



Ontario  
Human Rights Commission  
Commission ontarienne des  
droits de la personne

# Policy on discrimination against older people because of age

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## Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code* (*Code*) authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.<sup>1</sup> The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.<sup>\*\*</sup> Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and Tribunal,<sup>\*\*\*</sup> applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.<sup>\*\*\*\*</sup>

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<sup>\*\*</sup> Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the OHRC.

<sup>\*\*\*</sup> In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4<sup>th</sup> Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

<sup>\*\*\*\*</sup> Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*, available at:

[www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2](http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2)

## Introduction

The *Code* states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating 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 feels able to contribute to the community.

The *Code* prohibits discrimination because of age in the social areas of employment, services, goods, facilities, housing accommodation, contracts and membership in trade and vocational associations. The *Code's* protection against age discrimination extends to all persons over the age of 18.

Most of the claims filed regarding age discrimination are in the area of employment with services constituting the next largest area.<sup>2</sup> However, it is likely that incidents of age discrimination, particularly in job seeking and in services such as health care, remain unreported.<sup>3</sup>

This policy is the outcome of extensive research and consultation on issues of discrimination faced by older persons in Ontario.<sup>4</sup> In 2000, the Ontario Human Rights Commission published a Discussion Paper, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario*, which set the stage for a province-wide public consultation. In June 2001, the OHRC released its Consultation Report, *Time For Action: Advancing Human Rights for Older Ontarians* (“*Time for Action*”). The Report was intended to be a broad examination of all issues that may have an impact on the dignity and worth of older adults and may affect the enjoyment of equal rights and opportunities. As such, it contained a number of recommendations for government and community action. The OHRC also outlined several measures that it would take to address age discrimination, including developing this public policy statement.

Several conclusions resulted from the OHRC’s research and consultation and form the basis of this policy:

- Age discrimination is not seen as something that is as serious as other forms of discrimination despite the fact that it can have the same economic, social and psychological impact as any other form of discrimination.
- Society has accepted age-based criteria as a way in which to structure policies and programs and to make decisions about people in areas such as employment and services.
- Despite the fact that the population is aging, many aspects of society have been designed in a way that is not inclusive of older persons.
- Preconceived notions, myths and stereotypes about the aging process and older persons persist and give rise to discriminatory treatment.
- Age often works in “intersection” or combination with other grounds of discrimination to produce unique forms of disadvantage. For example,

women experience aging differently than men and older persons with disabilities face compounded disadvantage.

- Employers, service providers and others with responsibilities under the *Code* are looking for more information and guidance on meeting their human rights obligations vis-à-vis older persons. A shortage of skilled workers in certain fields means creative strategies are being sought by employers to attract and retain older workers.

This policy sets out the OHRC's position on discrimination against older persons as it relates to the provisions of the *Code*. It deals **only** with issues that fall within Parts I and II of the *Code* and that could form the basis of a human rights claim. *Time for Action* contains a broader examination of social policy and other issues which must be addressed through positive action by government and community partners. In addition, the OHRC is engaged in, and will continue to undertake, initiatives to address broader human rights issues related to age. The purpose of this policy is to:

- help the public understand how the *Code* protects persons against discrimination as they age
- make older persons aware of their right to equal treatment in employment, housing accommodation, goods, services, and facilities, contracts and membership in trade unions, without discrimination
- assist employers and providers of services and housing to understand their responsibilities under the *Code*
- assist the OHRC in dealing with issues relating to age discrimination
- provide a resource for educational initiatives and development of internal policies and procedures.

The analysis and examples used in this policy are based on the OHRC's research on age discrimination, principles and recommendations developed by the United Nations to guide countries in the promotion of the rights of older persons<sup>5</sup>, cases that have come before the OHRC, tribunal and court decisions and the input of individuals and organizations in the OHRC's consultation process.

## **2. "Age," "older" person and human rights concepts**

### **2.1 The definition of "age" in the Human Rights Code**

Subsection 10(1) of the *Code* defines age as:  
an age that is eighteen years or more.

Older persons can file a claim of age discrimination in all social areas including:

- employment
- services, goods and facilities (health care, social services, transit services, shops, restaurants, education etc.)

- housing (such as rental accommodation, condominium facilities, hotels and motels, residential care facilities and social housing)
- contracts
- membership in occupational associations, trade unions and self-governing professions.

## **2.2 The terms “older” and “ageism” as used in this Policy**

People may experience age discrimination at any time in their lives. However, persons who belong to, or are perceived to belong to, certain age groups tend to be more vulnerable to certain forms of discrimination. For example, younger persons may be more likely than middle-aged or older persons to be turned away from housing because of stereotypes around the desirability of younger tenants. As this policy focuses on the forms of age discrimination most commonly experienced by persons **as they age**, it has become necessary for the OHRC to adopt some terminology to describe the cohort that is at risk for experiencing these forms of age discrimination. It has chosen to do so by using the term “older” persons or workers. However, discrimination on the basis of age can be experienced by persons beginning as early as 40 to 45, particularly in employment. The term “older” is not meant to denote “old age” or stigmatise persons in any way. Rather it is simply being used as a relative concept meaning older than those who are less likely to face the particular types of discrimination being discussed.

It is important to remember that the concept of who is an “older” person may be a contextual one. For example, while older workers are generally those over age 45, if the average age in a workplace is 25, a 37-year-old job applicant may be turned away because of a perception that she is unable to fit in with the workplace culture. Therefore, in some situations, for example where the allegation pertains to negative attitudes and stereotypes about aging, it may be necessary to think not in terms of absolutes, but rather relative age. In other contexts, actual age may be relevant, for example, where a person’s age is used to determine eligibility for a program or service.

The terms ageism and age discrimination are both used in the OHRC’s work. Ageism refers to a socially constructed way of thinking about older persons based on negative stereotypes about aging as well as a tendency to structure society as though everyone is young. Ageism refers primarily to attitudinal barriers while age discrimination encompasses actions, namely treating someone in an unequal fashion due to age. Moreover, discrimination is a legal concept that has been defined in the *Code* and in court decisions and not every manifestation of ageism is age discrimination within the meaning of human rights law and policy. Ageism, however, is often the cause of age discrimination. It is therefore important from a human rights perspective to address both acts of age discrimination and also ageist attitudes that exist in society.

### **2.3 Other human rights concepts referenced in this Policy**

The *Code* and human rights case law contain a number of complex concepts and legal standards. For those who are not familiar with the terminology, it can be very difficult to understand a discussion of rights issues when these terms are used. Please see the Glossary at the end of this policy for a summary of the meaning of some of the key concepts that are referenced throughout this policy.

## **3. The intersection of age with other grounds of discrimination**

The experience of age discrimination may differ based on other components of a person's identity. For example, certain groups of older persons may experience unique barriers as a result of the intersection of age with gender, disability, sexual orientation, race, ethnicity, religion, culture and language. Please see *Time for Action* for a more detailed discussion of "age and intersectionality" and the particular barriers faced by certain groups.

This understanding of the complexity of how people experience age discrimination means that, where appropriate to the circumstances of the alleged discrimination, all relevant grounds must be considered along with age.

**Example:** A 55-year-old woman alleges that she was refused a job as a waitress because she didn't fit the image that the restaurant is trying to promote. The evidence reveals that the restaurant employs many younger women as waitresses as well as older men as waiters and maître d's. The fact that older persons (men) are employed and younger women are employed does not necessarily defeat her claim of discrimination as there may be unique stereotypes attributed to older women with regard to image or attractiveness.

It may be necessary to examine any stereotypes as well as the historical, social and political context associated with the particular combination of grounds.

**Example:** A 72-year-old man has recently immigrated to Canada. He has difficulty finding a physician in his community as there is already a shortage of doctors and he is perceived as a patient who will require a lot of time due to his age and the fact that he is not fluent in English or French. He finds he must attend drop-in clinics and when he complains of feeling depressed, he is told that it is to be expected considering his age and the fact that he has recently moved to Canada. He is not sent for further assessment.<sup>6</sup>

In some cases persons may be put at a 'double disadvantage' as a result of age combined with other grounds of discrimination.

**Example:** Empirical evidence confirms that older persons and persons with disabilities all face higher unemployment rates. As well, members of racialized groups are more likely to be underemployed. Therefore, an older African Canadian person who is developing a disability will likely face compounded disadvantage in a job search.<sup>7</sup>

As a society, we must be aware of the unique ways in which people may experience disadvantage. In seeking to understand rights and responsibilities, in addition to this policy dealing with age discrimination, where other grounds of discrimination may be at play, other OHRC policies such as the *Policy and Guidelines on Disability and the Duty to Accommodate* may be relevant.

## 4. General principles

### 4.1 When is differential treatment discriminatory?

The purpose of anti-discrimination laws is to prevent the violation of human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice. In many cases, differential treatment because of age will clearly be discriminatory. However, in other cases, it may be necessary to consider whether the treatment can be said to constitute “discrimination” in the sense of being something that is protected by human rights law.

Some age-based criteria or qualifications are not based on stereotypes, are not offensive to human dignity and do not target a historically disadvantaged age group. For example, discounts on services for persons under 25 or over 55, 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<sup>8</sup> would not likely be considered discrimination within the meaning of human rights law and policy.

In the context of equality claims under s. 15 of the Canadian *Charter of Rights and Freedoms* (the “*Charter*”), the Supreme Court of Canada has offered the following three broad inquiries as a tool for determining whether discrimination has occurred:

#### (1) Differential treatment

Was there substantively differential treatment, either because of a distinction, exclusion or preference, or because of a failure to take into account the individual’s already disadvantaged position within Canadian society?

#### (2) An Enumerated ground

Was the differential treatment based on an enumerated ground, in this case age?

#### (3) Discrimination in a substantive sense

Finally, does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, an individual? The discrimination might be based on stereotypes of a presumed group or personal characteristics, or might perpetuate or promote the view that an individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society who is equally deserving of concern, respect and consideration. Does the differential treatment amount to discrimination because it makes distinctions that are offensive to human dignity?

In *Law v. Canada (Minister of Employment and Immigration)*<sup>9</sup> the Supreme Court of Canada applied these three inquiries to conclude that even though the claimant was not entitled to a survivor's pension when her spouse died simply because of her age (she was 30), it was not discrimination under s. 15 of the Charter. Under the pension scheme, full benefits were paid to surviving spouses over the age of 45, partial benefits were paid to those between 35 and 45 and no benefits were available to surviving spouses under age 35. The Court found that persons under age 45 have not historically been subjected to discrimination and that younger persons do not face the same barriers to long-term labour force participation that the benefit was designed to address. The law did not stereotype, exclude, devalue or demean adults of the claimant's age.

#### **4.2 Age 65 benefits, special programs and special interest organizations**

In certain circumstances, the *Code* permits programs and benefits aimed at a specific age group.

The *Code* expressly provides for the preference of persons over 65 years of age:

*15. A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment.*

This permits seniors' discounts, seniors-only housing and other benefits aimed only at persons over 65.

As well, section 14 of the *Code* permits the use of special programs in all social areas. This allows preferential treatment or programs aimed only at older persons, even if they have not yet reached the age of 65, if the purpose of the program is to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve equal opportunity.

It is important that special programs be designed so that restrictions within the program, for example with regard to the age of those eligible to participate, are rationally connected to the objective of the program. A failure to do so, can lead to successful challenge of the program and a finding that it is discriminatory.<sup>10</sup>

The OHRC's *Guidelines on Special Programs* provide detailed information on how a special program can be planned, implemented and monitored.<sup>11</sup>

Section 18 of the *Code* allows certain types of organizations to limit participation or membership based on *Code* grounds including age:

*18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.*

**Example:** A charitable organization that is primarily engaged in serving the interests of women over the age of 55 through researching issues of interest to this group and lobbying government to make changes to law and policy limits its membership to persons similarly identified.

An organization that wishes to rely on this defence must show it meets all of the requirements of this section.

#### **4.3 When are standards, factors, requirements or rules that discriminate on the basis of age justifiable?**

A person who wishes to assert a human rights claim (a “claimant” or “applicant”) has the burden of making out a *prima facie* case of discrimination. After that, the legal burden shifts to the party complained about (often known as the “respondent”) to justify that its action is reasonable and *bona fide* in the circumstances (rules that can be justified as *bona fide* are often referred to as *bona fide* requirements or BFRs.).

Section 11 of the *Code* allows a respondent to justify a standard, factor, requirement or rule that has an adverse effect because of age by showing that it is a BFR. For example, a requirement that job applicants be “recent graduates” of a program may have the effect of excluding older candidates who are less likely to have completed their studies recently. However, the employer has the opportunity to show a justifiable reason for this requirement.

Section 24 allows direct discrimination in employment for reasons of age if the age of the applicant is a BFR because of the nature of the employment. For example, if an employer has a policy of hiring persons under a certain age only, it can attempt to show that this is reasonable in the circumstances.

Whether the discrimination is direct or by adverse effect, the Supreme Court of Canada has set out the same **three-step test** for determining whether discriminatory

standard, factor, requirement or rule can be justified as a BFR. The respondent must establish on a balance of probabilities that the standard, factor, requirement or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

The ultimate issue is whether the person who seeks to justify the discriminatory standard, factor, requirement or rule has shown that accommodation has been incorporated into the standard up to the point of undue hardship.

In this analysis, the procedure used to assess and achieve accommodation is as important as the substantive content of accommodation. The following non-exhaustive factors should be considered in the course of the analysis:

- whether the person responsible for accommodation investigated alternative approaches that do not have a discriminatory effect
- reasons why viable alternatives were not implemented
- ability to have differing standards that reflect group or individual differences and capabilities
- whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner
- whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

#### ***4.4 Combating “ageism” through inclusive design***

The OHRC has defined “ageism” to mean, in part, “a tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons.”<sup>12</sup> Ageism occurs when planning and design choices do not reflect the circumstances of all age groups to the greatest extent possible.

The Supreme Court of Canada has recently made it clear that society must be designed to be inclusive of all persons. It is no longer acceptable to structure systems in a way that assumes that everyone is young and then to try to accommodate those who do not fit this assumption. Rather, the age diversity that exists in society should be reflected in the design stages so that physical, attitudinal and systemic barriers are not created.<sup>13</sup>

As a corollary to the notion that barriers should be prevented at the design stage through inclusive design, where systems and structures already exist, organizations

should be aware of the possibility of systemic barriers and actively seek to identify and remove them.

#### **4.5 Individualization vs. assumption**

Another emerging human rights principle that has particular significance for age discrimination is the notion of individualized assessment and accommodation.

In the past, many standards, factors, requirements and qualifications that discriminate on the basis of age have been justified on the basis of **presumed characteristics** associated with aging.

**Example:** Mandatory retirement of police officers and firefighters at age 60 has been accepted where an employer has provided evidence of cardiovascular disease and decline of aerobic capacity associated with aging and has shown that individualized testing is “impractical”.<sup>14</sup>

However, in light of recent decisions from the Supreme Court of Canada, the Ontario Court of Appeal and the British Columbia Court of Appeal it does not appear that this type of approach is sufficient.<sup>15</sup> Rather, those seeking to justify age-based policies must show that individualized assessment as a form of accommodation is impossible, i.e. there is no method to do so or that it represents an undue hardship.

The onus is on those seeking to justify a discriminatory standard to show they have provided individualized assessment and accommodation that recognizes the ‘unique capabilities’ of every individual, unless to do so would cause undue hardship. Specifically, rather than judging individuals against **presumed group characteristics**, individualized assessment or testing to determine whether a person has the necessary aptitude or qualifications should be used, subject to the undue hardship standard.<sup>16</sup>

## **5. Employment**

Assumptions and stereotypes about older workers are unfortunately all too prevalent in our workplaces. Older workers are often unfairly perceived as less productive, less committed to their jobs, not dynamic or innovative, unreceptive to change, unable to be trained or costly to the organization due to health problems and higher salaries. These ideas about older workers are simply myths that are not borne out by evidence. In fact, there is significant evidence that older workers: are highly-productive, offering considerable on-the-job experience<sup>17</sup>

- do as well or better than younger workers on creativity, flexibility, information processing, accident rates, absenteeism and turnover<sup>18</sup>
- can learn as well as younger workers with appropriate training methods and environments<sup>19</sup>

- do not fear change but rather fear discrimination.<sup>20</sup>

Aging is a highly individual experience and it is not possible to generalize about the skills and abilities of a person based on his or her chronological age, any more than it is possible to make assumptions about someone based on any *Code* ground.

As a general principle, older workers should be treated as individuals, assessed on their own merits instead of presumed group characteristics and offered the same opportunities as everyone else in hiring, training and promotion. They should be subjected to the same performance management practices as every other worker. Age, including assumptions based on stereotypes about age, should not be a factor in decisions about lay-off or termination.

In fact, underestimating the capabilities of older workers and treating them differently as a result can actually hinder them from maintaining their productivity and value. On the other hand, treating older workers equally allows employers to utilize a valuable resource, especially given that there are current and projected labour shortages.

**Example:** An employer assumes that an older worker is too difficult to train and, in any event, is “riding it out to retirement”. She is not sent for training and is given performance reviews that do not meaningfully identify strengths and areas where there is room for improvement. Her skills do not remain current, she cannot work on improving in her weaker areas and she is less motivated to work hard because she feels she is not a valued worker, is not expected to perform and will never be recognized for her contribution.

## **5.1 Hiring**

Older workers face significant barriers in finding employment. These can take the form of overt discrimination, such as not hiring someone simply because of his or her age, or more subtle or systemic discrimination, such as eliminating someone because of a perception he or she lacks “career potential”. Such barriers can be compounded for persons who belong to groups that face their own barriers in accessing employment such as racialized persons, newcomers to Canada and persons with disabilities.

Whether the discrimination is overt or systemic, the *Code* protects individuals against discrimination on the basis of age in the hiring process. The *Code* prohibits a job advertisement that directly or indirectly classifies or indicates qualifications by age (subsection 23(1)). Similarly, application forms and oral questions must not directly or indirectly classify or indicate qualifications on the basis of age (subsection 23(2)). However, during an employment interview, questions may be asked about age provided that drawing a distinction on the basis of age is permitted under the *Code*.

This means that:

- **In an advertisement:** Statements that directly or indirectly relate to age should be avoided. Nothing should unfairly prevent or discourage an older worker from applying for a job. Requirements or duties for employment should be reasonable, genuine and directly related to the performance of the job.
- **On an application form:** While a form may ask “Are you 18 years or older and less than 65 years of age?” it should not ask any other questions about or relating to age or date of birth. The form should not request copies of documents that indicate age. Some employers may even choose not to ask when schooling was completed as this may often indicate age.
- **During an interview:** Questions relating to age should only be asked if a *Code* defence applies such as where a special program is in place (section 14), employment is aimed specifically at persons 65 or over (section 15), the employer is a special interest organization serving a particular age group (section 18) or age is a BFR.

Where age or date of birth is relevant to company pension and benefit plans, this information should be collected after making an offer of employment and should be kept confidential.

Demonstrating that age was directly or indirectly a factor in a hiring decision can be challenging. Employers rarely state that age was the reason for not giving an applicant the job. However, the following considerations may suggest that age was a factor in not hiring an applicant:

- The employer indicated qualifications at any stage of the recruitment process which can reasonably be interpreted as a euphemism for age: e.g. “Do you think you can handle this job? It takes a person who is full of vim and vigour.”, “We are looking to rejuvenate the workforce.”
- There is evidence the assessor made an issue about the age of the applicant such as by commenting on the applicant’s appearance and/or health or suggesting that the applicant may not fit into a youthful work culture.
- There is evidence that the employer considered age to be relevant when determining whether a person might adapt to certain job conditions such as menial tasks, minimal responsibility, low pay, shift work, being supervised by a younger person or that the employer felt that the candidate would not be trainable.<sup>21</sup>
- There is evidence that the employer felt that person would be too costly to the organization because of his or her age: e.g. there was an assumption that there will be less time to recoup training costs, the applicant will expect a higher salary, or an older person will cost more in benefits, especially related to disability.
- There is a pattern in the past hiring or employment practices of the employer suggesting a preference for, or an institutional bias toward, younger workers.

Statistical evidence can be relevant in this regard (see discussion of statistical evidence in section 5.2 On the job].

- The applicant's qualifications for the job were as good or better than those of the person hired and the person hired was significantly younger than the applicant. This will be compounded if any of the above factors are also present, such as a pattern of preferring younger applicants or commentary related to age. Also, the intersection of other disadvantaging factors such as race, ethnic origin, gender and disability may be important to consider if there is evidence of other patterns of discrimination in the workplace.

Some of the reasons that may be given for not selecting an older candidate are neutral on their face and yet may have a disproportionate impact on older persons. Some non-exhaustive examples include:

- **Turning away someone due to a perceived lack of “career potential”:** This requirement tends to adversely impact on older applicants, especially where they are applying for “entry-level” type jobs. Given the high rates of turnover in today's labour force and the fact that it is rare for someone to remain with the same organization for their entire career, it may be difficult to justify turning away an otherwise qualified person on the basis that they will not stay and grow within the organization solely because of their age.
- **Refusing an applicant who has “too much experience” or who is “overqualified”:** Sometimes this is simply used as a pretext for direct discrimination. However, most often this is a neutral factor that is not intended to discriminate. Nevertheless, turning away candidates who are “overqualified” may sometimes have an adverse effect on older persons, as they are more likely to have significant work experience and at the same time be changing careers due to a period of unemployment or a desire to transition into retirement. This can be compounded for others such as newcomers to Canada who may have no choice but to apply to positions they may seem overqualified for in order to get “Canadian experience”<sup>22</sup> or to “get their foot in the door”. Human rights law is based on the principle that employment decisions should be based on the applicant's ability to do the job. Therefore, the potential for human rights claims can arise where a qualified person is willing to take a job at the rank and salary offered but is refused simply because he or she has additional experience or skills.
- **Eliminating an applicant because the applicant's background is too diversified or contains gaps, the applicant is too specialized and will have trouble learning or the applicant's experience is too remote:** All of these factors can serve to disproportionately screen out older workers. Persons with longer work careers may appear more diversified and less “focused”. This can be a particular problem for older women who have re-entered the workforce after childrearing and have had to retrain. Older workers may seem too specialized if they have been doing a job for a long period of time. Of course, if someone's experience is not relevant to the job, they may not be qualified and will not have to be hired. However, an

older applicant should be attributed with just as much potential for redevelopment in a new area as a younger one. Finally, because older persons on average take longer to find a job and may have to accept alternative employment, it will not be unusual for an older applicant not to have worked in his preferred occupation for some time. This should not be an automatic disqualifying factor. Rather, consideration should be given to whether the time lapse has devalued his credentials.

An employer can always demonstrate a non-discriminatory reason for not hiring a candidate or preferring another candidate. Therefore, it is a sound practice, both from a human resources and human rights perspective, to develop up-front, objective and job-related screening criteria for job competitions, to score candidates relative to these criteria and to retain all records related to job competitions for at least one year after the competition has been completed.<sup>23</sup> As well, as discussed earlier in this policy an employer can disqualify someone because of age, either directly or through a neutral rule that has an adverse impact, if it can justify the requirement as reasonable and *bona fide* using the **three-step test** set out above. However, it should be borne in mind that the decisions to date where employers have tried to justify turning someone away solely because of their age have shown that it can be very hard to do so, especially if the concern for the employee's capacity is largely based on cost rather than on health and safety.<sup>24</sup>

## **5.2 On the job**

Due to current and anticipated labour shortages, many employers, economists and labour market specialists are beginning to stress the importance of promoting retention of older workers. Of course, ensuring an equal opportunity and discrimination-free work environment is one of the best ways to ensure that older workers will remain in the workforce longer.

Subject to *bona fide* requirements, denying or restricting employment opportunities or treating a worker differently because of age is a violation of the *Code*.

Examples of unequal treatment because of age include but are not limited to:

- Limiting or withholding employment opportunities including transfer, promotion and training opportunities.
- Not assigning an older worker to certain tasks or projects or subjecting an older worker to an unwanted transfer because of age.<sup>25</sup>
- Performance managing older workers in a different way than other workers. This includes subjecting an older worker's performance to a higher level of scrutiny but also failing to performance manage because of a perception that the older worker's performance is linked to age or because of a belief that performance management is not necessary as the person will soon be retiring.
- Not recalling someone from lay-off because of age.<sup>26</sup>

- Terminating someone's employment because of age.<sup>27</sup> Of course, employers are not precluded from terminating older workers, using the same performance management criteria as for any other worker, where there are legitimate performance concerns that are based on objective evidence about the employee's ability to perform the duties of the job.

Statistical evidence regarding systemic issues in the workplace can constitute circumstantial evidence from which it may be possible to infer that discrimination probably occurred in an individual case.<sup>28</sup>

**Example:** An organization was concerned about the aging of its employees and the fact that there would be a number of managers retiring within a 15-year period. Accordingly, recruitment practices were modified to meet the "long-term professional needs of the department." Statistical evidence dealing with age distribution of employees showed a disproportionate number of employees under 40 and the vast majority of recruits under 30. The tribunal found that the organization had set about recruiting a younger work force and that the 43-year-old claimant who had been with the organization 7 years was not offered a promotion into a particular position, in part, because he did not fit the profile for the organization's recruits into that position. There was "compelling circumstantial evidence of an organizational predisposition against promoting older internal candidates into ES positions."<sup>29</sup>

Older workers tend to experience disproportionate displacement or disadvantage as a result of workplace reorganization and downsizing. This can occur for a number of reasons such as an assumption that due to their age or the fact that they have been doing their job a certain way for a period of time, they will have more trouble learning new technology or procedures, a perception that they will not be willing to accept changes to terms and conditions of work such as reduced pay or different work hours, or a belief that it is more equitable to displace them as they can take early retirement. As well, reorganization and downsizing may simply be used as a means to "rejuvenate" the workforce by getting rid of older workers.

**Example:** Due to an economic downturn, a company was forced to lay off staff. The claimant, a foreman, had worked for the company for over 32 years and was 57 at the time he was selected for termination along with another foreman who was aged 56. Both were offered a generous retirement package. The two foremen who remained were younger than the two released. The vice-president had prepared a note indicating that the two older workers who were terminated were told of the need to reduce people and that they "hoped to keep people with career potential." The tribunal found age discrimination on the basis of the good employment record of the claimant, the ages of those selected for lay-off compared

to those retained and this statement which was found to be a “euphemism; its meaning concerns age.”<sup>30</sup>

**Example:** A business that served the public opened a larger facility designed to handle a greater volume of clients and introduced a new computer system. Two female staff persons in their 50s were transferred to positions which represented a demotion. Younger workers staffed the positions that they previously held. In finding age discrimination, the tribunal noted that the employer had not provided the claimants a meaningful opportunity to demonstrate they were able to perform the new duties, failed to provide even a minimal training and didn't give the claimants notice of the alleged performance concerns that were raised as a defence at the hearing. The tribunal noted that the employer's belief about older workers' capacity to learn and adapt to technological change was impressionistic and not a valid reason for changing the claimants' duties.<sup>31</sup>

The following factors will help guide any consideration of whether age discrimination has occurred in a workplace reorganization or downsizing:

- Comparison of the performance of those who were selected for termination versus those who remained with the organization.
- Statistical evidence indicating a disproportionate number of younger workers can suggest an organizational bias for younger workers. As well, an analysis of the ages of those who were selected for adverse treatment in a reorganization as well as an analysis of the ages of those who were not can be relevant circumstantial evidence that age was a factor in the company's decision making.<sup>32</sup>
- Criteria that can be applied in a way that disproportionately impacts on older workers such as: flexibility, rate of pay, ability to adapt to change, ability to be trained, being a generalist vs. a specialist. An assessment of personal suitability that is based on subjective considerations is always vulnerable to scrutiny as it can result in stereotyping or unconscious biases being brought into play.<sup>33</sup>
- Indications that workers were selected for termination because of a perceived propensity to retire or because they are pension-eligible.<sup>34</sup>
- A determination that the organization deviated from a previous approach, such as using seniority.
- Evidence of statements that can be interpreted as euphemisms for age such as “career potential”, “rejuvenate”, “renewal” etc.

On the other hand, there are ways in which employers can ensure that the decisions made in a workplace reorganization will be fair and non-discriminatory. Criteria should be objective and not based on subjective impressions about the particular worker's enthusiasm, flexibility or willingness to adapt. They should be demonstrably related to the goals of the reorganization or the needs that have been identified by the company. Ideally, positions rather than people should be selected for elimination and those positions should not subsequently be refilled.<sup>35</sup>

**Example:** A company decides that, due to decreased profits and the need to be more competitive in the marketplace, it will introduce a new, more automated production system. It identifies the number of positions that will be required to be staffed and what the duties of each will be. It also identifies the current positions that will no longer be required and why. It advises each person whose position has been determined redundant of this fact and how this decision was reached. It then invites all of these persons to compete for the new positions. It runs the competition using objective, age-neutral criteria and a scoring system which measures each candidate against the stated criteria. Past performance reviews are taken into account. The candidates with the best scores are selected and sent for training.

### **5.3 Retirement**

Before December 12, 2006 the *Code* did not prohibit age discrimination in employment against persons aged 65 or older. As a result, policies requiring mandatory retirement at age 65 could not be challenged under the *Code*. This is now no longer the case. Persons aged 65 and older who believe that they have been discriminated against on the basis of age, including through mandatory retirement policies, may file a claim of discrimination on the basis of age.

This does not mean that employers cannot have retirement programs based on a certain age. Rather, it means that such programs cannot be mandatory, except for judges, masters and justices of the peace under the Courts of Justice Act, for whom there is a specific exemption under the *Code*.

In some occupations, employers may wish to impose mandatory retirement on workers who reach a certain age on the basis that being younger than that age is a BFR.<sup>36</sup> For example, policies that require police officers and fire fighters to retire at age 60 are frequently used. In the past, before the new **three-step test**, 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 Canada, it is no longer acceptable to rely on presumed group characteristics associated with aging. An employer seeking to justify mandatory retirement must 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.

Except in circumstances where mandatory retirement can be shown to be a *bona fide* requirement, collective agreements containing mandatory retirement provisions can no longer be enforced.

Early retirement packages are often offered as an incentive to promote voluntary exit from the workforce. This can have many benefits to all workers: older workers may be offered a lucrative incentive which will allow them to pursue other interests or ambitions while at the same time ensuring that fewer workers will involuntarily lose their jobs. When designed properly, early retirement schemes are appropriate and will not raise human rights concerns. Also, if an employer has a non-discriminatory reason for terminating an older worker and wishes to offer the option of early retirement, there is nothing to prevent it from doing so. However, as early retirement schemes, by definition, target older workers, great care must be employed in using them as a means to achieve downsizing objectives.

In some situations, using early retirement to encourage older workers to leave the organization can raise concerns from a human rights perspective. This will occur if there is direct or implicit pressure being applied to accept retirement. Furthermore, if the older worker does not accept retirement, is subsequently selected for termination and the reason for selecting him or her for termination is related to age, an organization may face a human rights claim.

**Example:** A company decides that it needs to reduce its workforce by 10%. Human resources reviews the files of all workers and identifies all workers over the age of 60. Each one of them is called in for a meeting with management and told that they are nearing retirement age and should accept an early retirement package so that younger persons won't lose their jobs. They are warned that if they do not do so, their position may be selected for elimination in which case they will simply receive severance and lose the opportunity to receive the early retirement package. Under these circumstances, some older workers feel compelled to accept the offer despite the fact that they were planning to work longer.

The fact that a generous retirement package is offered does not defeat a claim of age discrimination if the early retirement option was not truly voluntary.<sup>37</sup>

Employers can take steps to ensure that an offer of early retirement is not coercive:

- Define the eligibility criteria for the voluntary retirement program and share them with all staff, irrespective of age, through a neutral medium such as a written document. A response deadline and a contact who can provide information should be provided so that those who qualify and are interested in the option can then decide if they wish to follow up on the offer without any pressure from management. Some employers even chose to offer similar voluntary exit incentive packages to persons who are not near retirement age.

- Do not make any link between acceptance of the package and job loss. If the workforce is being downsized, indicate what the criteria will be for selecting the jobs that will be eliminated. Employees can even be assured that eligibility for the voluntary exit program will in no way influence decisions about job loss.

Conversely, an employee cannot claim age discrimination if the employer does not offer him or her access to the voluntary exit program because the employer still requires his or her services.<sup>38</sup>

### **5.4 Pensions, benefits and seniority**

The protections in the *Code* extend to pension and benefit plans. As well, other grounds of discrimination such as disability and marital status are often relevant when considering pension benefits.

Section 25(2) of the *Code* states that rights are not infringed by pension and benefit plans that comply with the *Employment Standards Act* and regulations. O. Reg. 286/01 under the *Employment Standards Act* regulates employment-related disability, medical, dental, drug, life insurance and pension plans. This regulation defines “age” as “any age of 18 years or more and less than 65 years”. This means that pension and benefit plans that differentiate based on age 65 cannot be challenged under the *Code*. The OHRC has publicly expressed its concerns regarding these provisions and recommended legislative change.<sup>39</sup> The OHRC would encourage employers and unions to nevertheless develop and maintain pension and benefit policies and programs that comply with the spirit of the *Code*, do not use age-based criteria and are based on *bona fide* requirements.

The Regulation also permits other age-related distinctions in the provision of pension and benefit plans, for example, where age-related distinctions in contribution rates are made on an actuarial basis.

Sick leave plans that make benefits available based on age have been found to be discriminatory.<sup>40</sup> Reduced pension benefits for early retirees have been found not to be discriminatory where the actuarial present value of reduced pensions for early retirees is at least equal to the present value of the deferred pension for those who wait until the age of eligibility for full pensions.<sup>41</sup> Similarly, basing eligibility for pension benefits on reaching a certain age will not likely be considered discriminatory.<sup>42</sup>

It is not permissible to use age to assign seniority when more than one employee is hired on the same day.<sup>43</sup>

### **5.5 Accommodating the older worker**

Older workers may require accommodation for reasons such as disability and the need to care for an ailing spouse. The OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate* outlines rights and responsibilities with regard to accommodating workers with disabilities. In addition, the OHRC's publication *Human Rights at Work* explains that an employer's duty to accommodate on the basis of family and marital status extends to employees who have work absences due to family-related responsibilities and encourages flexible work arrangements to help employees balance work and personal life.<sup>44</sup> These obligations exist regardless of the age of the employee. However, due to a relationship between age and disability, these needs may become more apparent as workers and members of their family age.

Flexible work arrangements also benefit older workers who may be experiencing a decline in capacity and provide for an easier transition into retirement. Traditionally, workforce participation has been seen as an 'all or nothing proposition'; people either work full-time or are retired. However, moving from full-time work, spanning a lifetime, to the complete absence of work is a major change carrying with it social, psychological and financial implications.<sup>45</sup>

To facilitate the transition from employment to retirement and to encourage older workers to remain in the workforce longer, there is currently a trend towards more flexibility and phased in retirement. Therefore, employers may want to consider measures such as:

- flexible hours and conditions of work such as compressed work weeks (working longer days in exchange for a shorter work week), flex-time (flexibility in start, end and break times as long as an agreed upon number of hours are worked), tele-working (working from home)
- part-time arrangements and job sharing, which allow for a transition into retirement while at the same time providing opportunities for other workers, e.g. a new parent who wishes to work part-time as well
- employing workers who have chosen to retire on short-term contracts or as consultants.

As discussed earlier, the duty to accommodate requires designing a workplace that is inclusive of older workers. It also requires individualized assessment and accommodation to meet the changing needs and capacities of older workers. For example, if an older worker finds a physically demanding task challenging, the employer should either assign it to someone else, if it is not one of the essential duties of the position, or seek other ways in which to accommodate the worker.

## 6. Housing accommodation

Section 2 of the *Code* protects older persons against discrimination in housing. This right applies to renting, being evicted, building rules and regulations, repairs and use of services and facilities. Housing includes a range of accommodation options including rental accommodation, condominiums, retirement homes and care facilities. There can be some overlap between housing and services, for example seniors' residences in which services such as housekeeping, meals or medical assistance are provided.

The *Code* prohibits either direct or adverse effect discrimination in housing. For example, a housing provider should not turn away older persons because it wishes to attract more youthful residents. Similarly, older persons who may be paying lower rents due to longer tenure in their rental unit should not be targeted for eviction by landlords who wish to attract new tenants at a higher rent.

While there are some exceptions, older persons tend not to be turned away from housing due to discriminatory perceptions about age. Rather the main barrier to housing experienced by older persons is a lack of housing to meet their needs both in terms of affordability and also in terms of accessibility.

It is the OHRC's view that older persons benefit from the support, community and income security offered by seniors' housing projects. As well, the concept of "aging in place" has been recognized by the OHRC as a central consideration so that in some cases it may be appropriate to offer "seniors' housing" to those under the age of 65 who may have special needs that will remain as they age.

Therefore, the OHRC would encourage housing aimed at older persons, including those less than 65 years of age, which will foster the objectives of the *Code*. However, those responsible for such housing must be aware that age restrictions are *prima facie* discriminatory and that they must be able to justify them using one of the defences in the *Code*. Possible options include:

- Section 15: provides a defence to preferential treatment of persons 65 and over. This insulates housing that is limited to persons over age 64 from challenge by those too young to qualify.
- Section 14: permits special programs to alleviate hardship and disadvantage. This may allow social housing aimed at older low-income persons over a certain age, but starting at less than 65, if it can be shown that this group experiences particular disadvantage associated with their socio-economic status that younger persons do not experience. This might also permit specially designed barrier-free housing projects offered exclusively to older persons with disabilities.
- Section 18: religious, philanthropic, educational, fraternal or social institutions or organizations which primarily serve the interests of older persons, or older persons who belong to a particular religious or ethnic community, and which provide housing accommodation as part of their

services may be able to restrict that accommodation to persons who are similarly identified. However, in order to rely on this defence, the provision of accommodation alone is not sufficient, some other “service or facility” must be provided.<sup>46</sup>

**Example:** A synagogue runs a seniors’ residence the purpose of which is to foster the religion and culture of its residents. Prayer services are provided and kosher food is served. It restricts membership to persons of the Jewish faith who are over the age of 60.

There is no defence, however, that will permit “adult lifestyle” housing that results in the exclusion of children or persons under a certain age.<sup>47</sup>

Older persons may require accommodation in order to enjoy housing on an equal basis with other residents. The person responsible for the housing, such as the landlord in the case of rental accommodation or the condominium corporation in the case of condominium units, has a duty to accommodate the needs and capabilities of older residents, subject to the undue hardship standard<sup>48</sup> :

**Example:** A tenant in a rental unit develops arthritis and requests that doorknobs in her suite as well as to common areas such as the laundry room be changed from round knobs, that are difficult to grip, to handles that are suitable for persons with arthritis. The landlord willingly makes this change as it is not an undue hardship to do so. Moreover, it will benefit other tenants in the building who are also aging.

The duty to take steps to address special needs might include changes to an older person’s apartment (except where owned by the person him or herself), building entrance, sidewalks, parking facilities and common areas. This might include physical modifications such as installing elevators, ramps, visual fire alarms and doorbells for the hearing impaired, different door handles, lower counters etc. It can also require other forms of accommodation such as waiving or changing a rule, allowing transfer to another unit without penalty<sup>49</sup>, providing better maintenance such as more frequent snow removal and so on.

## 7. Goods, services and facilities

Section 1 of the *Code* prohibits age discrimination in “services, goods and facilities”. This includes but is not limited to educational institutions, hospitals and other health services, community care access centres, long-term care facilities, insurance providers, public places like malls and parks, public transit services, stores and restaurants.

Older persons have a right to the same level and quality of services as everyone else and service providers have a legal responsibility to ensure accessibility, subject to the undue hardship standard.

Age discrimination in services can arise as a result of direct discrimination, for example through programs with age requirements that are discriminatory:

**Example:** An Ontario Ministry of Health assistive devices program provided closed circuit television magnifiers only to persons under age 25. A 71-year-old who was refused the visual aid successfully challenged the age limitation on the basis that it was an under-inclusive special program. The Court noted that special programs should be designed so that restrictions within the program are rationally connected to the objective of the program. In this case the connection was not established; rather, the program had age restrictions to have a small pool of clients and to conserve financial resources and not because younger persons had a greater need for such aids and less access to them.<sup>50</sup>

Age discrimination in goods, services and facilities often results from a lack of access to services that meet the needs of older adults. As well, ageism persists as a problem with regard to provision of services and facilities to older persons. The social construction of age, which involves incorrect assumptions and stereotypes, results in perceptions that older persons are a drain on services such as health care and home care or leads to undue attention being given to age when an issue, such as driving accidents, arises. At the same time, the other manifestation of ageism in services and facilities is the failure to take the real needs of older persons into account. For example, buildings may not be designed in a manner that promotes full accessibility, appropriate transit services may not exist that will allow older persons to participate in their communities and services may be structured around how quickly and 'efficiently' clients can be served, with the result that insufficient time may be allotted for older clients.

The relationship between age and other *Code* grounds becomes particularly apparent when services are involved.

**Example:** A residential care facility does not allow a resident's same-sex partner the same visiting privileges as opposite-sex spouses.

**Example:** A transit service provider offers a conventional service and a paratransit system. Many older persons who have disabilities do not qualify for the paratransit system and must struggle to use the conventional transit system. Therefore, the extent to which it is accessible (e.g. contains elevators, uses low floor buses, provides access to TTY phones and so forth) has a direct impact on older persons, particularly if they also have a disability.

**Example:** A hospital recognizes the need for food that is culturally appropriate for patients on its geriatric ward. It therefore makes arrangements for special meals to be brought in several times a week.<sup>51</sup>

The right to be free from age discrimination in goods, services and facilities covers direct discrimination based on age and also policies, rules and requirements that appear neutral on their face but which have an adverse impact on older persons. The **three-step test** to justify requirements that discriminate on the basis of age (described in section 4.3 of this policy) also applies to claims of discrimination with respect to goods, services and facilities.

As well, consistent with the Supreme Court of Canada's decision in *Eldridge v. British Columbia (Attorney General)*, those who are responsible for the provision of services to the public must take positive steps to ensure that disadvantaged persons benefit equally from those services.<sup>52</sup> Once again, this requires providing services in a manner that is inclusive and accessible from the start and also providing accommodation, subject to the undue hardship standard.

With respect to insurance services, section 22 of the *Code* provides that automobile, life, accident, sickness or disability insurance, group insurance or life annuity policies that are outside of the employment context may make distinctions based on age and other grounds but these must be made on reasonable and *bona fide* grounds.<sup>53</sup> In *Bates v. Zurich*,<sup>54</sup> the Supreme Court of Canada stated that a discriminatory practice in the insurance industry is "reasonable" if a) it is based on a sound and accepted insurance practice and b) there is no practical alternative.

## 8. Harassment/poisoned environment

The *Code* prohibits harassment on the basis of age. Harassment means a course of vexatious comment or conduct that is known, or ought reasonably to be known, to be unwelcome. The phrase "ought to have known" introduces an objective element to the test.

In addition, the *Code* prohibits creation of a poisoned environment. A poisoned environment is a form of discrimination and can arise from even a single incident. It may be created by the comments or actions of any person, regardless of his or her status. The comments or conduct do not have to be directed at a particular individual.

Ongoing jokes and comments or derogatory statements made about older persons in a workplace or service setting may constitute harassment or create a "poisoned environment" for older persons by making them feel uncomfortable, threatened or unwelcome.

**Example:** A worker is referred to as the "old fart" and teased by his co-workers about his age and perceived health problems associated with aging. He walks away from any conversation in which this occurs and from time to time tells people that he doesn't find these comments funny. When he mentions it to his manager he is told not to worry about it as "it is all in fun since everyone gets old eventually anyway".

Even though comments and conduct on the basis of age may be perceived by some to be less offensive than if based on other *Code* grounds, there may be situations where it has the same negative effect on the recipient. It is important to remember that for harassment to occur, behaviour must be known or ought reasonably to be known to be unwelcome, but that this determination will be made based on the perspective of “reasonable person” which includes the perspective of the person who is being harassed.

## **Glossary of concepts in human rights**

### ***Prima facie case of discrimination***

The phrase “*prima facie* case of discrimination” is often used in human rights cases. The Supreme Court of Canada has described the test for such a case as follows:

The claimant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the claimant’s favour in the absence of an answer from the respondent–employer.<sup>55</sup>

### ***Forms of discrimination***

Discrimination can take many forms. It can occur when a service provider adopts a rule that, on its face, discriminates against persons on the basis of age.

Discrimination can also take place through another person or other means.

Rules, policies, procedures, requirements, eligibility criteria or qualifications may appear neutral but may nonetheless amount to constructive, or “adverse effect” discrimination.

### ***Bona fide and reasonable requirements or qualifications (BFORs or BFOQs)***

Where the claimant makes out a *prima facie* case of discrimination because a standard or requirement has had an adverse impact based on a prohibited ground of discrimination, the respondent may avoid liability by establishing that the standard or requirement in question is a ‘BFOR’ or ‘BFOQ’.

The Supreme Court of Canada has held in that in such cases a **three-step test** should be adopted to assess the standard or requirement in question. In the context of an employment case, the Court described the test as follows:

- (1) The employer must show the standard is adopted for a purpose rationally connected to the performance of the job
- (2) The employer must establish it adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose
- (3) The employer must show that the standard is reasonably necessary to the accomplishment of that purpose. To demonstrate this, the employer must show that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.<sup>56</sup>

### ***Undue hardship***

The duty to accommodate exists up to the point of undue hardship. It is the OHRC's position that the *Code* prescribes only three considerations in assessing whether an accommodation would cause an undue hardship:

*Cost:* Both the *Code* and the courts have set the cost standard as a high one. Costs will amount to an undue hardship if they are quantifiable, shown to be related to the accommodation, and so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability.

*Outside sources of funding:* Outside sources of funding may be available to alleviate accommodation costs. Organizations should avail themselves of such resources in order to meet their duty to accommodate and must do so before claiming undue hardship.

*Health and safety risks:* Whether a health and safety risk is sufficient to constitute an undue hardship must be evaluated using the **three-step test** described in this policy. The nature, probability, severity and scope of the risk must be determined based on objective, cogent evidence and not on assumptions or impressionistic evidence. It is also necessary to consider the fact that, in most things, perfect safety is not possible and that a reasonable level of safety is the goal.

## **For more information**

For more information about the OHRC or this policy statement, please visit our website at [www.ohrc.on.ca](http://www.ohrc.on.ca) .

Please visit [www.ontario.ca/humanrights](http://www.ontario.ca/humanrights) for more information on the human rights system in Ontario.

The Human Rights System can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim, please contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: [www.hrto.ca](http://www.hrto.ca)

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY: 416-314-6651 or Toll Free: 1-866-612-8627

Website: [ww.hrlsc.on.ca](http://www.hrlsc.on.ca)

## Endnotes

<sup>1</sup> The OHRC's power under section 30 of the *Code* to develop policies is part of its broader responsibility under section 29 to promote, protect and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices.

<sup>2</sup> In 2005-2006, age was listed as a ground in 211 of 2,399 claims (8.8%) filed; Ontario Human Rights Commission, *Annual Report 2005-2006* (Toronto: Queen's Printer, 2006). Please note that claims can cite multiple grounds; for example, age could be cited with sex or race.

<sup>3</sup> This observation is based on information received from individuals and organizations during the OHRC's consultation on age discrimination and on data gathered in the OHRC's research (e.g. unemployment rates for older workers).

<sup>4</sup> Age discrimination experienced by younger persons was not included as it raises separate issues requiring their own study.

<sup>5</sup> This includes the *Vienna International Plan of Action on Ageing*, Report of the World Assembly on Ageing, Vienna, 26 July – 6 August 1982 (United Nations publication, Sales No. E.82.I.16), the *United Nations Principles for Older Persons*, General Assembly Resolution 48/91 of 16 December 1991, online: UN Programme on Ageing < [www.un.org/esa/socdev/ageing/index.html](http://www.un.org/esa/socdev/ageing/index.html) > and *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, United Nations Committee on Economic, Social and Cultural Rights, E/C.12/1995/16/Rev.1 (1995).

<sup>6</sup> This example is based on information received during the age consultation about the difficulty that older patients face in accessing medical services, which can be compounded by language barriers. In addition, empirical evidence suggests that many family doctors fail to treat older patients for depression, anxiety disorders and dementia and tend to "normalize" these conditions; see Ontario Human Rights Commission, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (May 2000), online: Ontario Human Rights Commission homepage < [www.ohrc.on.ca](http://www.ohrc.on.ca) >. Studies on immigration and health have found that serious communication problems lead ethnic elderly populations to receive deficient treatment, extended hospital stays, unnecessary testing, premature discharge and problematic follow-up. (D. Kinnon, *Canadian Research on Immigration and Health* (Ottawa: Health Canada, 1999)).

<sup>7</sup> See Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: Queen's Printer, June 2001) at 24, also available online at [www.ohrc.on.ca](http://www.ohrc.on.ca) and also *In Unison: A Canadian Approach to Disability Issues: A Vision Paper* (Federal/Provincial/Territorial Ministers Responsible for Social Services, 1998) which notes, "persons with disabilities have a lower rate of employment as well as a lower participation rate in the labour force than those without disabilities" (at 36). Similarly, Canadian Race Relations Foundation, *Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income* (Prepared for the Canadian Race Relations Foundation by the Canadian Council on Social Development, 2000) describes barriers to employment faced by "visible minorities".

<sup>8</sup> In *Broadley v. Steel Co. of Canada Inc.* (1991), 15 C.H.R.R. D/408 (Ont. Bd. Inq.) [hereinafter "*Broadley*"], 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 *Law* decision, *infra*, note 9. Today, a similar scheme could be dealt with by considering whether it discriminates by making distinctions which are offensive to human dignity.

<sup>9</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [hereinafter "*Law*"].

<sup>10</sup> *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)* (1989), 10 C.H.R.R. D/6353 (Ont. Bd. Inq.), *affd* 14 C.H.R.R. D/1 (Ont. Div. Ct.), *revd* (1994), 21 C.H.R.R. D/259 (C.A.) [hereinafter "*Roberts*"].

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<sup>11</sup> The OHRC's *Guidelines on Special Programs* are currently being revised. For further updates on the status of the *Guidelines* please consult the OHRC's website at [www.ohrc.on.ca](http://www.ohrc.on.ca) .

<sup>12</sup> *Time for Action*, *supra*, note 7 at 13.

<sup>13</sup> In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [hereinafter "*Meiorin*"], 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]*

And in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [hereinafter "*Grismer*"] this principle was extended to all social areas covered by human rights legislation:

*Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them.*<sup>2</sup> [at 880]

<sup>14</sup> *Large v. Stratford (City)*, [1995] 3 S.C.R. 733.

<sup>15</sup> See *Meiorin*, *supra*, note 14 *Grismer*, *supra*, note 14, *Entrop v. Imperial Oil Limited* (2000), 37 C.H.R.R. D/481 (Ont. C.A.) and most recently *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District*, [2001] B.C.C.A. 435, a case dealing with mandatory retirement at age 65 in the public sector.

<sup>16</sup> *Grismer*, *supra*, note 14 at 880.

<sup>17</sup> TD Economics, *Canada's Talent Deficit* (September 6, 2001), online: TD Bank Financial Group homepage < [www.td.com/economics/index.html](http://www.td.com/economics/index.html)>.

<sup>18</sup> N.C. Agarwal, *Mandatory Retirement and the Canadian Human Rights Act* (Prepared for the Canadian Human Rights Act Review Panel, October 1999) as cited in *Time for Action*, *supra*, note 7 at 39.

<sup>19</sup> *Ibid.* See also S. Imel, *Older Workers: Myths and Realities* (Eric Clearinghouse on Adult, Career and Vocational Education, 1999), online: Eric Clearinghouse on Adult, Career and Vocational Education, Ohio State University homepage < [ericacve.org](http://ericacve.org)>.

<sup>20</sup> *Older Workers: Myths and Realities*, *ibid.*

<sup>21</sup> See *O'Brien v. Ontario Hydro* (1981), 2 C.H.R.R. D/504 (Ont. Bd. Inq.) where a 40-year-old man was refused an apprenticeship and the board of inquiry concluded that age stereotyping was the proximate cause and therefore discrimination had occurred. Although the employer did hire persons in the 40 to 65 age range, it did not hire them for the apprenticeship program. The employer considered that age had relevancy when determining whether a person might adapt to certain job conditions such as menial tasks, minimal responsibility, low pay and shift work.

<sup>22</sup> Requiring Canadian experience has been identified as a discriminatory barrier for newcomers to Canada; see Ontario Human Rights Commission, *Hiring? A Human Rights Guide* and Ontario Human Rights Commission, *Human Rights at Work*, 3<sup>rd</sup>. Ed. (Toronto: Carswell, 2008), available online at [www.ohrc.on.ca](http://www.ohrc.on.ca) .

<sup>23</sup> Persons who wish to file a human rights application with the Tribunal are generally required to do so within 1 year of the last alleged incident of discrimination, unless the delay in filing the claim has been incurred in good faith and has not caused substantial prejudice to any person affected by the delay (subsection 3 4(2)).

<sup>24</sup> In *Canada (Human Rights Commission) v. Greyhound Bus Lines of Canada Ltd.* (1984), 6 C.H.R.R. D/2512 (Can. Trib.), affd 7 C.H.R.R. D/3250 (Can. Rev. Trib.), affd 8 C.H.R.R. D/4184 (F.C.A.) the employer was unable to establish that its policy of only hiring new bus drivers under the age of 34 was a *bona fide* requirement. The evidence of a relationship between age and inability to cope with stress was rejected. Air Canada did not succeed in justifying a similar requirement that pilot applicants over age 27 have greater qualifications than younger applicants.

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Air Canada sought to do so on the basis of public safety and economic factors; *Air Canada v. Carson* (1985), 6 C.H.R.R. D/2848 (Fed. C.A.).

<sup>25</sup> See *Andronik v. Guildford Golf and Country Ltd.* (1993), 21 C.H.R.R. D/400 (B.C.C.H.R.) [hereinafter "*Andronik*"].

<sup>26</sup> In *Silzer v. Chaparral Industries (86) Inc.* (1993), 20 C.H.R.R. D/155 (B.C.C.H.R.), the tribunal found that the 64-year-old claimant was discriminated against on the basis of age and a perceived physical or mental disability when he was not recalled to work after a layoff. The claimant's history of medical problems was found to be a factor in his not being recalled and the employer suggested early retirement as a possible solution to the claimant's perceived health problems. This possibility existed because of the claimant's age; therefore age, in combination with perceived disability, was a factor in failing to recall the claimant.

<sup>27</sup> In *Kearns v. Dickson Trucking Ltd.* (1988), 10 C.H.R.R. D/5700 (Can. Trib.) a 69-year-old salesman was terminated despite excellent performance. The first time the alleged reason for termination was raised was in the termination letter. The reason given suggested that there would no longer be a need for his position, however it was not declared redundant and was filled by a younger person. A case of age discrimination was successfully made out.

<sup>28</sup> *Chopra v. Department of National Health and Welfare* (1998), 32 C.H.R.R. D/168 (F.C.J.).

<sup>29</sup> *Singh v. Canada (Statistics Canada)* (1998), 34 C.H.R.R. D/203 at para. 226 (Can. Trib.) [hereinafter "*Singh v. Statistics Canada*"].

<sup>30</sup> *McKee v. Hayes-Dana Inc.* (1992), 17 C.H.R.R. D/79 (Ont. Bd. Inq.) [hereinafter "*McKee*"].

<sup>31</sup> *Andronik, supra*, note 26.

<sup>32</sup> See *Salter, infra*, note 35 and *McKee, supra*, note 31

<sup>33</sup> *Singh v. Statistics Canada, supra*, note 30 at para. 245.

<sup>34</sup> In *Salter v. Newfoundland* (2001), 41 C.H.R.R. D/68 (Nfld. Bd. Inq.) [hereinafter "*Salter*"], the tribunal found that the factor of being a pension-eligible employee was considered in making the determination to declare the claimant redundant and that this was synonymous with considering his age. Age discrimination was found in the case.

<sup>35</sup> In *Salter, ibid.* one of the factors that contributed to a finding of age discrimination was that the claimant's position, though declared redundant, had been modified and then filled by a younger co-worker:

...the Board finds that William Clarke occupies either Eric Salter's previous position ... or a modification of [his] previous position... This brings into question the propriety of the selection process for this position and the decision to declare Mr. Salter redundant. The fact that Eric Salter was told his position was abolished when it was not is a very significant factor in allowing this Board to conclude that his redundancy has more than a "subtle scent of discrimination". [at para. 155]

<sup>36</sup> 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 15 (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.).

<sup>37</sup> See *McKee, supra*, note 31.

<sup>38</sup> See for example *Boeing Toronto Ltd. v. CAW-CLC, Local 673*, Arbitrator Kevin M. Burkett, Grievance No. W18/01, July 5, 2001.

<sup>39</sup> See the OHRC's *Submission to the Standing Committee on Justice Policy on Bill 211, the Ending Mandatory Retirement Amendment Act*, dated November 23, 2005, available online at [www.ohrc.on.ca](http://www.ohrc.on.ca).

<sup>40</sup> *Heidt v. Saskatoon (City)* (1988), 9 C.H.R.R. D/5380 (Sask. Bd. Inq.), affd 10 C.H.R.R. D/5808 (Sask. Q.B.), revd 12 C.H.R.R. D/387 (C.A.), leave to appeal refused 74 D.L.R. (4<sup>th</sup>) vii (S.C.C.). The Saskatchewan *Human Rights Code* contained a provision that the prohibition on age

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discrimination in employment does not prevent the operation of any term of a *bona fide* group or employee insurance plan. The Court of Appeal held that the defence had not been made out as no evidence was led to establish that the discrimination was reasonably necessary to allow the employer to put into place a viable and cost-effective sick plan.

<sup>41</sup> *Younger v. Gulf Canada Resources Ltd.* (1988), 10 C.H.R.R. D/6114 (Alta. H.R. Comm.).

<sup>42</sup> For example, a Factor 80 retirement scheme.

<sup>43</sup> *Dalton v. Canadian Human Rights Commission* (1985), 15 D.L.R. (4<sup>th</sup>) 548 (T.D.), rev'd in part 25 D.L.R. (4<sup>th</sup>) 260 (C.A.), leave to appeal refused 67 N.R. 158n (S.C.C.).

<sup>44</sup> Ontario Human Rights Commission, *Human Rights at Work*, *supra*, note 22.

<sup>45</sup> *Broadley v. Steel Co. of Canada Ltd.*, *supra*, note 9 at D/412.

<sup>46</sup> See *Gregory v. Donauschwaben Park Waldheim Inc.* (1990), 13 C.H.R.R. D/505 at para. 29 (Ont. Bd. Inq.). In that case, this defence was successfully relied upon by a non-profit society whose objectives were to foster and preserve the culture and heritage of Danube Swabians. The sale of property within the Park would only be approved by the respondent if the purchaser were German-speaking.

<sup>47</sup> A condominium corporation was found to be in breach of the *Code* because of by-laws which barred families with children younger than 14 or 16 from occupying the condominium units; *York Condominium v. Dudnik* (1991), 14 C.H.R.R. D/406 (Ont. Div. Ct.).

<sup>48</sup> In *Julie Ramsey v. S.W.M. Investments* (August 22, 1994), (Ont. Bd. Inq.) #642 [unreported], a tenant alleged discrimination because of disability due to the landlord's lack of designated "handicapped" parking. Under a settlement, the landlord agreed to provide two designated parking spots for tenants, one designated spot for visitors and further designated spots for tenants as required so that each tenant entitled to a spot would have one. The landlord also agreed to maintain the parking spots by clearing snow, sanding or salting the parking spots and the route to the door of the building.

<sup>49</sup> For example, during its consultations, the OHRC heard that older persons who become widowed face particular hardship when they seek to move to a smaller unit that they can better maintain but face significant rent increases. A possible accommodation in this situation may mean facilitating transfer to another unit in the building without treating the situation as a new lease to which higher rents would apply.

<sup>50</sup> *Roberts*, *supra*, note 11.

<sup>51</sup> Services that are not culturally sensitive have been identified as a particular problem for older persons; see Kinnon, *supra* note 6 and J.A. Auger, "Ethnic Seniors: Accessing Health Services" in R. Masi, L. Menash and K.A. McLeod, eds. *Health and Cultures: Exploring the Relationships*, Vol. II (Oakville: Mosaic Press, 1993) at 155-167.

<sup>52</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. In *Eldridge* the Supreme Court of Canada found that hospitals must provide sign-language interpreters for Deaf patients in order for them to access health care services on equal terms.

<sup>53</sup> For further information, see the OHRC's Discussion Paper and Consultation Report on *Human Rights Issues in Insurance*, available online at [www.ohrc.on.ca](http://www.ohrc.on.ca).

<sup>54</sup> *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321

<sup>55</sup> *O.H.R.C. and O'Malley v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 526 at 558. There is current debate as to whether the approach in *O'Malley* is still appropriate in human rights cases in light of the more recent approach to discrimination cases set out by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, *supra*, note 50. Nevertheless, an approach that first asks whether the claimant has made out a "*prima facie* case" continues to be used by many human right tribunals.

<sup>56</sup> *Supra*, note 14