 18, 2008, the Human Rights Tribunal of Ontario has upheld a provision in a Collective Agreement which requires mandatory retirement at age 60 for firefighters.

In the City of London decision, Adjudicator David A. Wright found that while the provision was *prima facie* discriminatory, it could be reasonably justified as a *bona fide* qualification for the following reasons:

1. medical evidence established a probable connection between firefighting and heart disease, and advancing age "contributes significantly to the risk of a cardiac event in firefighters";
2. there is a lack of individualized testing methods that would "allow a better risk assessment of on-the-job events for firefighters more accurately than age, given their occupation-related risks of heart disease"; and
3. the fact that the parties negotiated the mandatory retirement provision out of concern for the health and safety of the employees was an important and relevant factor.

Several earlier cases have upheld the mandatory retirement age of 60 for firefighters as being *bona fide occupational requirements.* However, the adjudicator noted that since those cases were decided, various changes had taken place in the "legal landscape". Specifically, the definition of "age" in the Ontario *Human Rights Code* was revised in 2006 to remove the upper limit of 65, thus effectively ending statutory mandatory retirement at age 65. One effect of this amendment is that employers must justify any age-related retirement policy on the grounds of a *bona fide occupational requirement*.

Moreover, the process of establishing a *bona fide occupational requirement* was revised by the Supreme Court of Canada in *Meiorin.* Under the *Meiorin* test, the party wanting to uphold a standard such as mandatory retirement at age 60 must show: 1) the standard was adopted for a purpose rationally connected to the performance of the job; 2) the standard was adopted in an honest and good faith belief it was necessary to the fulfillment of the legitimate work-related purpose; and 3) the standard is reasonably necessary to the accomplishment of the legitimate work-related purpose. It must be demonstrated it is impossible to accommodate the employee without imposing undue hardship.

The adjudicator found that the first two requirements of the *Meiorin* test were readily established. The third requirement was more difficult. In addition to the findings noted above, the adjudicator accepted medical evidence that "death from coronary heart disease is multiple times more likely while performing emergency firefighting duties than while performing non-emergency duties". Also, in cases of firefighters of an advanced age, there would be increased concerns of safety not only to the firefighter but also to the public and to his or her colleagues should a cardiac event occur when responding to an emergency.

Mandatory retirement for firefighters at age 60 has long been a controversial topic. Issues of health and safety are of primary concern, as is the need to ensure that the firefighters are capable of meeting the demands of suppression firefighting.

Unfortunately, this case is not determinative for all cases of firefighters wanting to work past age 60. The decision only addresses the broad category of suppression firefighters. It did not address the fact that District Chiefs, which was the classification in question, have substantially different physical demands than other suppression firefighters. It also leaves open the argument that other classifications such as Prevention, Training and Communications may not have to retire at age 60. It did not address the issue of what to do if an individual suppression firefighter comes forward at age 60 and provides appropriate medical evidence of his ability to continue to perform suppression work. Finally, it does not address what accommodation, if any, is necessary for any individual firefighter who wishes to stay after age 60.

Espey v. London (City), 2008 HRTO 412

For further information, contact your Hicks Morley lawyer or John Saunders (416) 864-7247 or Michael Kennedy (416) 864-7305 who are very familiar with this issue.

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