



# What's New in HR Law

## Human Rights Tribunal of Ontario finds Human Rights Code section allowing employers to exclude employees over 65 years of age from certain benefits unconstitutional

June 4, 2018

### **BOTTOM LINE**

In a ground-breaking decision, with the potential to affect both unionized and non-unionized workplaces, the Tribunal recently determined that a school board could not rely on section 25(2.1) of the [Human Rights Code](#) (the “Code”) to justify the blanket exclusion of employees over 65 years of age from extended health, dental and life insurance benefits.

### **Facts: Secondary School Teacher Working Past 65 Years of Age Excluded from Employer’s Extended Health, Dental, and Life Insurance Benefits**

Mr. Talos was a secondary school teacher who continued to work past 65 years of age. In accordance with the collective agreement between the school board and Mr. Talos’ union, Mr.

Talos' extended health, dental, and life insurance benefits were all terminated when he turned 65, although he continued to work for the school board on a full-time basis.

Mr. Talos filed an application with the Tribunal alleging the school board had discriminated against him on the basis of age.

Section 25(2.1) of the *Code*, when read together with section 44 of the [Employment Standards Act, 2000](#) (the "ESA") and [O. Reg. 286/01](#) under the ESA, generally allows employers to terminate benefits for workers over age 65.

Accordingly, the school board took the position that section 25(2.1) constituted a complete defence to Mr. Talos' allegations of discrimination. In an earlier interim decision, the Tribunal agreed with the school board and held that Mr. Talos' claim would have no reasonable prospect of success unless section 25(2.1) of the *Code* was held to be unconstitutional.

Mr. Talos argued that section 25(2.1) of the *Code*, when read in conjunction with the relevant ESA section and regulation, was unconstitutional as it was contrary to the [Canadian Charter of Rights and Freedoms](#) (the "Charter").

A number of unions and associations, as well as the Ontario Human Rights Commission, intervened in Mr. Talos' favour. The Attorney General of Ontario intervened in favour of the school board. Several experts provided actuarial evidence justifying the exclusion of employees aged 65 or older from benefit plans, as well as evidence of prevailing societal attitudes with respect to these employees.

### **The Determination: Section 25(2.1) of the *Human Rights Code* is unconstitutional**

The Tribunal held that section 25(2.1) of the *Code*, when read together with section 44 of the ESA and O. Reg. 286/01, is unconstitutional as it violates section 15 of the *Charter*; further, it is not saved under section 1 of the *Charter*.

The key findings made by the Tribunal in its 112-page interim decision are as follows:

- A legislative provision that prevents workers age 65 and older from being able to challenge any reduction or elimination of access to workplace benefits as age discrimination is a *prima facie* violation of section 15(1) of the *Charter*.
- Neither the length of the employee's career, nor his membership in a union, were relevant considerations. In contrast to earlier arbitral jurisprudence, the Tribunal considered it irrelevant that Mr. Talos' employment was governed by a collective agreement.
- Mr. Talos' eligibility for Old Age Security, the Ontario Drug Benefit program, and his pension under the Canada Pension Plan had no bearing on his *Charter* claim.
- Similarly, the Tribunal rejected the notion that "social consensus" had any bearing on whether or not there was discrimination, and was not persuaded that a worker's lifetime of earnings was relevant to the constitutionality of section 25(2.1).

- The Tribunal did not accept that the purpose of section 25(2.1) was to provide flexibility for employees and employers to determine optimal compensation through a collective or individual bargaining process.
- The Tribunal held that the financial viability of workplace benefits plans could be achieved without making workers aged 65 and older vulnerable to the loss of employment benefits without recourse to a claim under the *Code*.

In reaching its decision, the Tribunal was highly critical of the legislative process and policy analysis that had led to enacting the exception challenged by Mr. Talos. The Tribunal held that the Legislature's choice to carve out workers aged 65 and older had relied on the insurance industry's expectation of cost increases, which the Tribunal found was not empirically supported. The Tribunal also found that the Legislature had ignored research indicating that there had been little change to the cost of benefit plans in provinces that had abolished mandatory retirement, but not implemented a blanket exception for older workers.

The Tribunal ultimately determined that the school board could not rely on section 25(2.1) of the *Code* as a defence to Mr. Talos' human rights application.

### **What does this decision mean for employers?**

The Tribunal's finding in *Talos* that section 25(2.1) of the *Human Rights Code* is unconstitutional is currently limited to the decision in *Talos*. It is unclear whether the Tribunal will choose to take a similar position in subsequent cases, or take a different approach by distinguishing subsequent human rights applications on their facts. The Tribunal's decision in *Talos* is also likely to be challenged.

It is important to note that the Tribunal's decision in *Talos* dealt only with access to group health, dental, and life insurance benefit plans. *Talos* did not address long-term disability insurance, pension plans, and superannuation funds.

Date: May 18, 2018

Forum: Human Rights Tribunal of Ontario

Citation: *Talos v. Grand Erie District School Board*, [2018 HRTO 680](#).

### **Need more information?**

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