Age discrimination at the forefront

Aging workers, elimination of mandatory retirement makes age-related human rights a top workplace issue

EMPLOYEES aged 65 or older, particularly those in the federal civil service and nationally regulated industries, may well find themselves out of a job by year's end due to a legislative loophole.

Recent amendments to the Canadian Human Rights Act banning mandatory retirement have made such a cull possible. Ironically, the changes to the act, made in late 2011, were intended to empower older employees to work longer. However, the amendments do not take effect until December 2012, and the delay is motivating many federally regulated organizations — such as banks, airlines, broadcasters and interprovincial trucking and shipping companies — to get rid of older employees en masse before the ban kicks in.

Those unfortunate enough to be purged are being deprived of their right not to be discriminated against based on age, and the actions of these employers make a mockery of the decision by legislators to ban mandatory retirement. Federally regulated organizations, which include some of Canada's biggest employers, are clearly motivated to terminate older employees while they still can without incurring liability.

This brazen discrimination illustrates the pressures many employers today face to reduce costs, embrace new technologies and satisfy the impatient aspirations of younger employees. These performance and intergenerational concerns are so compelling that the protection afforded older employees by provincial human rights codes is being systematically circumvented.

Ontario's Human Rights Code, for example, amended the definition of age to include employees over the age of 65 in 2007. Since then, employers in the province have been required by law to accommodate employees experiencing age-related performance problems. Subsequent amendments also permit allegations of age discrimination to be heard in court.

OPINION

By
David Whitten

Despite these costly sanctions, many employers are showing a robust enthusiasm for skirting the law and go to great lengths to disguise their intent. A common tactic is to terminate groups of older employees in the name of restructuring, and toss in a few younger employees to make it difficult to prove that age was the motive.

Another popular approach is to subject an older employee to a difficult and stressful performance review and then play on her fears by offering a way out with a severance package.

Defending against age discrimination requires knowledge of both the law and how the game must be played. Employers must demonstrate that their decision to terminate had nothing to do with the employee's age. If age can be connected in any way to the termination, the employee will get a favourable ruling, particularly if the decision is rendered by a judge who happens to be older.

Pride motivates some older employees to vehemently deny that age has affected their ability to perform, which makes them easy pickings for termination. However, a shrewder response is to approach human resources and blame a problem on age. The employer is then obligated to offer assistance to enable the employee to continue in her role. And if the decision to terminate is eventually made, age is on the record as the reason. The organization will then be obligated to prove in court that it took steps to accommodate to the point of undue hardship, which is both a difficult and time-consuming task.

The mindset that admitting to age-related infirmity hurts employees in the workplace is something that will have to change. The fact is, memory loss, reduced ability to deal with stress, and lack of energy are normal age-related performance problems and employers are obligated by law to help.

One of the most common complaints about older employees, for example, is that they are less adept at mastering new technologies than their tech-savvy, younger colleagues. An employee could tie the performance problem to her age, such as memory problems that make it difficult to absorb new knowledge as quickly. If a connection between the lag in performance and the person's age is established, the obligation to accommodate is triggered.

Employees can request training courses to upgrade their tech skills and, if those are not sufficient, they are within their rights to request more intensive training. As long as the reason for the performance problem is related to age, the employer must make every reasonable effort to help such employees improve their tech skills. By using this defence, an employee can fight an effective rearguard action to protect herself and overcome performance deficiency.

Age discrimination promises to be the dominant workplace issue of our time. And the principle of fair and generous treatment for all employees, regardless of their age, must be defended.

Not only is this the right thing to do, Canada's national interest requires it. At stake is the sustainability of the country's pension system. Policymakers attempting to enable baby boomers to work longer should be highly concerned about organizations that sabotage their efforts by unnecessarily shortening careers.

Regrettably, many employers are blind to the new demographic reality and target their older employees. CELT

David A. Whitten is an employment law expert and the founding partner of Whitten & Lublin. He can be reached at david@whittenlublin.com.