OVER (65) AND OUT IN BENEFIT PLANS IS UNCONSTITUTIONAL HRTO RULES

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On May 18, 2018, the Human Rights Tribunal of Ontario (the "Tribunal") released its interim decision in *Talos v Grand Erie District School Board*.[1] The Tribunal held that section 25(2.1) of the Ontario Human Rights Code ("Code"), which permitted differentiation in benefit plans to employees age 65 and older, was unconstitutional.

Background and Decision

Mr. Talos brought an application alleging discrimination on the basis of age after his employer terminated his participation in various benefit plans on his 65th birthday, as per the terms of the plan.

The Tribunal in finding that section 25(2.1) was unconstitutional noted that employees age 65 and older provide the same labour as they did when they were 64. However, section 25(2.1) has meant that until age 65, employees have been guaranteed equal compensation and access to benefits but, by virtue of turning 65, the legislation allows them to be removed from benefit plans.

The Tribunal decided that this provision drew a distinction that created an age-based disadvantage in terms of the financial and emotional costs associated with the loss of benefits. It also concluded that removing healthcare benefits at age 65 effectively deprived older workers of the same supports that are available to help their younger counterparts to maintain their fitness for work.

The employer argued that section 25(2.1) protects the financial viability of workplace benefits, and thus could be saved under s.1 of the Charter. The Tribunal agreed that this was a pressing and substantial objective. However, it also noted that "the policy choice to deprive all active workers age 65 and older of Code protection from the elimination or reduction of workplace benefits"[2] is all-encompassing, and does not comply with the minimal impairment threshold set out by section 1 of the *Charter*.

The Tribunal also stated that there are less intrusive means to maintain the financial viability of benefit plans for the entire workforce, such as requiring an actuarial justification for reduced benefits. This alternative measure would maintain the Tribunal's ability to examine whether age-based differences in benefits entitlement are reasonable in the circumstances. It would also be in line with the requirements under the *Employment*

Standards Act, *2000* in relation to other kinds of Code-based differentiations in benefits coverage.

The Tribunal was clear that its decision did not apply to long-term disability insurance, pension plans and superannuation funds as they were not subject to the challenge brought by Talos.

What this Means for Employers

As this is only an interim decision, there is still the possibility that the decision could ultimately be subject to judicial review. In addition, the Tribunal still must make a further determination with respect to remedy in the application.

The age 65 cutoff is a common feature of benefit plans. Employers must therefore review their benefit plans to determine the impact of the decision on its plans and workforce. It should be noted that the Tribunal criticized the lack of actuarial evidence in the proceeding that might have shown that it would be financially unsustainable to extend group insured benefits to employees over the age of 65, so part of the employer's review will need to be to determine the financial impact of maintaining plans for employees in the over 65 demographic. Employers will also want to discuss with their insurers the impact of the decision on their benefit plans.

We will continue to follow this case and provide updates.

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[1] 2018 HRTO 680 [Talos].[ps2id id='1' target='/]
[2] Ibid., at para 272.[ps2id id='2' target='/]

A Cautionary Note