



## Provisions of a collective agreement which favour older workers may be out of favour with the Ontario Human Rights Code

April 11, 2011

Stikeman Elliott

The Ontario Labour Relations Board has found that an article in a collective agreement which gave preferred treatment to electricians over the age of 50 was a breach of the Ontario [Human Rights Code](#). The provision in the collective agreement was included to assist the older workers, who the union claimed were disadvantaged in an industry where younger, cheaper workers were often hired in place of the older workers. However, the OLRB [concluded](#) that although this was a commendable purpose, the union had not established that the older workers were at a significant disadvantage, and therefore, the article was found to violate the provisions of the *Code* prohibiting discrimination on the basis of age.

### Facts:

The collective agreement between the union and the company contained Article 706, which stated that “[w]here five or more Journeymen are employed, every fifth Journeyman shall be fifty years of age or older, where available”. This provision was added to address the difficulty faced by electricians in finding employment once over the age of 50, as younger, cheaper workers were often hired in place of older, more experienced but more expensive workers. This grievance arose after an electrician was laid off by the company. The electrician was over the age of 50, and following the layoff, no electricians over the age of 50 remained employed at the company. The union claimed this was a breach of Article 706. The employer brought a motion to dismiss the grievance, alleging that Article 706 was void as it contravened the prohibition on age discrimination in the *Code*.

### Arguments of the parties:

The union argued that Article 706 did favour older workers, but was not discriminatory as it was intended to remedy the disadvantage which older workers have in the construction industry. The union argued there were legitimate and acceptable reasons for the differential treatment given by Article 706. In the alternative, the union argued that Article 706 was a “special program” as allowed by section 14(1) of the *Code*.

The employer argued that there was no evidence that older electricians were at a disadvantage, and that the union had not produced any such reliable evidence, and thus Article 706 was prohibited by the *Code* as discriminatory based on the prohibited grounds of age.

### Decision of the OLRB:

The OLRB examined both the union's submission of evidence regarding the status of older workers in the construction industry and the union's request that the OLRB take administrative notice that older workers were disadvantaged in the workplace. However, the OLRB found that the factual submissions of the union were not directly applicable, as the submissions were general in nature, and considered the status of apprentices in the construction industry, not journeymen electricians. Similarly, the OLRB denied the union's request to take administrative notice that electricians over the age of fifty are disadvantaged in the workplace. In so doing, the Board was not prepared to perpetuate the stereotype that workers over the age of 50 require protection from layoff simply because of their age. While the OLRB was sensitive to the concerns expressed by the union, they found that these workers did not require the protections afforded by Article 706, and thus Article 706 breached the prohibition on discrimination based on age found in the *Code*.

The OLRB then examined the union's alternate argument that Article 706 was protected as a special program under the *Code*. Special programs are allowed under the *Code* to "relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity. However, after examining the requirements of such a program under section 14 of the *Code*, the OLRB found that Article 706 did not meet the requirements (such as registration of the special program with the Human Rights Commission), and thus was not properly characterized as a special program.

In the result, the preliminary motion of the company was allowed, and the grievance dismissed, as the OLRB found that Article 706 "clearly does differentiate between two classes of employees in relation to their employment on the basis of age and therefore infringes the rights of one class of those employees."

Our Views:

While the difficulties faced by older workers have been recognized by courts in Canada, including the Supreme Court in [Law v. Canada, 1999 CanLII 675](#), in which Justice Iacobucci stated "it seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice", the OLRB was unwilling to allow the disputed Article 706 to stand. The evidence presented did not factually establish that older workers are disadvantaged to the point that they require remedial preferential treatment, and the OLRB was not willing to take administrative notice of that fact.

This decision is interesting for employers as it sets boundaries on the limits to which the protections offered by the *Code* can be used to protect workers. While further evidence or a different set of facts may have equalled a different result, this case has established that special treatment is not available to workers over the age of fifty without a "*bona fide* laudable purpose".

DISCLAIMER: This publication is intended to convey general information about legal issues and developments as of the indicated date. It does not constitute legal advice and must not be treated or relied on as such. Please read our full disclaimer at [www.stikeman.com/legal-notice](http://www.stikeman.com/legal-notice)