



# The End of Mandatory Retirement: What Does it Mean for B.C. Employers?

By **GRAEME MCFARLANE**

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**T**HE DEMOGRAPHICS OF THE CANADIAN workforce is changing. In 1973, only seven per cent of Canadians were 65 or older. By 2023, it is estimated that 20 per cent of Canadians will be over 65. Our traditional workforce is shrinking. Some employers are coping with the workforce shortage by instituting phased retirement, or “retirees on call” plans. Others are encouraging retired employees to return to work for less pay and less authority. They gain the benefit of their experience and expertise while allowing a

gradual slow down of the employees’ pace of life.

At the start of 2008, the goal posts shifted.

Many Canadian provinces, including B.C., have recently passed legislation making mandatory retirement policies illegal. While it is difficult to predict how many employees will take advantage of the new laws and remain in the workplace past age 65, it is not hard to imagine the challenges that this will create for B.C.’s employers. What, for example, is an employer to do with an

aging employee whose faculties are declining to the point that her or she is no longer performing productive work?

**What has changed?** On January 1, 2008, the *B.C. Human Rights Code* (“Code”) was amended to effectively eliminate mandatory retirement in British Columbia. Under section 13 of the *Code*, employers must not refuse to employ or otherwise discriminate against an employee on the basis of age. The definition of “age” has been altered to include all individuals over the age of 19. As a result, forcing employees to retire simply because they have turned 65 will likely constitute a *prima facie* act of age discrimination.

It is important to note that the changes are *not* retroactive in effect. Employers are not required to re-employ employees who retired before the legislation came into existence. Furthermore, the legislation provides for specific exemptions for bona fide retirement, pension and benefit schemes that make distinctions on the basis of age. Given the typical structure of insured benefits, it is likely that despite the new legislation, most employee disability benefits will continue to cease at age 65, and that pension plans will continue to treat age 65 as the normal retirement age for purposes of benefit accrual and entitlement.

Finally, the legislation does not in any way *require* employees to work past age 65. The legislation simply gives employees the choice to retire at any age, subject to the terms of bona fide benefit plans, *bona fide occupational requirements* (“BFOR”) and undue hardship in accommodations.

**Employer Responsibilities:** The new legislation still allows employers to require an employee to retire if they can no longer perform the *BFOR*'s (which are basically the essential job functions or basic job qualifications) of their position. However, employers have a duty to take all reasonable steps to accommodate the limitations of older workers to the point of undue hardship. In almost all circumstances, employers will have to make these decisions on a case-by-case basis.

Virtually all workers will eventually require some form of accommodation should they continue to work to an advancing age. Not only are older workers more susceptible to age-related disabilities such as Alzheimer's, but employers must also accommodate the gradual, often permanent, deterioration of faculties that accompany the aging process.

The challenge for employers lies in properly addressing these issues while respecting the dignity of older workers, especially given that older workers often tend to be among the most senior and respected employees in an organization.

Employers will need to be flexible, and finding workable solutions will require the co-operation of all parties involved, including the Union where the worker is a bargaining unit employee. Open communication and individual testing of the abilities of aging workers will be one of the most important – and necessary – tools that an employer can use to determine exactly what an employee can and cannot do.

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**Case by Case Accommodation:** The importance of individual assessments and respect for the dignity of older workers were central in the B.C. Human Rights Tribunal's decision in *Comeau v. Cote*.<sup>1</sup> In *Comeau*, the employer laid off a 63-year-old labourer due to concerns about the employee's age and health. The employer knew that Mr. Comeau suffered from a heart condition and was concerned about his fitness to perform the work in question.

The Tribunal held that the employee's age and heart condition were factors in the employer's decision to lay him off, so the decision was *prima facie* discriminatory. The Tribunal further held that the employer had failed to prove that it was unable to accommodate Mr. Comeau's continued employment. The Tribunal was particularly critical of the employer's reliance on its impressions of the employee's condition, rather than requesting and relying upon solid medical information about Mr. Comeau's health and abilities. The Tribunal took into account the employee's age and

years in his trade when awarding damages for injury to dignity, feelings and self-respect, noting that Mr. Comeau took great pride in the work that he had done successfully for more than 50 years.

**Communication and Creativity:** As illustrated by the *Comeau* decision, employers must maintain clear, open communications with employees regarding their limitations, abilities, and retirement plan. The key to accommodating the needs of older workers, while still addressing safety, productivity and liability concerns, is to obtain as much information as possible about individual abilities and restrictions through individual ability testing and solid medical documentation. An employer cannot rely on assumptions or impressions about an employee's abilities.

Upon receipt of the necessary information, creative solutions may include part-time or flexible work schedules, a gradual reduction of duties over time, changing roles to lessen or eliminate physically demanding duties, altered equipment, safety training, and perhaps most importantly, increasing the older worker's role in training, coaching and imparting knowledge to the younger members of the workforce.

**Conclusion:** All workers in British Columbia now have the right to choose when they will retire, but will still face age-related distinctions in regard to the benefits available to them past the age of 65. Given that the new legislation has only been in force for a short time, it is difficult to predict with any certainty what its impact will be. For some employers, the focus will be on developing strategies to retain and recruit older workers in an attempt to keep corporate knowledge and experience within the company. For others, the challenge will be to manage an aging workforce without incurring extra liability.

The scope of the impending change is unknown. Employees with attractive retirement benefits may continue to retire at age 65 and either cease work altogether or seek alternative employment. There is no doubt, however, that the combination of Canada's changing demographics and the increased human rights protections for older workers will create some interesting, and difficult challenges for human resources professionals in the years to come. **PD**

<sup>1</sup> [2003] B.C.H.R.T.D. No. 32.