



Police Law Update

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We welcome your ideas, suggestions and feedback regarding this newsletter. Please direct your comments to Barrie Chercover or Natasha De Menna. We also welcome your contributions and will happily consider publishing suitable short pieces.

Congratulations, David

The lawyers and staff at Green & Chercover congratulate our friend and colleague David A. Wright on his recent appointment to the Human Rights Tribunal of Ontario. David has been a frequent contributor to the Police Law Update and a valuable part of the Police Law Practice Group at Green & Chercover.



All of us at Green & Chercover will miss David's contributions to the firm on both a professional and personal level. However, we know that David will make his mark in the field of human rights as a Vice-Chair of the Human Rights Tribunal.

Best of luck, David.

The End of Mandatory Retirement: What Impact Will it Have?

BY BARRIE CHERCOVER AND TERRI HILBORN

Mandatory retirement in Ontario formally came to an end on December 12, 2006. On that day, the *Ending Mandatory Retirement Statute Law Amendment Act* ("Bill 211") became law. Bill 211 amended the *Ontario Human Rights Code* (the "Code") and a number of other statutes to prohibit mandatory retirement for Ontario employees.

Although there has never been a law requiring employees to retire at age 65, many collective agreements or employer policies impose a mandatory retirement age. These provisions "discriminate" against employees because of their age. However, mandatory retirement provisions did not violate the Code because of the way in which the Code defined "age". While the Code prohibited age discrimination, it defined "age" to include employees between the ages of 18 and 65. That meant that employers could terminate or otherwise discriminate against

employees over the age of 65 without offending the Code. As of December 12, 2006, the upper age limit in the Code's definition of age has been eliminated. As a result, with a few exceptions, mandatory retirement provisions violate the Code and are no longer enforceable.

Is there an exception for police officers and civilians?

Bill 211 made no special exceptions for police officers, firefighters or others who work in jobs where physical demands are high and public safety is an issue. However, there are exceptions built into the Code which *may* provide a means of carving out an exception for certain professions.

The Code permits an employer to treat employees differently because of their age if age is a *bona fide* occupational requirement ("BFOR"). To demonstrate that a mandatory retirement policy is a BFOR, an employer must prove that the nature of the job requires retirement at a certain age. It is arguable that mandatory re-

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retirement policies are BFORs where the nature of the job is very physically demanding and involves public safety. In the past, mandatory retirement policies have been upheld for police, firefighters and pilots. However, these decisions were made before the Supreme Court of Canada established a new test for determining when a discriminatory workplace rule is a BFOR.

In the *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees Union ("Meiorin")*, the Supreme Court held that once a workplace rule was determined to be discriminatory, it would only be lawful if it met the following three criteria:

- The **purpose** of the discriminatory rule must be rationally connected to the job;
- The discriminatory rule must have been adopted in good faith to further this purpose; and
- The discriminatory rule must be reasonably necessary to accomplish the purpose. To prove a rule is reasonably necessary, it must be shown that it would be impossible to accommodate individual employees without undue hardship.

Although a mandatory retirement age for police officers would likely meet the first two criteria in the *Meiorin* test, the third is problematic. Mandatory retirement policies will only be upheld if it can be shown that individual members who want to work past normal retirement age cannot be accommodated without undue hardship.

Employers usually accommodate individual older members in one of two ways. First, rather than enforcing a blanket retirement age for all members, an employer could institute individual testing to ensure members who can fulfill the duties of their job are not forced to retire. Second, an employer could accommodate individual members who do not want to retire, but who cannot fulfill the physical duties of the job, by placing them in positions with less strenuous physical duties.

Unless it can be proven that individual testing and/or accommodated positions cannot be provided to individuals who do not wish to retire without imposing undue hardship, a mandatory retirement policy for a police service will not be considered a *bona fide* occupational requirement.

How does Bill 211 affect pensions?

Nothing in the new legislation should affect the pensions of police service members. Bill 211 did not amend either the *Ontario Pension Benefits Act (PBA)* or the *Ontario Municipal Employees Retirement System*

Act (OMERSA). The PBA, which provides minimum standards for pensions, already permits members to continue plan membership and benefit accrual past retirement age subject to any contribution or service caps in the plan itself. The OMERS plan has a service cap of 35 years of credited service. Once a member has 35 years, no further contributions are made, though annual earnings continue to be reported for the purpose of calculating pension benefits.

The PBA requires pension plans to set a "normal retirement date". The OMERS Plan sets a normal retirement date of 65, or 60 for police officers and firefighters. However, the normal retirement date does not require a member to retire at 65, 60 or at any other age. It is simply the age at which a member becomes entitled to an unreduced pension. These provisions have not been changed.

Pension plans can continue to make certain distinctions based on age as long the distinctions comply with the *Employment Standards Act, 2000* ("the ESA"). Regulations made under the ESA, permit pension plans to make distinctions based on age where there is an actuarial basis for doing so. As a result, plans may continue to make distinctions based on age to determine a normal retirement age, early retirement age and rates of contribution, as long as the distinctions have an actuarial basis.

How does the new law affect benefit entitlements?

Bill 211 does not change the status quo for life insurance plans, health benefit plans or for short and long-term disability plans for employees over the age of 65. In short, unless collective agreement provisions state otherwise, employers have no obligation under the *Code* to provide these benefits to employees over 65.

Bill 211 amended the *Code* to provide that pension and benefit plans will not violate the *Code* as long as they comply with the *ESA and its regulations*. The *ESA* regulations define age as 18 to 65. As a result, benefit plans that provide differential treatment for those 65 and older do not violate the *ESA* and, therefore, do not violate the *Code*.

The province has created a regime in which employees are permitted to work past 65, but have no legislated right to receive the same benefits as their younger colleagues. However, there is nothing in the new legislation that prohibits an employer from providing these benefits or that prevents associations from negotiating them through collective bargaining. Furthermore, in the right case, legislative provisions which permit employers to discriminate against older workers in the provision of benefits could be challenged under the *Charter*.

As with pensions, the *ESA* permits employers to continue to make certain distinctions in the provision of employee benefits that are done on an actuarial basis. This allows the continuation of provisions that may require, for example, different contribution rates for life

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insurance or LTD based on employee age.

Will older members be protected under the *Workplace Safety and Insurance Act, 1997*?

Bill 211 does not alter current entitlements under the *Workplace Safety and Insurance Act, 1997*. This means members who are injured prior to turning 63 will continue to receive loss of earnings benefits only until the age of 65. If a member is 63 or more at the time of injury, he or she will receive only two years of loss of earnings benefits. An employer's obligation to re-employ an injured worker still ends when the worker turns 65. This is another area that may be challenged under the *Charter*. However, some associations have negotiated provisions which limit WSIA loss of earnings benefits until the date on which a member becomes eligible for a full pension, which in most cases, will pre-date the limits set out in the WSIA.

What does this mean for Police Associations?

Police associations as well as police services have an obligation to ensure its members are not being discriminated against on the basis of age.

As a starting point, associations should review collective agreement provisions, benefit plans and workplace policies that make distinctions based on age to determine which ones may violate the *Code*. Associa-

tions may need to consider appropriate accommodation measures for members who do not want to retire at the normal retirement age, such as individual testing or accommodated positions for older members. Associations should also determine whether older workers are entitled to benefits and consider the best bargaining and/or litigation strategy for dealing with the issue.

Now that employers must prove just cause to terminate older workers, associations should be watchful to ensure older officers and civilians are not subject to discriminatory performance evaluations. Employer practices surrounding promotions, training and transfers should also be monitored to ensure older workers are not being by-passed unfairly.

The above is intended to provide a general overview of the impact Bill 211 may have for police associations. However, the full impact of the new law may not be known until the new statutory provisions, the exceptions to them, and certain collective agreement provisions are challenged through arbitration, human rights complaints and the courts. Please contact us if you have a specific question about the application of Bill 211.

One Last Chance—Part II Uniform Discipline

BY CARLO DI GIOVANNI

In the recent case of *Toronto Police Service v. Kelly*, 2006 Can LII 14403 (ON S.C.D.C.) ("Kelly") the Ontario Divisional Court confirmed the appropriateness of a joint submission on penalty, which essentially amounts to a Last Chance Agreement, in the context of an officer who was charged under the *Police Services Act* and faced the loss of his employment. In the last issue we looked at the role of Last Chance Agreements in civilian discipline. In this issue, we will consider the same question as it applies to uniform discipline.

In the *Kelly* case, a vice squad officer with a relatively long period of service, and a commendable employment record, was charged under the *Police Services Act* after being arrested on criminal drug charges. Although it may seem at first glance that he would have no

chance at retaining his job, given the high code of conduct required of officers, he was able to secure a second chance to rehabilitate himself and an opportunity to save his career when the prosecutor agreed to what amounts to a Last Chance Agreement.

During the investigation of the charges, mitigating factors surrounding the officer's personal circumstances emerged. The officer in question had experienced a series of traumatic events within a short time period, including the loss of his father, the breakdown of his marriage, and the shooting of his partner. As a consequence, he became depressed, which led to his addiction to the illegal drugs readily available to him in his undercover work in drug enforcement. In addition, the officer had expressed to his supervisors on several occasions his desire to be transferred to a less stressful unit.

Considering all of these circumstances, as well as the fact that he openly admitted his addiction and voluntarily entered a rehabilitation program, the prosecution and the officer's representative agreed to make joint submissions to the Hearing Officer with respect to penalty. The joint submissions provided that the officer be given a chance to retain his employment, but made his employment subject to thirteen rather strict conditions, including demotion. The joint submissions also contained one of the central features of a Last Chance Agreement, in that if any of its terms and conditions were breached, the officer would be immediately dismissed.

Despite the fact that the prosecution and defence agreed together to incorporate these terms into their joint submissions, the Hearing Officer held that he could not accept the joint

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submissions and decided that dismissal was warranted. The officer appealed the decision to OCCPS, and won on the grounds that among other things, the Hearings Officer ignored the fact that management, rather than terminate the officer's employment, had participated in drafting the terms and conditions of reinstatement, had explicitly recognized

that there was an alternate position available for the officer, and had in essence participated in an accommodation plan. OCCPS varied the penalty of dismissal and re-imposed the terms of the Last Chance Agreement. Management then appealed the decision of the OCCPS, but the Ontario Divisional Court upheld the decision of OCCPS as reasonable.

The court's decision in the *Kelly* case is an indication that the role played by Last Chance

Agreements in labour arbitrations may, in the right circumstances, be applied to police discipline. It is also a reminder that, no matter how hopeless a case for reinstatement may appear at first blush, it is helpful to conduct a full investigation into all of the circumstances surrounding the charges and to explore the possibility of agreeing to strict settlement conditions with the employer, in exchange for a "last chance."

Civilian Discipline—What is in your Agreement?

BY SIMON BLACKSTONE

One of your members tells you that she's just met with management and been given a two day disciplinary suspension, and that she asked for an Association representative and was told that she couldn't have one. There's no way this discipline is going to be allowed to stand – or is there? What if the time limits for imposing discipline were violated? What if written reasons for the discipline were required and no reasons were given?

Crucial in the review of any disciplinary decision made without union representation is the specific language in the collective agreement. Arbitrators distinguish between "procedural" and "substantive" breaches of the collective agreement and might find that a procedural offence is not sufficient to void discipline notwithstanding the breach of the collective agreement.

Some agreements set out that an employer must provide the reasons for discipline in writing upon terminating an employee. Does failure to provide the written reasons negate the discipline? Arbitra-

tors have said that it doesn't, despite the requirement in the agreement. In one case, an employer convinced an arbitrator that where the collective agreement time limits for imposing discipline were referred to in the agreement as "guidelines", failure to abide by them did not void the discipline, despite subsequent phrasing which indicated that the employer "will not" and "shall not" take certain action. The arbitrator concluded that the clause granted the employer "discretion and flexibility" in applying discipline. One can safely assume that the Union which drafted the clause intended to limit, rather than foster employer flexibility in the imposition of discipline.

What does all this mean for contract drafting? How can Associations avoid "procedural" language on issues like the right to representation and ensure "substantive" protections? The safest way to avoid having an arbitrator determine whether the protections in the clause are procedural or substantive is to ensure that the consequences for a breach of any part of the clause – are set out plainly and explicitly.

For such a provision, the strongest language is the best. For example, a provision requiring an employee to be accompanied by a representative "when interviewed in the course of a disciplinary investigation" followed with the phrase "failure to confirm with the above requirements shall render the discipline or discharge null and void". Other provisions which can protect employees facing discipline without representation include provisions which empower the member. For example, "the employee has the right to refuse to participate or to continue to participate in such interview unless he has received the notice herein provided for". This language gives protection to a member balking at entering to a process he or she already believes to be flawed, before it occurs.

When considering weaker language what will an arbitrator do? That will, as usual, depend on the facts and the language. The right to representation is seen, however, as a crucial and fundamental right. Strong, clear language is preferable, and will prevent an employer from attempting to uphold unfair discipline.

Employers who try to "save" discipline imposed without representation where the clause has no express language on the consequences of a breach may still face serious obstacles. The more fundamental the breach (no representation at an interview), or the more serious the discipline (discharge), the more likely an arbitrator will require an employer to allow Association representation before upholding the discipline.

We always advise that representation provisions, wherever possible, contain express consequences for the breach – the "null and void" language. This language provides that any departure by the employer from the provisions of the agreement results in the voiding of the discipline. Anything less than this might result in a philosophical debate about whether the protection is procedural or substantive from the result of which may not be satisfactory.

The null and void language may be difficult to achieve in bargaining but is well worth the effort.

One final word of warning. Negotiating a right to representation will not be enough if the member

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doesn't ask to be represented. Your jobs will all be made easier if you can find a way to

make your members understand when the need to be represented and to persuade them doesn't ask or even insist on contacting their Association before facing management in any meet-

G & C Profiles... Joshua S. Phillips



Josh Phillips is a partner at Green & Chercover. He obtained his Bachelor of Arts in Industrial Relations from McGill University and subsequently earned a law degree from the University of Toronto. Josh is also a graduate of the National Theatre School of Canada in the area of Technical Production, a subject he has taught at both the secondary school and community college levels.

Prior to practising law, Josh worked as a professional stage manager and production manager for various theatre companies throughout Ontario. He has also worked for the Ontario Ministry of Labour, labour unions and as an advocate for injured workers groups.

Josh's practice is now concentrated in labour law, professional discipline, civil litigation and appellate work, with a particular emphasis in the educational, police and cultural sectors. Josh has been a featured speaker for the Ontario Bar Association, the Canadian Association of Labour Lawyers (CALL), the Canadian Association for the Practical Study of Law and Education (CAPSLE), Lancaster House, Osgoode Hall Law School and others.

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