

# MANAGE THE BABY BOOM OR BUST: STRATEGIES FOR DEALING WITH TERMINATION AND RETIREMENT OF THE AGING WORKFORCE

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## Introduction

It's no secret that Canada's workforce is aging – rapidly. Statistics show that 24% of persons aged 65 to 70 are still working, which is an 11% increase from 2000.<sup>[1]</sup> Statistics also show that the rate at which the Canadian population is aging is accelerating as all baby boomers will reach age 65 between 2010 and 2031.<sup>[2]</sup> With this trend expected to continue, prudent employers will implement policies and procedures that manage the impact of the aging workforce on their businesses by, among of things, understanding their legal rights and obligations with respect to their older workers.

## The End of the Employment Relationship

Statistics show that the average retirement age in 2015 was 63.4 years of age.<sup>[3]</sup> More specifically, the average retirement age for public sector employees was 61.4 years of age as compared with 64 years of age for private sector employees and 66.7 years of age for self-employed workers.<sup>[4]</sup> Because an increased number of Canadian workers are retirement age or near retirement age, it is important for employers to understand the difference between retirement and termination.

## Retirement

From a legal standpoint, a retirement is the same as a resignation. Unless an employee's employment contract or company policy provides otherwise, employees who resign are not entitled to termination pay, severance pay, or any other benefit upon the termination of the employment relationship. Generally, on the retirement date, the employment relationship ends without any further entitlement or obligation.

However, employers who mischaracterize an employee's actions or comments as a resignation are at risk of wrongful dismissal claims, and as discussed below, the liability resulting from such claims for older, long service employees can be substantial. This begs the question – when is a resignation a resignation?

Generally, a resignation must be clear, unequivocal, and voluntary. To be clear and unequivocal, the resignation must objectively reflect the employee's intention to resign.<sup>[5]</sup> The Ontario Court of Appeal has affirmed that:

Whether words or action equate to resignation must be determined contextually. The surrounding circumstances are relevant to determine whether a reasonable person, viewing the matter objectively, would have understood [the employee] to have unequivocally resigned.<sup>[6]</sup>

Generally, if an employee merely mentions that he or she is thinking about retiring or has casual discussion with co-workers but not management about retiring, their words and actions are unlikely to be sufficiently clear and unequivocal.

Further, resignations arising from an ultimatum, employer pressure to retire, or "retirements" that are dictated by the employer are unlikely to be viewed as sufficient voluntary – likely nothing more than a camouflaged termination.

The British Columbia Court of Appeal has also confirmed that, even if an employee provides an employer with notice of resign (or retirement), the employee is entitled to change his or her mind before the resignation date, so long as the employer has not relied on the employee's expressed intention to its detriment.<sup>[7]</sup> Therefore, if the employer has not, for example, already taken steps to replace the employee through internal promotions, a reorganization, or external hiring, the employee can rescind his or her notice of resignation and continue to work for the employer.

To mitigate against the operational and financial risks associated with retirement, employers may wish to introduce formal succession planning for every employee. Employers should also ensure that they have appropriate policies in place so that, as soon as an employee provides notice of his or her retirement, the retirement date is confirmed and a transition plan is created and implemented.

### Termination

In Canada, an employee who is dismissed without cause or who is wrongfully dismissed (for example, because the employer mischaracterised the termination as retirement when it was actually a dismissal without cause) is entitled to a payment equal to the wages he or she would have received during the common law "reasonable notice" period, unless their employment contract contains an enforceable provision limiting this entitlement. The appropriate notice period is determined on a case-specific basis, considering all of the following factors: the employee's age, length of service, position, and availability of similar employment.<sup>[8]</sup> With respect to age, the Supreme Court of Canada has affirmed that being over the age of 45 at the time of dismissal is a factor that, barring other countervailing factors, will increase the reasonable notice period. The court stated as follows:

Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than

others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills. Their difficulty is also influenced by the fact that many in that age range are paid more and will generally serve a shorter period of employment than the young, a factor that is affected not only by the desire of many older people to retire but by retirement policies both in the private and public sectors.<sup>[9]</sup>

While there is no absolute cap on what constitutes reasonable notice, the Ontario Court of Appeal has affirmed that, generally only exceptional circumstances will support a base notice period in excess of 24 months.<sup>[10]</sup> However, a succession of recent decisions has affirmed that advanced age and long service can be exceptional circumstances.

For example, in *Hussain v Suzuki Canada Ltd.*<sup>[11]</sup> the Ontario Supreme Court concluded that, based on the plaintiff's age (65), years of service (36 years), and poor job prospects, there were exceptional circumstances, and awarded the plaintiff 26 months of notice. Similarly, in *Markoulakis v SNC-Lavalin Inc.*,<sup>[12]</sup> the Ontario Supreme Court again concluded that the plaintiff's age (over 65) and years of service (40 years) constituted exceptional circumstances and warranted a 27 month notice period.

In order to mitigate the high costs of terminating the employment of older, long service employees, employers should consider offering existing employees working notice or a combination of working notice and pay in lieu of notice instead of providing employees with a severance payment in the amount of their earnings for the entire notice period. To mitigate these costs in the long run, employers should also ensure that new hires are provided with employment contracts that limit the employee's entitlements upon the termination of the employment relationship.

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[1] Angella MacEwan, "Working After Age 65", Canadian Centre for Policy Alternatives (2012).<sup>[ps2id id='1' target='']</sup>

[2] Laurent Martel et al, "Projected trends to 2031 for the Canadian labour force", Statistics Canada (2011): <http://www.statcan.gc.ca/pub/11-010-x/2011008/part-partie3-eng.htm><sup>[ps2id id='2' target='']</sup>

[3] Statistics Canada, *Table 282-0051 - Labour force survey estimates (LFS), retirement age by class of worker and sex, annual (years)*, CANSIM (database), (accessed: February 5, 2017).<sup>[ps2id id='3' target='']</sup>

[4] Statistics Canada, *Table 282-0051 - Labour force survey estimates (LFS), retirement age by class of worker and sex, annual (years)*, CANSIM (database), (accessed: February 5, 2017).<sup>[ps2id id='4' target='']</sup>

[5] *Skidd v Canada Post Corp*, 1997 CarswellOnt 1019.<sup>[ps2id id='5' target='']</sup>

[6] *Kieran v Ingram Micro Inc.*, 2004 CarswellOnt 3117 at paragraph 30.<sup>[ps2id id='6' target='']</sup>

[7] *Tolman v Gearmatic Co.*, 1986 CarswellBC 737 at paragraph 14.<sup>[ps2id id='7' target='']</sup>

[8] *Bardal v Globe & Mail*, Ontario Supreme Court (1960).[ps2id id='8' target='']

[9] *McKinney v University of Guelph*, [1990] 3 S.C.R. 229.[ps2id id='9' target='']

[10] *Lowndes v Summit Ford Sales Ltd.*, 2006 CarswellOnt 11.[ps2id id='10' target='']

[11] *Hussain v Suzuki Canada Ltd.*, 2011 CarswellOnt 12251.[ps2id id='11' target='']

[12] *Markoulakis v SNC-Lavalin Inc.*, 2015 ONSC 2995.[ps2id id='12' target='']

### **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.

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