



## The End of Mandatory Retirement

Spring 2007

Topics:

The End of Mandatory  
Retirement

*front page*

A New Model for Human  
Rights in Ontario

*page 3*

In the past, employers often had policies advising employees that their employment would automatically end when they reached their 65th birthday. If such a mandatory retirement policy was widely distributed and enforced, an employee had working notice of the termination of their employment. For many employers, no further notice or pay in lieu was required.

For employers with a payroll in excess of \$2.5 million, statutory severance pay was payable if the employee had been employed for five years or more and was not going to receive a pension.

This age discrimination practice was permissible because of certain definitions under the Ontario Human Rights Code in Ontario (the "Code"). According to the Code, age discrimination occurred only if an employer used age as a factor in making an employment decision for employees who were between the ages of 18 and 64. Since the Code did not protect an employee from ageism if they were 65 or older, mandatory retirement policies were permissible.

The Human Rights Commission, along with many interest groups, raised concerns about this practice. Studies were undertaken and articles were written.

The common conclusion was that many employees did not want to and/or could not afford to retire. A number of employees in their 60s are supporting children and/or grandchildren and may have the expense of caring for their parents. Some employers, who are experiencing a skilled labour shortage, want employees to work beyond 65.

As a result of all of this discussion and debate, in December 2005, the Ontario legislature amended the Code to define age discrimination as a discriminatory act based on age for anyone 18 or older (*unless a bona fide occupational requirement can be proven*)<sup>1</sup>. The legislature gave employers 12 months to change their employment practices to comply with these amendments. The legislation

came into effect on December 12, 2006. Now any policy that requires an employee to stop working at a particular age is prohibited. If an employer has such a policy still in effect, it should be removed or changed. Further, if employers have employment contracts which purport to terminate on a 65th birthday, again, these should be amended.

Some of the issues arising from these changes:

1. Without retirement policies, an employer who plans to terminate an employee who is 65 or older, without cause, must provide common law notice or pay in lieu of notice as it would for any other employee. Notice periods for employees over 65 will be lengthy as re-employment opportunities will be limited.
2. An employer may face a human rights complaint if one of the reasons an employee is terminated is their age. If it can be proven, for instance, on a statistical basis that employees over 65 are more likely to be terminated than others in an organization, the employer can face an age discrimination case **even if it provides reasonable notice or pay in lieu**.
3. Some benefit plans may provide that benefits terminate at the age of 65 (i.e. Long Term Disability). Employers should seek input from their benefit providers on alternate ways to provide benefits to those 65 or older. If a benefit provider charges higher premiums for employees who are 65 or older, it may be permissible to pass on those increased premiums to employees. Employers would defend this on an actuarial basis. Some employers may decide not to provide any benefits to those over 65 due to the increased costs. We are in uncharted waters, but the concept may be found to be another form of age discrimination.

4. Some employers have discussed placing older employees on a fixed term contract. As employment ends at the end of a fixed term and is not due to the employee's age, the employer may avoid an age discrimination case. This might be helpful. However, if it is proven that only employees who are in their late 50s and 60s are placed on fixed term contracts, age discrimination may be found. Further, the full implications of a fixed term contract must be understood by an employer so that one form of liability is not simply replaced with another.
5. A voluntary retirement policy may be an alternative way to let employees graciously plan their exits. Perhaps a small monetary incentive or the continuation of certain benefits might encourage those who are in that age range to consider retirement.
6. Managing the performance of employees who are slowing down may also be a challenge. Do certain performance problems have a connection to old age? If so, can an employer place an employee on a performance management program for these deficiencies? Can the employer face a human rights complaint for such action? As these matters have not been litigated before, there are no Tribunal decisions to guide us.

Clearly, employers will have to act carefully to avoid complaints. [MG](#)

#### Notes:

<sup>1</sup> Employers have the opportunity to argue that in certain occupations, once an employee reaches a certain age, they are no longer physically or mentally able to perform the occupation.

## Employment & Labour Law Group

The Employment & Labour Group provides employers with expert, timely, practical and straight-forward advice on the common law and employment-related legislation, and on employee relations. We strive to resolve disputes realistically without resorting to often expensive, time consuming, unpredictable and divisive formal court or administrative proceedings. However, we do not hesitate to utilize all legal avenues available, including litigation, when it is in the best interest of our client.

We work closely with clients in developing an ongoing collaborative relationship so that we can often identify and resolve a wide range of issues that might otherwise become problematic at a later time. This strategy is cost-effective and encourages a more productive and motivated workforce which leads to a more flexible and profitable business.

## A NEW MODEL FOR HUMAN RIGHTS IN ONTARIO

In December 2006, the Ontario Government made significant changes to how human rights complaints will be administered. As just over 80 per cent of all human rights complaints relate to employment, employers will certainly be affected by the changes.

The former system had the Ontario Human Rights Commission (the “Commission”) as the gatekeeper for a human rights complaint. The complaint was filed with the Commission, mediated by the Commission and then later investigated by the Commission. If the investigation concluded that a breach may have occurred, the complaint was sent to the Ontario Human Rights Tribunal (the “Tribunal”) for a hearing. The Tribunal heard evidence and made a ruling.

Under the new system, complaints will be filed directly with the Tribunal. The Tribunal has been mandated to build mechanisms to screen, mediate and investigate complaints and will continue to adjudicate complaints. The Commission will take on an advisor/public interest role. It will be permitted

to bring its own complaints, be added to other complaints and review the Tribunal’s decisions in court.

There are some other very important changes that are highlighted in Figure 1.

At this point, we do not know exactly what the new system will look like in Ontario. The Tribunal is designing the new system within the guidelines of the new Code. The Commission has been given six months to either wrap up its files or prepare them for transfer to the Tribunal. Regardless of the final structures, employers will experience a very different process with more serious financial ramifications.<sup>MG</sup>

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Figure 1.

Former System	New System
Complainants had six months from the date of the incident that gave rise to the complaint to file a complaint. Thereafter, a complainant had to prove their delay was in good faith and that there would be no substantial prejudice to the respondent.	The complainant now has 12 months to file a complaint. <b>COMMENT:</b> May be more difficult for employers to find witnesses and get reliable evidence to defend a complaint.
There were restrictions on a complainant’s ability to commence a civil action for a breach of a human right.	Civil actions permissible. <b>COMMENT:</b> In some incidents, employers may face both a human rights complaint and a civil action relating to the same facts.
The Commission represented the complainant at a hearing. If a complainant retained counsel, it was at the complainant’s own cost.	Public system for legal representation being developed through the newly created Legal Support Centres. <b>COMMENT:</b> Complainants have the ability to seek free legal representation. Uncertain at this point whether financial need will have to be demonstrated. This could lead to an increase in the number of complaints.
There was a limit on General Damages of up to \$10,000.	Cap has been removed. <b>COMMENT:</b> Awards may be greater as there is no upper limit.

## Professional Notes

**Minden Gross LLP** and the **Commercial Leasing Group** were heavily involved with the International Council of Shopping Centers where the firm took a leadership role planning the Canadian Shopping Centre Law Conference on March 1-2 in Toronto. **Michael S. Horowitz** and **Christina Kobi** were on the Planning Committee and **Stephen J. Messinger** was the Special Initiatives Chair. Christina also co-chaired the Breakfast Roundtables where **Ian J. Cantor**, **Adam L. Perzow** and **Mordecai L. Bobrowsky** were panelists. Michael moderated the session "Tenant Audit Rights, or Costly Fights – The Saga"; **Stephen Posen** presented the paper "The End is Near: Restoration and Make-Good Obligations"; and **Robyn Kestenberg** spoke on "Top 10 in Under 10 – The Hottest Issues in Lease Negotiations."

**Phillip G. Bevans** is a Visiting Professor in Corporate Governance at the University of Western Ontario's Faculty of Law and is also working on a doctorate at Osgoode Hall Law School on Corporate Governance.

**Howard S. Black** appeared on ROB-TV's *MoneyTalk* to discuss "Transferring Ownership of the Family Cottage." The show aired December 14 at 8:00 p.m. Howard is also Adjunct Professor at Osgoode Hall Law School.

**Michael A. Goldberg** was quoted in "Tax move threatens businesses abroad" that appeared in the *Financial Post* on March 21.

**Arnie Herschorn** presented "Acting Reasonably and in Good Faith," **Michael S. Horowitz** presented "Kick-out Clauses" and **Christina Kobi** presented "What Franchisors and Franchisees Want in a Lease" at the 2007 Six-Minute Commercial Leasing Lawyer Conference, hosted by the Law Society of Upper Canada on February 21.

**Kenneth L. Kallish** and **Meritas** were featured in the February 2007 issue of *Canadian Lawyer*. "Going Global" discussed the benefits of using worldwide affiliated law firms.

**Christina Kobi** gave a lecture on "Incentives and Inducements for Landlords and Tenants" at the Commercial Real Estate Leases Course sponsored by Federated Press in Toronto on March 26-27.

**Stephen J. Messinger** participated as an advisory board member at the Georgetown Law Center Advanced Commercial Institute on March 28-30.

**Hartley R. Nathan, Q.C.**, contributed a chapter on directors meetings for the new *Ultimate Corporate Council Guide*, published by CCH Canadian Limited and the Canadian

Corporate Counsel Association in the Fall of 2006. He spoke at the accompanying seminar held on November 25. Hartley also co-chaired a program "The Nuts and Bolts of Running Company Meetings" on February 22 for the Ontario Bar Association where he delivered the lecture "How to Prepare For and Conduct a Directors' Meeting."

**Reuben R. Rosenblatt, Q.C.**, was quoted on a case involving Tim Hortons in "Mega-trials biggest criminal law issue of 2006" published in *Law Times* on January 8. In February, Reuben and **Yosef S. Adler** presented the paper "Non Disturbance Agreements Can Be Disturbing" at the 2007 Six-Minute Real Estate Lawyer Conference. Reuben also participated in the Committee for Continuing Education on February 6-7 with more than 2200 attendees. On April 4, 2007, Reuben gave a lecture for new lawyers on "Practice, Pitfalls and Recent Cases," offered by the Ontario Bar Association.

**David T. Ullmann** was quoted in the article "You gotta know when (and how) to fold 'em" that appeared in the February 15 edition of the *Globe and Mail*.

## Firm News

We are pleased to announce that Aecon Group Inc. has placed **Minden Gross LLP** on its list of preferred legal providers in 2007.

**Kenneth L. Kallish** was elected by the Board of Directors of **Meritas** as Chair Elect, to take office as Chairman in April 2007. The Chair serves as the principal advocate and public leader of Meritas, leads its Executive Committee and the Board in determining Meritas' strategic direction, works with the President in developing strategic and operational plans and represents Meritas at legal industry and client events.

**Martin Maierovits** was elected chairman of Kashruth Council of Canada in November 2006 where he has been a member for more than 10 years.

**Reuben R. Rosenblatt, Q.C.**, was honoured (roasted) by the Ontario Bar Association on February 13. Reuben was honoured for several reasons, two of which were his 50 years as a Real Estate lawyer and the completion of his 30th year as Adjunct Professor at Osgoode Hall Law School. The event was covered in the February 26 *Law Times*.

**David T. Ullmann** joined the partnership in February.