



Mandatory Retirement

Retirement issues are quickly emerging as critical issues for legislators, employers, unions and, most important of all, the thousands of working men and women who are fast approaching retirement age. However, the concept of “normal retirement age” is coming under increasing scrutiny as a confluence of economic, social, legislative and demographic forces change both the opportunities and perceptions of when a person retires and the protections afforded that individual through legislated, negotiated and individually planned retirement programs.

This paper examines one aspect of this critical public policy debate mandatory retirement. It considers some of the important developments in mandatory retirement case law. As well, the paper reviews some of the significant research done on the broader issue of retirement and how economic and social policy is being forced to grapple with issues connected to mandatory retirement.

This paper also reviews some of the findings in a recent book, *Times Up! Mandatory Retirement in Canada*, by authors C.T. Gillin, David MacGregor and Thomas Klassen. Their research not only helps set an important context, but also helps inform our own discussion on the issue of mandatory retirement.

Legislative Framework for Mandatory Retirement

Currently in Canada, three jurisdictions, British Columbia, Saskatchewan, and Newfoundland have human rights codes that place an age cap of 65, beyond which the code does not apply. This effectively allows for mandatory retirement because an individual cannot contest a policy which requires an employee to retire after reaching the age of 65. In effect, it is legal to discriminate against workers in employment who are under 19 or over 65.

In December of 2005, the Ontario government brought in *The Ending Mandatory Retirement Statute Law Amendment Act* which ended the right of employers to require employees to retire at age 65. This legislation will come into effect in 2006. Prior to its implementation, employers and unions in Ontario will be harmonizing their policies and collective agreements with this legislation.

All other jurisdictions, except Quebec and Manitoba, have removed the age cap from their Human Rights legislation. However, these provinces have also accepted bona fide retirement policies or pension plans with fixed dates for retirement. Only

Manitoba has effectively banned mandatory retirement through its human rights code by not having an age cap and not exempting retirement or pension plans.

In all jurisdictions, mandatory retirement at a specific age can be required if it is a bona fide occupational requirement (BFOR) of the job. These tend to be situations that involve public safety such as airline pilots, police and firefighters. The courts have generally held employers to a high standard when applying these bona fide occupational requirements.

It is important to note that most of the debate on the elimination of mandatory retirement is coming from the academic community. Many in this community see mandatory retirement as an artificial barrier in their academic career.

David MacGregor notes in *Times Up! Mandatory Retirement in Canada* that academics have been the most active in questioning the rationale for retirement at a specific age. As well, much of the case law on this issue has been generated as a result of actions taken by academics to challenge the legal basis for mandatory retirement provisions.

Canadian Case Law and Mandatory Retirement

In Canada there are very few laws that specifically identify an age at which workers must retire. Some exceptions exist for airline pilots, military personnel and judges. Where legal challenges have been initiated against mandatory retirement, they generally fall into two different categories. The first is workers who are forced to retire before age 65, typically because of bona fide occupational requirements (BFOR). The second is workers who are required to retire because they have reached the age of 65.

In several provinces in Canada, including BC, the prohibition of discrimination on the basis of age ends upon reaching age 65 even though the Supreme Court, in the landmark 1990 *McKinney v. University of Guelph* case, ruled that mandatory retirement at age 65 constituted acceptable discrimination under the *Charter* section 15. The Court saw mandatory retirement at age 65 as justified because it had become part of the usual organization of labour. In the Court's view, mandatory retirement allows for different compensation, facilitates recruitment, avoids continuous productivity review and provides both employers and employees with the ability to plan for their financial futures.

Prior to that decision the courts were skeptical and even critical of forced or mandatory retirement plans. For example, in 1982 an Ontario case, *Ontario Human Rights Commission v. Borough of Etobicoke*, set out a critical position on ageism and mandatory retirement. That case addressed the legality of bona fide occupational requirements for firefighters in Ontario.

The Ontario court provided a standard for testing the legality of when a BFOR can be used to justify forced retirement. The tests are two-fold, both subjective and objective:

1. The BFOR “must be imposed honestly and in good faith and in the sincerely held belief that such a limitation is imposed in the interests of the adequate performance of the work.”
2. The objective test is that the requirement must be “reasonably necessary to assure efficient and economical performance.”

More recently the courts are once again returning to that view and seem to re-emphasize the importance of human rights principles. This was articulated by Justice Iacobucci in *Law v. Canada (Minister of employment and Immigration)* [1999]

“The equality guarantee in s.15(1) is concerned with the realization of personal autonomy and self determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with the physical and psychological integrity and empowerment.... It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences... Human dignity within the meaning of equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.”

It should be noted that although *McKinney* and its companion decisions remain the Supreme Court’s lead rulings on mandatory retirement, those decisions apply only to universities in Ontario and Alberta, and to community colleges and hospitals in British Columbia. Although those decisions are often interpreted as sanctioning mandatory retirement, they do not set out a general rule that all mandatory retirement policies can always be justified under section 1 of the *Charter*.

Section 1 of the *Charter* allows for reasonable and demonstrable justifiable limits to be placed on the section 15 right of freedom from discrimination. The Supreme Court of Canada considered the definition of “age” in provincial human rights legislation. In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, the Court held that while the exclusion from protection of persons 65 years of age or older in the Ontario *Human Rights Code* breached the equality rights of section 15 of the *Charter*, the breach was saved by section 1, as a “reasonable and demonstrably justified limit.”

The current state of the law in British Columbia is such that a private sector employer is permitted to establish a policy of mandatory retirement at age 65 or older. The same is not true for public sector employers who are “government” for the purposes of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). A mandatory retirement policy of such an employer may or may not be allowable, depending on the circumstances.

In *Harrison v. University of British Columbia* (1990), 77 D.L.R. (4th) 55, the Supreme Court of Canada held that the university was not governed by the *Charter*. As the university is a private sector employer, not government within the meaning of the *Charter*, it is

not bound by the *Charter*. Its mandatory retirement policy does not have to comply with section 15 of the *Charter*. This same reasoning was applied in *Douglas College v. Douglas/Kwantlen Faculty Association (1990)* appeal of the mandatory retirement policy.

Currently in BC there is no protection afforded to workers 65 and older. The result is that employees can be required to retire at age sixty five and those employees who work beyond age sixty five don't have to receive equal treatment and opportunities in matters such as working conditions, workloads, salary and benefits.

The Union View of Mandatory Retirement

In *Times Up! Mandatory Retirement in Canada*, the authors view unions as being "essentially conservative organizations" (page 86) that have created the institution of mandatory retirement from which many members currently benefit. The right for workers to withdraw from the labour force with a degree of income security, provided by private and/or public pension was one of the battles fought by the unions in the 1950's. Not surprisingly, that history has made unions hesitant to abandon their fight for the right to retire with dignity and income security.

The authors also note that many unions are also concerned that what happened in the US could happen in Canada. The US abandoned mandatory retirement in 1986, resulting in the age for full social security increasing from 65 to 67. Furthermore, there are twice as many workers in the US over the age of 65 than in Canada. In 1999, in the US 8.9% of individuals over 65 were in the labour market, compared to only 3.4% of Canadians.

The labour movement in Canada predicts and fears that with the elimination of mandatory retirement, there will be greater numbers of older workers still in the work force and less generous social security. As a result of those fears, many Canadian unions support mandatory retirement on three grounds:

1. Compulsory or mandatory retirement at a fixed age creates jobs and promotions for younger workers, and thereby reduces the unemployment rate.
2. Without mandatory retirement governments and employers have greater scope to reduce pension benefits, which forces workers to remain employed for longer, and;
3. Mandatory retirement reduces the scope for employer monitoring and evaluating older workers by setting a binding date of retirement.

Since 1980, the CLC has formally endorsed mandatory retirement, even though their own staff has concluded that the argument that compulsory retirement will create

jobs for younger workers is both “bad economics and dangerous ethics.” The CLC’s support for mandatory retirement seems to rest primarily on the fact that unions accept mandatory retirement “as quid pro quo for other things – especially pension benefits.”

In *Times Up! Mandatory Retirement in Canada* the authors examine closely why unions in Canada support mandatory retirement. The primary reason is the link between retirement age and its relationship to pension plans. In that regard, there has been increasing concern in the last few years about the viability of pension plans and the pending flood of retiring “baby boomers.”

In defined benefit plans, a worker’s pension entitlement is a calculation of final salary and years of service. Fixed and predetermined retirement ages are critical in the plans because typically it is impossible for workers to accrue further benefits once reaching the usual retirement age.

With recent shifts to defined contribution models, pension levels are related to the level of assets that have accumulated in the fund as well as the number of years over which the benefits will be paid. Workers who contribute longer (even past the normal retirement age) draw a higher pension payment than those who retire earlier, not only because they contribute longer, but also because the pension will be paid for fewer years.

There is a divide between the traditional rank and file union members and relatively high paid professional workers, such as educators and doctors who are most active in the opposition to mandatory retirement. This same division also exists within the FPSE membership, primarily between the younger non-regular faculty and senior faculty approaching age 65.

On the one hand, the younger, non-regular faculty want greater opportunity and access to regular, good paid jobs. On the other hand, senior faculty want to continue to teach and contribute to society. What seems to be needed is increased flexibility with respect to retirement options.

Researchers in *Times Up! Mandatory Retirement in Canada* observe that if unions fail to recognize and respond to the changing demographic and labour market conditions, the call for human rights for all workers will grant greater control to employers and the state to redesign retirement and associated policies. The suggestion is that organized labour needs to be part of the solution and not let employers and government control the outcome of the debate on mandatory retirement.

Eliminating Mandatory Retirement: Potential Impacts

Several questions have been raised within the ranks of FPSE on the impacts of mandatory retirement and the possible consequences of any moves to eliminate or change existing age caps of FPSE. Some of those questions are:

1. What is the legal liability of those locals that currently have members who are sixty five years of age or older? Are they required to provide them with the same benefits and working conditions as their other members who are under age sixty five?
2. Must they negotiate health and welfare plans, life insurance and sick-leave plans on behalf of those members?

The answer to both at this time is no, not yet. Because the *BC Human Rights Code* does not at this time protect workers from discrimination after age 65, they would not likely succeed on the grounds of discrimination. However, would they succeed with a section 12 (Duty to Represent) complaint under the *Labour Relations Code*? Attached to this paper is a legal opinion that was provided to the UBC Faculty Association by Allan Black, QC. He carefully reviews the union's roles and responsibilities, and the advice he provides to the association would also apply to FPSE member locals.

If a local union has negotiated the elimination of mandatory retirement and has included that provision in the local collective agreement, the union should go one step further and ensure that those members past age 65 are treated equitably with younger employees in the bargaining unit.

Attachments to this paper also include an example of a MOU that was negotiated by the BCITFA on behalf of members who continue to be employed past age 65. This was in response to the elimination of the employer's mandatory retirement policy. If, as has happened in Ontario, Manitoba, Quebec and the Territories, human rights legislation is amended, then the union would have a duty to represent those members in the same manner as they represent all others.

Views and Opinions on the Elimination of Mandatory Retirement

The following are excerpts from the *Human Rights Coalition Newsletter* dated February 2005 Volume 2.1. The following was an interview done for the news letter. The authors are Margaret Menton Manery and Arleen Tigar McLean who co-authored a study on the implications of mandatory retirement for elderly women. The full text of their interview can be found at the BCHRC website at <http://www.bchrcoalition.org/files/News072005web.pdf>. The excerpts provide a useful guide to any union dealing with the complexities associated with mandatory retirement.

Arlene: *"The debate in Canada is very much framed around choice and flexibility so you have to ask who this language benefits, and it appears to be those with good jobs, good benefits, and good retirement reserves, such as university professors for example. The workers who are most likely to be covered by mandatory retirement agreements are advantaged workers. They earn relatively high incomes and have private pensions. Many workers, however, have had limited job opportunities and are unable to count on further opportunities as they age. We need to be careful that the 'right to work' post-65 doesn't become an obligation to work in conditions that jeopardize people's health and well-being in their later years."*

Margaret: *"The basic question is how will workers be protected against poverty in their old age? What is important to remember in the debate about mandatory retirement is that the focus should be on protecting the right to retire and the right to a public pension at age 65, both of which are criteria set by mandatory retirement."*

Banning mandatory retirement may sound attractive to those who are worried that they won't have enough money in their retirement years and therefore feel they will need to work as long as possible. It may also sound attractive to employers who seek to divest themselves of having to pay out private pension benefits. But the elimination of mandatory retirement is not a panacea.

Human rights legislation that prohibits employment discrimination against those aged 65 and over may disallow mandatory retirement. But for many people, the problem is inadequate wages and pensions. Private pensions have become less stable, full employment and good benefits less available. These issues need attention to address poverty and economic insecurity in old age, but are often ignored in the mandatory retirement debate. To protect private pension entitlements, unions and employers should retain the right to negotiate terms – which in some cases may mean set-age retirement criteria will still exist – on behalf of their members."

Policy Questions to Consider

In Chapter 8 of the book *"Times Up! Mandatory Retirement in Canada,"* Morley Gunderson and Douglas Hyatt argue that the elimination of mandatory retirement is not a simple proposition. The authors are not opposed to the elimination of legislation that allows for the discrimination against workers 65 and older. However, in their view banning mandatory retirement would prohibit private parties from entering into contractual arrangements that involve mandatory retirement.

They summarize the policy question as follows:

"Under what circumstances should private parties be prohibited from entering into contractual arrangements like mandatory retirement that may constrain their decision making in the future, in return for some other presumed benefits that may be associated with the policy?"

(Page 140)

The question that they see more often debated is:

"Should governments be allowed to require people to retire at some arbitrary age?" or "Should employers be allowed to engage in age discrimination?"

(Page 140-141)

The two authors go on to present some of the arguments for and against the elimination of mandatory retirement. They make the same observation that others have made that most jobs that are subject to mandatory retirement tend to be the "good" jobs with higher wages, long term stable employment, pension and retirement plans including generous early retirement provisions, and with the protection of the collective agreement or a formal personnel policy. Contrast that with the "bad" jobs that tend not to have mandatory retirement plans. The authors suggest that mandatory retirement policies should not be regarded as oppressive policies that have been imposed by mean spirited employers on disadvantaged employees with little or no bargaining power. They believe that banning mandatory retirement means banning the right of unions to negotiate mandatory retirement provisions as part of a pension plan for their members.

The authors also argue that if unions agree to contractual arrangements that involve a future commitment to retire at a specified age, and this is regarded as discriminatory, since it is based on age, then presumably we are discriminating against ourselves or at least ourselves in the future. They view this as being different than discriminating against defined other groups, whose oppression we may benefit from.

Gunderson and Hyatt make four policy recommendations:

1. Remove the age cap in the human rights codes that still have it, so as to provide protection against age discrimination to persons of all ages.

2. Exempt bona fide pension and retirement plans, and possibly collective agreements that have a mandatory retirement age. This allows private parties to agree to mandatory retirement, but only if accompanied by the protection of a pension and retirement plan, and possibly a collective agreement.
3. Remove, or at least reconsider, the institutional and legal barriers that discourage, often unintentionally, the continued labour force participation of older persons and that discourage flexible transition into and out of retirement.
4. Provide more information to all parties on issues that are likely to affect retirement decisions and the decision to agree to mandatory retirement, including information on the barriers that inhibit flexible retirement, experiences with later mandatory retirement ages, with voluntarily abandoning mandatory retirement, or more flexible mandatory retirement policies that permit re-contracting.

Organizational Positions on Mandatory Retirement

The following is a not an exhaustive list, but is a sampling of relevant organizations and the current positions they have taken on the question of the elimination of mandatory retirement.

CAUT

"Mandatory retirement is discrimination on the basis of age, and may give rise to discrimination on the basis of sex or other grounds. Academic staff have a right to continue their employment beyond the standard age under the same terms and conditions."

[CAUT Policy Statement on Retirement from CAUT website; approved by CAUT Council November 2002]

CUPE

"Mandatory Retirement is the wrong issue

Employers and governments are focusing on the issue of mandatory retirement but for workers it is the wrong issue. The vast majority of CUPE members would prefer to retire earlier not later. CUPE members want choice when it comes to deciding their retirement age, but real choice will only exist if we have a strong and comprehensive retirement system; a comprehensive approach to the training and recruitment of young workers; and protections against dismissals based on age. Therefore, in response to demands for the elimination of mandatory retirement, CUPE calls instead for:

- increases to provincial low-income supplements, sufficient to eliminate poverty in retirement;
- the requirement that all large employers provide secure, defined benefit pension plans to all employees – including part-time employees;
- establishing full indexation and improved survivor benefits as a requirement of provincial pension law;
- improving the recognition of international education and employment credentials so that immigrant workers can more easily obtain employment;
- amendment of all employment standards legislation to require just cause for any dismissal;
- the full commitment of all governments to the principles of decent minimum labour standards and pay equity to ensure that retirement income (which is based on earnings) is adequate."

[CUPE News Release, March 22, 2005]

BC Human Rights Coalition

"From a human rights perspective we support a retirement structure that provides choice, flexibility and options for everyone. We do suggest this new structure requires strengthened human rights protections in the workplace and a corresponding commitment that the changing landscape will not alter the foundation or the adequacy of our social security system.

The Coalition has long argued that our current age cap is under-inclusive in relation to our equality rights, and we urge those participating in the retirement dialogue to bring this concern to the government's attention. BC is one of four provinces (Saskatchewan, Ontario and Newfoundland are the others) that still utilize an age cap as a mechanism to restrict human rights protection in the area of employment.

BC also utilizes an exemption clause in its human rights legislation. This clause shields employers from human rights complaints as they relate to *bona fide* retirement, superannuation or pension plans. Most Canadian jurisdictions have a similar exemption, which effectively permits mandatory retirement, so long as the practice is part of a larger retirement plan. If we were to lift the age cap, but kept the exemption, the practice of mandatory retirement could still be shielded from complaints, so long as the practice is part of a larger retirement plan. To eliminate blanket mandatory retirement policies from being imposed on workers, this exemption would also have to be lifted. This would still allow employers to implement and incorporate retirement strategies, which in some cases may still include encouraging the workforce to retire at a set age. The difference however, would be that the practice would be subject to an employer's duty to accommodate where individuals preferred to remain in the workforce past that set age. Put another way, the blanket rule of requiring all employees to retire at age 65 would have to stand up to the test of *bona fide occupational requirement* (BFOR) in order to justify the rule.

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[From Newsletter July 2005 Volume 2.2 at this link
<http://www.bchrcoalition.org/files/News072005web.pdf>]

BC Federation of Labour

The BC Federation of Labour has no official policy or position on mandatory retirement.

BC Government

The BC government has indicated that they will review the question of mandatory retirement and make recommendations to the legislature on what changes may need to be enacted. The latest I have heard is that the Attorney General, Wally Opal, has been appointed to chair that committee.

Conclusion

The debate within FPSE ranks over the issue of mandatory retirement is starting to take shape. Like many sectors of the labour force in BC, the post-secondary education system will see a significant increase in potential retirements over the next five to seven years. Coincident with that increase will be demands to both improve income security for those retiring and improve the opportunities of those who want to extend their academic working career. Both demands can be accommodated but it will take considerable effort at both bargaining table and through legislative change to meet those demands.

As FPSE prepares for another round of bargaining to begin in 2007 and refines its lobbying and legislative priorities at the 2006 AGM, members and activists should consider incorporating the following measures into FPSE's work plan:

1. Ensure that the 2007 bargaining strategy includes new measures to enhance the income security of those members who are eligible to retire. Those measures could include better health benefit coverage, more effective inflation protection, improved pension entitlements or combinations of all three. In securing these improvements, FPSE will be in a much better position to deal with the fundamental concern of all members: adequate income security during retirement.
2. Work with the broader labour movement, both provincially and nationally, to ensure that our existing network of social programs provide proper security to Canadians in their retirement. There are indications that the new federal government under Prime Minister Stephen Harper may try to dismantle some of those basic protections and FPSE needs to work with the labour movement and progressive community allies to ensure that these protections are not lost.
3. Provide FPSE locals with the additional legal, research and staff support services to ensure that members have access to the most current information, advice and protection if the BC government decides to follow the Ontario government's lead and change the existing age caps in human rights legislation.