Mandatory Retirement for Safety: Justifiable or Stereotypical?

By Jamie Jurczak and Peter Mueller, Taylor McCaffrey LLP

Imposing a mandatory retirement policy for workers who hit a specific age *can* be a useful and valid way for employers to meet their safety and health obligations. However, employers who implement mandatory retirement policies may have their work cut out for them in demonstrating that the policy is justifiable. It's not enough to justify such policies based on nothing but a generalization that there may be safety risks that come with age and that mandatory retirement is the only way to ensure safety. This article briefly explores the legal implications of adopting mandatory retirement policies as a means to create a safer workplace and the considerations that go into deciding whether they're legally valid.

Age Discrimination 101

Discrimination on the basis of age is illegal under human rights law, which also considers it discrimination to treat someone differently because of a *perceived* characteristic. A mandatory retirement policy is presumptively discriminatory because it treats older workers differently than others and often on the basis of a *perceived* characteristic'that is, that someone's increased age results in a safety risk that's not otherwise present with younger workers. It's "presumptively" discriminatory because an employer may be able to defend its policy by laying out evidence to justify it. If that evidence demonstrates that there is, in fact, a characteristic that comes with increased age that gives rise to a safety risk and that safety risk can't be accommodated without undue hardship, then the policy will be justified.

The reality is that there are circumstances where increased age may translate to an increased safety risk in certain workplaces or in relation to certain work

duties. For example, as we age, the musculoskeletal system weakens, while the ability of the heart, lungs and circulatory system to carry oxygen decreases, both of which could translate into a safety risk for an older worker who must perform load-bearing activities or extended heavy physical labour. We all probably notice that we can't see as well as we used to, but these vision changes may become even more pronounced the older we get. In some instances, a decreased ability to judge distances and the speed of moving objects may pose a safety risk for those driving vehicles or operating other mobile equipment.

Where that's the case, when is a mandatory retirement policy the best way to manage that safety risk' How can an employer successfully justify such a policy'

As mentioned above, justifying mandatory retirement involves more than merely citing a general safety concern based on assumptions and generalizations about safety risks that may come with a worker's increased age. Human rights law says an employer has to prove, on a balance of probabilities, that:

1. The policy's purpose is rationally connected to the job;
2. The employer adopted the policy in an honest and good faith belief that it was necessary to fulfill that legitimate work-related purpose; and
3. The policy is reasonably necessary to accomplish that legitimate work-related purpose, which can be shown by demonstrating that the employer can't accommodate the worker without experiencing undue hardship.

A Comparison of Two Cases

The above steps are commonly (at least amongst lawyers) referred to as the *Meiorin* test, after the name of the worker in a Supreme Court case that set out the test, *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.,* [1999] CanLII 652 (SCC), Sept. 9, 1999.

Obviously not all workplaces are alike. You might already have a gut reaction as to whether a mandatory retirement policy is justifiable on the basis of safety in a workplace that does more paper-pushing that it does forklift-operating. Because each workplace is unique, it's impossible to simply categorize which workplaces would be likely to satisfy the *Meiorin* test when it comes to a mandatory retirement policy. However, it's useful to look at some past cases where employers have both succeeded and failed in justifying these policies in order to understand some of factors at play.

In 2008, in the case of *Espey v. London (City)*, 2008 HRTO 412 (CanLII), Dec. 18, 2008 (upheld on appeal), the Ontario Human Rights Tribunal had to decide if the requirement that suppression firefighters retire at age 60 was justified based on the *Meiorin* test. The Tribunal said that evidence showing the increasing risk of cardiac events with age and the effects of cardiac events on a firefighter's work established a rational connection between mandatory retirement based on age and the need to protect firefighters' health and safety. The evidence also demonstrated that the requirement was established in good faith by the employer and the union. Therefore, the employer met the first two parts of the test.

As to the third part of the test, the Tribunal then considered numerous issues before deciding that mandatory retirement at age 60, in this case, was reasonably necessary to ensure the health and safety of firefighters and that

individually accommodating firefighters would create an undue hardship. It was important in this case that the evidence showed that the risk of an “on the job” cardiac event was high for suppression firefighters, this risk was unique to firefighting and moreover, it only increased with age. There was an increased safety risk for not only a firefighter over 60, but also co-workers and members of the public if the firefighter suffered a cardiac event in the course of performing his duties. It was noted that individualized testing may be a better indicator than age of such risks for the public at large, but this didn’t apply to firefighters given the unique risks they face in their work.

Ultimately, the Tribunal accepted that age was the best indicator of a risk of cardiac events in these circumstances. Finally, the Tribunal gave stock to the fact that both the employer and union had come up with the retirement requirement to avoid individualized testing which, in these circumstances, may have led to discriminating against firefighters on the basis of a disability. Because of the demonstrated increased risk of a cardiac event occurring with increased age and the safety risks if one took place while a firefighter was performing his suppression duties, the mandatory retirement policy was justified.

Compare the *Espey* case with the more recent decision of *Way v. New Brunswick (Department of Education)*, [2011] CanLII 13074 (NB LEB), Feb. 16, 2011. Here, a New Brunswick Board of Inquiry heard the complaint of a former school bus driver who was forced by a regulation to retire at the age of 65. The Board agreed with the employer that the goal of the retirement requirement’public safety of school children on school buses’was rationally connected to the performance of the job. It also agreed that the requirement was adopted under the honest and good faith belief that it was necessary to accomplish its goal.

However, the Board found that the employer hadn’t shown that mandatory retirement was reasonably necessary to accomplish its goal and that accommodation wasn’t possible without causing undue hardship. The employer’s position was that no one above the age of 65 can meet the absolute standard of safely transporting school children but it didn’t have any evidence to back up its position. The Board said that there’s no “magic bullet” for a risk assessment nor is there a specific age that can be used to determine whether a person is or is not a safe driver. The Board also criticized the requirement because it “not only extends a time worn stereotype about the value of aging workers, but it is also one imposed under a blanket application, with a total absence of consideration for individual circumstances.”

These cases offer an important distinction between two different scenarios: The first involves clear evidence that age can be a relevant indicator of a safety risk and that individualized testing may not be possible given the particular nature of the work and the environment, justifying differential treatment on the basis of age. The second involves a general concern for safety but, instead of relying on concrete, scientific evidence, relies on nothing more than stereotypes and fails to consider whether another approach, such as individualized testing, could have achieved the same safety-related purpose without undue hardship.

Bottom Line

Employers should tread carefully when considering implementing a mandatory

retirement policy. They should consider whether:

- They have the evidence to satisfy each of the three steps of the *Meiorin* test;
- They're proceeding based on assumptions and stereotypes regarding age or have concrete evidence to justify the policy; and
- Age really is the best indicator of safety risk or whether other avenues are possible, such as individualized testing.

Jamie Jurczak is a partner at Taylor McCaffrey LLP. Jamie's preferred area of practice is occupational health and safety. She's experienced in defending employers charged under provincial and federal OHS legislation and is well versed in assisting clients in responding to serious workplace incidents, addressing administrative appeals of regulatory orders and performing regulatory compliance reviews and audits. She frequently speaks at conferences and seminars on various topics relating to OHS legal liability and due diligence. You can contact her at 204.988.0393 or jjurczak@tmlawyers.com.

Peter Mueller is an associate at Taylor McCaffrey LLP in its labour and employment law department. Peter has a particular interest in all matters related to safety and health in the workplace, including but not limited to assisting clients with meeting their legal obligations immediately after an incident has occurred and defending clients who have been charged with safety-related offences. Please feel free to contact Peter directly at 204.988.0316 or pmueller@tmlawyers.com.

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