The End of Mandatory Retirement: Legal Implications for Employers

By Barry W. Kwasniewski [*]

A. INTRODUCTION

Since the Province of Quebec became the first province in Canada to abolish mandatory retirement in 1982, all Canadian provinces and territories now have enacted similar legislation. Several provinces, including Ontario, Nova Scotia, Newfoundland and Labrador, British Columbia, Saskatchewan and Alberta passed laws during this decade eliminating mandatory retirement. Consequently, employers, including charities and not-for-profits, face potential challenges and liability risks in dealing with older workers. These issues will become even more important as Canada's baby boom generation ages. The purpose of this Bulletin is to highlight these risks and outline strategies that employers can implement to deal with an aging workforce.

B. THE END OF MANDATORY RETIREMENT IN ONTARIO

On December 12, 2006, the end of mandatory retirement took effect in Ontario. As a result of this change, an Ontario employee can no longer be forced to retire at the age of 65.[1] This does not necessarily mean that an older employee cannot be terminated; an employer is simply not allowed to arbitrarily impose a contractual term or policy requiring an employee to leave at the age of 65. However, an employer is still entitled to terminate an older employer for 'just cause' or with notice or pay in lieu of notice. Employers can use the same performance management criteria as for any other worker, where there are legitimate concerns that are based on objective evidence about the employee's ability to perform the duties of the job.[2]

---

[*] Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters' Ottawa office and would like to thank Kate Robertson, B.A., LL.B., for her assistance in the preparation of this article. This article is reproduced with permission from *Charity Law Bulletin* No. 229, October 27, 2010.

[1] Prior to December 12, 2006, the Ontario Human Rights Code did not prohibit discrimination in employment against people aged 65 or older.

[2] Ontario Human Rights Commission. "Policy on Discrimination Against Older People Because of Age." December 2009. http://www.ohrc.on.ca/en/resources/Policies/agepolicyen/pdf.

As a result of this change in the law, employers now bear a greater risk when terminating older employees. A long-serving older employee may well be entitled to a lengthy notice period, based on the common law and an employee's entitlements under the *Employment Standards Act*, 2000 ("ESA"). Also, termination of an older employee may give rise to a wrongful dismissal claim, and/or a human rights complaint based on age discrimination. These issues will be examined in more detail in the following sections.

C. TERMINATION PAY FOR OLDER EMPLOYEES

The factors a court should take into account in determining the reasonable period of notice, where an employee is dismissed without cause, were set out by the Ontario Court of Appeal in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (H.C.), at 145:

> "There can be no catalogue laid down as to what is reasonable notice, in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to *the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."*

There are numerous decisions that deal with the termination of older employees. Age is a key factor in the common law assessment of how much notice an employee receives, which means that the decision to terminate an older employee can be quite costly. An older employee can argue that it will take them much longer to find comparable employment, relative to a younger employee. Therefore, an older employee may commence a civil action for wrongful dismissal if he or she is not offered a proper termination package. As a result of amendments to the Ontario *Human Rights Code* in 2008, an employee can also claim damages for breach of a protected human right as part of the wrongful dismissal action. A common thread in the decisions examined below is that an older, long-term employee will likely be awarded a substantial termination package.

In the recent decision of *Brien v. Niagara Motors Ltd.*,[3] an employee brought a wrongful dismissal claim after working for a car dealership for 23 years, and having her employment terminated at the age of 51. At the time of termination, the employer had offered her eight weeks pay in lieu of notice and twenty three weeks of severance pay, if she agreed to sign a release. It was found that the dealership did not have cause to terminate Brien's employment and she was awarded damages equal to 24 months of notice. The judge came to these conclusions based on a consideration of her age, years of service, and position in the company. The 24 month notice period was upheld on appeal.

In the recent Alberta decision in *Peacock v. Western Securities Ltd*,[4] an employee made a claim for wrongful dismissal after being employed for the defendant for 13 years as a payroll and benefits manager or administrator, and having her employment terminated without just cause at the age of 62. The employee made a claim for payment of one month per year of service in accordance with the factors set out in the *Bardal v. Globe & Mail* decision. The relevance of an employee's age was discussed, citing Justice Iacobucci in the Supreme Court of Canada decision in *Law v. Canada (Minister of Employment & Immigration)* [1999 CarswellNat 359 (S.C.C.)]:

> "It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice."

The fact that the employee had not yet obtained full-time employment as of the trial date led the court to take judicial notice of the relevance of the employee's age. Based on the plaintiff's age, experience, and the specificity of her employment, the proper notice period was found to be twelve months.

The amount of notice that an older employee is entitled to was also considered in the British Columbia decision in *Monjushko v. Century College.*[5] In this case, the plaintiff was

[3] [2008] O.J. No. 3246, appeal allowed in part [2009] O.J. No. 5313 (C.A.).
[4] [2010] CarswellAlta 1021(Alta.Q.B.).
[5] 2008 BCSC 86.

employed as a professor at a college for over 9 years and brought an action for wrongful dismissal against the college after his termination at the age of 65. The plaintiff claimed he was entitled to 18 months of pay in lieu of notice. The court determined that the plaintiff was entitled to reasonable notice of 15 months, less any sums earned by him during that period, based on his age, length of employment, and the difficulty he had in finding alternate employment in his specialized field.

In another B.C. decision[6], the plaintiff was a 61-year-old engineer and forester, who had worked for the defendant for ten years when his services were terminated. On receiving eight months' salary in lieu of notice, he sued for damages for wrongful dismissal. The plaintiff claimed that he was entitled to 21 months' notice instead of the eight for which he received compensation.

His claim at trial was dismissed based on the finding that the plaintiff had not proved any damages consequent on the breach of his contract of employment. However, he succeeded on appeal and was awarded damages equal to 20 months' salary, plus the net loss he suffered with respect to being deprived of 20 months of benefits.

D. CONCLUSION

Given that employers across Canada can no longer require employees to retire at age 65, minimizing the risk of wrongful dismissal or human rights claims of older employees is important. Employers may limit the common law entitlements of an employee by written employment contract, which specifically defines the termination notice period, so long as the termination provisions at least meet the requirements of the ESA, or other applicable provincial laws. The request to have an employee sign a contract can be made when an employee receives their initial offer of employment with the company, upon a promotion, or upon receiving additional consideration such as a bonus.

Further, as with other employees, it is important for employers to properly manage the performance and expectations of older employees. For example, employers may consider the following practices:

[6] *Dunlop v. British Columbia Hydro & Power Authority*, 1988 CarswellBC 414.

- Establishing or expanding the number of voluntary, flex or part-time positions for employees who want to continue to work past age 65, but who want to do so in a reduced role;

- Managing the performance of older employees, especially in situations where there is evidence of decreased abilities;

- Encouraging older employees to share their knowledge and experience with younger employees, to reduce the “knowledge gap” when older employees choose to retire.

With their knowledge and experience, older employees can be an asset to an organization. However, organizations need to manage the risks of employing older works to reduce potential liability exposure.