

**Submission of the Ontario Human Rights Commission
to the Ministry of Labour
Regarding the Consultations on Ending Mandatory Retirement**

September 2004

This submission is in response to the Ministry of Labour's public consultation on ending mandatory retirement.

The Ontario Human Rights Commission ("OHRC") commends the Ministry for these steps towards ending mandatory retirement.

Human Rights and Mandatory Retirement

There are many economic, social, and human resource issues associated with mandatory retirement, as the Consultation Paper recognizes. At the core of the debate over mandatory retirement, however, lies a fundamental issue of human rights.

Employment is central to an individual's opportunity to participate fully in society. Not only does it have a major impact on a person's economic status, but for many people, employment is central to their sense of dignity and self-worth. Employment promotes independence, security, self-esteem and a sense of contributing to the community. The loss of employment can have a devastating effect on a worker. The denial of employment based solely on age is therefore a significant concern to the OHRC.

The OHRC believes that mandatory retirement is a form of age discrimination. It involves making an employment decision solely on the basis of age, and not the person's ability to do the job. As a society, we would not find it acceptable if individuals were to be terminated from employment on the basis of any other ground in the Ontario *Human Rights Code* ("the *Code*"), such as race, sex or disability. The OHRC is very concerned that ageism and age discrimination do not seem to evoke the same sense of moral outrage and condemnation as other forms of unequal treatment. We are glad to see that the Ontario government is committed to addressing these concerns.

At the heart of the *Code* is respect for human dignity. The Preamble to the *Code* states that its purpose is to "recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province". Mandatory retirement, which

undermines older Ontarians' independence, participation, and ability to make choices, is antithetical to the values of the *Code*.

It should also be remembered that the age 65 cap on *Code* protections against discrimination in employment also leaves vulnerable those who have been able to continue working past the age of 65. These workers currently have no protection under the *Code* against discriminatory practices based on their age.

Impact of Mandatory Retirement

In September 2000, the OHRC launched an extensive, province-wide consultation on age discrimination. The OHRC received a tremendous response to this consultation and received many submissions regarding mandatory retirement. Many individuals and organizations told the OHRC that the imposition of retirement has a significant financial impact. People expressed a fear that they would lose their homes, face a significant drop in their standard of living, or even find themselves in a state of poverty. As well, being told that one is no longer a valued employee, solely because of one's age, has a profound psychological and emotional impact. One individual stated that "Much of human dignity is experienced and expressed through work. As social creatures, we need to feel valued and empowered, feelings that come from knowing we are contributing to our social fabric ... a significant number of people ... experience feelings of uselessness and devalued self-worth upon retiring".¹

As the Consultation Paper recognizes, mandatory retirement can have a particularly serious financial impact on some persons. Women who stay at home to raise children or care for family members do not receive income and cannot contribute to the Canada Pension Plan (CPP) for the years they do not work. Moreover, when they do return to work once they no longer have caregiving responsibilities, they may face retirement just as they reach the peak of their careers or earning capacity. Women who are part of the paid labour force but who tend to work in sectors where employer pension plans are not available, in part-time or temporary employment and in jobs that earn considerably less than men, face a different challenge. These women are unlikely to be able to accrue a large enough CPP, RRSP or private pension to allow them to retire to a decent standard of living. Women are therefore often at real risk of being forced into poverty as a result of mandatory retirement.

Recent immigrants face many of the same difficulties. They may have a shorter period of employment in Canada upon which to build up a pension and they, along with racial minorities and persons with disabilities also tend to have more restricted access to the labour market, lower incomes and greater unemployment during their working lives. As a result, these groups also face serious consequences because of mandatory retirement.

¹ *Time for Action: Advancing Human Rights for Older Ontarians*, Ontario Human Rights Commission, 2001

As well, a number of consultees told us that they are responsible for supporting others, such as family members with a disability, or university-aged children, and that they will not be able to do so if they are no longer permitted to work. They expressed great concern about the consequences of their retirement for their loved ones.

Workplace Policies Related to Retirement

The removal of the age 65 cap on *Code* protections against age discrimination would affect a number of workplace policies and practices.

Some employers, particularly in occupations that are high risk and/or physically demanding, view mandatory retirement policies as essential. Under the *Code*, mandatory retirement policies are not discriminatory where they are *bona fide* occupational requirements.² For example, policies that require police officers and firefighters to retire at age 60 have already been the subject of human rights complaints.

In the past, such policies were found justifiable on the basis of evidence of a correlation between age and physical decline that could impact upon the ability to perform the essential duties of the job safely, combined with evidence that individualized testing is impractical. However, it should be noted that in light of the new three-step test articulated by the Supreme Court of Canada³, it is no longer acceptable to rely on presumed group characteristics associated with

² Mandatory retirement at age 60 for police officers, fire fighters and a Chief Fire Prevention officer have been found to be a BFR; *Large v. Stratford (City)*, *supra*, note 14 (Police Officers), *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297 (Chief Fire Prevention Officer), *Hope v. St. Catharines (City)* (1998), 9 C.H.R.R. D/4635 (Ont. Bd. Inq.) (Firefighters).

Mandatory retirement of school bus drivers at age 65 has been found to be a BFR as expert medical evidence indicated that, as a group, those over 65 are more likely to have accidents, and that it is impossible to test individually to determine who is likely to have health problems or create risks for others; *MacDonald v. Regional Administrative School Unit No. 1* (1992), 16 C.H.R.R. D/409 (P.E.I. Bd. Inq.).

³ In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, the Supreme Court said:

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. [at 38]

aging. An employer seeking to justify mandatory retirement policies will be required to show that individualized assessment, as a form of accommodation, is impossible, in the sense that there is no method to do so, or that individualized assessment represents an undue hardship. Moreover, the British Columbia Court of Appeal has recently confirmed that mandatory retirement policies should be approached on a case-by-case basis with the employer bearing the onus of establishing that its policy is justifiable in the circumstances of its workplace. Mandatory retirement policies are often incorporated into collective agreements negotiated between the employer and a union. A large number of Ontarians are affected by such agreements. The jurisprudence is clear that human rights cannot be contracted away. If the age 65 limit in the *Code* is removed, these policies should be subject to review under the *Code*.

Employers have often used early retirement packages as an incentive to promote voluntary exit from the workplace. Such programs can have many benefits to all workers, and when designed properly (e.g., to ensure that no pressure is applied to workers, either directly or implicitly, to take such packages) early retirement schemes are appropriate and will not raise human rights concerns. It is not retirement policies *per se* that raise human rights concerns, but the mandatory nature of some of these policies.

During its consultation, the OHRC heard that if mandatory retirement is abolished, employers will be obliged to manage performance, and even terminate older workers who are having difficulty performing job duties. It is said that mandatory retirement allows individuals who are under-performing to leave the workforce in a socially acceptable fashion with a level of income security. However, mandatory retirement should not be a substitute for appropriate personnel policies such as progressive performance management and ongoing training. Treating older workers in the same way as co-workers, and evaluating them on the basis of actual performance rather than age-based assumptions, best promotes their dignity.

Pensions and Benefits

The protections in the *Code* extend to pension and benefit plans. Issues associated with pensions and benefits are often complex as they are governed by a complicated statutory regime as well as actuarial factors. Section 25 of the *Code* contains specific rules for pension and benefit plans. For example, subsection 25(2) of the *Code* provides that the right to equal treatment in employment is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the *Employment Standards Act* and its regulations. It is therefore difficult to make broad statements regarding the application of human rights law in the area of pensions and benefits.

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The removal of the age 65 cap in the *Code* could leave a number of standard pensions and benefits practices vulnerable to human rights challenges, including age-based limitations on pension contributions, or basing eligibility for pension benefits on reaching a certain age.

However, it should be noted that not every age-based distinction within pension and benefit plans will be discriminatory within the meaning of human rights law. Some age-based criteria or qualifications are not based on stereotypes, are not offensive to human dignity, and do not target an historically disadvantaged age group. For example, retirement schemes that are based on a minimum age combined with years of service and measures aimed at facilitating the transition from full-time employment to retirement would not likely be considered discrimination within the meaning of human rights law and policy.⁴

The reconciliation of *Code* values with pension and benefits regimes will therefore require careful consideration.

Impact on OHRC Caseload

Complaints regarding discrimination on the basis of age make up a small but steadily growing portion of the OHRC's caseload. In 2002/2003, the OHRC received 125 complaints citing age as a ground (approximately 7% of all complaints filed). In 2003/2004, 232 complaints cited age, making up approximately 9.5% of all complaints filed. The OHRC also receives numerous inquiries from persons concerned about the effect of mandatory retirement policies on them. The OHRC anticipates that, should the age 65 cap in the *Code* be removed as we are advocating, there will be an increase in the number of age-related complaints filed with the OHRC. Given the overall increase in the OHRC's caseload in recent years, the OHRC does have some concerns regarding resources to effectively meet any increased demand for its services.

Conclusion

The OHRC heard during its consultations that employees want choice. Abolishing mandatory retirement should not result in people being penalized if they choose

⁴ In *Broadley v. Steel Co. of Canada Inc.* (1991), 15 C.H.R.R. D/408 (Ont. Bd. Inq.), a provision in a collective agreement that granted employees with 25 years of service extended vacation benefits beginning at age 61 was challenged on the basis that it discriminated against employees under age 61. The Board found that this benefit was a special program designed to alleviate the difficulty older workers often experience in the transition from full employment to full retirement. The tribunal used a very broad definition of hardship: hardship covers a range of problems stretching from something "more than mere inconvenience" through "adversity, suffering, or humiliation" to "extreme privation or difficulty" (at D/411). However, this case was decided prior to the decision of the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. Today, a similar scheme could be dealt with by considering whether it discriminates by making distinctions that are offensive to human dignity.

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to retire prior to the age of 65, or automatically expected to work past the age of 65. Rather, it is intended that older persons be able to make the choice for themselves of when to leave the workforce, so long as they are capable of performing their jobs.

The OHRC hopes that this submission will be helpful to the Ministry in bringing mandatory retirement in Ontario to an end in a fair and effective manner. In keeping with the OHRC's commitment to public accountability and its duties in serving the people of Ontario, this submission will be made public.