Emond Harnden Breakfast Seminar
Managing the Aging Workforce

Case Summaries

Terminating Older Workers:
***Hussain v. Suzuki Canada Ltd.,* [2011] O.J. No. 6355 (Ont. S.C.J.)**

This case was resolved on a motion for summary judgment. The parties submitted an Agreed Statement of Fact, which stated that Mr. Hussain had almost 36 years of service at the time of his termination, and was the employer's longest serving employee in the country. He had worked for Suzuki for the majority of his working life, most recently as an Assistant Warehouse Supervisor. Mr. Hussain was almost 65 years old at the time of termination and, the Court noted, while he had no intention to retire immediately, he was "closer to the end of his working years". In terms of re-employability, the Court noted that Mr. Hussain's skills were learned on the job and were specific to the automotive industry, which limited their transferability and marketability.

Mr. Hussain sought a notice period of 30 months, while Suzuki submitted that a range of 12 to 18 months was appropriate.

In awarding a reasonable notice period of 26 months, the Court acknowledged that, while 24 months is usually at the higher end of the range, a plaintiff's advanced age may constitute an exceptional circumstance, such that the notice period should be extended. In this case, the Court noted that, "The plaintiff is now 65 years old and […] he is undoubtedly facing extremely stiff competition with much younger applicants for the same kind of employment."

Voluntary Early Retirement Incentives:
***Deane v. Ontario (Community Safety and Correctional Services)*, 2011 HRTO 1863**

Anna Deane had been employed on secondment within the Ontario Public Service, in the Office of the Attorney General. When she reached the age that early retirement became an option for her, the employer understood her intention was to retire early, and arranged for former colleagues who had also retired early to discuss the option with her. Her direct supervisor further encouraged her to retire early, saying she would be "foolish" not to. After she was unsuccessful in posting in to her seconded position permanently, Ms. Deane did accept an early retirement option.

After retiring, however, Ms. Deane launched a human rights complaint, alleging that she had been subjected to age discrimination.

The Human Rights Tribunal of Ontario allowed Ms. Deane's claim, and awarded her $7,000 in damages for injury for to dignity, feelings and self-respect. In its reasons, the Tribunal confirmed that an offer of early retirement is not in itself discriminatory, but subjecting an employee to differential treatment on the basis of age – as the employer did in this case by encouraging Ms. Deane to accept its offer – can constitute discriminatory conduct. As the Tribunal stated, there is an important distinction between providing information and offering encouragement:

> *[86] Similarly, encouraging an older employee to take advantage of retirement options might result in discrimination because the message could be that the older employee is no longer valued as an employee. Of course merely providing information about retirement options is not discriminatory, especially if the information is provided at the request of the employee.*

Performance Management:
***Riddell v. IBM Canada,* [2009] O.H.R.T.D. No. 1411**

Mr. Riddell, a 59-year-old employee of IBM, was terminated on the basis of poor performance. He launched a complaint to the Human Rights Tribunal of Ontario, alleging that his work had been subjected to excessive and differential scrutiny after he declined to accept an early retirement package. He further alleged that the performance objectives he was required to meet were arbitrary and different than those set for younger employees, and that he had not been given the training and support required to be able to meet the objectives. In response, the employer submitted evidence that the performance standards applied to Mr. Riddell were used company-wide, and had been for a number of years.

In finding that the employer was justified in managing Mr. Riddell's performance, the Tribunal confirmed that Ontario's *Human Rights Code* does not insulate older workers from the application of performance management policies where there are legitimate performance concerns based on objective evidence. In this case, Mr. Riddell's performance was consistently the lowest on the team, and there was no evidence of the employer having considered his age in connection with his performance problems. Accordingly, the Tribunal concluded that IBM had a legitimate business need to performance manage Mr. Riddell, and had not engaged in discrimination.

This decision thus reiterates the need to rely on objective evidence – rather than stereotypes and assumptions – in deciding when and how to monitor and older worker's performance, and what the consequence of continued poor performance will be.

Human Rights and Accommodation:
***Salter v. Newfoundland*, (2001), 41 CHRR D/68**

Mr. Salter was a District Manager in Forest Ecosystems with the Department of Forest Resources and Agrifoods. He was 55 years of age and had 18 years of service when he was told his position would be abolished and he would be terminated. Instead of abolishing the position, however, the employer later rehired a younger employee into the role.

Given that he met the pension eligibility requirements at the time of his termination, Mr. Salter alleged that he had been targeted for workforce reduction on that basis.

The Newfoundland Board of Inquiry agreed, finding that, if the employer had considered Mr. Salter's pension eligibility at all in the course of deciding to declare him redundant, it was synonymous with having considered his age, as only older workers are pension eligible.

This case thus demonstrates that, even when there is no evidence of bad faith, relying on the stereotype or assumption that most employees are happy to take their pensions as soon as they become eligible can lead to a finding of discrimination.