Are Ontario Employees Entitled To Benefits Coverage After The Age Of 65?



With more and more Canadians working well past the 'traditional' retirement age, benefit entitlements have become more of a concern for both employees and employers.

On November 26, 2013, the Human Rights Tribunal of Ontario (the "Tribunal") released an Interim Decision in *Talos v Grand Erie District School Board* allowing a constitutional challenge to section 25(2.1) of the *Human Rights Code* (the "Code") to proceed through the hearing process.

Section 25(2.1) of the Code states that differential treatment on the basis of age with respect to employee benefits or group insurance plans will not constitute discrimination as long as an employee benefit, pension, superannuation or group insurance plan or fund complies with the *Employment Standards Act, 2000* (the "ESA"), and its regulations. Section 44(1) of the ESA states that no employer shall provide, offer or arrange for a benefit plan that treats an employee differently due to the employee's age, sex or marital status. However, "age" is defined in Ontario Regulation 286/01 to the ESA as "any age of 18 years or more and less than 65 years". As a result, differential treatment on the basis of age with respect to benefits for an employee who is over the age of 65 is not a breach of the ESA, and, pursuant to section 25(2.1) of the Code, does not constitute discrimination.

The Context of the Constitutional Challenge

Steve Talos ("Talos"), a teacher employed by the Grand Erie District School Board, brought an Application alleging discrimination on the basis of age in regards to the School Board's benefit plan, which provided that all employee benefits under the plan were to cease at age 65. After a summary hearing was granted to determine whether the Application should be dismissed as having no reasonable prospect of success, Talos filed a Notice of Constitutional Question arguing that section 25(2.1) of the Code contravenes section 15 of the *Charter of Rights and Freedoms*.

At the summary hearing, the Tribunal determined that Talos' allegations of discrimination on the basis of age had no reasonable prospect of success unless the constitutional challenge to section 25(2.1) of the Code was successful.

The Tribunal confirmed that Talos' constitutional challenge to section 25(2.1) of the Code would proceed through the hearing process. If the challenge is successful, it will require many employers to make significant changes to the benefits and group

insurance plans currently offered (or not offered) to employees over the age of 65.

To read the Interim Decision in *Talos v Grand Erie District School Board*, 2013 HRTO 1949, please click here.

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