



# Denial of Health Benefits to Older Employees

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# Legislative/Policy Background

- Ontario 2005 legislation to prohibit mandatory retirement at age 65
- Provided exemption for employers providing age-differentiated benefit and pension plans to employees:

Ontario Human Rights Code	New Brunswick Human Rights Act
<i>25(2.1) <u>The right under section 5 to equal treatment with respect to employment without discrimination because of <b>age</b> is not infringed by an <b>employee benefit, pension, superannuation or group insurance plan or fund</b> that complies with the Employment Standards Act, 2000 and the regulations thereunder.</u></i>	<i>4(6) <u>The provisions of subsections (1), (2), (3) and (4) as to <b>age</b> do not apply to</u>  ...  (c) the operation of terms or conditions of a <b>bona fide group or employee insurance plan.</b></i>

# Human Rights – Denial of Health Benefits to Older Workers

- Ontario Case: Talos v. Grand Erie District School Board (2018, HRTO).
- Issue: Age discrimination in denial of benefits
  - Notice of Constitutional Question
  - Legislated exemption for age discrimination in employee benefit plans for employees over 65 – whether contrary to Charter.
- Held: Legislated exemption not justified and contrary to Charter.

# Previous Challenges

- *Charter of Rights* section 15(1):

*Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

- Previous *Charter* challenges to the Ontario benefits exemption were not successful
- Most concluded infringement saved as being reasonable limit – need for flexibility and to balance benefits and costs for different parties

# *Talos* - Reasons Why Exemption Not Justified:

- No evidence of close link between costs and age over 65.
- If cost increases make plan unsustainable, other ways to manage plan costs.
- Employer is not required to demonstrate that exclusion is justified.

# What Not Decided:

- Interim decision – tribunal cannot issue a general declaration of constitutional invalidity.
- Allegation was with respect to only group health, dental and life insurance benefit plans – did not consider LTD insurance, superannuation and pension plans.
- Validity of change of benefits under exemption for bona fide qualification – in NB age-differentiation in a benefits plan is permissible if it is *bona fide*.

# Re: *Okanagan and Okanagan College Faculty Assn*, (2019 BC Arbitration)

- Interim Decision in ongoing British Columbia arbitration.
- Union grieved Group Life Insurance, LTD and AD&D benefits to faculty members under policies terminate at 65.
- Union arguing that if the Code authorizes age discrimination under the plans, the Code violates s. 15(1) of the Charter and not saved under s. 1.
- January 2019 – decision on admissibility of Union’s expert report on historical/social context of age discrimination. Same expert gave expert evidence for Ontario HRC in *Talos* decision.

# Re: *Okanagan and Okanagan College Faculty Assn*, (2019 BC Arbitration)

*[114] There will be delay. Everything about the present grievance proceeding has been slow and costly, admittedly the antithesis of an idealized labour arbitration process. On the other hand, this is hardly a typical grievance arbitration. Collective agreement benefits are at stake and so is the validity of legislation, should the Union succeed in its Charter challenge and prevail on judicial review.*

- Stay tuned!





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