Partners Face Mandatory Retirement

In 2009 John McCormick, 64 years of age, a senior partner at Fasken Martineau DuMoulin LLP, brought a complaint to the Human Rights Tribunal of British Columbia. He argued that a provision in his partnership that required that he retire at age 65 constituted age discrimination in employment contrary to the *Human Rights Code* of British Columbia.

The law firm argued that, as an equity partner, McCormick had no entitlement under the *Code* which deals with employees and not partners. The Human Rights Tribunal concluded that there was an employment relationship nonetheless.

The British Columbia Court of Appeal concluded that as an equity partner McCormick was not the subject of an employment relationship and accordingly was not protected by the age discrimination provisions of the *Code*.

McCormick appealed the ruling to the Supreme Court of Canada. It rendered its decision on May 14, 2014. Justice Abella speaking for an unanimous court said:

"In the absence of any genuine control over Mr. McCormick in the significant decisions of affecting the workplace, there cannot, under the *Code*, be said to be an employment relationship with the partnership."

As an equity partner who participated fully in the firm and its decisions he could not gain the protection of the *Code* since those protections are afforded to employees only. Partners, if they are protected from age discrimination, must find that protection in the provisions of the *Partnership Act* that provides that a partner must act with "the utmost fairness and good faith" to other members of the firm.

It is not unusual in business and law partnerships for "partners" so described, to be partners in name only, with little control over decision making, or even participation in decisions relating to the partnership.

Is a non-equity partner an employee for the purposes of the protections of the *Code*? Is a profit-sharing partner out of luck if subjected to age discrimination? There is no magic in the word "partner". It appears that it is purely a question of the level and extent of the control exercised by the individual. If you are the boss, or one of the bosses, you are not an employee. However, if you are called a "partner" that does not necessarily mean that you forgo the protections afforded by the *Human Rights Code*. Most "partners" are nothing more than glorified employees and to deny them protection against age discrimination is, in itself, an act of discrimination.

The control test relied upon by the Supreme Court of Canada is a slippery slope. For each case must be determined on its facts.

When the essential elements needed to support control are insufficient the applicant is deemed an employee who benefits from the *Code's* protection against age discrimination. But if elements of control are sufficient the non-employee or partner must resort to the general provisions of the *Partnership Act* which may or may not provide adequate protection against age discrimination. It appears that, as a result of the Supreme Court of Canada ruling, each case must examine the essential character of the work relationship between the individual and the firm or corporation. In each case this relationship must be examined and tested by the tribunal or court before a determination can be made.

In McCormick's case his status as a partner, which permitted him to vote and stand for election for the firm's board as well as share in firm profits and losses, meant that he exercised such control over his workplace that he did not rate the benefits available to an employee suffering age discrimination. Each court now will have to examine the nature of the "partnership" relationship before it can determine whether such protections are available.

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