BENEFITS AND PENSIONS MONITOR
www.bpmmagazine.com

Mandatory Retirement Being Retired Across Canada

By: Derek Knoechel

Mandatory retirement has a long and storied history as part of the Canadian labour system. As we enter 2010, it appears that a new chapter is being written, one in which mandatory retirement is the exception rather than the norm.

In Canada, mandatory retirement developed along with the introduction of private and public pension plans. Public programs, such as the Old Age Security, Guaranteed Income Supplement and the Canada and Quebec Pension Plans provided that retirement benefits were to be paid beginning at age 65. Private businesses developed or adapted their plans to complement and integrate with government pensions. By the 1970s age 65 had become generally accepted as the "normal" age of retirement, by employers and workers alike.

Mandatory retirement often formed part of a deferred compensation approach to the labour market. Most deferred compensation systems provided deferred benefits such as pensions and postretirement benefits that rise with the worker's tenure, with fixed retirement ages. This approach permits wages to rise with age, promotes employee loyalty in the expectation of rich pension benefits and encourages employers to invest in worker training.

This type of system had benefits for both employers and workers. Mandatory retirement allows employers to plan for the flow of labour into a workplace, to manage wage bills and to plan their financial obligations. Employees typically viewed the deferred compensation and retirement plan as a reward for a lifetime of service.

As a general rule, unions fought and bargained for this type of approach. In fact, by 1990, about two-thirds of collective agreements in Canada contained mandatory retirement provisions at the age of 65. Mandatory retirement provisions were seen as a powerful bargaining chip to unions and workers. It could be used to negotiate a number of important benefits including deferred compensation and job advancement opportunities.

In 1990, when the Supreme Court of Canada upheld the constitutionality of mandatory retirement in the university setting, the court emphasized that mandatory retirement at age 65 had become "part of the very fabric of the organization of the labour market in this country" and noted the important role of mandatory retirement for the structuring of pension plans, for fairness and security of tenure in the workplace, and for work opportunities for others. Many human rights laws had protected mandatory retirement from attack for age discrimination.

Times have changed. The unions' bargaining chip is gone. In virtually all Canadian jurisdictions, mandatory retirement is either prohibited or is permitted only if it is based on bona fide retirement or pension plans, or bona fide occupational requirements. This change appears driven, in part, by changes in worker demographics. People are capable of working longer. Many of them need to do so for financial reasons. Increased time spent in formal education before starting work has meant that, on average, people are starting work later in life. In addition, the Canadian economy is facing skill and labour shortages, as the current workforce ages and is not being replaced in sufficient numbers

by young workers. There is a growing recognition that rather than mandatory retirement, we should be looking at ways to encourage longer working lives.

Canada's federal jurisdiction has until recently been somewhat of an exception. Federal law still recognizes a 'normal age of retirement' for certain positions. However, this exception has been recently found to be unconstitutional, on the basis that it violates the equality provisions of the Canadian Charter of Rights and Freedoms. This was the finding of the Canadian Human Rights Tribunal in Vilven and Kelly v. Air Canada, 2009 CHRT 24.

The decision involved the forced retirement of two airline pilots when they turned 60 years of age. Their forced retirement was in accordance with the mandatory retirement provisions of the collective agreement in force between their union and the company. However, the provisions were ruled to constitute age discrimination,

were struck down. Standards in the airline industry which prohibited a person over the age of 60 from certain positions in the air crew of a plane involved in international flights, and the impact on Air Canada's scheduling ability related to such restrictions, did not assist the company. The Tribunal held that allowing employers to discriminate against employees on the basis of age so long as the discrimination was pervasive in the industry was contrary to the equality guarantees in the Charter.

In CKY-TV and Communications Energy and Paperworkers Union of Canada, Local 816, 2009 MBQB 252, a Manitoba court reviewed an arbitrator's decision which ruled that the mandatory retirement provisions of the collective agreement which required retirement at age 65 were discriminatory. The court upheld the arbitrator's decision. The employer argued that the policy of mandatory retirement contained in the collective agreement does not have a negative impact on an employee's human dignity: rather, it provides employees with numerous benefits during the course of their careers and with security of a pension. The employer claimed that negotiated mandatory retirement regimes (through the collective bargaining process) were consistent with the Supreme Court of Canada's endorsement of collective bargaining as a means of enhancing human dignity, equality and workplace democracy.

The Court in CKY-TV accepted the argument that the employment regime will survive without mandatory retirement. Similar arguments were accepted by the Canadian Human Rights Tribunal in Air Canada.

While both decisions are likely to be appealed, it is clear that we have begun to turn the page on mandatory retirement in Canada. The concept of mandatory retirement is, itself, easing into retirement. ■

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The article was published in its The HR Space publication.