Employment and Labour Law Reporter

VOLUME 29, NUMBER 10 Cited as (2020), 29 E.L.L.R. JANUARY 2020

• B.C. TRIBUNAL FINDS THAT REDUCED BENEFITS FOR EMPLOYEES OVER AGE 65 UNDER EMPLOYER'S BENEFIT PLAN IS NOT DISCRIMINATORY •

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The British Columbia Human Rights Tribunal (Tribunal) recently held that the decision to provide reduced benefits to employees over age 65 under an employer-sponsored benefit plan is not discrimination under the British Columbia *Human Rights Code* (Code) if the reduced benefits are provided as part of a "*bona fide* group or employee insurance plan" within the meaning of the Code.

In *Barker v. Molson Coors Breweries and another (No. 3)*, [2019] B.C.H.R.T.D. No. 192, 2019 BCHRT 192, the Applicant was an employee of Molson Coors Breweries (Employer) with 25 years of service. When he reached age 65, his health and welfare benefits were significantly reduced pursuant to the collective agreement to which he was subject. The benefits were governed by a letter of understanding (LOU), which provided that employees who worked past age 65 would receive "only the insured welfare benefits provided to employees on retirement as at his normal retirement date."

The Applicant argued that the reduction of health and welfare benefits constituted discrimination on the basis of age contrary to the Code. The Employer responded that the reduced benefits were provided as a part of a "*bona fide* group or employee insurance plan" within the meaning of the Code, and accordingly were exempt from the age discrimination provisions of the Code.

The parties agreed that the "*bona fide*" exemption in the Code, together with the interpretation of "*bona fide*" adopted by the Supreme Court of Canada in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] S.C.J. No. 46, 2008 SCC 45 (*Potash*), engaged the Applicant's right to equality guaranteed by the *Canadian Charter of Rights and Freedoms* (Charter). The Tribunal noted that it had serious reservations about the constitutionality of the "*bona fide*" exemption in the Code and its impact on the Applicant's Charter rights.

However, it recognized that pursuant to the British Columbia *Administrative Tribunals Act* and the Code, it did not have the jurisdiction to apply the Charter. As a result, it did not address the constitutionality of the *bona fide* exemption under the Code and stated it was obliged to apply it.

In applying the exemption, the Tribunal considered the *Potash* decision and noted that the test for whether a group or employee insurance plan is "*bona fide*" for the purposes of human rights legislation is whether it is "a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights."

The Tribunal considered the *Potash* test's objective elements (the legitimacy of the plan) and subjective elements (the intentions and motives underlying it) and applied it to the LOU.

In assessing the objective elements, the Tribunal stated that it was required to evaluate the plan as a whole and not the actuarial details or mechanics of the terms and conditions of the plan. The fact that the constituent components were not subject to isolated scrutiny was deemed fatal to the Applicant's argument that the plan was not *bona fide* by virtue of the fact that there was no connection between the cost of dental benefits and the age of 65. Applying the reasoning of the majority of *Potash*, the Tribunal stated that actuarial evidence regarding the reasonableness of the plan was unnecessary; rather, the appropriate test was to consider whether the overall plan is genuine and not a sham.

The Tribunal then considered the subjective elements of the *Potash* test, which concerns motives and intentions. On this, the Tribunal stated that the Employer's objective was to keep costs down, while the union's objective was to negotiate the most valuable benefits package possible for all members. In considering all the evidence, the Tribunal was satisfied that the plan at issue was adopted in good faith and not for the purpose of defeating protected rights. As such, the benefits package was also deemed subjectively *bona fide*.

The Tribunal concluded that the age-based reduction in the Applicant's benefits derived from the operation of a "*bona fide* group or employee insurance plan" and was therefore exempt from scrutiny under the Code. It noted that this conclusion was compelled by the broad scope of the "*bona fide*" exemption in the Code and the fact that the Tribunal does not have the jurisdiction to apply the Charter.

This decision can be contrasted with the 2018 decision of the Human Rights Tribunal of Ontario (HRTO) in *Talos v. Grand Erie District School Board*, [2018] O.H.R.T.D. No. 525, 2018 HRTO 680 (for more information about the HRTO's decision in *Talos*, see https://hicksmorley.com/2018/06/11/human-rights-tribunal-of-ontario-decision-on-post-age-65-benefits-raises-important-issues/). The Tribunal noted that in *Talos*, the HRTO (which is not restricted from applying the Charter) found that a similar provision of the Ontario *Human Rights Code* is unconstitutional.

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This article appeared in the *Employment and Labour Law Reporter*, Vol. 29, No. 10.