

## Legitimacy of mandatory retirement in federal workplaces questioned

As the Canadian workforce continues to age, retirement issues are gaining new importance and interest for employees and employers.

Mandatory retirement is among the issues that have received recent attention from the courts. Most recently, courts have questioned the legitimacy of mandatory retirement programs in federal workplaces.

In 1990, the Supreme Court of Canada upheld mandatory retirement in the university setting (*McKinney v. University of Guelph*). The court considered that mandatory retirement at age 65 had become the norm in Canada, and was integral to the organization of the Canadian labour market.

The court also accepted that it had "...profound implications for the structuring of pension plans, for fairness and security of tenure in the workplace, and for work opportunities for others."

In that context, mandatory retirement was justified.

That context is now changing, and the federal jurisdiction is likely to fall in line with the provinces and territories.

### Mandatory retirement across the country

In almost all provinces and territories, mandatory retirement is either prohibited or permitted only if based on bona fide retirement or pension plans or bona fide occupational requirements.

Changes to the Ontario Human Rights Code in 2006 prevent employers from making decisions about hiring, promotion, training opportunities or termination on the basis of an employee's age, unless the employer can properly justify it. As a result, mandatory retirement programs in Ontario



CRAIG STEHR

### LEGAL VIEW

are, in most cases, unenforceable.

The Canadian Human Rights Act, however, provides an exception for federally regulated workplaces, including those engaged in broadcasting, inter-provincial shipping, air transport and banking. The legislation permits mandatory retirement where the worker has reached the "normal age of retirement" for employees working in certain positions.

Recent cases have ruled that the federal exception permitting forced retirement is unconstitutional as it allows discriminatory treatment of aging workers.

In the most recent decision, *CKY TV v. Communications, Energy and Paperworkers Union of Canada, Local 816*, the Manitoba Court of Queen's Bench upheld an arbitrator's finding that mandatory retirement was discriminatory and violated workers' charter rights.

The employer, owned by CTV, sought judicial review of the arbitrator's decision that ruled the provisions in the collective agreement that required retirement at age

65 were discriminatory.

The case involved a maintenance technician who was forced to retire at age 65, after 27 years of employment. The collective agreement did not include age as a prohibited ground of discrimination. The workplace had a longstanding mandatory retirement policy.

### Charter violation

The court first concluded the Canadian Human Rights Act exception that allows mandatory retirement at the "normal age of retirement" violated the equality guarantee in the Canadian Charter of Rights and Freedoms.

The court stated, "...the broad exception to human rights legislation is prima facie discriminatory, reinforces pre-existing stereotypes and... adversely impacts a person's human dignity."

Second, the court found mandatory retirement was no longer integral to the organization of Canadian employment – as it was in 1990 – and therefore could not be justified in today's modern employment context. The employment regime of pensions, job security, good wages and reasonable benefits does not require retirement at age 65.

As a result, it has become increasingly difficult for federal workplaces to justify mandatory retirement.

The employer must demonstrate that the mandatory retirement program was developed in good faith, is rationally connected to the nature of the work and that it would be impossible to develop a non-discriminatory program without undue costs or health and safety risks.

Mandatory retirement has not been outlawed, but the assessment of these programs must focus on the individual needs of each workplace.

Federal employers, however, may now have to reassess the purpose and legitimacy of existing mandatory retirement programs.

The courts are clear: mandatory retirement is now the exception and not the rule.

*Craig Stehr practices labour and employment law at Nelligan O'Brien Payne LLP in Ottawa. He can be reached at [craig.stehr@nelligan.ca](mailto:craig.stehr@nelligan.ca) or (613) 231-8208.*

### TIPS FOR EMPLOYERS

## Assessing mandatory retirement

- Communicate in good faith with employees about their retirement plans.
- Continue programs to promote workplace loyalty.
- Maintain voluntary retirement plans and incentives.
- Work with unions to assess whether age-specific retirement is a bona fide occupational requirement of positions in the workplace.
- Continue mandatory retirement programs only if a bona fide occupational requirement exists.