



FEBRUARY 22, 2010

Pension *Pulse*

Age-Based Early Retirement Program Upheld

The Ontario Human Rights Tribunal released a decision last week upholding the validity of an early retirement program under the Ontario Human Rights Code: *Kovacs v. Arcelor Mittal Montreal 2010 HRTO 303*.

The employer, Arcelor Mittal Montreal had acquired a company that operated two facilities in Ontario and that had filed for protection under the *Companies' Creditors Arrangement Act*. Arcelor entered into a memorandum of agreement with the United Steelworkers of America in respect of the closure of one of the facilities. An early retirement program was part of the agreement.

The early retirement program provided enhanced pension benefits for employees who satisfied one of the following criteria:

- 30 or more years of service
- at least age 55 with 15 or more years of service
- at least age 52 with 25 or more years of service

The applicant was a 47 year old unionized employee with 27 years of service. He alleged that he was the subject of age discrimination that violated the *Ontario Human Rights Code (the "Code")*. He clearly would have qualified for the enhancements if he had attained age 52 when the program was introduced. He alleged this constituted unlawful discrimination.

The decision, which was a "case resolution conference" decision, confirmed that the provisions of the early retirement program were not contrary to the *Code*. The applicable law in this area is somewhat circuitous. Section 5 of the *Code* states that every person has a right to equal treatment with respect to employment without discrimination on certain grounds including age. Section 25(2.1) of the *Code* provides an exception for pension and benefit plans that comply with the *Ontario Employment Standards Act, 2000 (the "ESA")* and the regulations thereunder.



Section 44(1) of the *ESA* prohibits discrimination by reason of age, sex or marital status in the provision of benefit plans for employees, except as prescribed in the *ESA* regulations. Section 4(3) of regulation 286/01 under the *ESA* states that the prohibition against age discrimination in Section 44(1) does not apply to the establishment of normal retirement dates or voluntary early retirement dates under a pension plan, provided the pension plan complies with the *Ontario Pension Benefits Act (the "PBA")*.

The *PBA* contains minimum standards for pension plans. Employers are entitled to adopt provisions that are more generous than the minimum standards. It requires pension plans to have a normal retirement date of no later than age 66, and an early retirement date within ten years of the normal retirement date. The *PBA* does not prohibit earlier normal or early retirement dates. For example, a pension plan may have a normal retirement date of 62 and an early retirement date of 52.

The net result of the above provisions of the *Code*, the *ESA* and the *PBA* is that employers in Ontario may establish early retirement windows and other incentives in pension plans without running afoul of prohibitions against age discrimination. ■



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As a member of our firm's Labour and Employment group, Mark handles all aspects of pensions and benefits law, including governance, regulatory compliance, collective bargaining, litigation, due diligence, mergers and acquisitions, financing agreements, bankruptcy and insolvency, and the tax aspects of compensation, pensions and benefits.

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