FTR Now

Arbitrator Upholds Statutory Provisions Permitting Age-Based Distinctions in Benefits for Employees Aged 65 and Older

Date: November 5, 2010

On October 31, 2010, Arbitrator Etherington issued a significant award on the interpretation of the provisions of the *Ontario Human Rights Code* (the "*Code*") and the *Employment Standards Act, 2000* (the *"ESA, 2000"*), which effectively permit an employer to reduce or eliminate employee benefits once an employee reaches age 65. Arbitrator Etherington found that while the provisions violate the section 15 equality rights of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), they are a reasonable limit on those rights and are therefore constitutional.

This *FTR Now* discusses this award and its implications for employers.

BACKGROUND

Historically, the *Code* prohibited discrimination in employment on the basis of age, which was defined for employment purposes as "an age that is eighteen years or more and less than sixty-five years." In 2006, the *Code* was amended to remove the upper limit of age 65, thus extending the protections of the *Code* to all employees aged 18 years or older. One of the key consequences of the amendments was the end of mandatory retirement in virtually all Ontario workplaces.

Although the 2006 amendments extended the *Code*'s protections to employees over the age of 65, the *Code* was also amended to permit employers to differentiate on the basis of age in employee benefits plans, as long as the plans complied with the *ESA, 2000* and its regulations. Because the *ESA, 2000* only prohibits age distinctions for employees below the age of 65, the effect is to continue to permit employers to make age-based distinctions, such as the level of benefits they provide or whether benefits will be provided at all, with respect to employees 65 years of age or older.

Following the changes to the *Code*, the Municipality of Chatham-Kent and the Ontario Nurses Association ("ONA") negotiated a collective agreement that provided for reduced levels of benefits for employees aged 65 or older, and provided for no LTD or AD&D coverage for these employees. Despite having negotiated the provisions in question, ONA subsequently challenged the collective agreement provisions, and the constitutionality of the *Code* itself.

THE AWARD

In Ontario Nurses' Association and Municipality of Chatham-Kent (31 October 2010, Etherington), ONA complained that the collective agreement was unlawful because it provided a reduced benefit package for employees over age 65. ONA alleged that the collective agreement violated the *Code* and the prohibition against age discrimination in section 15 of the *Charter*. More importantly, ONA also alleged that the *Code* itself was unconstitutional because its provisions with respect to benefit plans were contrary to section 15 of the *Charter*.

In his award, Arbitrator Etherington held that the relevant provisions of the collective agreement and of the *Code* do violate section 15 of the *Charter*. He concluded that the distinctions they draw between workers under age 65 and those over that age constitute discrimination based on age.

However, he went on to find that the impugned provisions constitute a reasonable limit on the equality rights of the *Charter* and, therefore, are "saved" by section 1. He found that, although not a perfect solution, the government's decision to allow employers and employees to retain their current benefit plans and to preserve their ability to negotiate plans best suited to

their workplace was a reasonable approach to the impact that the elimination of mandatory retirement would otherwise have on a wide variety of benefit plans developed prior to the change.

In coming to this conclusion, he noted that the choice of any age limit always involves a degree of arbitrariness, stating that "there may be a range of acceptable alternatives available to government to select, but…they must inevitably engage in some line drawing and decide on which is the preferable limitation from a social policy perspective given the need to balance the interests of the individual with the collective interests at stake."

He also found that the impugned legislation left "employers, employees and unions with the flexibility to negotiate whatever terms and conditions of employment they feel the market warrants or requires to meet their particular needs in terms of recruitment, retention or continued employment. It does not mandate lesser benefits or insurance plan coverage for senior workers but leaves it to the parties to bargain to arrive at the coverage that best meets their circumstances."

Having concluded that the *Code* provisions were valid, the Arbitrator then held that their plain and ordinary meaning allowed the kind of distinction in benefit plans negotiated by these parties and, therefore, the collective agreement did not violate the *Code*.

IMPLICATIONS FOR EMPLOYERS

Although the award is binding only on the parties involved, other arbitrators will likely find Arbitrator Etherington's detailed factual and legal analysis very persuasive. This is good news for employers. Most benefit plans were negotiated or developed when all employees retired at age 65. Consequently, many plans do not offer benefits beyond that age. With the abolition of mandatory retirement, employers have had to confront the question, given the increased cost and limited availability of benefits for older employees, whether they can provide a different package of benefits to those employees who stay on past 65. Unless overturned by the courts, this award affirms that such distinctions are lawful in Ontario.

The case was successfully argued on behalf of the employer by Barry Brown of Hicks Morley's London office. If you have any questions about this award, please contact Barry Brown at 519.931.5602, Aida Gatfield at 519.931.5605 or your regular Hicks Morley lawyer.

The articles in this Client Update provide general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hicks Morley Hamilton Stewart Storie LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express permission of Hicks Morley Hamilton Stewart Storie LLP. ©