

2006 – The Year in Review

Legislative Changes and Employment Law Update



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Objectives

- Possible changes to human rights mechanisms
- Mandatory retirement
- Employment Law Update
 - LTD benefits/notice period
 - Wallace damages - inducement
- Employment Standards Act – family medical leave

Bill 107

An Act to amend the Human Rights Code

-awaiting Royal Assent

Bill 107

An Act to amend the Human Rights Code

Affected parties:

- Ontario Human Rights Commission
- Complainants
- Human Rights Tribunal of Ontario

Bill 107

An Act to amend the Human Rights Code

- Proposed Changes to the Commission:
 - Commission's functions will primarily relate to the promotion of respect for human rights and the elimination of systemic discrimination
 - Chief Commissioner will address problematic areas by directing the Anti-Racism Secretariat and a Disability Rights Secretariat

Bill 107

An Act to amend the Human Rights Code

Individual Complaints mechanism:

- Complainants are given 'direct access' to the Tribunal rather than the Commission as the first point of contact

Effects:

- Complainants pay for their own investigation, including up-front legal fees
- Discourages frivolous complaints, but limits access

Bill 107

An Act to amend the Human Rights Code

Human Rights Tribunal of Ontario

- Complainants apply to the Tribunal - Discretion in which cases the Tribunal will undertake

- Expansion of the scope of remedial powers
 - No limits on monetary compensation
 - Compensation for *injury to dignity, feelings and self-respect*

The End of Mandatory Retirement

What *was* the law?

- The prohibited grounds of discrimination in employment are set out in the Ontario *Human Rights Code*:

Every person has a right to equal treatment with respect to employment without discrimination because of... age...

What is the law going to be?

- Bill 211: *An Act to Amend the Human Rights Code and certain other Acts to end mandatory retirement*
- Received Royal Assent on December 12, 2005
- Transition period: comes into force one year later - **December 12, 2006**
- The Act is **not retroactive**

What is the law going to be?

- Legislation repeals the *Code*'s definition of "age" and replaces it with the following:

"Age" means an age that is 18 years or more

- Removes the ceiling of 65 years

What doesn't change? (WSIA)

- The Act amends Part I of the *Workplace Safety and Insurance Act, 1997* by adding the following section:
A provision of this Act or the regulations under it, or a decision or policy made under this Act or the regulations under it, that requires or authorizes a distinction because of age applies despite sections 1 and 5 of the Human Rights Code.
- Came into force upon royal assent (no 1 yr wait period)

What doesn't change? (ESA)

- The Act also amends the Ontario *Human Rights Code* to state that the right to non-discriminatory equal treatment in employment with respect to age:

... is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the Employment Standards Act, 2000 and the regulations thereunder.

What doesn't change? (Pensions)

- The end of mandatory retirement does not affect access or entitlement to employer-sponsored pensions in Ontario.
- Minimum standards for pension attributes under Ontario's *Pension Benefits Act* (PBA)
- Eligibility for Canada Pension Plan (CPP) benefits

Implications: Demonstrating a BFOR

- An employer should review the requirements of its various positions (preferably in writing) to identify if age could constitute a BFOR
- May be difficult to establish a BFOR on a “blanket basis” - individual assessment
- An employer must also show they are not able to accommodate without incurring undue hardship – high threshold.

Implications: Accommodation

- End of mandatory retirement will likely result in more employees remaining on the job at an advanced age
- Could lead to increased requests for age-related accommodation (disability, decrease in work capacity, family obligations)
- Possible measures: flex time, reduced schedule, modified responsibilities

Implications: Performance Management

- Mandatory retirement no longer a resolution option
- Employers should review their policies as enhanced measures may be required to manage employee performance
- Upgrading of performance monitoring should not be implemented in a discriminatory fashion

STRATEGIES

- Can still have normal policies for retirement (incentives) which are not mandatory
- Also consider non-compulsory “phased-in” retirement (eg. part-time work) to ease into retirement.

Keays v. Honda - costs

- Honda was liable for costs on substantial indemnity:
 - Keays had outstanding success
 - Honda advanced only one offer
 - Modest offer advanced to settle from Keays
 - Issues: wrongful dismissal and harassment
 - “Reprehensible” conduct by defendant

Keays awarded \$610,000 in costs, 25% premium

Keays v. Honda – appeal

- Reduced punitive damage award from \$500,000 to \$100,000
- Costs premium of 25% reduced to 12.5%

Keays v. Honda – impact

- ***Re Stelco Inc (Ont S.C.J. 2005)***
 - Employee amended claim after *Keays* to raise punitive damages from 100 000 to 500 000 – No egregious behaviour found
- ***Massey v. Hollyburn (BCHRT, 2005)***
 - Tribunal acknowledged courts can look at discrimination as a factor when awarding damages
- ***Peng v. Star Choice (Ont S.C.J. 2006)***
 - Courts can look at discrimination in calculating damages, none found in this case

Egan v. Alcatel – Court of Appeal

- Inducement is a factor eligible for “Wallace” damages
- Plaintiff became eligible for STD/LTD benefits after termination but before end of reasonable notice period
- Awarded pay in lieu of notice until date of disability, then STD and LTD benefits for entire period of disability (employer pays)

Egan v. Alcatel - SCC

- Employer's request for leave to appeal dismissed without reasons

Employment Standards Act – Family Medical Leave

- 8 weeks job-protected, unpaid leave
 - To provide care or support to a specified family member
 - Where serious medical condition with a significant risk of death occurring within a period of 26 weeks
- Eligible family members were:
 - Employee's spouse
 - Parent, step-parent, foster parent of the employee
 - Child, step-child or foster child of the employee or employee's spouse

Eligibility expanded to

- Siblings
- Grandparents, grandchildren
- Certain in-laws
- Aunts, uncles
- Certain step-relationships
- A person who considers the employee to be “like a family member”