BONA FIDE OR NOT? B.C. HUMAN RIGHTS TRIBUNAL EXAMINES WHAT CONSTITUTES A BONA FIDE BENEFITS PLAN

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Employers take great caution in establishing employee benefits and amending benefits plans to fit within new legal parameters when required. The case of *Barker v. Molson Coors Breweries and another* (2017 BCHRT 208) is a good example of why a very diligent approach can be necessary.

In *Barker*, the B.C. Human Rights Tribunal ("**Tribunal**") examined, on a preliminary inquiry, whether a benefits plan might be discriminatory on the basis of age. There, the 68 year-old applicant, an active employee, alleged that he was unfairly denied certain health and welfare benefits under his collective bargaining agreement because he was over 65 years old.

Both Molson and its Union (Brewery, Winery and Distillery Workers Union, Local 300) responded to Barker's Application and sought dismissal thereof without a hearing, arguing that section 13(1) of the BC *Human Rights Code* (the "**Code**") exempts a *bona fide* group or employee insurance plan from the broader rule against age discrimination. Other provinces have similar exemptions for benefits plans – for example, Ontario's *Employment Standards Act, 2000* and the *Benefit Plans* regulation (O. Reg. 286/01) permit various distinctions among employees and are incorporated by reference in the Ontario *Human Rights Code*.

However, in *Barker*, the Tribunal focused not just on the benefits plan under the relevant collective agreement, but also on a 1991 Letter of Understanding (LOU) between the Union and employer, prepared alongside the collective agreement in effect at that time. The LOU stated that in the event mandatory retirement at age 65 was no longer permitted in B.C., the normal retirement date for the purpose of benefits under the collective agreement would be 65. Otherwise, the date was 71 years of age.

The application arose after Molson discovered in 2015 that it had accidentally failed to reduce the applicant's benefits in accordance with the LOU. After Molson reduced the applicant's benefits, the Tribunal was required to determine whether the LOU was part of a "*bona fide* group or employee insurance plan", as required under the *Code*.

The Tribunal examined the test for a *bona fide* plan set out by the Supreme Court of Canada in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.* (2008 SCC 45), which requires that a

plan be "a legitimate plan, adopted in good faith and not for the purpose of defeating rights." Taking into account the low threshold for permitting an application to proceed to a hearing, the Tribunal ruled that the LOU was not "on its face" part of a coherent insurance plan. Therefore, it was not reasonably certain that the respondents could prove that the LOU constitutes all or part of a *bona fide* group or employee insurance plan under s. 13 of the *Code*. Importantly, the Tribunal noted that the mere inclusion of a discriminatory (i.e. on the basis of age) provision in a collective agreement does not automatically guarantee treatment thereof as a "*bona fide* plan" under the *Code*.

What Employers Should Know

The question of whether an addendum to a benefits plan, such as the LOU in *Barker*, is legally a part of that plan is a discrete but potentially important one. *Barker* demonstrates that importance of ensuring that major legislative changes (i.e. elimination of the mandatory retirement age) should be reflected within the direct language of a given plan. Appended documents are not guaranteed to be deemed part of the plan in question for the purposes of employment standards or human rights legislation.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.