

Employment and Labour Fall seminar

**What's new in pension and benefits: Case law update on the termination of benefits at age 65 and latest updates in pension law**

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# Agenda

## 1. Discrimination on the basis of age?

- a) Review of the decision in *Talos v Grand Erie District School Board*, 2018 HRTO 680 (“*Talos*”)
- b) Cases on the termination of benefits after age 65 since *Talos*

## 2. Recent updates in pensions law

# Age Discrimination in the Termination of Benefits

## Permitted Age-based Discrimination in Legislation

- Under the Ontario *Human Rights Code*:

25 ...

(2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is **not** infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder.

- Sections 4, 7 and 8 under Ontario Regulation 286/01 of the Ontario *Employment Standards Act, 2000* permit differentiation based on an employee's age in pension plans, life insurance plans and disability benefits.

# Age Discrimination in the Termination of Benefits

*Talos v Grand Erie District School Board, 2018 HRTO 680*

- Mr. Talos challenged the constitutionality of the exception in the Ontario *Human Rights Code* that permits employers the discretion to terminate benefits for workers at and over age 65
- His extended health, dental and life insurance benefits were terminated when he reached age 65 despite continued full-time employment
- The Human Rights Tribunal of Ontario (“Tribunal”) found that the provision was unconstitutional, but not within its jurisdiction to make a general declaration of invalidity
- The Tribunal noted this “decision does not address long term disability insurance, pension plans and superannuation funds.”
- There was concern about the impact of this decision, while not binding, on other decisions before the Tribunal and across Canada

# Age Discrimination in the Termination of Benefits

*Rayonier v Unifor, Locals 256 and 89, 2022 CanLII 75226 (“Rayonier”)*

- Decision deals with a number of grievances relating to long-term disability benefits and life insurance for employees over age 65
- The arbitrator upheld the reduction in long-term disability coverage, but ordered payment of life insurance in accordance with the wording of the collective agreement
- Reductions in long-term disability coverage, while *prima facie* discriminatory, are demonstrably justified and saved by section 1 of the *Canadian Charter of Rights and Freedoms*
- Reductions in long-term disability coverage are unlikely to be treated in the same way that age-based distinctions in health, dental and life insurance benefits were found to be in *Talos*

# Age Discrimination in the Termination of Benefits

*Air Canada Pilots Association v Air Canada, 2023 FC 138*

- Judicial review of a Canadian Human Rights Tribunal decision where the complainant pilot alleged that age-based differentiation with respect to long-term disability insurance plans for employees who became eligible for unreduced pensions violated s. 15(1) of *Canadian Charter of Rights and Freedoms*
- The CHRT found ss. 3(b) and 5(b) of *Canadian Human Rights Benefit Regulations* provided a constitutionally-valid exemption for termination of disability benefits for pilots reaching pensionable age
- The Federal Court upheld this finding
- The finding in *Talos* is unlikely to extend to long-term disability plans particularly when there is an unreduced pension available to the employee in accordance with the finding in *Rayonier*

# Age Discrimination in the Termination of Benefits

*Griggs v Loblaws (Real Canadian Superstore)*, 2023 HRTO 166

- Recent decision of the Human Rights Tribunal of Ontario dismissing the applicant's claim that there was discrimination on the basis of age with respect to the reduction in life insurance and short-term and long-term disability benefits when the applicant turned 65
- This case post-dates the Federal Court decision in *Air Canada Pilots Association v Air Canada* that made a similar finding
- This decision affirms that the Human Rights Tribunal of Ontario will not necessarily follow *Talos* in making decisions about long-term disability benefits, rather making a finding in accordance with the Canadian Human Rights Tribunal and Federal Court for analogous provisions in the federal statute

# Age Discrimination in the Termination of Benefits

Where are we now? Take-aways

- *Talos* is not necessarily going to be followed
  - *Talos* only addressed group health, dental and life insurance plans and did not address long-term disability insurance, pension plans and superannuation funds
- However, the specific context in which the benefit being terminated at age 65 matters
- Practical outcome: depending on the specific context, an employer may or may not be able to rely on the legislative carve outs under the Ontario *Human Rights Code* and *Employment Standards Act, 2000* as a defence to allegations of age discrimination in the termination of benefits at age 65



# **Recent Updates in Pension Law**

# Canadian Association of Pension Supervisory Authority (CAPSA)

- **Draft Guideline No. 3 – Capital Accumulation Plans**
  - Updates and replaces 2004 Guideline
    - Updated definitions (including CAPs and CAP sponsor), clarified factors that may affect a CAP sponsor's fiduciary duty, etc
  - 2022 consultation resulted in a second stakeholder consultation, which ended July 2023
    - 5 themes updated based on stakeholders comments: fiduciary duty, value for money, decumulation, service providers vs. sponsors and the definition of CAPs
- **Draft Pension Plan Risk Management Guideline**
  - Second consultation combined 3 draft guidelines (Cyber Risk, ESG and Leverage)
  - Added sections on: Third Party (Outsourcing) Risks, Target Pension Arrangements and Investment Risk Governance

# Financial Services Regulatory Authority (FSRA)

## Information Technology (IT) Risk Management Guideline

- Final version released October 8, 2023 following a consultation in the spring of 2023
- Guideline includes:
  - Seven practices for effective IT risk management
  - A process to notify FSRA in the event of an IT risk incident
    - To be provided as soon as feasible (normally within 48-72 hours)
  - Sector specific requirements including for pension plan administrators, Ontario-incorporated insurance companies, etc
- Guideline is effective as of April 1, 2024
- Failure to comply can impact registering with FSRA

# Bill C-228

## Pension Protection Act

- Royal Assent received on April 27, 2023
- Requires pension plan deficits to be paid in priority over most creditors, including secured creditors in bankruptcy or insolvency proceedings
- Includes a four year transition period for existing pension plans, meaning the new priority will not take effect until April 27, 2027
- Pension plan registered after April 26, 2023, will be subject to the pension priority rules immediately

# Defined Contribution Pension Plans

## Correcting Contribution Errors

- On June 22, 2023, Bill C-47 received royal assent
- Implemented variety of amendments to the *Income Tax Act* and its regulations
- Included amendment which permit retroactive contribution to defined contribution (DC) pension plans
  - Employers and members are now permitted to correct contribution errors through a tax deductible “permitted corrective contribution” (PCC)
    - Over contributions and under contributions being rectified
    - Not subject to the annual contribution limits of the ITA but will have a separate limit
    - Must relate to one of more of the 10 years immediately preceding that calendar year in which refund is provided