Case In Point

Operation of Pension and Benefit Plans do not Discriminate on the Basis of Age: Human Rights Tribunal of Ontario

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Recent decisions of the Human Rights Tribunal of Ontario (the "Tribunal") provide welcome guidance for employers who have been confronted with allegations that provisions of their pension and benefit plans discriminate on the basis of age under the Ontario *Human Rights Code* (the "*Code*"). In several decisions the Tribunal has held that some age-based distinctions made by pension and benefit plans are not discriminatory, either through the operation of exemptions under the *Code* that permit certain distinctions if they comply with pension legislation and the *Employment Standards Act, 2000* ("ESA"), or because the distinction is based on employment status (which is not a prohibited ground of discrimination under the *Code*), not age.

In Clarke v. Ontario Teachers' Pension Plan Board, the Tribunal found that the re-employment rules contained in the Teachers' Pension Plan, which limit the number of days a retired teacher can be re-employed in education and result in the suspension of the retiree's pension if those limits are exceeded, do not discriminate on the basis of age. The Tribunal determined that it was Mr. Clarke's status as a re-employed pensioner that triggered the application of the re-employment rules and not the fact that he was of a particular age. The Tribunal concluded that this distinction was based on employment status, not age, and therefore did not violate the *Code*.

The decision in *Clarke* was followed in two cases raising virtually identical issues dealing with the re-employment provisions under the Teachers' Pension Plan. In Andrews v. Ontario Teachers' Pension Plan Board and Arapis v. Ontario Teachers' Federation, the Tribunal applied the reasoning in *Clark*e and again concluded that any differential treatment experienced by the retired teachers resulted from their employment status, and not their age. The Tribunal dismissed the applications in both cases on the basis that there was no reasonable prospect of success.

These cases, which were all successfully argued by Hicks Morley, confirm that the terms of an Ontario-registered pension plan can, in certain circumstances, treat members differently on the basis of their employment status without violating the *Code*. It is, however, important to keep in mind that under the Ontario *Pension Benefits Act*, members of the same "class" must generally be treated the same for the purposes of eligibility and participation in a pension plan.

In two very recent decisions, the Tribunal again dealt with allegations of age discrimination in pension and benefit plans. In Repaye v. Flex-N-Gate Canada the applicant suffered a non-work-related injury and received employment insurance benefits, but was denied short-term disability benefits because he was over the age of 65. He alleged that the denial of benefits discriminated against him on the basis of age. In considering the issue of whether employers are prohibited from providing lesser benefits to employees once they reach the age of 65, the Tribunal considered the exemption under section 25 of the *Code* and the provisions of the ESA and its Benefit Regulation, O. Reg. 286/01. The Tribunal found that because the Benefit Regulation defines "age" as any age between 18 and 65, it does not prohibit differential treatment on the basis of age for people younger than 18 or older than 65. On this basis, the Tribunal concluded that the disability plan fell within the exemption under section 25 of the *Code*, and dismissed the application on the basis that there was no reasonable prospect of success.

The applicant in Ying v. Canadian Commercial Workers Industry Pension Plan also alleged discrimination on the basis of age arising out of the operation of a pension plan. The applicant's employment ended when the store she worked at closed. The pension plan in question differentiated between members on the basis of age. Members age 50 and older were eligible for a reduced early retirement pension. In contrast, members under age 50, such as the applicant, were not eligible for a reduced early retirement pension, and instead were entitled to either a transfer of the commuted value of the pension or a deferred

pension, payable upon reaching the age of 65. The applicant alleged that this constituted age discrimination.

The Tribunal found that the distinction complained of resulted from two factors: (1) the applicant was no longer an active member of the pension plan and; (2) she was not eligible for a deferred pension. It concluded the distinction arising from the loss of her status as an active member of the plan was based on her employment status, not her age, and did not violate the *Code*. The Tribunal did find that the applicant's ineligibility for a deferred pension was an age-based distinction. However, it concluded that the distinction fell within the exemption under section 25 of the *Code*, and therefore, did not contravene the *Code*.

These decisions are welcome news for employers as they demonstrate that not every age-based distinction made under a pension or benefit plan constitutes discrimination for the purposes of the *Code*. In certain circumstances, employers may be permitted to draw distinctions between members without violating the *Code*'s prohibition on age discrimination if the differential treatment is based on employment status, or the distinction falls within an exemption under the *Code.*