Boomers and Beyond

by Ella Forbes-Chilibeck

For the first time there are four generations in the same workforce (Traditionalists, Baby Boomers, Gen X and GenY/Millennials).

Specifically, law and aging in the workplace is a hot topic. At the end of April this year the Centre for Law in the Contemporary Workplace at Queen's University is hosting a major conference on Law and Aging in the Contemporary Workplace.

THE "OLDER" WORKER – MYTHS AND REALITIES

Myth #1: When one hits a certain age, one automatically becomes an "older" worker

- This will be a different age depending on the purpose of the organization as well as the needs of the specific worker. Age alone is not the defining characteristic of an "older worker", and this may be more situational than age-related.
- Concept of "older" is contextual. Older workers are generally those over 45, but if the average age in the workplace is 25, a 37 year old job applicant may be turned away because of the perception that he/she is unable to fit into the workplace culture.

Myth #2: Everyone wants to retire

- People may not be able to retire due to frequent job changes, underemployment, and not having acquired a consistent retirement package due to not working at one place for entire career.
- Further, "older" workers satisfy the increasing demand for productivity, worker shortages and retaining corporate knowledge.
- Employing older workers will ease the societal burden of supporting seniors, and reduce age discrimination.

Myth #3: Older workers have declining productivity

- In most cases this is unfounded. There is significant evidence older workers:
  - Are highly-productive, offering considerable on the job experience;
  - Do as well or better than younger workers on creativity, flexibility, information processing, accident rates, absenteeism and turnover; and
  - Can learn as well as younger workers with appropriate training methods and environments.
- Consider implementing changes in training and workplace design to enhance productivity of older workers.
- In fact, underestimating the capabilities of older workers and treating them differently as a result can actually hinder them from maintaining their productivity and value.

Myth #4: Older workers lack "career potential"

- Given the high turnover rates in today's labour force, and the fact that it is rare for someone to remain with the same organization for their entire career, it may be difficult to justify turning away an otherwise qualified person on the basis that they will not be with the organization very long.

- Employers assume older workers can't or don't need to learn new skills, and that they don't need to be developed because they are heading towards retirement. Research shows older workers are able to master new skills as well as younger workers.

- Career development programs for older workers are a worthwhile investment. The continued skill development of older workers can provide employers with a pool of experienced, motivated, and engaged employees, which will become increasingly important as older adults begin to comprise a greater proportion of the population.

Myth #5: Older workers are more likely to be off sick

- Research has shown that in the UK, the opposite is the case.

- Older workers are often an asset in terms of work ethic, reliability, accuracy, and stability.

Avoiding Accidental Age Discrimination – Common Pitfalls

Watch out during recruitment and selection

- Increased needs for productivity, financial strains on retirement systems, and a changing demographic structure are increasing the interest in older workers. They are being viewed as more recruitable, retrainable, and retainable.

- ***Job Ads and Application Forms***

  - Application forms often require date of birth and employment record. This can be daunting, as the older worker may have gaps in their record they are unable to discuss on an application form.

    - Avoid asking for age on application form or indirectly asking by requiring documents that indicate age. Some employers have stopped asking when schooling was completed, as this may often indicate age.

    - You may ask "Are you 18 years or older and less than 65 years?"

  - Job ads often use language that warn off older workers. Ads can often imply they want someone with not too much experience (i.e. "post graduate experience" often means someone in their 20s).

    - Focus on the nature of the job and skills required. Describing the work environment as "dynamic" or "lively" may give the impression that the employer is looking for younger workers.

    - Avoid statements that directly or indirectly relate to age in job advertisements.

- ***Selection***

  - Selection procedures often reinforce stereotypes about older workers not fitting in or being able to learn new skills.

  - Employers are often suspicious: shouldn't they be retired or already have a job? Employers won't consider workers who are: over-qualified, too experienced, or not what they had in mind when they made the post.

  - Questions about age should only be asked in the interview if an Ontario

Human Rights Code defence applies, such as where there is a special program in place under s. 14, employment is aimed at persons 65 or over under s. 15, the employer is a special interest organization serving a particular age group under s. 18, or age is a bona fide occupational requirement.

- It is a sound practice to develop some upfront, objective and job-related screening criteria for job competitions, to score candidates relative to these criteria, and to retain all records related to job competitions for at least one year after the competition has been completed.

Have good training and a good equal opportunity policy

- Have a good equal opportunity policy. Age discrimination is potentially the form of discrimination that affects most people. Once you have a good policy in place, take the policy and age discrimination seriously.

- Train your managers and personnel staff about age diversity, including challenging the preconceptions they have about older workers.

- It is a good idea to engage in age profiling: record the age of employees, those promoted, dismissed, etc. If the average age of the employees dismissed is significantly higher than the average age of employees in your workplace, you may be engaging in unintentional age discrimination. The same goes if the average age of those promoted is significantly younger than the average employee.

Adapt your workplace accordingly: Watch for signs of unequal treatment of older workers

- Older workers tend to experience disproportionate displacement or disadvantage because of workplace reorganization and downsizing.

- Ways unequal treatment of older workers manifest themselves:
  - Limiting or withholding employment opportunities, including transfer, promotion and training opportunities;
  - Not assigning an older worker to certain tasks or projects or subjecting an older worker to an unwanted transfer because of age;
  - Performance managing older workers in a different way;
  - Not recalling someone from lay-off because of age; and
  - Terminating someone's employment because of age.

- The problem with age discrimination is it is often unintentional and cumulative. If the President of a large company tells each branch to reduce the headcount by 10%, and the plant manager then tells each of the supervisors to eliminate one position, the supervisor may have the foreman decide who to eliminate. If the foreman is given no criteria, they might get rid of an older worker who has a chronological back problem. This may then happen with each foreman, leading to unintentional age discrimination across the company.

- Consider what you actually need done from the employee in that position; is it possible to redesign the job to make it a better fit for an older worker while still obtaining what you need?

- Consider the different ways people learn. Some older workers might be less familiar with new technology or software. Provide the necessary training or coaching to ensure it is not simply technology issues that lead to performance issues.

- When there is cause for concern with an employee's performance, discuss the options with the employee. Possibilities may include alternative work (such as mentoring) or flexible hours.

- Flexibility will be key. The issue has changed from assisting older employees into retirement to retaining and recruiting older workers.

  - There might be caring responsibilities outside of work, or they may just want to work fewer hours. A flexible working pattern can help attract older workers when recruiting and hold on to older workers that are established employees.

Update your Retirement policies

- Update your retirement and redundancy policies. Retirement policies have to be more open and flexible since the mandatory retirement policy was struck down. The age a person retires at is now usually linked to the individual career and the person, not to a specific age.

- Redundancy policies need to state clearly that employees will not be selected because of age. Employers need to be careful of unintentional discrimination by using other redundancy criteria (such as part-time working) when selecting employees for redundancy. Again, age profiling of your redundancy choices may show that you are inadvertently discriminating on the basis of age.

- Further, discrimination may arise when an assumption is made that because of an employee's age the employee is likely to retire imminently. Treating an employee as if the employee is going to retire soon when the employee is not going to retire soon can infringe on Human Rights Code protected rights because the basis for the treatment is the employee's age (*Deane v. Ontario (Community Safety and Correctional Services),* 2011 HRTO 1863).

Keep up with the case law and the legislation

- Some age-based criteria or qualifications are not based on stereotypes, are not offensive to human dignity, and do not target a historically disadvantaged age group. For example, discounts on services for persons under 25 or over 55, retirement schemes based on a minimum age combined with years of service, or measures aimed at facilitating the transition from FT employment to retirement have all been allowed by the Ontario Human Rights Tribunal.

- The Ontario Human Rights Code expressly provides for preference of persons over the age of 65 years in s. 15, and this permits for seniors' discounts, seniors-only housing and other benefits aimed at those over the age of 65.

- S. 14 allows for the use of special programs, allowing for the preferential treatment or programs aimed only at older persons, even if not 65, if the purpose of the program is to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve equal opportunity. BUT, the age restriction must be rationally connected to the objective of the program.

  - This was recently considered in the case *International Brotherhood of Electrical Workers, Local 353 v. Black & McDonald Ltd.,* [2010] O.L.R.D. No. 3943. The collective agreement contained a provision giving journeymen electricians over the age of 50 preference in maintaining employment when the employer was laying off employees. This was done to address the difficulty these older electricians faced in finding other employment.

- The Ontario Labour Relations Board held that this clause did contravene the Ontario Human Rights Code

- The Board refused to take administrative notice that electricians over the age of 50 were a disadvantaged group because they faced significant difficulties in finding employment and remaining employed. The Board felt there was no evidence to support that conclusion, and that the declaration would only perpetuate stereotypes against older workers.

- The provision did not constitute a s. 14 special program under the Code as a rational connection is required between the potentially discriminatory provision and the purpose of the program. The Board noted that there was no explanation for choosing 50 as the cut-off age, nor was there any explanation why the provision applied only to journeymen and not apprentices. The union failed to demonstrate that journeymen electricians over the age of 50 were a disadvantaged group as opposed to journeymen who were 49 years of age.

- If you are going to rely on exceptions outlined in a Human Rights Code, make sure that you are in strict compliance with the applicable Human Rights Code. As demonstrated in *International Brotherhood of Electrical Workers, Local 353,* even if the intention is good, a special program will be struck down if it does not comply with the legislation.

- To determine whether discrimination has occurred, consider the Charter s. 15 test: (1) Is there differential treatment? (2) Is the discriminatory treatment on the basis of an enumerated ground? and (3) Is this discrimination in a substantive sense?

Performance Expectations and Management

Performance Expectations

- In the Ontario Human Rights Code, s.11 allows for the justification of a standard, factor, requirement or rule set by an employer that has an adverse effect because of age if the employer can show it is a Bona Fide Occupational Requirement ("BFOR").

  - Section 24 of the Code allows for direct discrimination in employment for reasons of age if the age of the applicant is a BFOR because of the nature of the employment.

  - There is a 3 step test that must be met in order for the discriminatory treatment to be considered a BFOR:

    - 1. Was it adopted for a purpose or goal that is rationally connected to the function being performed;

    - 2. Was it adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and

    - 3. Is it reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

  - When considering whether a performance expectation is a BFOR, factors to consider are:

    - Whether the person responsible for accommodation investigated alternative approaches that do not have any discriminatory effect;

    - Reasons why viable alternatives were not implemented;

    - Ability to have differing standard that reflect group or individual differences and capabilities;

- Whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner;
- Whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies; and
- Whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

- Further, the Supreme Court of Canada made it clear in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [Meiorin], that society must be designed to be inclusive of all persons. It is no longer acceptable to structure systems in a way that assumes that everyone is young and then try to accommodate those who do not fit that assumption. Physical, attitudinal and systemic barriers should not be created at all.

- When writing workplace policies, the employer should attempt to enhance the work experience for the vast majority of employees who are hardworking instead of protecting the employer against the small percentage who are not.
  - Organizational strategies for achieving targets should be written with older workers in mind too. They should be a positive reflection of what older workers can achieve rather than an acceptance of negative stereotypes.

Performance Management

- Concerns regarding performance management include subjecting older workers to a higher level of scrutiny, but also failing to performance manage because of a perception that an older worker's performance is linked to age or because of a belief that it is not necessary as that person will soon be retiring.

- Make sure you have performance reviews of older workers, as a "let it be" attitude will indicate that the employer does not value their work. This will require:
  - A reporting system with clear, realistic objectives
  - Regular meetings with ongoing appraisal throughout the year
  - Personal development plans that reflect an employee's individual strengths and weaknesses

- In *Clennon v. Toronto East General Hospital,* 2009 HRTO 1242, there were issues surrounding an older employee's use of certain software. The Tribunal found that where active performance management was not undertaken, the evidence supported an inference that the employee's age was a factor in the determination that active performance management would not have utility and would not achieve results.
  - The Tribunal was quick to note that this was not a suggestion that the simple absence of a performance management plan would in all cases result in a finding of discrimination.
  - In this case, because the termination was based on performance issues, and the failure to address the performance issues was tainted by age discrimination, this in turn tainted the decision to terminate the employee.

- Employers assume older employees will or should not need challenging targets during performance appraisal reviews.
  - Think about how to make the most of older workers' expertise without blocking the career progression of younger employees.

- Think about other options for older workers, such as: more open job description with a wider variety of tasks, sideways moves to other jobs that have more responsibility, special projects, or a mentoring role to help develop and coach junior colleagues.

- Employers need to move away from emphasis on presence in the workplace as example of excellence. Emphasis should be on the deliverables produced by the employee rather than the amount of time the employee spends in the workplace.

  - Giving employees the flexibility to manage their lives when needed can pay huge dividends in productivity. Think about work shifting, telecommuting, flexible work arrangements, and home offices.

- Issues surrounding lack of knowledge of new technology in older workers can be overcome with training.

Can employers deny benefits and terminate participation in pension plans on the basis of age?

- The Ontario Human Rights Code holds in s. 25(2) that an employee's rights are not infringed by pension and benefit plans that comply with the Employment Standards Act ("ESA").

- The definition of age found in the ESA means that pension and benefit plans that differentiate based on age 65 cannot be challenged under the Code.

  - The Regulation also permits other age-based distinctions in the provision of pension and benefits, for example, where age-related distinctions in contribution rates are made on an actuarial basis.

- In *Canadian Union of Public Employees, London Civic Employees, Local 107 v. London (City)*, [2010] L.V.I. 3911-2, benefits, including medical, dental and life insurance, were available to "all employees" under the collective agreement. The municipality was not permitted to deny those benefits to employees who continued working past the age of 65. The arbitrator found that though the employer's insurance coverage specified that eligibility ended at age 65, these provisions could not supersede "the plain ordinary meaning" of the language in the collective agreement.

  - However, this result relied heavily on the actual wording of the collective agreement. The arbitrator did note that s. 25 of the Ontario Human Rights Code did allow employers to provide lesser benefits to senior workers. However, this did not change the plain and ordinary meaning of the disputed clause in this case, as that clause expressly provided for benefits to all permanent employees.

  - The importance of the actual wording of the contract is demonstrated in a different case where the same arbitrator held that provisions that expressly reduced the coverage for workers over the age of 65 did not violate the Code or the Canadian Charter of Rights and Freedoms. In that case, the arbitrator held that though the reduction of benefits did violate s. 15 of the Charter, this was a reasonable limit under s.1. He further noted that s. 26 of the Code, s. 44 of the Employment Standards Act ("ESA") and ss. 7 and 8 of the ESA Regulations demonstrated a clear legislative intention to allow employers to continue to make age-based distinctions in pension, benefit and insurance plans.

- So be careful of the wording of contracts and collective agreements. While the ESA allows for differential treatment, it does not mandate it, and the plain and ordinary meaning of the contractual wording will override s. 25 of the ESA.

Does an employee have a legal right to work as long as he or she wants?

- Mandatory retirement at age 60 of certain groups (such as police officers and firefighters) used to be accepted where the employer provided evidence of some issue associated with aging, and showed that individual testing was impractical (see for example *Large v. Stratford (City),* 1995 SCC).
  - However, in light of recent SCC, ONCA and BCCA decisions, it does not appear that this type of approach is sufficient (*Meiorin, Entrop v. Imperial Oil Limited* (2000 ONCA), and *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District* (2001 BCCA)).
  - In light of the new three step BFOR test of the SCC, it is no longer acceptable to rely on presumed group characteristics associated with aging. An employer seeking to justify mandatory retirement must show that individualized assessment, as a form of accommodation, is impossible in the sense that there is no method to do so, or that it would be an undue hardship.
- Except where it can be shown to be a BFOR, mandatory retirement provisions in collective agreements can no longer be enforced.
- In *Vilven v. Air Canada and Air Canada Pilots Association; Kelly v. Air Canada and Air Canada Pilots Association,* 2010 CHRT 27, two Air Canada pilots alleged that the mandatory retirement at age 60 was discriminatory.
  - The Canadian Human Rights Tribunal held that the mandatory retirement policy was a bona fide occupational requirement, and its elimination would cause Air Canada undue hardship.
  - 86% of Air Canada flights went through international air space, and the International Civil Aviation Organization rules mandate that a pilot over 60 cannot fly on international routes unless another pilot on the flight is under 60. Given the effect on the operational costs, scheduling efficiency, pension plan, seniority and collective agreement, the Tribunal concluded on a balance of probabilities that Air Canada would suffer undue hardship if forced to abolish the mandatory retirement policy.
  - Here there was a long history of meaningful and legitimate bargaining, and the Tribunal concluded that on a balance of probabilities, the policy was a bona fide occupational requirement and did not have a discriminatory foundation. The mandatory retirement clause "was intended to accomplish the legitimate purpose of melding the company's needs with the collective rights and needs of its pilots."
- Employers can still have retirement programs based on a certain age, but these programs cannot be mandatory, except for judges, masters and justices of the peace for whom there is a specific exemption under the code.
  - Early retirement packages are still often offered. When designed properly, these are appropriate and will not trigger human rights schemes (see for example *Watson v. Canadian Auto Workers Local 27,* 2011 HRTO 446).
  - However, there can be no direct or implicit pressure being applied to accept retirement. Encouraging an employee to take advantage of retirement options might result in discrimination because the message could be that the older employee is no longer valued (*Deane v. Ontario (Community Safety and Correctional Services),* 2011 HRTO 1863).

Considerations when terminating older employees

- Employers are not precluded from terminating older workers, using the same performance management criteria as for any other worker, where there are legitimate concerns that are based on objective evidence about the employee's ability to perform the duties of the job.

- However, age, including assumptions based on stereotypes about age, should not be a factor in decisions about lay-off or termination.

- If an employer has a non-discriminatory reason for terminating an older worker and wishes to offer the option of early retirement, there is nothing to prevent the employer from doing so. However, as early retirement schemes by definition target older workers, great care must be employed in using them as a means to achieve downsizing objectives. Further, if the older worker does not accept the retirement package, and is subsequently selected for termination, and the reason for selecting him/her for termination is related to age, an organization may face a human rights claim. The fact that a generous retirement package is offered does not defeat a claim of age discrimination if the early retirement option was not truly voluntary.

- Be careful what is said at a termination meeting. When an employer allegedly commented that "these new young hires are really good, they pick up new technology very quickly, learn quickly, are very smart and just amazing", the HRTO found that this, if said, could arguably raise an inference that age was a factor in presenting the severance offer or that the respondent used age to pressure the complainant into accepting the offer (*Riddell v. IBM Canada,* 2009 HRTO 1454. I would note that the HRTO concluded that the employer in fact did not say these things).

- Factors to guide any consideration of whether age discrimination has occurred in a workplace reorganization or downsizing:

  - Compare the performance of those who were selected for termination versus those who remained with the organization;

  - Watch for statistical evidence indicating a disproportionate number of younger workers were kept on, which can suggest an organizational bias for younger workers;

  - Be wary of an assessment of personal suitability that is based on subjective considerations as it can result in stereotyping or unconscious biases and is always vulnerable to scrutiny;

  - Watch for indications that workers were selected for termination because of a perceived propensity to retire or because they were pension-eligible;

  - Be careful of any deviation from the organization's previous approach, such as using seniority; and

  - Be careful of statements that can be used as a euphemism for age, such as "career potential", "rejuvenate the workplace" and "renewal" etc.

- If more people stay on and work to a later age, then older workers will become more common in the workplace, the stereotypes will lessen, and older workers who are terminated may have an easier time searching for employment. This will impact reasonable notice periods, presumably making them shorter based on the expectation that a highly motivated, energetic and experienced older employees will be better able to find comparable work.

  - This is still more of an idea than a reality. There is no case law where it has been argued that older workers now have an easier time finding work.

- Also there is a counter argument that because older workers are staying in their jobs longer, there are more people competing for the same jobs, which is actually making it harder to get another job. This would actually increase the reasonable notice period.

- As of yet, there are no significant decisions that have addressed how the changing population and the elimination of mandatory retirement will impact reasonable notice. The reality is it may still be difficult for older workers to find new employment, so age may well continue to be a relevant factor.

Ella Forbes-Chilibeck practises employment law with the law firm Nelligan O'Brien Payne, OCASA's legal services provider.