

**MANDATORY RETIREMENT FOR FIREFIGHTERS AT AGE 60 UPHeld BY THE ONTARIO
HUMAN RIGHTS TRIBUNAL**

*Espey and Ontario Human Rights Commission v. City of London and London Professional Fire
Fighters' Association, 2008 HRT0 412*

By Kaili Toome

Introduction:

In December 2008, the Ontario Human Rights Tribunal upheld an age 60 mandatory retirement provision in a firefighters' collective agreement. While adjudicators have previously upheld such provisions, the complaint made by Edwin Espey presented the Tribunal with an opportunity to reconsider the issue in a changed legal landscape.

The Tribunal's previous decisions were based on a framework of analysis that has since been revised by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"). Under the revised test, to establish a *bona fide* occupational requirement, evidence that the claimant could not be accommodated without experiencing undue hardship is required.

The adjudicator also noted that in 2006 the definition of the word "age" in the Ontario *Human Rights Code* was revised to remove the upper limit of age 65. Prior to this change, if an age 60 mandatory retirement provision was struck down, an age 65 provision could be put in its place in order to conform to the *Code* without the need to prove that it is a *bona fide* occupational requirement.

The Facts:

The collective agreement between the City of London and the London Professional Fire Fighter's Association (the Respondents) required suppression firefighters to retire at the age of 60. Edwin Espey, employed by the City of London as a District Chief, turned sixty in September of 2004 and was required to retire pursuant to the provisions of the collective agreement. Mr. Espey had 32 years of credited service, rather than the maximum 35 years allowed. A pension estimate indicated that he would receive an additional \$7,000 per year in his pension if he continued working until age 65.

The Adjudicator Upholds the Mandatory Retirement Provision:

The Ontario Human Rights Commission and Mr. Espey took the position that the mandatory retirement provision constitutes discrimination that has not been justified by the Respondents. The Respondents conceded that the provision is *prima facie* discriminatory, but that they have met their onus in justifying mandatory retirement as a *bona fide* occupational requirement. The justification focussed on the fact that the risk of cardiac events increases dramatically with age. Dealing with this risk through mandatory retirement was reasonable, and changing the provision would constitute undue hardship.

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Applying the test from *Meiorin*, the adjudicator considered whether the respondents had satisfied the following steps:

- that mandatory retirement at age 60 for suppression firefighters was adopted for a purpose or goal that was rationally connected to the performance of the job;
- that this requirement was adopted in an honest and good faith belief that it was necessary to the fulfilment of that purpose; and
- that this requirement is reasonably necessary to accomplish this purpose. To do so, they must show that individual employees over 60 cannot be accommodated without undue hardship.

The first two steps were easily satisfied. In light of the increasing risk of cardiac events with age, and the effects of a cardiac event on the work of a firefighter, mandatory retirement was found to be rationally connected to the work of a firefighter, to protect health and safety. The adjudicator also found that the standard was adopted in good faith to promote the work-related purpose of protecting health and safety.

The adjudicator found that the Respondents had satisfied the third step of the *Meiorin* test for three reasons:

- 1) The medical evidence established that “advancing age contributes significantly to the risk of a cardiac event in firefighters. The increased risk of cardiac events while firefighters are responding to an emergency is particularly high. The safety consequences of such an event for an on-duty firefighter, the public and his or her colleagues may be grave.” This combination of high risk and serious consequences was an important factor in the analysis.
- 2) There is no individualized testing method that would allow a better risk assessment of on-the-job events for firefighters than age, given the occupation-related risks of heart disease.
- 3) Mandatory retirement as method of dealing with the risks to firefighters and the public of cardiac disease was negotiated into the collective agreement, and continues to be supported by the Association.

The adjudicator concluded that there had not been a violation of the *Code*. The mandatory retirement provision was reasonably necessary, and modifying it would cause undue hardship. However, the adjudicator left open the possibility that an individual firefighter may request an exception to the mandatory retirement provisions where medical evidence of an extremely low risk of cardiac events is provided. In these circumstances, accommodation may be required.

The City of London was represented by Peter Thorup and Lance Ceaser.

April 24, 2009