



Education Law eBulletin

A newsletter for educators.

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new legislation

Ending mandatory retirement

On December 12, 2005, Bill 211, the *Ending Mandatory Retirement Statute Law Amendment Act, 2005*, received royal assent. The countdown has begun to December 12, 2006, when employers will no longer be able to maintain blanket mandatory retirement policies. The heart of the legislation is the redefinition of "age" as it appears in the Ontario *Human Rights Code*. Whereas "age" is currently defined as between the ages of 18 and 65, under the new legislation there will no longer be a ceiling of 65 years. Consequently, after December 12, 2006, employers who enforce blanket mandatory retirement policies requiring retirement at a specific age will no longer be insulated from Human Rights challenges. The legislation does not include any exemptions for existing collective agreements.

An exception to the prohibition against mandatory retirement exists if the employer can meet the *bona fide* occupational requirement ("BFOR") test under the *Human Rights Code*. Under this test, employers may compel the retirement of an employee if they can demonstrate that:

- the age-based job requirement or qualification is a BFOR;
- the employee does not meet the job requirement or qualification; and
- the employee could not be accommodated without causing undue hardship to the employer.

The accommodative portion of the test places a heavy onus on the employer. As is the case with disabled employees, the accommodation criterion requires that each employee be assessed on a case-by-case basis to determine whether accommodation is possible.

With the elimination of mandatory retirement, all employees will be entitled to notice of termination or pay in lieu and severance pay (if applicable) under the *Employment Standards Act* upon the termination of the employment relationship. Employees who continue to be subject to a mandatory retirement scheme that is permitted under the *Human Rights Code*, however, will not be entitled to this compensation. It is important to note that employee benefit plans, pensions and group insurance plans, so long as they comply with the *Employment Standards Act*, will not breach the provisions against discrimination on the basis of age contained in the *Code*. Accordingly, employers will continue to be permitted to exercise their own discretion when determining whether to offer any of the above plans to employees who are 65 years of age or older, without risking human rights complaints.

School boards and private school administrators should review their current collective agreements, employment contracts, and retirement policies to determine what, if any, changes may be required in light of this new legislation. Importantly, the new legislation does not act to hinder early retirement agreements entered into by employers and employees.

in the courts

Supreme Court Rules on Vicarious Liability in School Setting

In its recent decision, *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, the Supreme Court of Canada upheld a British Columbia Court of Appeal decision which found that the Catholic Order was not vicariously liable for the sexual abuse of a student attending its private residential school for First Nations children. The Court of Appeal had overturned a lower court finding of vicarious liability against the Order.

The student had been regularly abused by a staff member while attending the Oblates' residential school between 1957 and 1962. The abuser was employed as a baker, boat driver and odd-job man and lived in the upper floor of a building on school grounds which was off-limits to the students. The student sought damages from the Order for both "direct liability", which requires that there be some fault on the part of the defendant, and "vicarious liability", which arises from the employment relationship between the school and the abusing employee regardless of any knowledge or fault on the part of the employer. The Supreme Court of Canada only considered the issue of vicarious liability.

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A majority of the Supreme Court (8 of 9 judges) concluded that the Order was not vicariously liable for the abuse. The majority explained that while the school may have created the "opportunity" for the abuse to take place, there was no strong connection established between the roles and responsibilities assigned to the abuser and the abuse. The Court found that to impose vicarious liability in this situation would lead to the school becoming an "involuntary insurer", and noted that, if such general liability is to be created, it was a matter for the legislature.

The Court considered several factors in determining whether or not to impose vicarious liability, including:

- While the residential setting where the abuse occurred would favour a finding of vicarious liability, the limited duties and role of the abuser at the school were conclusive against vicarious liability.
- The abuser was not "permitted or required" to be with children, apart from supervised trips in a motorboat (which the abuser drove).
- The abuser had no significant contact with students and his quarters where the abuse took place were "off-limits" to students.
- The abuser did not have the authority to become involved in the intimate lives of the student or other students.
- The abuser was not conferred any power in relation to the particular student.
- The abuser did not have regular or meaningful contact with the students.

These factors and others referenced in the decision are useful for school boards to consider when structuring their employment relationships.

The lone dissenting judge, Justice Abella, who held that the School should be vicariously liable for the abuse, concluded that the Court of Appeal had wrongfully characterized the trial judge's decision and oversimplified the judge's reasons. Justice Abella emphasized the abuser's role in the supervision and authority over the children, the isolation and vulnerability of the children, and the environment of a generalized fear toward all staff at the school (where corporal punishment was used). Notably, Justice Abella distinguished between the vicarious liability cases in the residential school setting and in the public school setting, finding that a "public school is not the functional equivalent of a residential school" given the unique and extreme vulnerability created in residential schools.

new legislation

Learning to 18 Legislation

New legislation called "Learning to 18 Legislation" (Bill 52) was recently introduced by the Ministry of Education as part of its Student Success Strategy. The Bill raises the compulsory school attendance age from 16 to 18, and provides for the creation of alternate education programs to address pupils' individual learning needs. The proposed legislation also amends the *Education Act* and *Highway Traffic Act* to require pupils to either stay in school or in an "equivalent learning" program until age 18. A pupil who withdraws from such a program can be prevented from having a valid driver's licence. Parents and guardians will be required to cause a pupil to attend school, unless the pupil is at least 16 years old and has withdrawn from parental control, or risk incurring a fine of up to \$1000 (up from \$200).

Other noteworthy aspects of the draft legislation include:

- School boards will be required to designate a person to determine "requests for confirmation" advising whether or not a pupil is in compliance with the school attendance provisions or is exempt, for the purpose of the Ministry of Transportation deciding the pupil's entitlement to a driver's licence. A determination of non-compliance can be appealed pursuant to regulations.
- The term "guardian" referred to in the *Education Act* sections regarding pupil attendance will be extended to include any person who receives a person of compulsory school age into his or her home or care.
- The right to be qualified as a resident pupil will be extended to persons aged 16 or 17 years who have withdrawn from parental control, and to persons who are at least 18 years old.
- The Minister will be empowered to make regulations excusing persons over the age 14 years from compulsory attendance at school; and regulations specifying circumstances when certain rights or obligations of a parent or guardian are passed to a pupil who is 16 or 17 years old.

Bill 52 had its first reading on December 13, 2005. It remains to be seen what changes may be made to the proposed legislation before it ultimately becomes law.

We welcome your comments and questions. Send them, and any updated contact information, to byrdena.macneil@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com

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