

Age Discrimination: Mandatory Retirement Is Far from Dead



Mandatory retirement used to be a venerable institution in the Canadian workplace. A rule requiring employees to retire when they reach age 65 was enshrined in many a collective agreement, pension plan and workplace policy. But now that institution is dead. Or, at least that's the perception. In fact, there's still plenty of room for age-based retirement policies in Canada. Here's why.

The Law of Mandatory Retirement

Human rights don't use the term "mandatory retirement." They do ban age discrimination, of course. But until a decade ago, most jurisdictions limited that ban to individuals of a specified age range, typically 18 to 64. Result: Employers were free to make employees retire when they turned age 65. The abolition of mandatory retirement referred to eliminating the age window and effectively protecting all individuals from age discrimination no matter how old they are.

The 2 Big Exceptions

On its face, removal of the specified age window made it illegal for employers to make employees retire upon reaching *any* age. While recognizing the dignity of older employees, a complete ban on age-based mandatory retirement created practical problems. For one thing, the declining physical or mental capacities of older employees make it dangerous for them to continue doing certain jobs. The other problem is that an employee's age directly affects an employee's entitlements under many existing pensions, insurance, and other benefits plans.

To resolve these problems, human rights laws include 2 major exceptions to age discrimination in general and the ban on mandatory retirement in particular.

The BFOR Exception

- If a taxi company refuses to hire a driver because she's blind, is it guilty of disability discrimination?
- If a company rejects an immigrant who can't speak any English for a public-facing receptionist job, would it be liable for discrimination on the basis of the applicant's nationality?

The answer, of course, is NO because of the rule that allows an employer to base employment decisions on protected grounds, e.g., race, religion or age, when it's a bona fide occupational requirement (BFOR). Employers can, therefore, justify age-based mandatory retirement as a BFOR. But to do that, the employer must prove:

- The policy was adopted for a purpose that's rationally connected to the performance of the job;
- The employer adopted the policy in an honest and good faith belief that it was necessary to fulfill that legitimate work-related purpose; and
- The policy is in fact reasonably necessary to fulfill the legitimate work-related purpose.

In practice, it's extremely difficult to meet the so-called "Meiorin" test (named after the Supreme Court of Canada decision that created it, *British Columbia (British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 (SCC)), and employers who take on the challenge fail much more often than they succeed.

Prong 1: Rationally Connected

"Rationally connected to the performance of the job" means proving that the reason for forcing employees to retire at the designated age is based on the duties of the position. In most cases, this would involve showing that reaching the target age diminishes the physical or mental ability of the person to do the job safely and efficiently. This is easier to do when the position is safety-sensitive, e.g., police officer, firefighter, airline pilot or driver. Even so, it requires objective scientific evidence, including expert testimony and/or medical, statistical or other data.

Prong 2: Good Faith Belief

The "honest and good faith" belief prong is a subjective test that looks at what was on the employer's mind when it implemented the policy. In other words, the employer must show that it really believed mandatory was necessary to accomplish its non-discriminatory purpose and didn't have any ulterior motives or hidden agendas, e.g., camouflaging mandatory retirement for pilots at age 55 as a safety policy when its real purpose was to cut the airline's health insurance costs.

Prong 3: Reasonable Necessity

The third and hardest prong of the *Meiorin* test is to show that the discriminatory policy is "reasonably necessary" to accomplish the legitimate work-related purpose. Among other things, the employer must prove that it

considered less discriminatory alternatives to mandatory retirement and rejected them because they didn't meet the purpose. Instead of forcing them to retire, the court will ask, why couldn't the employer assign the older employees to other, less safety-sensitive duties?

The Bona Fide Pension Plan Exception

The second legal basis for justifying a mandatory retirement policy is the exception in human rights laws allowing employers to base decisions on an employee's age when it's part of the operations of a "bona fide pension plan" (BFPP). The BFPP exception recognizes that to provide for retirement income for a group of employees, a pension or retirement plan must be able to set age-based rules governing vital matters like plan contributions and the accrual and payment of benefits.

Proving the BFPP exception applies is also much easier than meeting the *Meiorin* test for a BFOR. All the employer has to show is that the plan is a genuine vehicle for providing retirement benefits to members and not a sham to get around age discrimination restrictions, tax obligations or other legal requirements. And once the legitimacy of the plan is established, courts won't question the legitimacy of the particular mandatory retirement or other age-based decisions it makes.

While it might seem unfair, having a broad BFPP rule actually makes a whole lot of sense. That's because age-based, actuarial decisions affecting members' retirement benefits are an unavoidable part of running a pension plan. The reason the BFPP exists is to give plans the room they need to make such decisions. Without such protection, plan administrators would be besieged by age discrimination claims and it would be all but impossible for employers to establish pension plans for their employees.