



Does Age Matter?*

*Yes it Does!

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Outline

1. Stats, stats and stats
2. Diversity in pension, health and benefit plans
3. Managing the older worker
4. Termination issues

Average Age in Canada

Average Age for the Population of Canada			
	Male	Female	
Average age	40.1	41.9	

Source: Statistics Canada - 2016 Census.
Catalogue Number 98-400-X2016003.

Employment Rate for Individuals Ages 55-64

Employment Rate for Individuals Ages 55-64						
	2005	2010	2015	2016	2017	2018
Australia	53.5	60.6	62.1	62.5	63.6	63.8
Canada	54.8	58.1	60.9	61.6	62.2	62.9
Japan	63.9	65.5	70.1	71.6	73.4	75.3
South Korea	58.3	60.6	66	66.2	67.4	66.8
Great Britain	56.8	57.2	62.2	63.3	64.1	65.3
USA	60.8	60.3	61.5	61.8	62.5	63.1
EU	42.3	46.2	53.3	55.2	57.1	58.7

Retirement Age in Canada by Class of Worker

Retirement age by class of worker in Canada (both sexes)										
	Class of worker	1980	1990	2000	2010	2014	2015	2016	2017	2018
Average age	Total, all retirees	64.6	62.8	61.6	62.1	63	63.4	63.6	63.6	63.8
	Public sector employees	63.4	60.6	58.9	60.2	61.5	61.4	61.6	61.5	61.7
	Private sector employees	64.8	63	61.1	62.8	63.3	64.1	63.8	64.2	64.4
	Self-employed	65.7	66	66.4	66	66.4	66.7	68.1	68	67.7
Median age	Total, all retirees	64.8	62.8	61.1	61.6	63.3	64	63.3	64.1	64.3
	Public sector employees	64.2	60.4	59.4	59.7	60.3	61.3	61.2	61.4	61.3
	Private sector employees	64.9	63.4	61.3	62.6	64	64.7	64.1	64.8	64.8
	Self-employed	65.1	65.3	65.1	65.4	65.8	66.9	66.9	67.1	66.8

Labour Force Participation Rate

	2005	2010	2015
15 to 64	77.7%	77.8% (+0.1%)	78.0% (+0.2%)
65 +	8.1%	11.3% (+3.2%)	13.4% (+3.1%)



Diversity in Pension, Health and Benefit Plans

Outline:

1. Legislative framework
2. Pension plans
3. Exceptions for pension and benefit plans
4. Specific considerations in benefit plans
 - i. Benefits and cannabis
 - ii. Gender
 - iii. Gender identity and gender expression
 - iv. Family status
 - v. Sexual orientation
5. Workers compensation
6. Summary

Legislative Framework

1. Protected grounds under human rights acts
 - Established federally and in each province and territory
 - *Charter of Rights and Freedoms* applies to legislation
2. No discrimination on protected grounds
 - Employers and benefits plans cannot discriminate on basis of protected grounds
 - Protected grounds are generally consistent in Atlantic Canada

Legislative Framework

Protected grounds in Atlantic Provinces include:

Age	Colour	Creed
Gender Expression	Gender Identity	Ethnic Origin
Family Status	Marital Status	
Mental Disabilities	Physical Disabilities	Political Beliefs
Race	Religion	Sexual Orientation

Others which do not apply in all four provinces include:

- ancestry (NB), aboriginal status (NS), group association (NS), irrational fear of contracting illness (NS), past criminal conviction (NL, PEI), social condition (NB), source of income (NL, NS, PEI)

Protected Grounds

- Employers should be cautious when asking about protected grounds both in an employment application and on benefits forms
- Inquiries into protected grounds at the application stage are *prima facie* discriminatory
- Limit questions related to protected grounds where possible

Protected Grounds

- Exceptions exist to allow for the making of inquiries into protected grounds
- Exceptions include:
 - Bona fide occupational requirement (“BFOR”)
 - Necessary requirement for the position
 - Bona fide employee benefits plan
 - Can vary benefits on the basis of age

Exceptions for Benefits Plans

Age (and disability) – Bona fide employee benefits plan

New Brunswick v. Potash Corporation of Saskatchewan Inc., 2008
SCC 45

- Differentiated provision of benefits for employees over 65 justified where:
 1. A genuine/legitimate benefits plan;
 2. Enacted in good faith; and
 3. Not enacted to defeat protected rights
- Subjective and objective elements to test
- Different than test for “undue hardship”

Exceptions for Benefits Plans

Talos v. Grand Erie District School Board, 2018 HRTO 680

- Employee claimed *Charter* violation due to termination of coverage under plan after 65
- *Employment Standards Act (ESA)* defines “age” as 18 years to 65 years so can treat employees over age 65 differently
- Employee claimed *ESA* and regulations were unconstitutional
- HRTO agreed – unconstitutional, and not justified
- Interim decision – but highlights “caution” for future

Exceptions for Benefits Plans

*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 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.
- Stay tuned!

Exceptions for Benefits Plans

Protected Characteristics Other than Age

Zurich Insurance Co. v. Ontario (Human Rights Commission),
[1992] 2 SCR 321

- A discriminatory practice in a plan is “reasonable” where:
 - a) Based on “sound and accepted” insurance practice (for legitimate business purpose)
 - b) No practical alternative
- *To be “*bona fides*” must have been adopted honestly, not for purpose of defeating human rights

Benefits & Disability - Cannabis

Canadian Elevator Trust Fund v. Skinner, 2018 NSCA 31

- *Welfare plans need not cover “the sun, the moon and the stars”*
- Coverage for medical marijuana denied by plan
- Benefits plan covered approved prescription drugs
- Marijuana not approved by Health Canada – No DIN
- Board of Inquiry’s order for plan to pay for employee’s medical marijuana – Overturned by Court of Appeal
- Plan does not need to provide “prescription drugs personally beneficial to each claimant”

Benefits & Disability - Cannabis

Skinner v. Nova Scotia (Workers' Compensation Appeals Tribunal) 2018 NSCA 23

- Skinner was denied benefits from WCB as well following accident
- The Court recognized benefits of medical marijuana, and connection to accident
- The Court allowed WCB's finding that reimbursement "would be inconsistent with Canadian healthcare standards"
 - "no healthcare standards in place to govern use"

Benefits & Disability - Cannabis

Drug Plans:

- High cost drugs
 - May have DIN
 - How to exclude
- Skinner outlines the path
 - No “sun, moon and stars”
 - Avoid excluding all drugs for a medical condition

Gender & Pension

Fraser v. Canada (Attorney General) 2017 FC 557

- Three female RCMP officers claimed pension plan discriminated based on sex and parental status by preventing full contribution during job-sharing
- Disproportionately more women working part-time
- Court held that distinction based on eligibility requirements, not sex or parental status
- More women job-sharing not in itself discrimination

Gender & Pension

- Benefits generally end during maternity or parental leave
- Necessary to treat all employees on leave the same
- If employer is already paying disability benefits to people on leave (sabbatical, education, etc.)
 - Must pay benefits to employees on other maternity/parental leave²
- ² *Canada (Human Rights Commission) v Canadian National Railway (Terra Transport)* (2000), 38 CHRR D/107 (Fed TD); *Ontario Nurses' Association v Orillia Soldiers Memorial Hospital*, 1999 CanLII 3687 (ON CA).

Gender Identity

- Plans historically set rates for disability, life insurance, etc. using gender
- Benefits providers should be prepared to accommodate based upon gender identification
 - Full accommodation → rate based on identified gender
 - Minimal accommodation → rate based on “M”, “F” or blank
 - No accommodation → rate based on gender assigned at birth
- Plan providers should consider the options

Family Status

IAFF, Local 268 v. Adekayode 2016 NSCA 6

- Unionized employee alleged discrimination in provision of adoptive, but not parental leave
- Court of Appeal overturned finding of discrimination
- Goal was to improve condition of disadvantaged group “adoptive parents”
- Not to discriminate against biological parents

Sexual Orientation

Toronto v. Toronto Professional Fire Fighters' Association
[2010] WDFL 1527 (“Maidment”)

- A firefighter and his same-sex partner were attempting to have a child via surrogacy but the city would not cover fertility drugs for the surrogate
- Coverage not available for non-beneficiary
- Claim denied; cannot allow a plan member to “contract out that benefit to a third party”
- Claimants being treated the same as other plan members

Workers Compensation – Nova Scotia

- Up to age 65 – 85% of net earnings loss
- At age 65 – 5% of total benefit paid as an annuity
- Issues
 - For WCB – Will this be challenged as discriminatory?
 - For Employers – Will this mean more accommodation requests?

Summary

- An inclusive workplace meets the diverse needs of workers, including through provision of benefits
- More plan options today after age 65 – but not “forever”
- Differentiating how benefits are provided requires a legitimate plan with good faith justification (i.e. *BFOR*, *bona fide plan*)
- Plans need not cover the “sun, the moon and the stars” but plan sponsors should consider options and whether practical – especially “high cost” drugs
- New challenges will surely arise as grounds are recognized (e.g. gender identity)

Managing the Older Worker

Outline:

1. Stereotypes
2. Age and family status
3. Recruitment
4. Performance management
5. Can you ask about employee's retirement plans
6. Accommodation
7. Succession planning

Myth #1

Older Workers are less productive

Facts:

- Intellectual capacity and ability to perform routine or repetitive tasks are not influenced by age
- Workers who perform the same tasks for a number of years enjoy the benefit of accumulated work experience
- Physical strength does begin to diminish with age. Where physical strength is a key component of job performance, slight decline in productivity may occur

Myth #2

Older workers are quick to retire

Facts:

- Employees do not view retirement as a set event, but rather a gradual process
- Many older workers plan on remaining connected to the workforce in some way when they retire from their primary career
- Statistics Canada conducted a survey of older workers between 50 and 75 years of age. Among respondents who were currently working, and had never retired (approximately 78% of the sample), over half indicated they plan to continue to work on a part-time basis when they retire.

Myth #3

Training older workers, who are likely to leave or retire, is not cost effective

Facts:

- Older workers tend to be loyal and are less likely to frequently change jobs
- In a knowledge economy, the payback period on investment in training is becoming shorter for all workers, meaning that spending money on training older workers is likely to be recovered before those workers retire.



Age and Family Status

- Family status covers individuals providing eldercare for ailing parents.
- There will be an increase in family status claims for different work schedules as an increasing percentage of the population ages and needs to be cared for.



Age and Family Status

Canada v. Johnstone (2014 FCA 110)

Canadian National Railway Company v. Seeley (2014 FCA 111)

Family status encompasses family obligations that:

- Are immutable;
- Are not possible to neglect without engaging liability; and
- Do not constitute personal choice

Age and Family Status

To make out a prima facie case, must show that:

1. Elder is under the employee's care and supervision
2. Legal responsibility is engaged as compared to personal choice
3. Employee has made reasonable efforts to meet the obligation through reasonable alternative solutions
4. The workplace rule interferes in a manner that is more than trivial or insubstantial with fulfillment of obligation



Recruitment

- An interviewer or recruiter might rely on stereotypes relating to older workers
- Interviewer might conclude that an older candidate lacks career potential or is “overqualified”
- Recruitment strategies themselves might be inadvertently focusing on younger workers



Recruitment

- Questions about age should generally be avoided during recruitment processes
- Questions should also not, directly or indirectly, classify or indicate qualifications on the basis of age



Performance Management

- Employer cannot terminate employment based on age stereotypes
- However, an employer might terminate employment where there is declining performance
- Regardless of age, the same performance review and management processes need to be followed for all employees
- The employer may have a duty to accommodate



Monitoring Job Performance

In order to rely on job performance issues to terminate an older employee, it is crucial that:

- The performance management tool is objective and rational;
- Employees are evaluated consistently and regular performance reviews are held;
- When necessary, constructive criticism and warnings are given; and
- Performance management issues are clearly documented



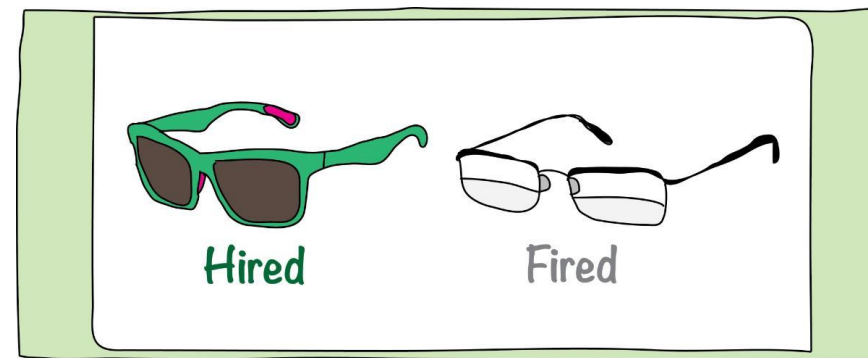
Top Line Roofing (2013 BCHRT 306)

- 53 year old employee had been working for company on and off for 15 years
- Employee was terminated along with another employee aged 61
- Employer argued that they had been terminated due to a work shortage and poor performance
- A few months prior, employer had hired younger employees
- Employer provided no evidence that it had spoken to employees about work performance



Clennon v. Toronto East General (2009)

- Failure to follow performance management policy;
- “Would not have utility or would not achieve results”;
- “Energies...would be better expended on a new and younger employee”;
- Although employer’s concerns around work performance were legitimate, termination tainted.



McKee v. Hayes-Dana Inc. (1992)

- Layoffs imposed due to economic downturn;
- Two older foremen terminated and two younger retained;
- “Hoped to keep people with career potential”;
- Discrimination despite very generous retirement packages.



Schram v. Avon-Maitland District School Board (2010 HRTO 24)

- Employers can ascertain their employees' intentions with respect to retirement;
- Inquiries into an employee's retirement plans and retirement date is not discriminatory



"How long have you been with our firm, Dad?"

Weiler v. Famcomb Surveying (2009 HRTO 528)

- Cannot require employees to identify retirement date;
- Retirement must remain voluntary;



Age as a Bona Fide Occupational Qualification

- Onerous standard;
- Requires evidence of undue hardship regarding:
 - Health and safety;
 - Operational requirements



Accommodation

- The employer has a duty to accommodate to the point of undue hardship
- This is not about finding the perfect or most ideal solution
- The employee needs to engage in the accommodation process
- It is important not to entertain stereotypes about what someone of a particular age is capable of doing!



Types of Accommodation

- Flexible work hours
- Compressed work weeks
- Teleworking
- Part-time work
- Job sharing
- Short or fixed term contracts
- Phased retirement
- Training and re-training
- Lateral move to a better fitted position



Flexible Working

Succession Planning

- Develop a mentorship program
- Be careful about singling out employees to talk about retirement based on age
- Make conversations surrounding retirement and future goals and plans a consistent practice
- Think about offering referrals to financial planners for those who are interested



Alternatives to Termination

- Look to see if any accommodation options might be suitable
- Be careful about committing to a retirement agreement
- Feel free to offer voluntary early retirement packages and incentives
- Any of these alternatives should be voluntary and free from employer coercion or undue influence



Termination Issues

Outline:

1. Discrimination claim – dealt with already
2. How much?
3. Statutory Issues

Reasonable Notice Periods

- Age is one of the *Bardal* factors used to determine an employee's reasonable notice period
- Courts are grappling with what a reasonable notice period is for aging workers
- It is rare that the court has awarded a notice period higher than 24 months...but



Markoulakis (2015 ONSC 1081)

- Employee was 65 and had worked at company for his entire 40-year career
- Argued that he had only ever worked for one employer, was close to retirement, and job market was scarce
- Employee was awarded 27 months' pay in lieu of notice



Kimball v. Windsor Raceway (2014 ONSC 3286)

- Employee advised his employer that he intended to retire after his 65th birthday but did not do so
- When his employer asked about it years later, the employee again informed his employer he would be retiring shortly
- The employer ended up laying off the employee before he retired
- Employee was 71 years old and had 43 years of service
- Case was privately settled

Statutory Issues

1. Labour Standards Code – Nova Scotia

- Section 71
- No termination “without cause” after 10 years service
- Remedy of reinstatement (and lost wages)

2. Canada Labour Code

- Section 240
- No termination “without cause” after 1 year
- Managers excluded
- Remedy of reinstatement (and lost wages)



Questions?



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