

The Decay Of The “Wrinkled Ceiling”



The Supreme Court of Canada has recently ruled that partners can be forced to retire at 65. Elderly employees, however, need not resign themselves to early bird specials just yet. Indeed, there are a growing number of Canadian employees working beyond 65; proof positive that the wrinkled ceiling is in decay.

The outdated notion of mandatory retirement hails from late 19th century Germany, when that country became the first nation to adopt an old-age social insurance program designed by Germany's Chancellor, Otto von Bismarck, for “those who are disabled from work by age and invalidity [and] have a well-grounded claim to care from the state.” Despite his right-wing credentials, Bismarck was labelled a socialist for introducing such a program. His retort in the Reichstag debates of the time was, “Call it socialism or whatever you like. It is the same to me.”

There have been significant advancements in health care and a drastic increase in life expectancy such that employees retiring at 65 is no longer part of the current zeitgeist. Many find the notion that 65 year olds be put out to pasture quite offensive, myself included.

After all, there are many benefits to employers who retain older employees. These employees have been with the company for many years, building up a significant vault of knowledge and know-how. The older employee has also had many years to build up a strong network of relationships that he/she can draw upon in ways that a younger employee cannot.

The end of mandatory retirement does not mean that older employees cannot be terminated. Rather, an employer cannot arbitrarily impose a contractual term or policy requiring an employee to leave employment at age 65. Now that mandatory retirement is dead and older employees are poking holes in the wrinkled ceiling with their walking sticks, employers must carefully consider a number of issues when terminating the older employee.

Reasonable Notice:

Employers' attempts to nickel and dime older employees by offering reduced severance packages on the basis that the employee will retire at 65 is no longer acceptable. Over the past several years, courts have awarded generous notice periods to the older terminated employee, sometimes in excess of 24 months.

In a 2013 decision by the Ontario Superior Court of Justice in *Filiatrault v. Tri-*

County Welding Supplies Ltd., the court recognized that there were few, if any, cases where the courts have awarded notice periods in excess of 24 months but that the few higher notice periods have been awarded to those employees in their 60s and above.

This case, and others, indicate that given the end of mandatory retirement, notice periods will be awarded in excess of 24 months as the workforce becomes increasingly populated by older workers with longer periods of service and little opportunity to replace their employment at an advanced age. The termination of an older employee often means the end of their work related career.

Employers wishing to limit their liability on the termination of older employees should consider their options, such as providing the older employee with working notice, offering incentives to older employees such as attractive pension plans as well as work on special projects on a consensual basis.

Discrimination:

The end to mandatory retirement was implemented by provincial and federal amendments to human rights legislation. Employees are now protected from age discrimination beyond 65 years.

Not only can older employees bring an application to the Human Rights Tribunal when they believe they are being discriminated against on the basis of age, but now terminated employees can also claim damages for breach of this protected human right as part of a wrongful dismissal claim, which can result in an award of additional damages for discrimination.

Employers also need to “accommodate” older employees in accordance with current human rights legislation. This issue of “accommodation” has become increasingly important as the number of older employees in the workforce grows.

As the rising tide of geriatric employees swells, employers must consider these and related issues.

However, the experience and wisdom that forms part of the older workforce may provide a benefit not yet fully appreciated by employers.