

# LEGAL UPDATE

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## ONTARIO HUMAN RIGHTS TRIBUNAL DECISION ON POST-AGE 65 BENEFITS

*On May 18<sup>th</sup>, 2018, the Ontario Human Rights Tribunal determined that terminating an employee's health, dental, and insurance benefits post-age 65 pursuant to Ontario's legislation was unconstitutional.*

### THE FACTS

In [Talos v. Grand Erie District School Board, 2018 HRTO 680](#) ("Talos"), the *Ontario Human Rights Tribunal (Tribunal)* deemed certain provisions of the *Ontario Human Rights Code* (the "Code") and the *Ontario Employment Standards Act* (the "ESA") unconstitutional.

Mr. Talos, a secondary school teacher who continued working past age 65, had his extended health, dental, and life insurance benefits terminated upon turning 65 in accordance with the collective agreement and pursuant to section 25(2.1) of the *Code* and section 44 of the *ESA*. Importantly, the Ontario statutory scheme did not require any actuarial justification for lesser benefits for employees aged 65 years and older.

Mr. Talos filed a claim against his employer alleging that the School Board's benefits plan was discriminatory based on age and also argued that

section 25(2.1) of the *Code* contravened section 15 of the *Charter of Rights and Freedom (Charter)* which provides that every individual is entitled to equal protection before the law, without discrimination on several grounds, including age.

In the interim decision, [Talos v. Grand Erie District School Board, 2013 HRTO 1949](#), the Tribunal found that Mr. Talos' allegations of discrimination on the basis of age had no reasonable prospect of success unless the constitutional challenge to section 25(2.1) of the *Code* was successful.

The issue before the Tribunal then was to consider the constitutional challenge, and specifically (1) whether section 25(2.1) of the *Code* infringes section 15(1) of the *Charter*, and (2) whether the infringement was justified under section 1 of the *Charter*.

### THE DECISION

In *Talos*, the Tribunal found that Mr. Talos' section 15(1) *Charter* right was infringed as a result of section 25(2.1) of the *Code* and that the School District had

failed to justify this infringement under s.1 of the *Charter*.



The impugned legislation infringed Section 15(1) of the *Charter* by drawing a distinction on the basis of age and this distinction created financial and emotional costs. In commenting on this infringement, The Tribunal wrote:

*[T]he impugned law operates to permit lower compensation to older workers, without regard to individual circumstances and without regard to the social, political, economic and historical factors concerning the same group of workers over age 65... This serves to devalue the contributions of workers age 65 and older in the*

*workplace and entrenches the stereotype that their labour is worth less. ... and thus infringes the equality guarantee of s. 15(1) of the Charter (para. 244).*

On the second issue of whether the infringement was justified under section 1 of the *Charter*, the Tribunal found that it is not justified. Reduced benefits for employees aged 65 and older did not require actuarial justification and the evidence presented failed to demonstrate a justification for this distinction based on age.

## WHAT THIS MEANS FOR EMPLOYERS

For employers in British Columbia, mandatory retirement was eliminated in 2008. Similar statutory exemptions for benefit plans in Ontario can be found in the British Columbia *Human Rights Code* and other Canadian jurisdictions. A difference between Ontario and B.C. is that the B.C. *Human Rights Code* does permit age-differentiation in benefit plans where it is *bona fide*.

Employers that have a practice of terminating or reducing employees' benefits at age 65 should consider whether their age based restrictions are based on accepted insurance practice, credible actuarial data, and can be justified as *bona fide* if challenged.

At this time, there is no update with respect to whether this decision will be reviewed or appealed.

## QUESTIONS?

If you have any comments or questions about this update, please e-mail [RES360@metrovancover.org](mailto:RES360@metrovancover.org) or call 604-451-6558.

## SOURCES

*Talos v. Grand Erie District School Board*, 2013 HRTO 1949

<<https://www.canlii.org/en/on/onhrt/doc/2013/2013hrto1949/2013hrto1949.html>>, retrieved on 2018-08-16

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<<https://www.canlii.org/en/on/onhrt/doc/2018/2018hrto680/2018hrto680.html?autocompleteStr=talos%20v.%20grand&autocompletePos=7>>, retrieved on 2018-08-16