Administrative driving suspension not just cause to dismiss assistant fire chief

02 October 2018 | Contributed by Dentons

Litigation, Canada

An assistant fire chief has won a wrongful dismissal suit after he was fired after receiving a 90-day administrative driving prohibition for impaired driving while off duty.**(1)**

The assistant fire chief was travelling home from a so-called 'date night' with his spouse when he was pulled over for suspected impaired driving. He failed two roadside breathalyser tests and received an administrative driving suspension. He immediately advised the fire department and was distraught and remorseful.

Although the fire chief and HR adviser advised against firing him, and a number of firefighters signed a letter asking that he not be fired, the fire department's chief administrative officer was adamant and dismissed him.

The court held, for the following reasons, that the fire department did not have just cause for dismissal:

- The assistant fire chief was off duty and was not representing the fire department at the time.
- While the vehicle that he was driving belonged to the fire department, it was not marked as such.
- There was no public knowledge of his administrative driving prohibition.
- His conduct was not of the same "moral reprehensibility" as in other cases where employees' off-duty conduct was just cause for dismissal.
- The assistant fire chief was not the public face of the fire department.
- The other firefighters in the fire department had not lost confidence in him.
- There was no criminal charge, but rather he received a 90-day driving suspension.

In conclusion, the court held that his off-duty conduct was not incompatible with the faithful discharge of his duties or otherwise prejudicial to the interests or reputation of the fire department.

The court awarded the assistant fire chief five months' salary as provided for in his employment contract.**(2)**

For further information on this topic please contact Adrian Miedema at Dentons Canada LLP by telephone (+1 416 863 4511) or email (adrian.miedema@dentons.com). The Dentons Canada LLP website can be accessed at www.dentons.com.

Endnotes

(1) *Klonteig v West Kelowna (District)*, 2018 BCSC 124 (CanLII).

(2) For more information please see www.occupationalhealthandsafetylaw.com.

Court finds lawyer's communications and conduct during harassment investigation were not privileged

18 September 2018 | Contributed by Dentons

Litigation, Canada

- **Facts**
- **Decision**

In *Clayton v SPS Commerce Canada Ltd* (2018 ONSC 5017 (CanLII)) an Ontario court permitted an employee to refer in her statement of claim for constructive dismissal and bad faith to the communications and conduct of the company's employment lawyer in respect of a sexual harassment investigation.

Facts

The employee raised sexual harassment and bullying claims against a co-worker. The employer investigated and concluded, without speaking to the employee, that the claims were unsubstantiated. During the investigation, the employee was placed on a performance improvement plan.

The employee retained counsel, who requested a severance package. The employer then also retained counsel. Over a few months, the lawyers communicated by phone and correspondence. They discussed the investigation and the employee's counsel urged the company to conduct a new or more thorough investigation, which the employer did. The employee then commenced a constructive dismissal suit, which included in her statement of claim reference to some of counsel's discussions and conduct.

The company moved to strike those paragraphs from the statement of claim on the basis that the discussions between counsel were without-prejudice settlement discussions.

Decision

The court refused to strike the paragraphs, holding that the discussions and conduct of the company's lawyer with respect to the harassment investigation did not relate to a litigious dispute, but rather to the company's statutory obligation to investigate claims of sexual harassment under the Occupational Health and Safety Act. The sexual harassment investigation report was not privileged and counsel's conduct during the sexual harassment investigation was "highly relevant and both counsel must have understood its relevance should litigation ensue". Finally, although the outcome of negotiations between counsel may have led to a severance settlement and the employer's lawyer told the employee's lawyer that she wished to engage in without-prejudice settlement discussions before sharing any information with him, the communications in relation to the investigation and the performance improvement plan were directly relevant to the employee's claim for constructive dismissal and bad faith.

As a result, the communications between counsel regarding the sexual harassment investigation and the performance improvement plan were not settlement privileged and thus were not struck from the employee's statement of claim.**(1)**

For further information on this topic please contact Adrian Miedema at Dentons Canada LLP by telephone (+1 416 863 4511) or email (adrian.miedema@dentons.com). The Dentons Canada LLP website can be accessed at www.dentons.com.

Endnotes

(1) For more information please see www.occupationalhealthandsafetylaw.com.

Adrian Miedema

Owner of electrical contracting firm held personally liable for its C$430,000 regulatory fine

11 September 2018 | Contributed by Dentons

Litigation, Canada

- **Facts**
- **Decision**
- **Comment**

In what appears to be a novel regulatory decision, an Ontario Court of Justice recently held the owner of an electrical contracting firm personally liable for the company's regulatory fine after he transferred assets out of the company following a fatal incident.**(1)**

Facts

In 2014 an elderly man died from burns after being found lying on his bathroom floor, which had overheated. The overheating was caused by the negligence of one of the contractor's employees four years earlier when he installed an underfloor heating mat in the bathroom.

The company pleaded guilty to charges under the Electricity Act in respect of the installation. The court fined the company C$430,000.

Decision

The Ontario Court of Justice judge found that the owner had transferred assets, including property, out of the company after he learned that it was going to be charged, in order to avoid paying the fine. The judge also found that the owner had been dishonest in his testimony and misleading to the Electrical Safety Authority. As a result, the company was left with no or very few assets to pay the fine.

The judge decided to pierce the corporate veil and require the owner and a related entity, to which he had transferred assets, to pay the fine. In a scathing decision, the judge held that the owner had put his own assets at risk by blurring the lines between himself and the company. Further, the judge held that, although no statute gave him the power to pierce the corporate veil and make the owner personally liable, he should do so where it would be "too flagrantly opposed to justice" not to. The judge stated:

> *If Mr Merante had simply shuttered Pro-Teck and left its assets intact and gone on and opened up Master Electric, he could not have been faulted... But he did not simply do that. Two roads diverged before him and Mr Merante took the one marked self-interest and deceit rather than the one that was marked by his duty to respect his obligations as a shareholder and his duty to accept that the protections that came with Pro-Teck's corporate status also created responsibilities.*

The judge held that the owner's acts:

> *...deprive him and Master Electric, both beneficiaries in one way or another of the diversion of assets, of their legal separateness from Pro-Teck. He in effect treated all three legal entities as one; as he sowed, so shall he reap. The fines levied against Pro-Teck may be recovered from Mr Merante personally and from Master Electrical Contracting Services Ltd, 2433302 Ontario Ltd.*

Comment

It is unknown whether the decision has been appealed. Although the owner's behaviour was clearly troubling to the judge, it is questionable whether an appeal court would affirm that the judge had the legal authority to pierce the corporate veil and make the owner personally liable for the fine.**(2)**

For further information on this topic please contact Adrian Miedema at Dentons Canada LLP by telephone (+1 416 863 4511) or email (adrian.miedema@dentons.com). The Dentons Canada LLP website can be accessed at www.dentons.com.

Endnotes

(1) *R v 1137749 Ontario Ltd (operating as Pro-Teck Electric)*, 2018 ONCJ 502 (CanLII).

(2) For more information please see www.occupationalhealthandsafetylaw.com.

Adrian Miedema

Class action claiming gender harassment dismissed as only arbitrator had jurisdiction

04 September 2018 | Contributed by Dentons

Litigation, Canada

A group of female police officers has lost its bid to bring a class action in the courts for gender discrimination and harassment.**(1)**

The officers had claimed systemic gender-based discrimination and harassment by male members of the police force.

The court held that it had no jurisdiction over the class action because the claims should have been brought at arbitration. Under the Police Services Act, arbitration is mandatory and binding, even though the arbitrator did not have the power to award punitive damages. The officers were therefore barred from making the discrimination and harassment claim in the courts.

The fact that the police association (the police union that would have carriage of a harassment case at arbitration) was comprised mostly of male members did not require the court to take jurisdiction.

The court also held that a claim of workplace discrimination did not constitute a viable cause of action under common law. This meant that even if the court (rather than an arbitrator) had jurisdiction over the case, the claim was not the type of case that the courts will hear.

The court concluded:

> *The Defendants should not regard this result as a vindication of current practices. Like Sharpe JA in A(K), I have considerable sympathy for the Plaintiffs' desire to have this litigated in court. Even on the limited and contradictory evidence before me, it is apparent that this case raises serious, triable issues relating to the workplace culture. The allegations are very troubling and will require close scrutiny should this matter proceed to another forum for adjudication.*

The court action was therefore stayed.

The plaintiffs have appealed the decision to the Ontario Court of Appeal.**(2)**

For further information on this topic please contact Adrian Miedema at Dentons Canada LLP by telephone (+1 416 863 4511) or email (adrian.miedema@dentons.com). The Dentons Canada LLP website can be accessed at www.dentons.com.

Endnotes

(1) *Rivers v Waterloo Regional Police Services Board*, 2018 ONSC 4307 (CanLII).

(2) For more information please see www.occupationalhealthandsafetylaw.com.

Adrian Miedema

Safety manager wins wrongful dismissal suit having not failed to complete assigned tasks

28 August 2018 | Contributed by Dentons

Litigation, Canada

An Alberta safety manager recently won C$28,000 in damages after he was fired by his employer.**(1)** The employer argued that the employee had quit or, in the alternative, that there was just cause for dismissal.

The court rejected the employer's argument that the employee had quit. The employer's email stating, "Don't bother coming in either I'll look after all this k that your two weeks. Thanks for your services have good day [sic]", made it clear that the employer had dismissed the employee.

The court also rejected the employer's argument that it had just cause for dismissal. Contrary to the employer's claim, the employee had not failed to complete the assigned task of adding certain safety procedures to the employer's safety manual and, even if he had failed to do so, there was no evidence that the company had suffered harm as a result.

Further, the court held that the employee's outburst in which he told his manager to "f– off" on a telephone call was not just cause for dismissal. The outburst took place on a private call and there was no scene in front of other employees or the public. The employee had an unblemished work record and the manager admitted that he fired the employee in the heat of the moment.

Therefore, the court held that the employee, who had three-and-a-half years of service and an annual salary of C$82,000, was entitled to four months' pay in lieu of notice – approximately C$28,000 in damages.**(2)**

For further information on this topic please contact Adrian Miedema at Dentons Canada LLP by telephone (+1 416 863 4511) or email (adrian.miedema@dentons.com). The Dentons Canada LLP website can be accessed at www.dentons.com.

Endnotes

(1) *Bohnet v Rebel Energy Services Ltd*, 2018 ABPC 131 (CanLII).

(2) For more information please see www.occupationalhealthandsafetylaw.com.

Adrian Miedema

employmentlawtoday.com
Aug 16, 2018

Female police officers' class action claiming gender harassment dismissed because arbitrator, not courts, had jurisdiction

Ontario court finds 'serious, triable issues' over workplace culture, but Ontario legislation requires police matters to go before an arbitrator
By Adrian Miedema

A group of Ontario female police officers has lost its bid to bring a class action in the courts for gender discrimination and harassment.

The Waterloo, Ont., officers claimed systemic gender-based discrimination and harassment by male members of the police force.

The court decided that it had no jurisdiction over the class action because the claims should have been brought at arbitration. Under the Ontario *Police Services Act*, arbitration was mandatory – and binding – even though the arbitrator did not have the power to award punitive damages. The officers therefore were barred from making the discrimination and harassment claim in the courts.

The fact that the police association (the police union that would have carriage of a harassment case at arbitration) was made up mostly of male members did not require the court to take jurisdiction.

The court also decided that a claim of workplace discrimination did not make out a viable "cause of action" at common law. This meant that even if the court (not an arbitrator) had jurisdiction over the case, the claim was not the type of case that courts will hear.

The judge concluded:

"The defendants should not regard this result as a vindication of current practices. Like Sharpe J.A. in *A.(K.),* I have considerable sympathy for the plaintiffs' desire to have this litigated in court. Even on the limited and contradictory evidence before me, it is apparent that this case raises serious, triable issues relating to the workplace culture. The allegations are very troubling and will require close scrutiny should this matter proceed to another forum for adjudication."

The court action was therefore stayed, bringing it to an end.

The plaintiffs have appealed this decision to the Court of Appeal for Ontario.

For more information see:

- *Rivers v. Waterloo Regional Police Services Board*, 2018 CarswellOnt 11504 (Ont. S.C.J.).

Adrian Miedema is a partner with Dentons Canada LLP in Toronto. He can be reached at (416) 863-4678 or adrian.miedema@dentons.com. Adrian's discussion of this case also appears in the Dentons blog www.occupationalhealthandsafetylaw.com.

Court declines to quash bid ban imposed by city on paving company

07 August 2018 | Contributed by Dentons

Litigation, Canada

- **Facts**
- **Decision**

The Ontario court decision in *Interpaving Limited v City of Greater Sudbury* (2018 ONSC 3005 (CanLII)) illustrates the serious business implications that Occupational Health and Safety Act compliance issues or disputes can have on a company.

Facts

The city of Sudbury banned paving company Interpaving from bidding on city contracts for four years on the following grounds:

- Interpaving had sued the city in relation to five city projects or contracts.
- Interpaving violated health and safety legislation.
- Interpaving had "a significant history of abusive behaviour and threatening conduct" towards city employees.

With respect to safety issues, the city noted an incident in 2015 in which a pedestrian was struck and killed by a construction vehicle as she entered a construction zone in which Interpaving was working. The Ministry of Labour issued compliance orders against Interpaving and the city of Sudbury. Interpaving appealed the orders, claiming that the city, rather than Interpaving, was the constructor under the Occupational Health and Safety Act. The city claimed that Interpaving failed to understand its obligations under the act, including its role as constructor, and failed to cooperate with the city on safety matters.

Interpaving asked the court to overturn the bid ban, arguing that the city had not followed a fair process in coming to the decision to impose the ban.

Decision

The majority of the court disagreed. It held that although the city had initially breached its obligation of procedural fairness by not giving Interpaving notice of its intention to debar, its grounds for debarring, a description of the potential penalties or an opportunity to respond, the city had "cured" that breach through its reconsideration and process, which gave Interpaving full opportunity to be heard.

The court stated:

> *In the Debarment Letter, the City made reference to 'numerous orders in relation to projects that Interpaving has been involved in for the City... including seven orders in relation to the City's Elgin Street Project issued by the Ministry of Labour'. The reference to OHSA orders was also made under the heading 'Poor Contract*

Performance'. ***Contrary to the assertion made by Interpaving, there is nothing unreasonable in the consideration of OHSA orders in connection with the quality of lnterpaving's contract performance.*** (Emphasis added.)

Interpaving stated that it employed 200 people in Sudbury and an additional 200 people in the summer. This type of debarment decision by public entities can have a serious effect on businesses. The decision indicates that Interpaving's road paving business is primarily in the city of Sudbury.**(1)**

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Endnotes

(1) For more information please see www.occupationalhealthandsafetylaw.com.

Adrian Miedema

Occupational health and safety charges in fatality case dismissed for delay

31 July 2018 | Contributed by Dentons

Litigation, Canada

In *R v Nugent, Guillemette and Buckingham* (2018 ONSC 3546 (CanLII)) an Ontario appeal judge upheld the dismissal of Occupational Health and Safety Act charges against employees due to delay.

The charges followed the death of a mining employee from cyanide intoxication by way of skin absorption. The company had pleaded guilty to criminal negligence charges, after which all 15 Occupational Health and Safety Act charges against it were withdrawn. Criminal charges against one of the employees were also withdrawn at the time.

The total delay – from the laying of the charges to the last day scheduled for trial – was 21 months, which exceeded the 18-month presumptive delay ceiling set out by the Supreme Court of Canada in *Jordan*.

The trial judge found that the Ministry of Labour prosecutor had breached his duty to develop and follow a concrete plan to minimise the delay due to the complexity of the case. In addition, it was not reasonable for the prosecutor to have failed to seek trial dates until five-and-a-half months before the 18-month presumptive ceiling for delay. Further, the prosecutor made no effort to narrow the issues or shorten the trial by seeking admissions, attempting to negotiate an agreed statement of facts or seeking agreement regarding documents until late in the case, despite being invited to do so by the defence. Therefore, the trial judge concluded that the prosecutor's trial management fell well below the standard set out in *Jordan*.

The appeal judge upheld the finding and the trial judge's decision to stay the charges against the employees for delay, thereby ending the prosecution – despite the fact that the charges were particularly serious as they resulted from a fatality. **(1)**

For further information on this topic please contact Adrian Miedema at Dentons Canada LLP by telephone (+1 416 863 4511) or email (adrian.miedema@dentons.com). The Dentons Canada LLP website can be accessed at www.dentons.com.

Endnotes

(1) For more information please see www.occupationalhealthandsafetylaw.com.

Adrian Miedema

Distracted by mobile phones: forklift operators guilty of occupational health and safety offence

17 July 2018 | Contributed by Dentons

Litigation, Canada

In *Ontario (Ministry of Labour) v Nault* (2018 ONCJ 321 (CanLII)) two forklift operators at a bottling plant were found guilty under the Occupational Health and Safety Act for using mobile phones while sitting on their forklifts. The charge was operating equipment in a manner that may endanger a worker (ie, distracted driving of a forklift).

A co-worker staged a work refusal after observing the forklift operators using mobile phones while seated on their forklifts and a Ministry of Labour inspector was called in. The co-worker, who was retired at the time of trial, testified that one operator had been looking at the mobile phone while sitting on the forklift, which was stationary and not moving, and the other operator had been showing his mobile phone to another employee.

In response, one of the operators stated that he had used his mobile phone only to check the time, and the other stated that he was not on his forklift and that it was another employee who had been using his mobile phone. The court did not accept the operators' version of events and found that they had and were using their mobile phones.

The court held that "operating or using" a forklift includes sitting on a forklift even when it is stopped and turned off, as other workers and forklifts may be nearby and put at risk by the operator's distraction and inattention to their surroundings while using a mobile phone. Further, the employer had clearly prohibited the use of mobile phones in the warehouse, even displaying a poster that depicted a mobile phone with a slash through it. Therefore, the operators were guilty of the Occupational Health and Safety Act charge against them.

The court stated:

> *Like motorists who unlawfully hold or use cellphones or other mobile communication devices while operating or driving motor vehicles on public highways in Ontario, workers that use cellphones or other mobile communication devices while operating equipment or machines in factories or warehouses, such as a forklift, would also pose the same danger to themselves or others, as a consequence of being distracted to what is going on around them while using those mobile communication devices.***(1)**

For further information on this topic please contact Adrian Miedema at Dentons Canada LLP by telephone (+1 416 863 4511) or email (adrian.miedema@dentons.com). The Dentons Canada LLP website can be accessed at www.dentons.com.

Endnotes

(1) For more information please see www.occupationalhealthandsafetylaw.com.

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Adrian Miedema

Vehicle owner not liable for accident caused by repair shop employee during driving test

10 July 2018 | Contributed by Dentons

Litigation, Canada

- **Facts**
- **First-instance decision**
- **Court of Appeal decision**

The Alberta Court of Appeal recently reviewed the provisions of the Workers' Compensation Act that enable the Workers Compensation Board (WCB) to be subrogated to the right of a claim against a party not covered by the Workers' Compensation Act when the WCB has paid out benefits to a party that is covered by the Workers' Compensation Act.

Facts

In *McIver v McIntyre* (2018 ABCA 151 (CanLII)) the defendant was the owner of a vehicle, which he had taken to a repair shop to have its brakes repaired. A mechanic employee of the repair shop took the vehicle for a test drive with the shop's authority and the defendant's consent. During the test drive, the vehicle collided with the plaintiff's vehicle and the plaintiff sustained injuries.

There was no dispute that the mechanic's negligence caused the accident. The plaintiff was also operating his vehicle in the course and scope of his employment at the time of the accident; therefore, he claimed benefits from the WCB. Under the Workers' Compensation Act, both the mechanic driver and the repair shop were immune from any suit arising from the accident. There was no question that but for the Workers' Compensation Act, the repair shop – as the mechanic's employer – was vicariously liable for the plaintiff's loss at common law.

The WCB accepted the plaintiff's claim for benefits and thus the Workers' Compensation Act vested the plaintiff's action in the WCB. The WCB commenced an action in the plaintiff's name, seeking to recover from the defendant the benefits that it had paid to the plaintiff. As noted, action against the repair shop and the mechanic was barred by operation of the Workers' Compensation Act – the defendant was the only involved party who was not protected by the Workers' Compensation Act.

The plaintiff's action was based on the Traffic Safety Act, which imposes vicarious liability on the owner of a vehicle. Under the Traffic Safety Act, it was undisputed that the owner was vicariously liable for the plaintiff's loss.

First-instance decision

In these circumstances, the Workers' Compensation Act limits liability to a non-WCB covered defendant to only "that portion of the damage or loss occasioned by the defendant's own fault or negligence". The trial judge held that the defendant was liable only for the portion of the plaintiff's loss occasioned by the defendant's fault, not for any loss that was

contributed to by the repair shop. The judge then found that the repair shop had the power to supervise the driver while the vehicle owner did not and thus apportioned 100% of the plaintiff's loss to the repair shop. As such, the plaintiff and the WCB had no ability to recover from any of the parties because the only liable parties were immune from suit.

The plaintiff appealed the decision.

Court of Appeal decision

The Court of Appeal confirmed that pursuant to the Workers' Compensation Act, defendants that are not protected from suit should not be held liable for the portion of loss caused by an employer or worker that is protected from suit. The repair shop's notional vicarious liability constituted fault under the Workers' Compensation Act; therefore, the court had to apportion the plaintiff's loss between the repair shop and the owner. The court confirmed that the effect of the Workers' Compensation Act is that the liability of the owner is several, not joint or joint and several. The court affirmed the trial judge's finding that the repair shop was 100% notionally liable for the plaintiff's loss, confirming that this was consistent with both the purpose of the Workers' Compensation Act and the Traffic Safety Act.

Therefore, in what was essentially a contest between the WCB and the automobile insurer, the insurer came out on top.**(1)**

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Endnotes

(1) For more information please see www.occupationalhealthandsafetylaw.com.

Cristina Wendel

No benefits past 65? That’s discrimination

Ontario decision comes long after restrictions around mandatory retirement

By Sarah Dobson

07/01/2018 | Canadian HR Reporter | Last Updated: 06/25/2018

In 2006, Ontario’s Human Rights Code was changed to protect employees against discrimination on the basis of their age, such as hiring, promotion, training or termination — including mandatory retirement.

But, for some reason, employee benefits didn’t warrant the same protection.

Fast-forward to 2018 when the Human Rights Tribunal of Ontario (HRTO) decided that code, and related provisions in the Employment Standards Act, amounted to age discrimination and violated the Canadian Charter of Rights and Freedoms.

“It’s a very big decision, that we’ve waited for for a long time,” said Anneli Legault, a partner at Dentons in Toronto.

“It was an inevitable challenge. The government almost set it up to be challenged at some point,” she said. “Because they were so honest, they actually said, when they passed the mandatory retirement abolishment, they were worried about the financial viability of benefit plans. So they were allowed to not give benefits to everyone.”

Background

The case concerned Wayne Talos, a teacher at the Grand Erie District School Board in Brantford, Ont., whose extended health, dental and life insurance benefits ended when he turned 65, though he was still working full-time.

Talos alleged the exception in the Human Rights Code infringed his equality rights and was unconstitutional, and he sought monetary compensation of $160,000 for lost benefits and compensation for injury to dignity, feelings and self-respect.

In its decision, the tribunal looked extensively at Bill 211, the “Act to amend the Human Rights Code and certain other acts to end mandatory retirement” which was intended to end the upper limit on age when it came to involuntary retirement, but “preserved the ability to employers to provide differential benefits and pension plan contributions for workers 65 and older in a bid to maintain the financial viability of those plans.”

This “carve-out” was questioned by HRTO associate chair Yola Grant in her May 18 decision:

“I find that the policy choice to carve out workers age 65 and older relied on the insurance industry’s expectation of costs increases, an expectation that was not empirically supported in 2005. This policy choice by the legislature ignored ‘independent’ research that indicated little change to the cost of benefit plans in Manitoba and Quebec post-mandatory retirement.”

Bill 211’s purpose to maintain the financial viability of various benefits and pension plans was not supported by any empirical evidence concerning the proportion of workers who would likely remain active after age 65, said Grant, or whether maintenance of these plans would be cost-prohibitive, or age differentiation in benefits was necessary to ensure the viability of the group insurance plans.

And since then, more credible actuarial data shows there is no “steeper curve” in costs for workers 65 and older, and “the policy choice to exclude workers age 65 and older from equal protection in employment benefits appears arbitrary and not ‘within a reasonable range of choices’ to which this tribunal should accord deference,” said Grant.

There are various ways to manage plan costs should increases become unsustainable, she said, so “the legislature could have devised a less intrusive means to meet the objective of maintaining the financial viability of workplace group benefit plans.”

“The age 65 and older group need not be made vulnerable to the loss of employment benefits without recourse to a (quasi-constitutional) human rights claim in order to ensure the financial viability of workplace benefits plans. The government’s age limit of 65 for protection from discrimination in the provision of benefit and insurance plans appears unacceptable given the cogent evidence to the contrary that there is no close link to costs and age,” said Grant.

“An employer is not required to demonstrate that their exclusion from employment benefits is reasonable or bona fide, or justified on an actuarial basis, or because their inclusion would cause undue hardship.”

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Concerns about costs

Back in 2005, there was an assumption it would potentially be too expensive to provide full benefits to workers 65 and older, said Bruce Ryder, an associate professor and academic director of the anti-discrimination intensive program at Osgoode Hall Law School in Toronto.

But this recent decision focused on the fact that “the regulations and the Employment Standards Act, which allow discrimination against workers 65 and older with respect to benefits plans, is a total exclusion of the right to have discrimination issues considered. And the Human Rights Code provision, which (Grant) has found unconstitutional, basically eliminates the possibility of raising the issue with the tribunal, and that’s why it was found unconstitutional.”

“It tidies up really what should have been addressed back then.”

In 2005, it was an intentional decision when the Ontario government specifically excluded benefits, said Legault.

“They abolished mandatory retirement, saying, ‘Oh, that’s age discrimination,’ and they purposely and intentionally said we are not touching the benefits section,” she said, adding there could be another challenge at some point around workers’ compensation for the same reason.

But with this decision, and the extension of benefits past 65, more people might choose to work past that age, said Legault.

“That will then mean those actuarial numbers… are going to be wrong because they were trying to say, ‘Don’t worry, there aren’t that many (older workers), the cost isn’t going to be that high,’ but if you have all the people who desperately need benefits self-selecting to stay on and get in the benefits plans, I think the cost may very well be higher than what the tribunal anticipated.”

The decision really recognizes that there are more older people working now, said Renu Mandhane, chief commissioner at the Ontario Human Rights Commission in Toronto, “and that they should be treated equally compared to younger workers. And to that extent I think the decision really sends the message that older workers are valuable, it disrupts stereotypes about their capabilities and their worth in the workplace, and it recognizes that they make a contribution to the workplace and they should not receive less compensation as a result of their age.”

Implications for employers

Many employers across Ontario may be required to change group health, dental and life insurance benefit plans if they offer fewer or no benefits to employees age 65 and older compared to younger employees, according to the OHRC.

“Employees should not face blanket exclusions because of their age: instead, age-based distinctions in benefits should be based on accepted insurance practice and credible actuarial data.”

It will now be up to employers to consider where their benefits plans may raise human rights issues, said Mandhane.

“They should look at their benefits plans and ideally obtain legal advice in terms of how the decision in Talos may affect the eligibility for older workers in their workplace.”

The Talos decision is not saying any differential treatment of older workers in benefits plans will violate the code, said Ryder, “but there has to be a right to raise those issues, and there has to be a more nuanced approach, and employers will have to justify any differential treatment of older workers as bona fide occupational requirements, and show that the different treatment is necessary to maintain the sustainability of the benefits plan, and that a more generous approach would amount to undue hardship.”

While there might be adjustments to the scope of an employer’s benefits in order to sustain the sustainability of a plan, “to have a complete denial of benefits if you turn 65 will be very difficult for the employer to justify,” he said, adding the issue will also have to be addressed in collective agreements to make sure they’re brought into compliance.

In unionized environments, employers may now argue they have to cover more people with less, rather than few people with more, so “there will be certainly be some interesting bargaining going on,” said Legault. “For non-union (workplaces), it’s up to the employer to do the costing but still try to keep good employee relations and good employee morale.”

Really, it’s the insurance companies that write the policies selected by employers, she said.

Several insurance companies are reviewing this decision, according to Craig Anderson, vice-president and general counsel at the Canadian Life and Health Insurance Association in Toronto.

“With more people working longer and putting off retirement, employers and insurers continue to look at their benefit plans to ensure they meet the needs of a changing society.”

Employees don’t come cheap

Hiring a full-time employee in Canada is expensive

By Todd Humber

07/01/2018 | Canadian HR Reporter | Last Updated: 06/25/2018

Employees are expensive. There is no getting around the fact that, for most organizations, the number one cost on the books is salary and benefits. In regulation-loving Canada, dare we say the burden on employers is getting a tad too heavy — and a recent human rights ruling is only going to increase the load.

Skyrocketing minimum wage, increasing Canada Pension Plan (CPP) and employment insurance (EI) premiums and the ever-popular double-digit increases in benefit costs are all unsavoury ingredients for a healthy bottom line.

Just look at some of the math already facing employers. From 2017 to 2018, the annual maximum CPP employer contribution stayed flat at 4.95 per cent. Nothing to complain about, right?

Well, no. Because as maximum pensionable earnings increase, so too does the contribution in real dollars — rising from $2,564 to $2,593 for employers outside of Quebec. Employers with workers covered by the Quebec Pension Plan (QPP) will see it jump from $2,797 to $2,829.

Employer EI premiums for non-Quebec employees also rose from $1,170 in 2017 to $1,201 this year. Quebec’s maximum rate rose from $912 to $940 — that doesn’t include the separately funded Quebec Parental Insurance Plan, which saw premiums rise from $556 to $567.

Put another way, if you have 500 employees contributing the maximum, then your contributions for those two things alone increased more than $30,000 year-over-year. In Quebec, it’s even higher at $36,000 plus.

Minimum wage has been a popular punching bag in many provinces, as the rush is on to get it to $15 per hour. In Ontario, between 2017 and 2019, the wage is scheduled to jump nearly 32 per cent from $11.40 per hour to $15. It currently sits at $14 per hour —and may very well stay there following the election of a Progressive Conservative government.

In Alberta, the minimum wage is scheduled to jump to $15 per hour in October. That's a 47 per cent increase since 2015. Trot out all the numbers you want about the relatively small percentage of workers earning minimum wage, but the domino effect it has in driving wages up for all workers can't be ignored.

The latest fuel to be thrown on the cost fire is coming out of Ontario, as detailed in the page 3 story by Sarah Dobson. That's because a human rights tribunal has ruled it is discriminatory to cut off benefits for a worker who turns 65.

It is impossible to argue against that decision. You cannot, and should not, discriminate against someone on the basis of age. That battle was fought and won when mandatory retirement was outlawed for most jobs, with a few exceptions that had bona fide occupational requirements.

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But remember the reason why governments didn't mandate benefits coverage at the time? Anneli Legault, a partner at Dentons in Toronto, summed it up perfectly.

"They were so honest, they actually said, when they passed mandatory retirement abolishment, they said they were worried about the financial viability of benefit plans," she said. "So (employers) were allowed not to give benefits to everyone."

Well, the exemption is gone but the worry very much remains. I'm concerned about the viability of benefit plans as we know them in an age where Canadians are working longer than ever.

Older employees cost more to insure — the simple fact is they are more likely to have health issues. From prescription drugs to long-term disability, the price tag will be significant and many firms will have no choice but to scale back coverage or put much more of the onus on employees to share the burden.

But the biggest fear on benefits doesn't rest with older workers. Many employers value the experience and wisdom they bring to the table and will figure it out in the short run. Instead, it's on the generation about to enter the workforce who may never see a benefits package like their parents and grandparents enjoyed.

We have seen a rise in precarious work — contract after contract handed out rather than adding to dreaded headcount.

We've seen an explosion in companies that thrive on the backs of independent contractors — and some creative accounting and stretching, shall we say, to ensure these contractors (who are workers in everything but name) remain independent.

And we haven't even touched on the obligations on employers when a worker is terminated, from severance to common-law notice periods.

The golden handcuffs that long-term employees wear — the ones who won't walk out the door without a package — are non-existent for independent contractors. You can pretty much show them the door, for any reason, at no cost whatsoever.

It all goes back to one simple point — hiring a full-time employee in Canada is expensive. Adding headcount isn't a slam dunk, but good HR practices tell us the benefits still outweigh the costs in most cases.

For HR, it just means that making the business case for investing in solid human resources practices is getting even more difficult.

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