HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Wayne (Steve) Talos

Applicant

-and-

Grand Erie District School Board

Respondent

-and-

Ontario Human Rights Commission, Her Majesty the Queen in right of Ontario as represented by the Ministry of the Attorney General of Ontario, Ontario Confederation of University Faculty Associations, Ontario English Catholic Teachers Association and Elementary Teachers Federation of Ontario

Intervenors

INTERIM DECISION

Adjudicator:	Yola Grant
Date:	May 18, 2018
File Number:	2012-11420-I
Citation:	2018 HRTO 680
Indexed as:	**Talos v. Grand Erie District School Board**

APPEARANCES

Wayne Talos, Applicant	)	James M. Melnick, Counsel
Grand Erie District School Board, Respondent	)	Stephen Gleave and Richelle Pollard, Counsel
Ontario Human Rights Commission, Intervenor	)	Cathy Pike, Sunil Gurmukh, Rana Arbabian and Kylie Thomas, Counsel
Her Majesty the Queen in right of Ontario as represented by the Ministry of the Attorney General of Ontario, Intervenor	)	Bruce Ellis and Matthew Horner, Counsel
Ontario Confederation of University Faculty Associations, Intervenor	)	Emma Phillips and Daniel Sheppard, Counsel
Ontario English Catholic Teachers Association, Intervenor	)	Paul Cavalluzzo and Adrienne Telford, Counsel
Elementary Teachers Federation of Ontario, Intervenor	)	Kate Hughes and Lauren Sheffield, Counsel

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INTRODUCTION

[1] Mr. Talos came before this Tribunal to allege that an exception in the *Human Rights Code* that permits employers the discretion to terminate benefits for workers over age 65 infringed his equality rights and was unconstitutional. His extended health, dental and life insurance benefits were terminated when he reached aged 65 although he continued to work on a full time basis. He was an experienced secondary school teacher and was enthusiastic about contributing as a teacher although he could retire and receive a pension and other government benefits that accrued to Ontario residents of that age. He was also financially motivated to work as he needed the health benefits that had for decades effectively augmented his remuneration. These benefits assisted greatly with the medical and other expenses that his family faced because his wife had become gravely ill. She had no employer sponsored benefits and, as she was younger than 65 years old, she did not qualify in her own right for various government income supports like Old Age Security and Ontario Disability Drug Benefits Plan. The family was able to apply for and receive some financial support from the needs-tested Ontario Trillium Drug program that covered partial costs for certain drugs. The family was still out of pocket for a considerable sum and was deprived of the peace of mind one associates with having an insurance plan that covers unpredictable eventualities. Mr. Talos seeks monetary compensation of $160,000 for lost benefits and compensation for injury to dignity, feelings and self-respect.

[2] Involuntary retirement at age 65 was prohibited with the passage of Bill 211 in late 2005. The instant Application addresses a hold-over from that era that continues to permit employers to provide age-differentiated benefits to workers 65 and older.

[3] Mr. Talos' Application was filed under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), and alleges discrimination with respect to employment because of age. He alleges that his employer, the respondent Grand Erie District School Board (GEDSB or the Board), breached s. 5(1) of the *Code*, on the basis of age when he turned 65, because the employer terminated his membership in the various employer benefit and pension plans without any actuarial justification. At the

start of this hearing, the allegation of discrimination was limited to group health, dental and life insurance benefit plans, excluding long-term disability insurance, superannuation and pension plans from consideration in the instant constitutional challenge.

[4] Mr. Talos (the applicant) is covered by a collective agreement between GEDSB and his union Ontario Secondary School Teachers' Federation (OSSTF). OSSTF has not been involved in the hearings before the Tribunal, and a decision to add them as a party has been deferred pending the outcome of the constitutional challenge.

[5] On August 13, 2013, the applicant filed with the Tribunal a Notice of Constitutional Question (the "Notice"). The Notice indicated the applicant intended to argue that s. 25(2.1) of the *Code* contravenes section 15 of the *Charter of Rights and Freedoms,* Part 1 of the Constitution Act, 1982 being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11 (the "*Charter*"). On November 26, 2013, the Tribunal issued an Interim Decision, *Talos v. Grand Erie District School Board,* 2013 HRTO 1949 ("*Talos")*,) in this Application and found that s. 25(2.1) of the *Code* is a complete defence to Talos' allegation of a *Code* infringement. Consequently, there was no reasonable prospect of success in this Application unless s. 25(2.1) of the *Code* is found to be contrary to the *Charter*. The Application continued in the Tribunal's normal hearing process with respect to the *Charter* issue solely.

[6] It should be noted that when the Tribunal in the instant Decision refers to the issue being whether s. 25(2.1) of the *Code* is contrary to the *Charter*, the Tribunal is using this as a shorthand to refer to the impact of the defence provision in s. 25(2.1) of the *Code* read together with s. 44 of the *ESA* and O. Reg. 286/01 under the *ESA*.

Jurisdiction of HRTO

[7] The HRTO has jurisdiction to consider a *Charter* challenge where there is a connection to the *Code*: *Wilson v. Toronto Catholic School Board*, 2011 HRTO 1040,

citing two decisions of the Supreme Court of Canada (*Martin* and *Laseur*). The Tribunal reasoned as follows in *Wilson* at paras 18 and 19:

> The Supreme Court of Canada has addressed the jurisdiction of a tribunal to hear and decide *Charter* issues. In *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 the Court said (at paragraph 36):
>
> > Thus, an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision. In other words, the power to decide a question of law is the power to decide by applying only valid laws.
>
> The Human Rights Tribunal of Ontario has the power to decide questions of law arising under the *Code*. In deciding those questions of law, the Tribunal is required to consider the constitutional validity (including the operation of the *Charter*) of the law. This includes questions of law arising from an interpretation of the *Code* itself and arising from the interpretation of other laws that are relevant to a determination under the *Code*. However, the Tribunal does not have a general authority to hear and determine *Charter* issues that do not arise in relation to a determination of an Application under the *Code*.

[8] The applicant seeks a determination that s. 25(2.1) of the *Code* is invalid (and thus inapplicable) for being in breach of the equality provision of the *Charter* that enumerates "age" as a protected characteristic. As "age" is also a protected ground under the *Code* and it is incorporated in the impugned *Code* provision (s. 25(2.1)), the Tribunal has jurisdiction to interpret its constitutive statute and to determine the constitutional issue within this Application.

[9] The Tribunal cannot issue a general declaration of invalidity: see *Martin (above)* at para. 31. It can, however, refrain from applying the impugned section of the *Code* if, in the Tribunal's view, it offends the *Charter*.

Parties and proceedings

[10] This is the first instance where the constitutionality of s. 25(2.1) of the *Code*, that permits the termination of employee benefits at age 65, has been raised before this Tribunal. The *Charter* issue (or constitutional challenge) prompted intervention by the Attorney General of Ontario ("AG") and the Ontario Human Rights Commission ("OHRC"), both of which were entitled to party status pursuant to s. 109(4) of the *Courts of Justice Act*, R.S.O. 1990, C.43 and s. 37(2) of the *Code*. By Case Assessment Direction ("CAD") dated September 25, 2014, the AG and OHRC were confirmed as intervenors with full party status. Also, by the same CAD, the applicant's request to add his union OSSTF as a party was deferred pending a determination of the constitutional issue and the crystallization of the union's interest, if any, in denying liability for any breach of the *Code*.

[11] Further intervenors were granted full party status by the following Interim Decisions: Ontario Confederation of University Faculty Associations (OCUFA) by Interim Decision issued on November 7, 2014 (2014 HRTO 1639), and the Elementary Teachers' Federation of Ontario and the Ontario English Catholic Teachers' Federation by Interim Decision issued on March 18, 2015 (2015 HRTO 349).

[12] The hearing regarding the *Charter* issue began in April 2015 and was conducted over 14 days, 11 of which were devoted to hearing evidence. Argument was completed in mid-September 2016. A total of 67 exhibits were entered into evidence, of which a few were contributed by the union intervenors. Ten witnesses comprising the applicant and his wife, a number of expert witnesses including a sociologist, two actuaries, an economist, two professors and other affiants contributed to the record.

[13] This decision is issued in May 2018 on account of the adjudicator's absence on leave.

SUMMARY OF DECISION

[14] For reasons set out below, I find in favour of Mr. Talos' claim that he experienced disadvantage on the basis of age and that his s. 15(1) *Charter* right has been infringed as a result of the impact of s. 25(2.1) of the *Code*, and that the respondent has not discharged its onus to justify this infringement under s.1 of the *Charter*.

[15] Section 25(2.1) of the *Code*, in conjunction with the *Employment Standards Act, 2000* (S.O. 2000, c. 41) ("*ESA*") and its Regulations, creates a distinction between workers under the age of 65 and those who are 65 and older who perform the same work and are vulnerable to losing a portion of their remuneration package. The former are protected by the *Code* from age-differentiated workplace group benefits, on any basis other than an actuarial basis, while the latter group is not afforded *Code* protection and is thus vulnerable to not being rewarded equally for work performed. The ending of mandatory retirement with the 2006 passage of Bill 211 did not end the differential treatment of workers over age 65; section 25(2.1), in conjunction with the *ESA* and its Regulations, specifically carved out 65 and older workers from protections with respect to different treatment in benefits plans, pension and other workplace plans, in a bid to maintain flexibility for the workplace parties to make arrangements that would respect the financial viability of those plans.

[16] It is evident that employees who work after age 65 provide the same labour as they did when they were 64 years of age and would normally be guaranteed equal compensation, including access to benefits. Absent the impugned provision, a benefit differential that is only explained by the age of the employee would be *prima facie* age discrimination under the *Code*. In my view, a legislative provision that prevents a worker age 65 and older from being able to challenge any reduction or elimination of access to workplace benefits as age discrimination is a *prima facie* violation of s. 15(1) of the *Charter*. Relying on *Tétrault-Gadoury*, and distinguishing *Withler*, I do not accept the responses advanced by the Board that Mr. Talos suffered no disadvantage because of the "generous" nature of his pension, that "he [Talos] can lead an economically viable life during his senior years" because he benefited from being the memb*er of a uni*on,

and that his transition to government funded programs at age 65 adequately substituted for benefits that he previously enjoyed as part of his remuneration package. I find that these considerations are irrelevant to determining whether Mr. Talos' equality right (to equal compensation) in employment as guaranteed by s. 15(1) of the *Charter w*as infringed.

[17] On a plain reading of the *ESA* and the *Code,* I find that neither statute supports the respondent's submission that Mr. Talos' long career and his membership in a profession and a union are relevant to the statutory protections afforded to all employees by these two statutes. These two statutes establish minimum standards for conduct and conditions of employment without regard to an employee's access to a collective bargaining process. Talos was denied the protection of the *Code*, not because he had a long successful career or was unionized, but *becaus*e he was over age 65. To restrict the interpretation of the impugned section to the particular context of Mr. Talos would be inconsistent with the approach taken by the Court in *McKinney* and other cases that addressed the issue of "proportionality" articulated in the *Oakes* test by reference to the impact on all workers "65 and older" to whom the impugned law applies.

[18] The AG submitted that *McKinney* stands for the proposition that all other provisions of the *Code* that impact employment terms and benefits for workers 65 and older remain constitutional in the wake of legislative action to end mandatory retirement ("Bill 211"). In my view, *McKinney* offers no assistance in addressing the instant question of whether the impugned section of the *Code* is constitutional, where vestiges of age-based differentiation in employment remain in the *Code* after mandatory (or involuntary) retirement was expressly prohibited. *McKinney* addressed ss. 9(a) and 4 of a former version of the *Code* (now ss. 10(a) and 5 of the current *Code*)*,* did not address the *ESA* or any link between the *ESA* and the *Code*, and, in any event, predates Bill 211 and the current climate and availability of empirical data to determine the issue in dispute.

[19] The Tribunal disagrees with the AG's submission that the decision of grievance arbitrator Brian Etherington in *Chatham-Kent (Municipality) v. O.N.A. (O'Brien) (Re)*, 104 C.L.A.S. 267 (October 31, 2010), 202 L.A.C.(4th) 1, is persuasive and should be followed. In *Chatham-Kent*, the constitutionality of s. 25(2.1) of the *Code* and the relevant provisions of the *ESA* and its Regulations was upheld. I agree with Arbitrator Etherington's determination that the equality provision of the *Charter* is infringed by s. 25(2.1) of the *Code* on the basis of age, but I disagree with Arbitrator Etherington's decision that the infringement is saved by section 1 of the *Charter*. It is noteworthy that the actuarial evidence presented in the instant Application differed significantly with that presented in *Chatham- Kent* regarding the cost associated with benefits for employees in their 60's.

[20] The fact that the collective bargaining *process* (rather than results) is constitutionally protected under s. 2(d) of the *Charter* is not determinative of the s. 1 *Charter* analysis, as the impugned *Code* section and the *ESA*'s permission of age-differentiated benefits plans apply without modification to non-bargaining unit members. In the result, this Tribunal finds that there are no competing constitutional rights engaged in the instant Application.

[21] Moreover, for the section 1 justification, I find that the evidence does not support the respondent's submission that the purpose of the impugned provision was to provide flexibility for employees (including non-unionized employees) and employers to determine optimal compensation through a collective or individual bargaining process. I find that this purported purpose is conjectural and irrelevant to the instant Application.

[22] The instant hearing involved the participation of the Ontario Human Rights Commission (OHRC), and various intervenor unions and faculty associations, and the Tribunal had the benefit of opinion evidence of various experts that were not available to the arbitrator in *Chatham-Kent*. In the intervening years since involuntary (mandatory) retirement was eliminated in 2006, societal views of workers over age 65 have changed significantly, compensation packages have also changed, and the experience of claims and costing for a decade are particularly relevant today to the justification of age-

differentiated benefits and the financial viability of workplace plans that include workers age 65 and older.

[23] After considering all the evidence, I conclude that the financial viability of workplace benefits plans can be achieved without making the age 65 and older group vulnerable to the loss of employment benefits without recourse to a (quasi-constitutional) human rights claim. I find that the impugned provisions do not minimally impair the rights of these older workers, as an employer is not required to demonstrate that their exclusion from employment benefits is reasonable or *bona fide*, or justified on an actuarial basis, or because their inclusion would cause undue hardship.

BACKGROUND

Recapitulation of Prior Decision in this Application and Result of Instant Decision

[24] As noted above, the November 2013 Interim Decision in the instant Application provided that the Application shall be dismissed "unless the applicant's constitutional challenge to s. 25(2.1) succeeds". Citing an earlier decision of this Tribunal (*Repaye* v. *Flex-N-Gate Canada*, 2012 HRTO 1258 at paras. 20-22), I stated in the November 2013 Interim Decision in *Talos* that "None of the relevant provisions in the *Code* and the *ESA* distinguish between employment where the workers are unionized from those where they are not." An excerpt from the November 2013 Interim Decision in *Talos* (above) is provided here:

> [22] Both parties provided the Tribunal with *Chatham-Kent (Municipality) and O.N.A. (O'Brien) (Re)*, 202 L.A.C. (4th) (October 31, 2010), a decision of Arbitrator B. Etherington in which the arbitrator concludes that s. 25(2.1) of the *Code* violates s. 15(1) of the *Charter of Rights and Freedoms* but is constitutional as it is saved by s. 1. The arbitrator also states in that decision that s. 25(2.1) of the *Code* means it is not discrimination for an employer to offer a benefits plan that excludes employees 65 and older. As a result, it does not support the position of the applicant.

[23] However, the applicant also filed with the Tribunal *Strathroy-Caradoc Police Association* v. *Municipality of Strathroy-Caradoc Police Services Board*, 2012 CanLII 51946 (ON LA). It involves an employee who, like the applicant here, was told by her employer that she was no longer entitled to benefits under the employer's benefits plan as she had reached 65. The issue before the arbitrator was whether or not this discontinuance of benefits breached the collective agreement between the employer and the union representing the employee. At paragraph 16 the arbitrator writes:

> The amendments to the Human Rights Code ended the requirement that employees retire at age 65. The amendments permitted employers to maintain benefit plans that provided different (or no) benefits to employees who continued to work past 65 years old. *In the collective bargaining context, arbitrators have to figure out whether the union and the employer have negotiated a benefit plan that differentiates between employees who are older than 65 years.* [Emphasis added.]

[24] The arbitrator goes on to interpret the collective agreement between the parties and determines that the agreement was that the employer would provide benefits to all members without age restriction. Therefore, when the employer purchased or maintained an insurance policy which did not provide benefits to those 65 and over, the employer breached the collective agreement. In interpreting the collective agreement the arbitrator relied on another decision by a different arbitrator, *City of London* v. *Canadian Union of Public Employees, Local 107*, [2010] O.L.A.A. No. 347, for the principle that:

> The finding of an intention to differentiate on such grounds [age] should require clear and unambiguous language to indicate such an intention.

[25] The applicant relies on this statement in support of the proposition that because the collective agreement between the respondent and the applicant's union does not explicitly say benefits will only be provided to employees up to age 65, the respondent's failure to provide the applicant with benefits after reaching age 65 is discriminatory.

[26] The Tribunal is not charged with hearing a grievance under the collective agreement between the applicant's union and the employer. The question before the Tribunal is whether or not the applicant's rights under the *Code* may have been breached by the respondent because its benefits plan provides no benefits to the applicant as he has reached age 65. On a grievance the question would be whether or not the respondent and the union agreed in their collective agreement that the employer would provide benefits to employees beyond 65. Therefore, the question

of how an arbitrator might interpret the terms of the collective agreement and the respondent's obligation to provide benefits to the applicant under it is not relevant.

[27] This issue came before the Tribunal in *Repaye* v. *Flex-N-Gate Canada*, 2012 HRTO 1258 (CanLII). At paras. 20-22 the Tribunal writes:

> … the applicant… submits that the present case can be distinguished on the facts from the Arbitrator's decision in *Chatham-Kent* because in that case, the age differentiation that affected the grievor's entitlement to benefits after she turned 65 was "a freely bargained for benefit of the Collective Agreement". In her submission, in the instant case, the Collective Agreement is silent on whether an employee is entitled to short-term disability benefits beyond age 65 and the employer has unilaterally negotiated short-term disability coverage that ends at 65.
>
> In my view, even if [the applicant] is correct that the circumstances here are different, this would not change the analysis in this case. *None of the relevant provisions in the Code and the ESA distinguish between employment where the workers are unionized from those where they are not*. In either case, it is clear that workplace short-term and long term disability plans that differentiate because a person is over 65 cannot be challenged under the *Code*. [Emphasis added.]
>
> An allegation that the employer has violated the terms of the Collective Agreement by securing an insurance contract that provides benefits only to age 65 when there was an agreement between the union and the employer to provide benefits beyond 65 is a matter that can be dealt with using the procedures established by the Collective Agreement.

[28] Given all of the above, I find that s. 25(2.1) of the *Code* means that the allegations in the Application of discrimination on the basis of age have no reasonable prospect of success unless the applicant's constitutional challenge to s. 25(2.1) succeeds. If it does not, then this part of the Application shall be dismissed.

[25] Given the within success of Mr. Talos' constitutional challenge to s. 25(2.1) of the *Code*, this Application shall continue in the Tribunal's process for a determination of the merits and damages, if any.

The impugned provisions

[26] The impugned section of the *Code* deems differential treatment (or entitlement) to employee benefit and pension plans on the basis of age, sex, marital status and family status to be a non-infringement of the *Code* as follows. Of particular concern is s. 25(2.1) regarding age-differentiated benefits:

> Employee benefit and pension plans
>
> 25 (1) The right under section 5 to equal treatment with respect to employment is not infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer, that makes a distinction, preference or exclusion on a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 25 (1).
>
> Same
>
> (2) The right under section 5 to equal treatment with respect to employment without discrimination because of sex, marital status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the *Employment Standards Act, 2000* and the regulations thereunder. R.S.O. 1990, c. H.19, s. 25 (2); 1999, c. 6, s. 28 (12); 2005, c. 5, s. 32 (15); 2005, c. 29, s. 1 (4).
>
> Same
>
> (2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder. 2005, c. 29, s. 1 (5).
>
> Same
>
> (2.2) Subsection (2.1) applies whether or not a plan or fund is the subject of a contract of insurance between an insurer and an employer. 2005, c. 29, s. 1 (5).

Same

(2.3) For greater certainty, subsections (2) and (2.1) apply whether or not "age", "sex" or "marital status" in the *Employment Standards Act, 2000* or the regulations under it have the same meaning as those terms have in this Act. 2005, c. 29, s. 1 (5).

[27] The definition of "age" in the *Code* as contrasted with that set out in O.Reg. 286/01 under the *ESA* is at the core of this constitutional challenge. The *Code's* definition of "age" in respect of freedom from discrimination in employment "means an age that is 18 years or more" (s.10(1) of the *Code*) while O.Reg. 286/01 under the *ESA* defines "age" as "any age of 18 years or more and less than 65 years".

[28] Deeming certain kinds of differential treatment to be a non-infringement of the *ESA* and, by virtue of s. 25(2.1), of the *Code*, is founded in an exception at section 44(1) of the *ESA*, which prohibits employers from providing a benefit plan that differentiates between employees (and other categories) on the basis of age "*except as prescribed*".

[29] The relevant regulation under s. 44 of the *ESA* is O.Reg. 286/01. O.Reg. 286/01 contains the following relevant definition (section 1) and provisions prescribing age-based distinctions (sections 7 and 8):

"actuarial basis" means the assumptions and methods generally accepted and used by fellows of the Canadian Institute of Actuaries to establish, in relation to the contingencies of human life such as death, accident, sickness and disease, the costs of pension benefits, life insurance, disability insurance, health insurance and other similar benefits, including their actuarial equivalents; O. Reg. 286/01, s. 1.

s. 7. The prohibition in subsection 44 (1) of the Act does not apply to,

(a) a differentiation, made on an actuarial basis because of an employee's age, in benefits or contributions under a voluntary employee-pay-all life insurance plan; and

(b) a differentiation, made on an actuarial basis because of an employee's age and in order to provide equal benefits under the plan, in an employer's contributions to a life insurance plan. O. Reg. 286/01, s. 7.

s. 8. The prohibition in subsection 44 (1) of the Act does not apply to,

(a) a differentiation, made on an actuarial basis because of an employee's age or sex, in the rate of contributions of an employee to a voluntary employee-pay-all short or long-term disability benefit plan; and

(b) a differentiation, made on an actuarial basis because of an employee's age or sex, in order to provide equal benefits under the plan, in the rate of contributions of an employer to a short or long-term disability benefit plan. O. Reg. 286/01, s. 8.

[30] Reading the *ESA* and the *Code* sections above together, workers aged 65 and older are effectively denied the human rights protection under section 5 of the *Code* that is available to all other workers age 64 and under. For workers age 64 and under, a workplace group benefits plan is prohibited from making a differentiation in benefits coverage on the basis of "age" as defined in O.Reg. 286/01, except in certain limited circumstances and only then if the differentiation is made on an actuarial basis. In contrast, workers 65 and older can be deprived of workplace group benefits or be differentiated against adversely because of their age, without an employer needing to bring itself within the limited circumstances set out in O.Reg. 286/01 in which age differentiation is permitted or the need for the demonstration of any actuarial basis for doing so. As a result, this permissive differentiation based on age as allowed by s. 25 (2.1) of the *Code* can be described as a "carving out" of some workers, aged 65 and older, from the scope of the protection of the *Code* in relation to employee benefit and other plans.

The *Charter* Issue and Existing *Code* Defences

[31] It was argued by OHRC and intervenors aligned in interest that s. 25 (2.1) of the *Code* is unconstitutional as it breaches the equality provisions and is not justifiable in a

free and democratic society. Without this carve out provision, workplace group benefits plans could address the needs of older workers on an equal basis, failing which employers (and unions) and insurers could rely on the defences found in sections 11 and 22 of the *Code* to justify any differential treatment based on age supported by credible actuarial evidence to show *bona fides* and/or establish "undue hardship". These relevant justification sections of the *Code* are as follows:

> Constructive discrimination
>
> s.11 (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
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> (a) the *requirement, qualification or factor is reasonable and bona fide in the circumstances…* [emphasis added]
>
> Restrictions for insurance contracts, etc.
>
> s. 22 The right under sections 1 and 3 to equal treatment with respect to **services and to contract** on equal terms, without discrimination because of age, sex, marital status, family status or disability, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, *differentiates or makes a distinction, exclusion or preference on reasonable and bona fide grounds* because of **age**, sex, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 22; 1999, c. 6, s. 28 (10); 2001, c. 32, s. 27 (5); 2005, c. 5, s. 32 (13). [emphasis added]

The Hansard Record

[32] Bill 211 was titled "An Act to amend the Human Rights Code and certain other Acts to end mandatory retirement". It had two clear purposes: (1) it ended the upper limit on age (at age 65) that deprived workers of *Code* protection from employers' practice of involuntary retirement; and (2) it preserved the ability to employers to provide differential benefits and pension plan contributions for workers 65 and older in a bid to maintain the financial viability of those plans.

[33] In response to a question from a Member of the Opposition at the Standing Committee on Justice Policy (November 24, 2005), regarding the carve out creating two classes of workers, the Minister of Labour remarked:

> Nothing in the proposed legislation would prohibit employers from providing benefits to workers beyond the age of 65….
>
> We know that in the past it's become the norm for some reason, to apply the age of 65 to a good many of our pension and retirement plans, and a host of things that we've sort of framed our society around. That attitude is changing with society's acceptance of the abilities and the rights of people beyond the age of 65 to enjoy the same employment rights as those under 64.
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> Ex. 47, JP-24

[34] On further questioning by another Member of the Opposition regarding the experience of other jurisdictions and the need for statistics from employee benefits underwriters, insurance companies or pension funds, the Minister of Labour responded:

> The industry, when it was consulted, Mr. Klees, was asked those specific questions. Staff themselves went out and did an inter-jurisdictional scan for evidence of what the impact had been of the implementation of this legislation in other jurisdictions. *Independently, we could not find that there had been any major impact on the expense of pension plans, benefit plans or dental plans as the result of the ending of mandatory retirement*. When the industry was asked to provide figures they may have that would assist us in that regard, my understanding, and to this date my knowledge, is that those figures were never provided. However, the advice that

> appeared to be coming from them is that there was a potential for increased expenses….
>
> *If you look at places like Quebec and Manitoba, where this was done over 20 years ago, I don't see, or haven't heard during any of the public consultations, that their plans differ in any significant way from plans in Ontario*. And they have ended mandatory retirement. [emphasis added]
>
> Ex. 47, JP-25

[35] The Opposition Member went on to express frustration and stated it was "unconscionable" that the Minister if Labour "can't answer the fundamental, rudimentary questions that I've put to this committee". The Minister of Labour responded further:

> That's the wonderful thing about this place, that so many different opinions don't necessarily have to be based on fact. The consultation that was done in the preparation of this proposed legislation has been very extensive. We travelled over all the province …. But to suggest that somehow the research on this proposed legislation has in some way been faulty is unfair to those members of the civil service who prepared that information …
>
> The question asked was, is there any evidence that this change would impact the expenses incurred by pension plans or by benefits plans, presumably to employers in this province? *The answer has been that no evidence could be found, but to be fair to the companies that were asked, there was, in their opinion, a potential for increases to expenses. That's a very clear answer; I think that's very fair answer*. [emphasis added]
>
> Ex. 47, JP-25

PARTIES' OPENING SUBMISSIONS

The Applicant – Steve Wayne Talos

[36] The applicant submitted that he will demonstrate that s. 25(2.1) of the *Code* (the "impugned section") that incorporates the *ESA* violates s. 15 of the *Charter* and is not saved by section 1 of the *Charter*. He submitted that a distinction is created on an enumerated ground, and the distinction creates a disadvantage by perpetuating prejudice or stereotype. As there is no pressing or substantial concern, he submitted that the impugned provision ought not to be justified under section 1. The applicant stated that he would rely on sociological and actuarial evidence to demonstrate disadvantage, and to show that the legislation does not minimally impair his rights. He stated that the evidence would demonstrate that even if there is a cost of supplying benefits to those working past the age of 65, these costs are not prohibitive or necessarily even difficult to absorb by the institutions and organizations that are responsible for providing these benefits.

[37] For the applicant, the issue does not concern his wealth or means or his specific circumstances. The question is "Does the legislation permit a differentiation of benefits at the age of 65 and is that discriminatory?"

[38] With respect to the employer's position that bargaining agents are the proper agents for dealing with these kinds of benefits, the applicant noted that not all employees over the age of 65 are represented by unions, though all employees over the age of 65 may well be affected by the *ESA* and the impugned provision of the *Code*. Furthermore, he noted that not all unions represent the minority interests of their members, and in some cases, this would be actually antithetical to what unions do. The applicant submitted that it is necessary to have legislation that establishes a base minimum below which no bargaining agent can go. It was submitted that the applicant and his union cannot be required to bargain for human rights.

Ontario Human Rights Commission (OHRC)

[39] The OHRC stated that, as a result of the impugned provision, the right under Section 5 of the *Code* to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *ESA* and its Regulations. The OHRC states that, in turn, section 44(1) of the *ESA* states that except as prescribed, employers shall not provide benefit plans treating employees differently because of their age, sex or marital status. While the *ESA* does not define "age", Ontario Regulation 286/01 passed pursuant to the *ESA* does. It is the Commission's position that section 25(2.1) of the *Code*, inasmuch as it relies upon the definition of "age" in the ESA, violates the *Charter*.

[40] The OHRC stated that, by way of historical context, the impugned provision was left unchanged in the *Code* in 2005 when Bill 211, the *Ending Mandatory Retirement Statute Law Amendment Act,* was enacted. Prior to 2005, employees could work past 65, but their employer could require them to retire (hence the term “forced retirement”). The Commission only partially supported Bill 211 at the time of its enactment. In particular, at second reading of the Bill, the Commission expressed its grave concerns about the provisions regarding access to equal benefits and to Workers' Compensation for employees over age 65.

[41] Excerpts from the Commission’s critique of Bill 211 before its passage follow:

> Bill 211 leaves intact the provisions of the *Employment Standards Act* and its Regulations that permit employers to discriminate in the provision of benefits against employees who are age 65 and older. There need be no difference whatsoever between the skills, abilities, and job duties of an employee age 64 and one age 65, but one will have access to benefits and the other will not. Without amendments to Bill 211, employees who are denied benefits or will receive lesser benefits solely because of their age will not be entitled to file a human rights complaint on the basis of age discrimination.

> Many of those who continue to work past age 65 do so because they cannot financially afford to do otherwise. Permitting employer to arbitrarily cut off benefits to older workers rather than make a determination on a rational basis is both discriminatory and unfair.
>
> The Commission, therefore, recommends that Bill 211's sweeping and arbitrary exemption from benefits protection for persons aged 65 and older be replaced by a more circumscribed defence for employers and insurance providers whereby distinctions in the provisions of benefits are approached on a bona fide and reasonable basis with the employer bearing the onus of demonstrating that the practice is justified in the circumstances.
>
> The provisions of Bill 211 respecting benefits and Workers' Compensation are a form of age discrimination. They send a message that older workers are essentially of lesser worth and value than their younger co-workers and reinforce negative and ageist stereotypes and assumptions about the abilities and contributions of older workers. They fail to recognize the contribution of older workers to their workplaces or the importance of work to older workers. These provisions are offensive to dignity and the Commission believes they will be vulnerable to challenge under the *Charter*.
>
> Hansard (November 23, 2005 at JP-16 (Nancy Austin))

[42] The OHRC stated that it would address the termination of health care benefits and life insurance for workers over age 65 as discriminatory, as this amounts to blanket exclusion, is overly broad, is not justified on actuarial grounds, and devalues older workers. Relying on the Supreme Court of Canada decision in *Eldridge* v*. British Columbia (Attorney General),* [1997] 3 SCR 624, 1997 (para. 83), the OHRC took the position that, for the purpose of the constitutional challenge, the applicant need only prove that he belongs to a group whose rights were infringed, and that it is not necessary at this preliminary stage of the proceeding for this Tribunal to make any final determination as to whether the applicant's personal rights were infringed.

Grand Erie District School Board (GEDSB)

[43] The respondent employer views this case as being about the tension between the legitimate institution of collective bargaining and the individual dignity of individuals to be treated with respect in the workplace. The respondent submitted that collective bargaining is a constitutionally protected "institution" and is a viable means for unions and employers to voluntarily set the terms of the workplace. It submitted that the issue to be addressed in the instant case is whether collective bargaining facilitated a "trade-off" process, whereby the applicant's union, OSSTF, opted to not pursue benefits for workers over age 65 when they faced the employer's request for a concession regarding the workload of teachers.

[44] The respondent Board submitted that there is no violation of s.15 of the *Charter* for two reasons:

1. With university education and professional status, the respondent submitted that the applicant is a member of an advantaged group in our society. Reyling upon *Withler v. Canada (AG)*, 2011 SCC 12, at para. 43, the respondent submitted that the Supreme Court of Canada has repeatedly said a group must be looked at in a contextual sense. The respondent stated that the applicant has received pay at the top of the pay scale, in the amount of $95,000 annually; he has had the security of a collective agreement for 40 years of his work life; he has benefited from a benefits plan to age 65; and his pension plan is second to none in Ontario. The respondent stated that the applicant has derived all of these advantages as a member of OSSTF and a beneficiary of the collective bargaining process.

2. The respondent further submitted that it cannot be demonstrated that the current law impacts the applicant by perpetuating stereotypes based on age, as he can lead an economically viable life during his senior years, relying on the benefits bestowed on him through collective bargaining.

[45] The respondent stated that it would also rely on the fact that s. 25(2.1) of the *Code* and the relevant provisions of the *ESA* are permissive, not prohibitive. It submitted that there is a social consensus that people retire by age 65 and move on or transition

to government supported programs like the Ontario Drug Benefit Plan (ODBP) and the Ontario Trillium Drug Program. The respondent stated that teachers in fact retire well before age 65, in part because of a generous “factor 85” pension provision.

[46] The AG's opening submission below was also adopted by the respondent Board with respect to the impugned provision having, as one of its purposes, the fostering of collective bargaining, and that there is no prima facie violation of s. 15 (1) of the *Charter* based on age if the approach of the court in *Withler* is adopted by this Tribunal.

Attorney General (AG)

[47] The Attorney General (AG) intervened in this proceeding in support of the constitutionality of section 25(2.1) to (2.3) of the *Human Rights Code* and the related provisions of the *Employment Standards Act* and its Regulations. These sections of the *Code* were passed in 2005 in Bill 211.

[48] Prior to the passage of Bill 211, an employer could enforce a mandatory retirement policy on persons who attained age 65, and the *Code’s* prohibition on age discrimination in employment was limited to distinctions in benefits, working conditions etc. made between persons between the ages of 18 to 65. In practice, employers and unions could negotiate terms that included different benefits, pension, and/or group insurance plans for workers age 65 and older or simply provide no benefits at all. After Bill 211, employees had the right to choose to work or to retire at age 65, and employers retained discretion with respect to providing different benefits, pensions and/or group insurance plans for persons over age 65.

[49] According to the AG, in 1989 the Supreme Court of Canada in *McKinney* and subsequent cases has consistently held that the provisions of the *Human Rights Code* that permit employers and employees to negotiate such terms, including mandatory retirement, are constitutional. Similarly, with respect to the federal *Human Rights Act*, in 2012 the Federal Court of Appeal in *Air Canada Pilot’s Association v*. *Kelly* (2012 FCA 209) determined that it was bound by the decision in *McKinney* and that the mandatory

retirement provision in that legislation was constitutional. The AG takes the position that in Ontario, since 2005 and post-Bill 211, the *Code* remains constitutional with regard to permitting negotiation of all terms of employment except for mandatory retirement and there have been no developments in the law (since *McKinney*) to suggest that a different result should be reached in the instant Application.[1] The AG, however, conceded that in recent years there have been some changes in the equality analysis under s.15 of the *Charter* (since Justice L'Heureaux-Dubé wrote her dissenting opinion in *McKinney).*

[50] Further, the AG submitted that the constitutionality of the *Code* and related *ESA* provisions was upheld by arbitrator Brian Etherington in *Ontario Nurses Association v. Chatham-Kent (Municipality)*. The AG submitted that this grievance arbitration decision, while not binding on this Tribunal, may be very persuasive.

[51] Finally, the AG indicated that it would lead evidence to demonstrate the increased costs of providing benefits to older workers would either significantly increase the cost of benefits or alternatively result in a significant reduction in benefits provided to all employees. The AG stated that the choice of age 65 as the point at which differentiation in benefits is permissible is consistent with employees' access to pension

[1] The Tribunal notes that law and practice regarding bargaining has changed in Ontario since *McKinney*. There have also been changes in statutes in Quebec and Manitoba prohibiting involuntary retirement. Thus, social context and experiences in those jurisdictions are arguably relevant in re-assessing the *Chatham-Kent* decision on the constitutionality of the impugned *Code* provision.

benefits and is the age at which the vast majority of employees have retired. By allowing certain distinctions on the basis of reaching age 65 to be freely negotiated, the AG stated that the provisions at issue recognize that employees negotiating alone or within a collective bargaining regime may wish to prioritize compensation such as salary or working conditions over health benefits and group insurance that become more costly or difficult to obtain at older ages. Even if there is competing evidence regarding whether a benefit could be obtained at low cost, the AG stated that the impugned provision provides flexibility for optimal compensation to be determined through the bargaining process.

[52] The AG submitted at the start of the hearing that the impugned provision encourages collective bargaining in accordance with section 2(b) of the *Charter*.[2] The AG stated that the impugned provision does not perpetuate prejudice, disadvantage or stereotypes about older workers and is not arbitrary. The AG submitted that, therefore, the impugned provision is not discriminatory under section 15 of the *Charter*.

[53] In the alternative, under section 1 of the *Charter*, the AG submitted that the impugned provision is "saved" as a reasonable limit on the equality rights of employees, as the impugned provision balances two competing purposes: the desire of some individuals to continue to work past age 65; as against the desirability of permitting

[2] The AG revised this position in final argument. Late afternoon on the first day of argument (September 12, 2016), counsel conceded that he would not argue that the purpose of the impugned section was to foster free collective bargaining and that he was "not re-litigating *Chatham-Kent*".

employees and employers the freedom to bargain pensions, group insurance, and other employee benefits to maximize efficiency over the course of employees' work-life cycle.

Ontario Confederation of University Faculty Associations (OCUFA)

[54] OCUFA is a coalition of 28 faculty associations who in turn represent over 17,000 professors and academic librarians. As an occupational group, professors are the group most likely to work past age 65. Since 2006, the number of professors working past age 65 has been growing and now stands at about 10% of the group or 897 faculty members.

[55] OCUFA had advocated for the elimination of mandatory retirement that culminated in the passage of Bill 211, and like the OHRC, it was concerned that there was no protection for employees' workplace benefits once they attained 65 years of age. OCUFA submitted that the employer should not be entitled to take a position arbitrarily based on age as long as the employee is continuing to make contributions at work. OCUFA supports the OHRC position that the blanket exemption for workers over age 65 is arbitrary and discriminatory, and is not saved by section 1 as it fails to take into account the particular circumstances of the employer and the demographics of the employee group, and it does not require the employer to demonstrate *bona fides* or a reasonable basis for exempting workers from benefits at age 65.

[56] OCUFA submitted that there is evidence that employers can provide benefits to employees 65 and older in a manner that is actuarially sound, because some employers are doing so right now. OCUFA argued for close scrutiny of costs to provide benefits. From its monitoring to date, OCUFA stated that some faculty associations have been successful in negotiating benefits for members age 65 and older, but these are almost always at a lower level and have been obtained at a higher price through concessions at the bargaining table.

[57] OCUFA submitted that collective agreements are not negotiated in a legislative vacuum, and that the concept that employees and employers bargain voluntarily and engage in "trade-offs" to achieve optimal terms is a legal fiction. OCUFA noted that the terms negotiated at the bargaining table are constrained in numerous ways by legislation, such as the *ESA,* the *Pay Equity Act,* the *Pension Benefits Act*, and the *Code*. It stated that constraints are placed on bargaining because as a society we have agreed that certain terms are not acceptable; e.g. women cannot be paid less than men. OCUFA stated that it would present evidence to show that the Ontario government has been active in intervening in bargaining, and in mandating that certain terms be negotiated at the central versus local bargaining table. OCUFA submitted that, in this climate, voluntary "trade-offs" are simply not possible.

Elementary Teachers Federation of Ontario (ETFO)

[58] This intervenor is the bargaining agent for 76,000 elementary teachers and early childhood educators in Ontario, including 1,000 members who are employed by the respondent GEDSB. Of these 1,000 elementary teachers, 15 are over the age of 64 according to information prepared by GEDSB.

[59] ETFO takes the position that any distinction based on age in a benefits plan must have a *bona fide* rationale to comply with the *Charter*. In its view, the impugned provision violates s.15 and is not saved by s.1 of the *Charter*.

Ontario English Catholic Teachers Association (OECTA)

[60] This intervenor is the bargaining agent for all teachers in Ontario's publicly funded Catholic education system, numbering 45,000. OECTA currently represents a number of teachers who are age 65 and older, and in recent years has seen a steady increase in the number of teachers who opt to work past age 65.

[61] OECTA supports the position taken by the applicant and the OHRC that s. 25(2.1) of the *Code* is arbitrary and too broad. Furthermore, it submits that "social

consensus" cannot excuse a violation of s. 15 of the *Charter*, particularly as the equality provision was designed to protect minority interests regardless of social consensus.

[62] Additionally, OECTA takes the position that a contextual analysis is required to determine on a case by case basis whether a benefit can be denied based on age, as opposed to the blanket exemption mandated by the impugned provision. The context includes consideration of the cost of the benefit, the nature of the benefit, the demographics of the bargaining unit, and if there is a union, collective bargaining considerations that a union must take into account in bargaining a collective agreement.

[63] OECTA observed that the AG and GEDSB rely on the decisions in *McKinney* and *ONA v. Chatham-Kent,* both of which found that there was a clear violation of s. 15. It submitted that the "fighting ground" then seems to be the section 1 analysis. OECTA stated that the *Oakes* test will thus be engaged, and this Tribunal will be required to consider:

> Is there a pressing and substantial objective for the impugned statute?
>
> > If "no", then what was the purpose and effect of the impugned statute? If either of these violate s.15, that ends the matter.
> >
> > If "yes", i.e. there is a pressing and substantial objective, one must consider whether the means adopted to effect this objective is proportional (and minimally impairs the *Charter* right).
>
> *R. Oakes* [1986] 1 S.C.R.103,Dickson C.J. for the majority at paras. 69-71 as paraphrased by OECTA counsel.

[64] OECTA urged this Tribunal to conclude that there is no pressing and substantial objective for the impugned provision, and find that the impugned provision does not minimally impair the *Charter* right as there is a more balanced way to respect human rights. OECTA submitted that the Tribunal should then proceed with this case with the typical analysis of discrimination on a prohibited ground, including whether undue hardship would be imposed on the employer in requiring them to provide benefits to workers over age 65.

[65] OECTA countered the AG's submission and stressed that there is no constitutional protection of collective bargaining *results*. It submitted that it is only the collective bargaining *process* that is protected by s. 2(d) of the *Charter*. OECTA submitted that there is nothing inconsistent with a constitutionally protected *process* of collective bargaining being required to conform to the requirements of either section 15 of the *Charter* or the *Human Rights Code*. For clarity, as only the collective bargaining process is protected, OECTA submitted that it does not follow that whatever results from that process is also protected from scrutiny under s. 15. Indeed, OECTA submitted that s. 2(d) is raised in this context as a "red herring", as there is no competition between these two constitutional protections. At best, if this Tribunal were to engage in a balancing exercise of two constitutional rights (section 2(b) v. section 15(1)), OECTA submitted that this Tribunal need to consider whether the process of collective bargaining is substantially interfered with by the law in question.

[66] OECTA concluded that the *Human Rights Code* without section 25(2.1) is adequate and fair to deal with this Application, because it will take into account all of the relevant considerations (e.g. undue hardship) without any arbitrary line that determines who gets protected and who does not.

EVIDENCE AND FACT FINDING

List of Witnesses

[67] Below is a list of ten witnesses who provided evidence in the hearing of this Application. Witnesses included the applicant and his wife, a sociologist, two actuaries, an economist, two professors and others. Unless otherwise stated, witnesses provided both affidavit and *viva voce* testimony. Experts provided reports and affirmed them at the hearing. The experts' qualified area of expertise is included below with the summary of their evidence.

1. Wayne Talos
2. Diane Talos

3. Dr. Ellie Berger – OHRC expert sociologist

4. Peter Gorman – GEDSB's expert actuary

5. Sharon Bell – GEDSB, Human Resources Manager

6. Prof. Richard P. Chaykowski – AG's expert on Ontario's labour relations regime

7. Hugh Mackenzie- OCUFA, economist, responding to Prof. Chaykowski

8. Russell Janzen, OCUFA, research analyst; affidavit only, no *viva voce* evidence

9. Ellen Whelan, OHRC's expert in Reply (group benefits actuary)

10. Prof. Michael Lynk – OHRC's expert on labour relations (in Reply) responding to Prof. Chaykowski

Summary of Evidence and Fact Finding

[68] The evidence submitted to the Tribunal is copious, including affidavits as well as *viva voce* testimony captured in verbatim transcripts of the proceedings. Below is a brief statement of the evidence that each witness provided to the Tribunal. Where the evidence was uncontested, it was accepted by the Tribunal. Where there was a dispute in the evidence, a separate section headed "Finding of Fact" will follow.

Mr. Talos

[69] Wayne Steven Talos provided an affidavit on April 24, 2015 to replace an earlier one filed with the Tribunal that was dated January 14, 2015. He gave evidence of his communications with his employer GEDSB, including the Board's Trustees, in spring 2012 when his benefits were terminated and he decided that he could not afford to pay for individual insurance.

[70] Mr. Talos indicated that he did not receive information in a timely manner that would have permitted him to apply for health insurance within 60 days of his 65th

birthday, without the need to disclose his wife's illness. As he sought to apply later, he disclosed her illness and then did not follow through, as the verbal appraisal from E. Tremblay, an insurance representative, was that the cost would be prohibitive and the coverage would not be as extensive as was needed to fully cover his wife's illness.

[71] He spoke of the need for his family to disclose their finances in the process of applying to receive assistance from Trillium Drug Benefits. Although they were deemed eligible, some drugs were unavailable to his wife because her cancer was at "stage 4", while no such restrictions (i.e. financial needs test and denial because of disease progress) applied to his employee benefits plan. At least two drugs were provided free of cost by physicians and/or hospitals that were not covered by Trillium or ODP.

[72] He gave further testimony that he was out of pocket for the Trillium deductible ($3,000 in drug costs), fees associated with Trillium, dispensing fees, and an extra $2,400 that was paid for life insurance.

[73] During his examination and in connection with his real property holdings, Mr. Talos expressed the following view:

> There are two prongs to this. One is, I am a hardworking, diligent, conscientious teacher. And the Grand Erie District School Board receives money to subsidize my benefits and I saw no bona fide or legitimate reason why, just because I had some grey hair and was 65, that I should be treated any differently than them.
>
> And the other prong to this is the fact that -- the potential consequence for my wife. And I know that, you know, the Respondent wants to try to prove on paper I have a substantial amount of money, which I won't dispute. I mean, I'm property-rich and exceedingly penny-poor.
>
> …. And so, without those drugs, it was my opinion at the time that her life was being further threatened by the fact that we did not have a group benefit policy.

[74] Mr. Talos was cross-examined in connection with his real property holdings, some of them inherited (among them, a farm business, a vacation home and a rental property), and his inability to liquidate and to rely on his own financial resources to manage the family's medical bills in the absence of his workplace benefits. Mr. Talos testified that he was "property rich and penny poor"; that the properties held mortgages and he was over-extended; that he tried to liquidate and was unsuccessful; and finally, that "I didn't intend to make my financial situation an issue for the human rights commission [*sic*]; I should be treated equally."

Mrs. Talos

[75] Diane Talos, the spouse of applicant, provided an affidavit dated March 18, 2015 and gave brief testimony regarding her inability to obtain certain drugs that would have been available to her had the applicant's insurance benefits continued. She supported the applicant's testimony regarding seeking out alternative sources to obtain assistance with drug costs for her dual diagnosis, in the absence of his workplace benefits. Because of poor health, she had ceased working in 2006 and received a disability pension from CPP. She had no health benefits associated with her work in private clinics for the majority of her career as an X-ray technician.

[76] Mrs. Talos, in her affidavit, identified that methotrexate and enbrel (for arthritis) had to be purchased privately, and that she later suspended the use of these medications for about two months as costs were prohibitive after her husband's benefits were terminated as these were not covered by ODP. Another drug that was prescribed for her, neupogen (to promote white blood cells during cancer treatment), was prohibitive in costs, and thus that treatment was unavailable to her for a period until her oncologist was able to source it for free. Her treatment using a third drug, vespesid, was interrupted between the loss of her husband's workplace benefits and her attaining age 65 to become qualified for ODP. Vespesid, which has demonstrated some positive results in C125 cancer counts, was not covered by Trillium. With her inability to obtain certain drugs and with the progress of the disease, the Talos family sought out

alternative drugs and treatments, some of which were not covered by ODP and OHIP respectively.

[77] She added to the applicant's testimony and indicated that the family forfeited other benefits that they had previously, like eye-care, travel, dental and physiotherapy.

Dr. Berger – expert sociologist called by OHRC

[78] The intervenor OHRC, which was aligned in interest with the applicant, called Dr. Ellie Berger as an expert witness. On April 28, 2015, Dr. Berger was put forward as a "sociologist with expertise in social gerontology and, in particular, ageism in the workplace". After objection from AG's counsel regarding the expert commenting on the issue to be decided, there was agreement that Dr. Berger would proceed with the parties' and the Tribunal's understanding that "ageism" is a field of sociological study, not a legal determination of whether there was age discrimination in the instant matter.

[79] Dr. Berger holds a Masters degree in Public Health Science (examined from sociological and psychological perspectives) and a doctorate in Sociology. She has previously provided an expert report to a committee of the House of Commons on "Opportunities for Older Persons in the Workforce" and an expert report to the HRTO, but this is her first instance of giving *viva voce* evidence. She also has published on aging identities, managing age discrimination, and has a forthcoming book with University of Toronto Press titled "Ageism at Work: Negotiating Age, Gender, and Identity in the Discriminating Workplace".

[80] Dr. Berger describes herself as a social gerontologist. She examines social systems and their impacts on individuals, particularly regarding health, ageism and social inequality. She indicated that this field of gerontology has been around since the 1950's, with some research done in the 1960's, and the term "ageism" was coined by a medical doctor (Robert Butler) in 1968. Research in ageism is continuing but at a lesser pace than research in sexism and racism. She admitted that there is a paucity of data

based on the Canadian population, and she relies on data from other developed countries.

[81] She is currently an Associate Professor at Ryerson University. Her Masters' thesis focused on older workers' job search processes and their experiences of ageism.

[82] She compiled five volumes of literature, and her opinion was introduced into evidence (Ex. 4) with two documents substituted among those that were previously disclosed. The literature provided by Dr. Berger included academic articles she authored and co-authored. She expressed that her view was consistent with the articles that she had compiled to support her evidence.

[83] Dr. Berger indicated that the definition of "older worker" is imprecise. It varies by gender and by decade, and by expectations regarding retirement. In the 1980's, an older worker was over age 45, then age 55, and now with the removal of mandatory retirement at age 65, the definition of the upper limit is again changing. Chronological age also has a different significance depending on whether a worker is already employed compared to one who is seeking to re-enter the workforce.

[84] To aid with our understanding of age, Dr. Berger indicated that there are at least three types of age: chronological, functional and sociological.

[85] Below is a summary of her *viva voce* opinion evidence, given on April 28 and 29, 2015, based on her extensive literature review and her studies that I found relevant and undiminished by lengthy cross-examination:

- Older workers continue to work because of financial necessity, possibly due to inadequate savings or pension, and some do for a desire to work, or to retain a part of their identity and for intellectual stimulation and dignity. In contrast, there are lots of misconceptions on the part of employers who hold the view that older workers are bored with retirement for lack of something to do.
- Older workers retire earlier than age 65 or when they are financially prepared for reasons relating to poor health.

- Older Canadians (not just workers) face disadvantages in the workplace, in the housing sector, through invisibility or negative treatment in media images, and due to personal abuse, and these vulnerabilities and disadvantages are enhanced depending on race and gender.
- The definition of “ageism” used by gerontologists was coined by Dr. Butler and refers to personal, institutional, intentional and non-intentional attitudes and prejudices against older people. [Nota bene: legal definition is concerned with *effects* not with attitudes or motivation necessarily.]
- Regarding “ageism’, we all age and thus this “-ism” is viewed as different from racism, sexism etc. Over a life cycle, most every Canadian can imagine they will grow older; age is a mutable personal characteristic.
- Dr. Berger’s research reveals that: employers’ hold positive and negative stereotypical attitudes towards older workers: reliable and good mentors versus inability to adjust to new technology or to benefit from training. She noted also that views were mixed among employers regarding productivity as increasing research shows that productivity does not decline, but the stereotype of reduced productivity persists.
- Her research revealed other effects of employer-held views on older workers: personal identity disintegration; internalizing poor image resulting in a lack of confidence; and increased stress affecting mental and physical health. The description “old and useless” came from subject participants who were engaged in the job search process.
- In her more recent research, to be published shortly in a book, Dr. Berger examined intersectionality and ageism by looking at how older women experience ageism relative to older men and younger women, and also at the interplay of ageism with race, immigration status and Aboriginal status. Older women are judged by their appearance in searching for and maintaining work; women also generally lack financial preparation for their retirement in part because of “disrupted” work-life because of childrearing and eldercare responsibilities, and because they are paid less than men throughout their work life; and pension benefits if at all available are less than men’s because of lower pay and less years of contribution.

[86] In cross-examination, Dr. Berger was asked to elaborate on her research methodology (qualitative and quantitative), and to indicate which of her publications were peer reviewed. She was also asked to confirm that she is not an economist or an actuary, and that the views in her report regarding the lack of financial security of older workers were not based on her examination of teachers with pensions specifically, or on costing of benefits for older workers.

[87] The respondent did not produce any witness to respond to Dr. Berger's opinion evidence.

Fact Finding

[88] Dr. Berger's responses to questions in cross-examination did not detract, in my view, from her opinion evidence above that apply to a large spectrum of workers, including teachers, and provided this Tribunal with some social context, including the effects of intersectionality, with which to make a determination related to the *Charter*.

[89] While Dr. Berger's research focussed on the hiring of older workers and she provided no opinion evidence on the denial of benefits for workers 65 and older, her evidence was nonetheless useful to the Tribunal in regard to negative stereotypes that still persist regarding older workers despite the prohibition on involuntary retirement.

Sharon Bell

[90] Sharon Bell is a Human Resources Manager with GEDSB (the Board). She provided affidavits dated March 2 and April 22, 2015 that were entered as Exhibits 29 and 30 respectively, and gave *viva voce* testimony on June 30, 2015. Her affidavits were adopted as her evidence at the hearing, and she elaborated further on her experience with GEDSB and with the collective bargaining process.

[91] Ms. Bell had 13 years experience as Manager of Human Resources, supervising a staff of 14, and she had over 30 years with GEDSB. During this time, she was part of the Board's bargaining team for all the teacher groups on about 25 occasions, involving multiple unions at the Board (e.g. OSSTF, CUPE, EFTO). She was also the Board's point person for benefits (as plan administrator); she also handled grievances and, with the Superintendent, was responsible for labour relations.

[92] By way of her affidavit (Ex. 29 at paragraph 20), Ms. Bell provided the following information regarding the GEDSB's benefit plans that accommodate retired, *non-active* teachers up to age 65:

> I also wish to note that should a teacher choose to retire before the age of 65, they will have access to benefits coverage through the Board plans if they pay 100% of the premium. However, in all cases, access to benefits is terminated when a teacher / retiree reaches age 65.

[93] Ms. Bell stated that a letter dated February 1, 2012 (Tab "G" to her affidavit, Exhibit 29) was sent to the applicant, and indicated that his benefits would be terminated on his 65th birthday. He was informed that he could convert to an individual *life insurance* plan, and was given a contact person at Blue Cross to assist with completing the conversion process within 31 days of the expiry of his employer's coverage. He was advised that he may investigate other insurance providers as well.

[94] The Tribunal's review of the letter to the applicant regarding termination of his benefits (Tab G, Ex. 29) reveals that the letter referred to conversion of life insurance from group to individual plan only. The subject header read "Re: Termination of Benefit Coverage – Employee Group Life Insurance Conversion Option". That letter made no reference to replacement health, dental or other benefits coverage that the applicant received through the Board prior to his 65th birthday.

[95] With regard to the Board's provision of benefits and its bargaining concerning benefits, a summary of Ms. Bell's evidence that remained uncontested after cross-examination follows:

1. The GEDSB's employee booklets are fairly comprehensive and can be found online. The booklets mirror the Board's policies closely and the terms of benefits plans are explained in the booklets.

2. Ms. Bell was involved in the bargaining of the collective agreements covering 2008 to 2012, 2012 to 2014 and the one underway. Benefits were not raised in 2008 bargaining, but were initially raised by OSSTF's President (Bruce Hazelwood) in a presentation to the GEDSB's Trustees in fall 2009, three years after the prohibition on mandatory retirement.

Subsequently, in 2010 a MOU was agreed upon by the Board's various unions, including OSSTF, for payment in lieu of benefits to workers 65 and older. Lump sum payments were made until that MOU expired with the collective agreement on August 31, 2012. In the subsequent round of bargaining, OSSTF requested benefits for workers 65 and older (Ex. 29, Tab "D") but no agreement was reached as the Board requested a concession relating to workload and OSSTF rejected that request as an unfair trade-off for its members.

3. Regarding the willingness of the Board to bargain with OSSTF on benefits to workers 65 and older, Ms. Bell stated that the Board was indeed willing, but she also had a mandate from the Trustees "*to get something for it*". Removal of Article 12.06 (the provision relating to workload) from the OSSTF collective agreement was described as "the most important item in our list where we needed to get movement on" in Bell's cross-examination. She conceded that Article 12.06 affected all teachers who taught over 3 courses (complement of full time teachers was 642 full time equivalents per witness Gorham, or 780 teachers per witness Bell), while there were only 8 *secondary* teachers over age 65 at the time of the bargaining of the 2012 to 2014 collective agreement with OSSTF.

4. Ms. Bell indicated that, if benefits were extended to OSSTF members over age 65, the Board would feel obligated to offer benefits to other bargaining unit members over age 65, besides the 8 who were members of OSSTF like the applicant, and thus the total count would be about 42 to 50. She further conceded that other considerations, like *the aggregate costs for all workers 65 and older throughout the Board*, apart from OSSTF's agreement to the removal of Article 12.06 in exchange of benefits for secondary teachers 65 and older, factored into the Board's decision making during bargaining with OSSTF.

5. Ms. Bell conceded that apart from discussing Article 12.06 at the bargaining table, there was considerable litigation over that clause. There were two arbitrations (in 2009 and 2012) and, after the Board applied for a judicial review of the second decision, OSSTF succeeded in protecting that clause in the collective agreement and treating it as mandatory (Ex. 29, Tab F).

6. Each round of bargaining is unique and depends on what issues arose during the life of the collective agreement, including what legislation has been passed that affects the school Board. Ms. Bell recalled the passage of Bill 115 (*Putting Students First Act,* S.O. 2012, c.11) that set the parameters for bargaining the 2012 to 2014 collective agreement that included a wage freeze, unpaid professional development days, and an option for the provincial government to impose an agreement on the parties. She viewed the legislation as a "game changer" as it dictated what issues were to be bargained centrally and locally, and the Board had to

abandon plans to bargain over sick leave and a retirement gratuity. At the local level, non-monetary issues relating to health and safety, harassment in the workplace and various procedures could be bargained, while wage increases, benefits enhancement, preparation time and other items related to money were to be bargained centrally. This legislation "was action by a government that we had not seen in a long time", whereby the government had decided it was going to reduce the sick leave plan and eliminate the retirement gratuity, freeze wages and prohibit strikes. Ms. Bell concurred with the view that "both sides'" ability to bargain was impaired by the legislation, as the Board was required to bargain locally with no money during the negotiation of the 2012 to 2014 collective agreement. She went on to comment:

> "And now we have additional legislation that's driving the process, that they're a party [provincial government] at the table now."

7. On questioning by the Tribunal, Ms Bell confirmed that the parties still retained the ability to address benefits for workers 65 and older at the local level, as there was still a budget for benefits. Ms. Bell stated that "some things could be accomplished if the parties put their minds to it". When, in cross-examination, she was specifically asked whether the recent legislation prevented the Board from providing benefits for workers 65 and older, she responded "no". Excerpt from transcript, June 30, 2015 at page 885:

   > Melnick – Q: And so I'm just asking you if –with this kind of legislation and there's no money, does it – would it have prevented you from giving benefits to people past the age of 65?
   >
   > Bell – A: Insofar as the government still was giving us money for benefits for over 65 --- age 65 employees, that money that they gave us was still coming our way, so insofar as we had that, the answer would be no.

8. The Board receives about $8,000 to $8,500 to cover all benefits for each teacher, including employer statutory contributions (CPP, EI, WSIB and health tax). Of the $8,000 to $8,500, about $3,200 to $3,400 is left after statutory payments to cover "fringe" benefits.

9. Ms. Bell confirmed that GEDSB does not lose the "flow through" funding of benefits for workers who turn 65 (and are deprived of "fringe" benefits), but this money is "channelled into other areas of need or where we're over budget", as is done for other workers who do not receive benefits for reasons unrelated to their age.

10. The Board engaged in discussions repeatedly about benefits to workers 65 and older, starting with OSSTF's presentation to the Trustees in fall

2009. Discussions between Ms. Bell, the Superintendent and OSSTF continued separately from the other unions throughout 2011 over the language of the MOU that resulted in the payment of a lump sum to employees 65 and older in lieu of benefits until August 2012.

11. OSSTF again raised the issue of providing benefits to workers 65 and older in bargaining. Ms. Bell produced her handwritten notes from bargaining found at the back of Ex. 29, Tab E. She confirmed that the Board's sole offer to OSSTF about benefits to workers 65 and older, during May to September 2013 bargaining sessions, was the removal of the workload clause from the collective agreement (Article 12.06). OSSTF made no counter-offer after rejecting the Board's offer.

12. In cross-examination, Ms Bell stated that after an OSSTF's presentation in fall 2009, the Board Trustees commissioned a study sometime before April 2010 and obtained quotes for the aggregate cost of providing benefits to all workers 65 and older belonging to its various unions. These quotes were not revealed at the hearing before this Tribunal or at bargaining, and the Trustees' discussions were described as *in camera*. In cross-examination, Ms. Bell concurred with information that the applicant gleaned though a Freedom of Information (FOI) request: that the Board had inquired of its health and life insurance carriers to ascertain the cost to extend benefits past age 65 for active teachers. As the applicant asked for the "per capita" quote in his FOI request, the Board responded that neither insurance company provided a *per capita* quote, and did not volunteer any further information that it may have received as a quote for extending benefits. However, Ms Bell confirmed that the Board received a quote - " *an aggregate number*" - from its privately commissioned expert and that, going into bargaining in 2013, the Board was willing to give benefits over age 65 "as long as we met our mandate from the trustees …we had to get something for it".

[96] Ms. Bell was present at each of the bargaining sessions with OSSTF in 2013 and kept handwritten notes. She also retained notes written by another member of the Board's bargaining team (Jane Filipetti) during these sessions. She incorporated both of these notes as Tab 5 to her affidavit (Ex. 29) and adopted them during her *viva voce* evidence.

[97] The Tribunal's review of the bargaining notes at Ex. 29, Tab E discloses that John Jakob, who with Ms. Bell represented the Board on September 19, 2013, described Article 12.06 as "*a thorn in the side to the Board*" – in Ms. Bell's handwriting at the back of Tab E. Furthermore, John Jakob requested a concession from OSSTF to

"*delete A.12.06 in exchange for age 65*" and noted that the union said "no" but he asked for them to reconsider.

[98] In her examination, Ms Bell elaborated as follows:

> So one of the things that the Board wanted very badly was [a] particular article in the Collective Agreement to *be removed from the agreement.*
>
> It is very difficult if – *for anyone who has bargained, you will know that it's very difficult, once things get into a Collective Agreement, to get them out.* The unions see [them] as strips and are not usually willing to entertain that kind of discussion.
>
> So our mandate from our Board of Trustees was that, when we went into that round of bargaining, that there had to be give and take on both sides, and if we were going to be giving the union things, that there needed to be things that we also could go to the trustees and say that we had gained in that bargaining process as well. [italics added]

[99] During cross-examination, Ms. Bell admitted that the only option the Board put to OSSTF during 2013 when bargaining for benefits for workers 65 and older was to "get rid" of Article 12.06, and that OSSTF was "not prepared to entertain any changes to 1206 whatsoever" (30 June 2015 Transcript, page 923 and 925).

[100] The Tribunal notes that "1206" above refers to Article 12.06, a workload provision, over which the parties had litigated repeatedly with a decision in favour of OSSTF on judicial review.

[101] Notes filed in the same Tab 5, in the more legible handwriting of Jane Filipetti who was also a member of the management team, gave more details of the exchanges during bargaining on September 19, 2013. According to Ms. Filipetti's notes:

> Near the start of the meeting, Kelly Morin-Currie, OSSTF District Officer, stated:
>
> > "Provincial has advised that we are not to sign. As for 65 benefits, we do not see 12.06 as a fair trade *but we do want the flow through money*. We

> will be going to the Board [to] advise that we want the flow through money. We felt hostage at the table…..."

In response, Jakob, speaking for the Board stated:

> Age 65 benefits – last time we spoke we were clear that we needed to get something; *would be happy to explore if willing to remove 12.06 which has been a thorn to the Board*; would consider adding…; life insurance w/b [would be] an issue; likely not form part of the benefits

Near the end of the meeting, Mr. Jakob further indicated:

> "Board has sent the issue of benefits over age 65 back to the bargaining table. …*we must negotiate and get something back for it*."

Ms. Morin-Currie responded:

> "I have the documents that show the money is there. *Why would I give 12.06 up for benefits for age 65?*" [Italics added]

[102] Further notes in the same Tab E (in Ms. Filipetti's handwriting) disclose that "age 65 benefits" were raised by Ms. Morin-Currie on an earlier date, May 13, 2013, during bargaining. Mr. Jakob responded then:

> "*Our position is you don't have right to them @ this time. …* this would be a fairly lg [large] give so would need to discuss what [we] could get back." [Italics added]

[103] Ms. Bell highlighted further bargaining notes relating to the May 16, 2013 discussion of benefits for workers 65 and older. Ms. Bell brought attention to the following exchange in the handwriting of Ms. Filipetti:

> John Jakob (GEDSB): *See this as a give to you. Would be looking for a give.*
>
> Kelly Morin-Currie (OSSTF): Board has kept $. See this as a cost neutral – the gov't is the first payor
>
> Jakob: That was the deal that was cut in previous years. Is OSSTF expanding LTD to +65?

> Morin-Currie: I haven't had any discussions [about LTD]. *I can't say to the membership that I stripped the CA [collective agreement] to get benefits for a few members over age 65.* [italics added]

Near the end of the May 16, 2013 meeting, Mr. Jakob further indicated (according to the Filipetti's notes):

> *Benefits for age 65 – we aren't going to go down that road w/out a meaningful trade*; got [the] idea you weren't interested …[Italics added]

[104] In cross-examination, Ms. Bell confirmed that secondary teacher's long term disability (LTD) benefits were 100% employee funded and were administered by their union (OSSTF). LTD coverage thus did not fall within the ambit of the *employer*-funded benefits (or flow-through of monies received from the provincial government for teachers' benefits) that was in issue during bargaining or in the instant constitutional challenge.

[105] In further cross-examination by ETFO, Ms. Bell confirmed that all elementary teachers over age 65 who are actively working (approx. 13) are not receiving benefits currently or a lump sum payment in lieu, since the expiry of the MOU in 2012. She also concurred that while there is "give and take" in bargaining, some items like statutory leave, e.g. pregnancy leave, are not subject to "give and take".

[106] She further clarified in cross-examination by OCUFA that during bargaining with OSSTF for benefits for workers 65 and older, the Board considered the consequences for a larger group of employees age 65 and older, including members of ETFO and CUPE as well as the non-union group amounting to about 50 in total of GEDSB's employees.

[107] Finally, Ms Bell confirmed that Bill 115 has been replaced by Bill 122 (*School Boards Collective Bargaining Act, 2014*) and that the process of central and local bargaining has been formalized such that monetary items like benefits are now deferred by the local team for potential bargaining at the central level (or at the "provincial" table).

Finding of Fact

[108] It is undisputed that the union, OSSTF, raised the issue concerning benefits for workers 65 and older prior to, and repeatedly, during bargaining. It is also undisputed that the Board made a single response – a demand for the removal of the workload clause that was decided at arbitration. It is further undisputed that OSSTF's consistent response was that the workload clause was non-negotiable. It is evident that the Board's response to OSSTF's proposal was uncompromising, a "strip" from the status quo collective agreement, and insensitive to the union's position that it could not jeopardize the position of the majority of its members for the sake of the few who were 65 and older.

[109] It is also undisputed that OSSTF confirmed that money was available to pay for benefits and insisted that it wanted "the flow through monies", and stated at the bargaining table that they would raise the issue directly with the Board's trustees when it appeared that the parties were at an impasse.

[110] I note that in the MOU negotiated between the Board and various unions, the "flow through" funds were provided in a lump sum to teachers age 65 and older. None was provided to Mr. Talos, who turned 65 about four months before the expiry of the MOU. During the period of bargaining and up to now, the "flow through" funds allocated by the government for each full-time employee have been redirected to other Board priorities. I thus find that Mr. Talos and other OSSTF bargaining unit members age 65 and older have fared worse since the benefits issue was raised at the bargaining table than they fared under the terms of the expired MOU, ostensibly because the OSSTF would not acquiesce to the removal of a workload clause that it had won through arbitration.

[111] Finally, I note also that Ms. Bell confirmed that some 13 elementary teachers (ETFO members) have also not been paid benefits or a lump sum in lieu since the expiry of the MOU. The Board failed to advance any reason for the broad withholding of benefits to other bargaining unit members age 65 and older (non-OSSTF members)

except for the general statement that the Board would need to administer benefits payments uniformly for all employees age 65 and older, including non-bargaining unit members.

[112] After carefully considering the evidence of the Board's witness, supported by contemporaneous notes of a member of the Board's bargaining team, I find that the Board failed to respond with its own version of an acceptable "benefits" proposal and failed to address OSSTF's view that exclusion of workers 65 and older from benefits was a human rights issue, except for countering that "you don't have a *right to them at this time*" (J. Jakob). I also find that the Board representatives failed to respond to the OSSTF's position / proposal that the benefits it sought, given that the "government is the first payor", would be *cost neutral to the Board*. Nor did the Board respond favorably to providing the "flow through" monies to the union members age 65 and older.

[113] The Tribunal is not here concerned with the conduct of the parties during bargaining to assess good faith or unfair labour practice. Of interest, is the fact that the Board did not appear to engage with exploring the cost of providing benefits from ear-marked funds it had received and stuck to its position that a significant trade-off of an unrelated item was needed from the union before it would entertain even the union's cost neutral proposal. In light of the Board and the AG's *opening* submission that fostering collective bargaining was a purpose of the impugned provision (as was successfully argued in *Chatham-Kent*), the failure of the Board's and OSSTF's bargaining process to yield *any* substantive result is relevant to the Tribunal's consideration at the s. 1 justification stage of this *Charter* challenge.

Peter Gorman

[114] The intervenor, Attorney General, who is aligned in interest with the respondent school board (GEDSB), called Mr. Peter Gorman as an expert witness. In addition to his affidavit (sworn February 4, 2015) that he adopted as his opinion evidence, he gave *viva voce* testimony on June 29 and 30, 2015. Mr. Gorman was put forward as a professional actuary with expertise in "the design, financing, administration, and governance of pension and benefit plans".

[115] There was some discussion among the parties about Mr. Gorman's expertise being primarily pensions rather than benefits. This matter will be addressed later in relation to the weight that the Tribunal will give to his evidence.

[116] At the outset of his examination, Mr. Gorman indicated as follows:

1. He is a Fellow of the Canadian Institute of Actuaries (1980) and the Society of Actuaries. He had work experience at various firms before he opened his own firm called JDM Actuarial Expert Services Inc. where he currently advises on pension and benefits consulting, costing, administration, valuations, and governance consulting. He also provides expert evidence in matters that are of an actuarial nature. Throughout his career he has provided consulting on both group insurance and pension benefits.

2. In connection with the instant Application, he was asked to provide an opinion on "whether and why it may be appropriate …. to provide different benefits to employees after age 65". He looked at: life insurance, health benefits including prescription drugs, dental benefits, long-term disability benefits, and pensions. He considered some of the available publicly funded social benefits and concluded that:

   > As one ages, the cost of benefits goes up to the point that when we factor in the current developments in drug costs, the cost of benefits after age 65 is likely going to be significantly greater than it is for an average employee.

3. Mr. Gorman had an opportunity to review the report prepared by Ms. Ellen Whelan (dated April 15, 2015), the expert who was put forward by OHRC in reply. He commented that after reviewing her expert report, he maintained his conclusions, but noted that she used different "facts" than his, which prompted him to review his calculations using her information

(particularly studies by two insurers, Green Shield and Great West Life). He concluded that this review made very little difference to his opinion. Later in his evidence, he testified that when he drafted his affidavit:

> [I] was unable to find any statistics that were available regarding the cost – the different costs by age for health insurance. I therefore relied on memory of data that I had utilized when I was with my previous employer.
>
> When I saw Ms. Whelan's report, I realized that my memory either had failed or with the passage of time, there has been a shift in claims, so the cost of health benefits by age that Ms. Whelan reported differs [from] what I had utilized in coming up with my numbers.
>
> I revisited all of my costings, and utilizing the aging factors from the Green Shield data [from Ms. Whelan], I recalculated all of my results …and the bottom line is, I did not change my opinion.
>
> Transcript, 29 June 2015, 511-513

[117] Mr. Gorman informed the Tribunal about "Principles of Insurance" in his affidavit as well as in his *viva voce* evidence – principally about reliance on statistics derived from a large pool of insured to determine claiming patterns from which insurers can determine aggregate pay-outs and also derive premiums. More importantly, he drew attention to the concept of "anti-selection" on which he based his opinion:

> Anti-selection occurs when… an individual has information that they can act on to improve their financial benefit where that information is not known or cannot be acted upon by the insurance company.
>
> … So for instance, on life insurance, the insurance company would have a medical questionnaire and if I did not complete it accurately, they would then be able to deny coverage because of the inaccuracies in my statement. If I complete it accurately, they now know what I know and they can take appropriate steps, possibly denying me coverage or increasing the premium rate.
>
> ..One of the things that actuaries need to be aware of is the potential for anti-selection. … we need to consider "Are there situations here when an individual could gain an advantage over the program that was not expected or that is not in the best interests of all participants in the program?"

Transcript, June 29, 2015 page 487-489

[118] Mr. Gorman also gave the following opinion on the cost of life insurance as one gets older:

> The cost goes up. I would describe it as fairly dramatically because the probability of death increases as one ages.

He stated that the following reason, aside from costs, that individuals or employers may have for reducing or cancelling life insurance at older ages:

> The principal one would be the perceived need of the individual … Life insurance while one is working is usually considered to be a means of providing funds for covering loss of income in the event of death, so funds that a spouse or dependants would be able to access to replace the lost income of the deceased person. And, the time you get to retirement, you have enough funds in retirement to provide spousal benefits…
>
> Transcript, June 29, 2015 page 490 -492

[119] He gave the following opinion on long term disability (LTD):[3]

> …[LTD] provides income replacement to an employee who is disabled … Disabled would be ill or injured from an accident; any kind of

[3] In the instant Application, the union OSSTF administers the 100% employee funded LTD plan.

> condition that prevents the person from being able to engage in their normal occupation.
>
> As one ages, the cost increases. There's a number of factors. As one gets older, injuries and illness become more common. The period of time that one remains disabled increases because older people tend not to recover as quickly from their disabilities. … And eventually, with LTD, we get to a point where costs have reached a maximum and then they will start to decrease (Affidavit, Chart 71). The reason for the cost decrease is that there is, under LTD policies, a maximum age that benefits get paid to [usually 65].
>
> If there is not cut-off [at age 65], the costs of premiums would increase significantly if disabled individuals were to receive benefits past age 65.
>
> Transcript, June 29, 2015 page 490 -501

[120] Mr. Gorman gave the following opinion on group dental benefits:

> Age has little to no impact on costs.
>
> Transcript, June 29, 2015 page 502

[121] Regarding extended health care benefits, including prescription drugs, out of country or province travel medical coverage, and paramedical services including chiropractic, physiotherapy etc., Mr. Gorman gave the following opinion on the impact of age on the cost of private health insurance:

> The costs of health benefits increases as one ages.
>
> At age 65, employer-provided health care costs would reduce because a large portion of prescription drugs are paid by the province rather than through group insurance.
>
> As one ages, one accesses more health care benefits and the cost rises, and it just rises from age to age. If we include the impact of the Ontario Drug Benefit Plan, the cost increases up to age 65 and then there is a decrease as the province pays for a large portion of drugs, and then it resumes the gradual increase by age after age 65. [emphasis added]

Transcript, June 29, 2015 page 503-505 and 509-510

[122] Mr. Gorman elaborated further on the increasing cost of health benefits to employers for employees over age 65 (and even after the uptake of the Ontario Drug Benefit Plan) as being impacted by two elements: (1) costs increase directly with age as one accesses more health care with increasing age; and (2) the incidence of high cost drugs.

[123] Mr. Gorman conceded that there are "some situations where the [medical] issue that gives rise to the high-cost claims also acts to prevent the person from working so they may not have a choice [about retiring]", consistent with Dr. Berger's evidence that health issues sometimes drive the decision to retire even earlier than age 65. For those who are able to work with the assistance of "high-cost" drug therapy, Mr. Gorman expressed the view that they are incented to work past age 65 to maintain benefits. Or, if the drugs are for a spouse, the employee will remain employed rather than retire.

[124] Mr. Gorman testified that "anti-selection" (defined in paragraph 116 above) could come into play particularly in relation to "high cost drugs" for employees age 65 and older i.e. employees who have high cost claims are in a better position if "they remain employed and are covered by benefits than if they retire and have no benefits". Mr. Gorman expressed his opinion that there is more likelihood of anti-selection at age 65 and older compared to employees at age 44-64 and that "the percentage of workers who will need high-cost drugs will increase as one ages".

[125] Finally, Mr. Gorman conceded that the opinions expressed by Ms. Whelan, the actuary presented by the OHRC to counter his testimony, are correct, except with regard to the role of "anti-selection" should benefits be extended past age 65. Where Ms. Whelan took issue with his assumptions and absence of data (at paragraphs 55, 56 and 57 of his affidavit) and she used different data, he conceded as follows:

> I accept the [her] data. It's coming from credible sources. It's certainly more current than the data I had and it's well set out, particularly the Green Shield data, so it provides, I believe, a more credible result.

And:

> The original aging structure that I utilized in my report had a much higher claims cost at age 65 than is indicated by the Green Shield data.
>
> Transcript, 29 June 2015, page 519

[126] Mr. Gorman noted, however, than when the additional costs for insuring employees 65 and older was averaged over the pool of 650 employees, the difference between his and Whelan's dollar amount was "not material" to his opinion. He nonetheless disagreed with Whelan's evidence that the "additional costs to each employee of extending benefits to employees over the age of 64 are a few cents a year, at best". In Gorman's view, Whelan's average costs did not "reflect the incidence of anti-selection and high-cost drugs that we are likely to see amongst employees over age 65."

[127] Mr. Gorman rejected Ms. Whelan's opinion that "anti-selection is not played out in the data." His view is that anti-selection is currently hidden within the data and "why it's not coming through yet in the data really ties into the recent phenomenon for high-cost drugs." Furthermore, "the elimination of benefits at age 65 puts a limit on the impact of anti-selection, so removing age 65 would allow it to continue". As more high-cost drugs are approved by Health Canada, Mr. Gorman stated that there is an expectation in the insurance industry that anti-selection will become a greater influence in the future. (Transcript, pp. 523-525)

[128] Mr. Gorman clarified that the basis to support his view that the approval of high-cost drugs will enhance anti-selection in the future is his expectation only, *not historical data*. In his words:

> ..More specifically, in the last five years, we have seen more and more high-cost drugs being approved by Health Canada becoming available to workers. And so we <u>haven't got a large number [of] workers yet who have gone through the anti-selection process</u> when they're using those drugs." [emphasis added]

Transcript, p. 524.

[129] As noted above, Mr. Gorman accepted the evidence of Ms. Whelan except for his comment that she did not pay heed to the potential for anti-selection to increase in the over age 65 group with the increasing appearance of high-cost drugs on the market.

[130] Mr. Gorman did not take issue with Ms. Whelan's statement (at page 7, Ex. 8) that "many plan sponsors incurred these annual cost increases [year over year increases of 10-15% consistently] in the recent past, without significant changes in their employee demographics and without responding with significant plan reductions". He took issue, however, with her statement that "from an actuarial perspective, cost increases at this level or higher [20% or higher] per year are likely not sustainable for the plan sponsor." Instead, Gorman elaborated on three things that employers have done to manage health care costs:

> [First] Employers implemented plan changes and required that generic brands be substituted by the pharmacy for a named brand prescribed by a doctor.
>
> [Second] Employers also have implemented, where there are high-cost drugs involved, a requirement for pre-approval, to make sure that the need can be assessed and, if it's appropriate, coverage would be approved.
>
> [Third] Most employers have tended to adopt what we call "total compensation policy" towards worker compensation. Total compensation looks at the total cost of employing somebody, so it's wages, benefits, pensions, payroll taxes. …What the employers manage is the total compensation costs…so if health care costs go up 10 per cent, but if the total compensation is only going up 3 per cent, then there are offsetting reductions. It may be through wages …it could be in some other benefits.
>
> <u>So the employers had means of dealing with these large double-digit inflationary increases on medical benefits</u>. [emphasis added]
>
> Transcript, pp. 528 -531

[131] Mr. Gorman expressly disagreed with Ms. Whelan's conclusion that health care plans with 20% or higher annual inflationary increases are not sustainable. He offered

his view that “as long as the [plan] sponsor is able to handle it within the context of total compensation, it is sustainable, but it has impacts on—potentially on the plan sponsor as well as on the employee individually”.

Mr. Gorman in cross-examination

[132] Mr. Gorman was cross examined at length regarding his qualifications and his experience in matters relating to underwriting life insurance, health and dental benefits group plans. He was also cross-examined at length regarding his affidavit and his concurrence with the report filed by Ellen Whelan, the actuary who was put forward by the OHRC.

[133] In cross-examination, OECTA sought to establish that Mr. Gorman is primarily a pension specialist and has little experience or qualifications in the area of health care group insurance. Mr. Gorman admitted that he had elected the “retirement benefits” track (for his final two exams) to qualify as a specialist as a Fellow of the Society of Actuaries. He did not pursue the separate track titled “group and health”. He also admitted that his professional biography at the Society of Actuaries website made no reference to health and welfare benefits in his “primary area of practice” or “specialization” sections. And, similarly, in his CV (Ex. A to his expert’s report/affidavit) and his company website (JDM Actuarial), he made no reference to group and health plans being among his area of expertise. Furthermore, in his 13 years at Morneau Shepell (1998-2011) he was “a partner in the Toronto pension practice”. Finally, regarding his publications listed in his CV, all but 3 of 71 listed articles related to pensions.

[134] Mr. Gorman indicated that he has taught courses at Humber College in the Pension Plan Administration Certificate (PPAC) program for 30 years, and between 1983 -1990 he also taught in the Certificate of Employee Benefits program. He also admitted that he supplied a summary of his qualifications to LinkedIn that in part read:

Actuary providing expert testimony in support of lawsuits related to criminal rate of interest, lost income and pensions.

Pension consultant with over 35 years of experience. Focus on both defined benefits and defined contribution types of pension.

Frequent speaker and author. Faculty for PPAC.

[135] Finally, in terms of his expertise, Mr. Gorman appeared previously as an expert for the AG in a class action law suit (*Authorson v. The Attorney General*, Court file no. 99-GD-45963, Ont. Sup. Ct.) where he was described by the judge as "an actuary of some 25 years experience, particularly in relation to pensions".

[136] With respect to his affidavit (or expert report), Mr. Gorman made the following admissions:

1. He did not analyse the claims experience of secondary school teachers employed by GEDSB but instead looked "at an average group that was representative of an employee group in Ontario".

2. He did not analyse the characteristics of secondary school teachers employed by GEDSB (i.e. age and seniority demographics).

3. He had no data, published or unpublished, and instead relied on his memory (from working at Morneau in the early 2000's) to form the opinion that "increases in the use of medical services are gradual through ages 20 to 50, picking up and becoming much greater after 65". [Transcript, p. 626]

4. Looking at the Great West Life 2012 health and dental study, he agreed with the proposition that the data suggests that for the age brackets 55-59 and 60-64, the change in average number of health services claims is greater than that associated with age brackets to 65-69 and 70 -74.

5. He clarified that his report was based on health cost by age based on individual employees while the Great West Life data, and indeed the majority of group insurance plans, is based on coverage for the family group i.e. including spouses and dependent children. He contended, however, that the data from Green Shield provided in Ms. Whelan's report was for "an average claim amount for an individual, not an average for a family group" *but this distinction was immaterial to her overall conclusion, with which he agreed.*

6. He retracted his opinion regarding extended health care, specifically that:

   - "after age 65, ongoing increases to the cost of providing extended health care bring the cost back to the age 74 level at about age 70";
   - "the cost of medical benefits at age 64 is four times the cost for an average employee" and revised that to a factor of two to agree with Ms. Whelan;
   - there was a 60% increase in claim levels at age band 60-64 compared to 45-49;
   - his opinion (i.e. his starting or base assumption at para. 55(b)) that after accounting for the Ontario Drug Benefit Plant at age 65, "the cost increases each year thereafter with an average cost for employees age 65-70 is equal to 2.5 times the cost of the average employee.

7. He revised his opinion (the first 3 cited at point 6 above) to agree with Ms. Whelan's conclusion that "the data from both Green Shield and Great-West Life showed that people age 65-79 claim at levels similar to 40-49 year olds".

8. He revised his opinion (the fourth cited at point 6 above, i.e. that there is a steady increase in costs such that employees age 65-70 are 2.5 times that for the average employee) to agree with the data produced by Ms. Whelan, namely that for Green Shield, costs *remain roughly* the same while the Great West data shows a *slight decrease* as the family ages.

9. He modified his statement at paragraphs 40 and 43 of his affidavit regarding life insurance and acknowledged that he assumed that the employee age 65 or older would maintain the same coverage. If coverage was reduced at age 65 to 25% of the original amount or some other nominal value, the average premium costs to employers can be mitigated and need not increase.

10. He modified his assumption in paragraph 55(b) and 55(d) of his affidavit to reflect Ms. Whelan's data, and arrived at the same conclusions as she did regarding the estimates for including age 65 plus teachers, up to 2% of the pool of insured, i.e. that it was not cost-prohibitive to insure them. He agreed with Ms. Whelan's conclusion that including age 65 plus teachers was not cost-prohibitive, except for his *caveat* that her estimates did not consider the incidence of anti-selection and high-cost drugs.

11. For greater clarity, aside from anti-selection and high-cost drugs, Mr. Gorman agreed with Ms. Whelan's "conclusion about providing dental and health care benefits to teachers over 65" based on her estimate of average plan costs. He agreed with Ms. Whelan's conclusion that "if the Board covers all the participants over age 64, there would not be an

increase to the *average* plan costs", although the *aggregate* plan costs would increase for the number of newly covered employees. [Transcript, pp. 747-751, 777, 783 (June 29, 2015) and 841 (June 30, 2015)]

12. Mr. Gorman further noted that Ms. Whelan's estimates of 5 -10% of the active employee pool being 65 and older were *quite conservative* relative to his assumption of 2% 65 and older (which is closer to the actual percentage of employees age 65 and older at GEDSB).

[137] In contrast to his retractions above, Mr. Gorman maintained his assumption regarding anti-selection (at para. 55 (f)) that:

> "…. of those over age 65, an additional 10-40 per cent will incur expenses for high-cost drugs in relation to the percentage of all employees under age 65 who incur such expenses."

Despite acknowledging that this assumption was made in the absence of data about claiming patterns, Mr. Gorman was adamant that this assumption regarding high-cost drugs and anti-selection among workers over age 65 was not overstated. He defended his assumption that an additional 10-40 per cent of those over age 65 will incur expenses for high-cost drugs on the following basis: "[this] is what I expect will happen in the future as – if workers over age 65 are provided benefits and are able to anti-select as there is more – more high cost drugs are available on the market". He acknowledged that the rate of increase in pay-outs shown by industry data is 10-15 per cent annually (the increase shown in Ms. Whelan's data). He further noted that some annual increases in pay-outs were in the "low single-digit numbers each year" in the last few years. When he was specifically asked about the absence of cites for his estimate, he further defended his 10-40 percent assumption regarding claims increase for high-cost drugs for employees 65 and older, stating:

> Q: And you don't cite any of the forms of data I mentioned for this assumption; published data, unpublished data?
>
> A: The only information published are – would be ***insurance company projections about where they expect claims costs to go in the future.***
>
> Q: And you didn't cite any of those insurance company projections here in your report?

> A: I didn't [provide cites] because they don't specifically address the issue of what happens if age 65 is removed, and all employees are provided with benefits after 65. They are looking purely at the totality of health care claims costs as we go forward.
>
> Transcript, p. 659

[138] Mr. Gorman also maintained another of his assumptions (at para. 55(g)) that:

> The average expense for high-cost drugs for each person over age 65 who incurs such an expense is $50,000 per year.

Once again, Mr. Gorman acknowledged that he did not base this assumption on any data projections. Rather, Mr. Gorman maintained his choice of $50,000 as a number he felt was reasonable to prepare future "costings" of high-cost drugs. In his *viva voce* evidence, Mr. Gorman stated that "there's no information that indicates what the average high-cost drug will be in the future." He was unable to produce any documentation that he reviewed, before or after preparing his affidavit, to support his assumptions of *average cost* for high-cost drugs for employees 65 and older (i.e. $50,000 per person age 65 and older) or the *incidence* of incurring expenses for high-cost drugs for employees age 65 and older (i.e. 10-40% of claims for persons 65 and older), if they were permitted to claim for drug costs. [Transcript, p. 793]

[139] Mr. Gorman rejected the characterization of his assumptions (at paras. 55(f) and (g) of his affidavit specifically) as speculation. Because he is an actuary, he explained, he is trained to make assumptions when there is insufficient or non-existent data. Finally, he expressed that he believed that there is information on the cost of high-cost drugs by *age* "that could be got if you request it from the right people".

[140] Mr. Gorman also defended his assumption at paragraph 54 of his affidavit that there is a direct relationship between the incidence of anti-selection and people who chose to work after age 65:

> It is likely that the group of people who choose to work after age 65 include a much greater proportion of people needing high-cost drugs than

> would be found among the average employee group or would be found among a group of retirees.

As above, Mr. Gorman had no data to cite to support this assumption, and noted that "there would be [a] very limited amount of data available currently" to determine the effect of a requirement to provide benefits after age 65.

[141] Mr. Gorman was also questioned at length about his assumption about the relationship between *age* and the incidence of high cost or "speciality" drugs (including biologics). He acknowledged that there is some expectation that "treating and curing, particularly with the new drugs …is expected to reduce costs in the future", for example in the treatment of Hepatitis C, such that a high-cost drug may reduce overall costs compared to decades of ineffective treatment. He also acknowledged that he had no documentation from presentations or seminars that he attended to support his assumption that there is a relationship between *age* and claims for high-cost drugs. He ultimately conceded that high-cost drugs are not limited to persons over age 65, and testified that the industry analysis is that, to date, increases because of high-cost drugs have been offset by the lower costs of substituted generic drugs. [Transcript, pp. 810 and 814]

[142] Furthermore, Mr. Gorman agreed that anti-selection can occur within existing group plans, and that if "we mined the data" it might be possible to determine claiming patterns of employees who use high-cost drugs, including biologics, to see the effects of anti-selection and retirement patterns in relation to employees between 55 and 64 years of age. He expressed the view that the data does not yet reveal the anti-selection effect that he hypothesized because "the effect of these high-cost drugs have not fully worked themselves into the system".

[143] Mr. Gorman indicated that he is aware of employer plans that provide extended health benefits to employees 65 and older at the same level as provided for employees 64 and under. He is also aware of other plans that provide the same level of health benefits but reduced life insurance to those 65 and older.

[144] Mr. Gorman concurred with applicant's counsel that for a sum of $3,000 annually, the estimate of premiums paid by the school board on behalf of each teacher age 64 and under, "Mr. Talos would not be able to buy into a plan essentially as good as his group benefit plan". [Transcript, pp. 831-832]

[145] With respect to Standards of Practice and "accepted actuarial practice", in particular regarding providing actuarial evidence, Mr. Gorman affirmed that the standard requires actuaries to describe the data relevant to their calculations and to list the sources of information on which they relied.

Ellen Whelan

[146] In reply to Mr. Gorman's evidence relating to section 1 of the *Charter*, the OHRC called Ellen Whelan, an actuary with Eckler Ltd., to provide evidence on the cost sustainability of group-sponsored employee benefits plans that include employees age 65 and older. She provided an expert report dated April 15, 2015 and gave *viva voce* evidence. She elaborated on her report in her testimony on January 7 and 8, 2016 with some minor corrections to the terminology in a few places in the report (e.g. "claims" should read "cost to employer plan sponsors").

[147] With the parties' consent, the OHRC presented Ms. Whelan as an actuary and group benefit consultant with expertise in:

- The design, funding, reserving, pricing, valuation, risk management, governance, underwriting, costing and financial reporting of non-pension employee and post-employment benefits; and
- Health care and life insurance costs by age for group-sponsored employee benefit plans.

[148] Ms. Whelan was asked to address two questions:

1. Is it cost prohibitive in aggregate and on an average per employee basis, to provide health care and life insurance benefits to employees over age 64, relative to the cost of coverage for other covered employees under age 65?

2. *If* it is cost prohibitive in aggregate and on an average per employee basis, to provide health care and life insurance benefits to employees over age 64, are there changes that can be made by the plan sponsor, to make the plan not cost prohibitive in aggregate or on an average per employee basis?

[149] In her analysis, Ms. Whelan defined "health care" costs to include all medical and paramedical services as well as drugs and dental services. Her report cites her credentials, her sources of data, and the meaning of "credible" data. She provided an analysis of data from two studies and two insurers' "books of business" for 2014[4], and made *conservative* estimates of the aggregate costs and the average cost per employee assuming that 5-10% of the active employee pool is age 65 and older. She concluded that it is not "cost-prohibitive", i.e. it is financially sustainable, to include employees over age 65 (to age 79)[5] in health care and modified life insurance coverage even with plan cost increases of 10-15% year over year.

[150] She also compared the average claim costs of active employees to retirees of the same age, and noted that retirees' claim costs are considerably higher for every age group above 50 (based on an examination of 376,000 plan participants between ages

[4] The 2014 data from insurers Green Shield Canada (GSC) and Great West Life (GWL) include a proportion of employees who worked past age 65 in the post-mandatory retirement period (2006 onwards). Mr. Gorman's assumptions were based on his recall of data from the "early 2000's" which data pre-date the statutory prohibition on mandatory retirement. Other data relied upon by Ms. Whelan was derived from studies of retirees only done by the Canadian Institute of Actuaries (CIA), and Eckler Ltd.'s Study of Group Benefit Plan Costs by claiming age for select client data (72,000 plan participants).

[5] There is insufficient data regarding active employees over 79 to provide an opinion on the cost of their inclusion in an employee plan.

50 and 80). [Ex. 8, p. 14] This bears out the earlier observation from Dr. Berger's evidence that an employee's retirement decision is often influenced by their (or a loved one's) illness.

[151] To provide some context for this Tribunal's deliberations, Ms. Whelan drew on a Statistics Canada report in 2010 titled "Population Projections for Canada, Provinces and Territories 2009-2036" and made the following comments:

- There is a definite undeniable shift in the structure of the Canadian population by age, with seniors (age 65 and over) the fast growing demographic profile;
- The total number of seniors will increase and so will their proportion of the total population; seniors will exceed the number of residents age 14 or less between 2015-2021;
- With the continuous increase in life expectancies, there is an expectation that people will want to work longer and thus retire at late ages;
- Employers can structure their compensation packages to influence the behaviour they want, such as earlier retirements or later retirements.

[152] Ms. Whelan's conclusions from her data study include the following:

1. It is true that people use more health care services as they age and that total health care costs increase significantly by age, but so does government coverage of those costs increase by age, particularly at age 65. This means that supplementary medical costs (excluding dental) which are largely driven by drug claiming, increase steadily with age. These costs decrease significantly for private plans because a significant portion of prescription drug cost is picked up by the Ontario Drug Benefit plan.

2. Excluding dental, the average supplementary health care cost per employee is at its highest for the age 60-64 bracket, just before turning 65. Employees in the bracket 65-79 cost employer sponsors at levels similar to employees in their 40's and thus it is actually cost neutral to cover employees over age 64. [Ex. 8, p. 9]

3. While age 65 is an important milestone for health care benefits due to the integration of government sponsored drug plans, the same is not true for dental care. Dental costs also exhibit a different pattern by age compared to supplementary health care costs addressed above. The GWL and GSC data show that dental costs peak at age 45-49 and 60-64 and steadily decrease thereafter. [Charts, Ex. 8, p. 17]

4. Ms. Whelan concludes that combined dental and supplementary health care benefits plan costs by age is about the same for an employee in the group age 40-49 as for an employee in the group age 65 and over.

5. Four aging studies – showing different age profiles/demographics in the employee pool – were included in Ms. Whelan's report. Consistent with the conclusion immediately above, she noted that a plan sponsor that has a higher proportion of participants under age 50 or over age 64 would expect to have lower costs than a plan sponsor with a higher proportion of participants age 50-64. Peak health care plan costs are associated with employees in the age range 50-64, with the highest cost employees being at age 64.

6. Should the proportion of employees over age 64 increase, this may reduce the proportion in the age range 50-64, with the resulting effect of actually decreasing aggregate costs for health care plans.

7. For life insurance, age 65 is not significant in terms of mortality. Data shows that at age 50 and 80 there is a sharp increase in the rate of mortality, but between age 55-75 there is a steady increase with age. Thus, for life insurance, extending benefits to employees over age 64 will increase the average plan costs, but plan reductions could be made to keep the average cost unchanged.

8. Given increased mortality rates, life insurance coverage after age 64 could be reduced so that the average plan cost is unchanged and the aggregate cost is kept sustainable. If coverage is maintained at the full benefit amount (a multiplier of salary), coverage of employees over age 64 would increase average plan costs as well as aggregate costs. In particular, Ms. Whelan recommends that a plan sponsor could establish a consistent policy akin to retiree benefit amounts of 25% to 50% of earnings for employees over age 64 up to age 80, so that the expected increase in average cost of life insurance is neutralized by the decreased benefit amount.

<u>Findings of fact regarding the sustainability of plans with an extension of health, dental and life insurance benefits to workers age 65 and older</u>

[153] As noted in Mr. Gorman's evidence above, he agreed with Ms. Whelan's conclusions and observed that her data was more credible than his. His only critique of her report was that she did not take into account the incidence of anti-selection and the likely increase in that practice for employees age 65 and older who have a need for high-cost drugs. He had no data regarding the current incidence of anti-selection, and

no basis for a projection that the practice would increase because of the increasing approval of high-cost drugs that might appear on the market. Most importantly, Mr. Gorman had no data to support his assumption that there is a relationship between *age* and high-cost drugs.

[154] Mr. Gorman stated in his *viva voce* evidence that Ms. Whelan's conclusions are correct, except that she did not consider his assumption or hypothesis that the incidence of anti-selection and high-cost drugs increases with age. Mr. Gorman viewed this non-consideration as a shortcoming in Ms. Whelan's evidence. I find that Mr. Gorman's hypothesis is largely speculative, as it cannot be said to be a projection based on observed trends, even if there is limited data from plans with employee participants who are age 65 and older or from the past decade of experience with high-costs drugs being on the market.

[155] Mr. Gorman indicated that this data could be obtained from the "right people" and that the "data could be mined" to reveal the current incidence of anti-selection, but he did not do so in his affidavit or for the purpose of his *viva voce* evidence. Without a credible basis grounded in observable facts, this hypothesis is not useful to the Tribunal's inquiry into plan sustainability. As Mr. Gorman's hypothesis is not supported by data or the projections of experts in the field, I find that his hypothesis regarding the incidence of high-cost drugs and its relationship with ageing is essentially his conjecture and unhelpful to the Tribunal.

[156] Mr. Gorman's expert report, on its face, did not conform to the established practice of his profession with regard to citing the sources of his data. His admission that he relied on his "memory" to form the basis of many of the initial assumptions that underlie his report is troubling. He demonstrated integrity in retracting the conclusions he put forward based on his memory and in the absence of any credible or recent data. In light of Mr. Gorman's many retractions, his concessions and his express deferral to Ms. Whelan's data sources and the correctness of her calculations during his *viva voce* evidence, the Tribunal finds that his report is inadequate and will ascribe little weight to it.

[157] Although Mr. Gorman was able to refresh his memory and revise his thinking once he had the benefit of Ms. Whelan's report, he cannot be described as an expert with working knowledge of costing benefits plans in the recent past, in the wake of the prohibition on involuntary retirement. He also did not relate his various hypotheses about the costs of continuing benefits to workers age 65 and older in a manner that supports deference to the government's policy choice to exclude this group from *Code* protection in employment benefits.

[158] In contrast to Mr. Gorman, Ms. Whelan's evidence on plan sustainability was clear and compelling, rich in detail, internally consistent, logical and thoroughly sourced. Where there is conflict in the actuarial evidence, I prefer that of Ms. Whelan over Mr. Gorman.

[159] It follows that the Tribunal accepts as proven facts, the uncontroverted evidence of Ms Whelan. Most particularly, I accept and find that it is not "cost-prohibitive", i.e., that it is financially sustainable, to include employees age 65 and older (to age 79) in plans for health care (including dental) coverage and *modified* life insurance benefits, even with aggregate plan cost increases of 10-15% year over year, and the assumption that 5-10% of the Board's workforce is age 65 or over, while keeping average (per employee) plan costs virtually unchanged.

[160] The Tribunal also accepts Ms. Whelan's evidence regarding potential adjustments to the life insurance benefit amount for 65 and older employees, so that plan sponsors / employers are able to keep average plan costs unchanged, given that it is undisputed that mortality increases with age.

[161] The Tribunal also accepts the evidence of Mr. Gorman that plan sponsors / employers can manage inflationary increases of 20% or more through managing "the total compensation costs", including wages, as another approach to maintaining plan sustainability.

[162] The Tribunal rejects as speculative the hypothesis of Mr. Gorman that for age 65 and older employees, there is an increase in anti-selection (up to 40%) and an increased reliance on high-cost drugs with an average cost of $50,000/year per claimant. The data presented demonstrated that there was no link between the incidence of high-cost drugs and age.

[163] Moreover, in regard to GEDSB, Ms. Whelan noted that this employer has "stop loss" insurance that would protect against high-cost claimants, so that if benefits were extended to age 65 and older employees, GEDSB's health care plan would remain sustainable.

[164] As the applicant has not made a claim for the GEDSB to provide LTD benefits past age 65, there is no need to address the evidence led by the AG through Mr. Gorman regarding LTD cost increases associated with age. The Tribunal notes also that Ms. Bell, a HR manager with the Board, indicated that in the instant case, LTD is 100% employee funded and administered by the applicant's union OSSTF.

Russell Janzen, OCUFA Analyst

[165] On consent of all the parties, an affidavit prepared by Russell Janzen, Senior Research Analyst with 9 years' experience at OCUFA, was admitted into evidence without cross-examination (Ex. 65). This affidavit contains uncontested evidence of the percentage of full-time faculty age 65 and older by gender, and a table compiling benefits negotiated for post-age 65 faculty members at Ontario universities.

[166] Mr. Janzen, in the ordinary course of his work, provides research and support for OCUFA and its members, including bargaining activities. He noted that the collective bargaining committee is comprised of representatives from all of the trade unions and professional associations that represent university faculty members across Ontario.

[167] Among the data that he collects is the full-time faculty headcount, generated from Statistics Canada and another data exchange database (Ontario Council of Academic Vice-Presidents' Data Exchange). From these sources, he was able to report on: the proportion of faculty (excluding medicine) aged 65 and older; headcounts by institution, rank, gender and age ranges (by 5 year increments up to age 70.

[168] The following are some conclusions drawn from the data collected and analysed by Mr. Janzen for OCUFA:

1. Some faculty associations have succeeded in negotiating the provision of health benefits, dental benefits and life insurance to employees over age 65 to age 69, 70 or 80, but these benefits are often of lesser value (reduction in cap or % coverage) than for employees 64 and under. [Ex. 65, attachment B].

2. The proportion of faculty members age 65 and older (male and female combined) has increased in each year since 2005; they have increased from 1.4 to 9.9 per cent when comparing 2005 to 2013.

3. The proportion of female to male faculty in the r age 65 and older group has varied over time increasing from 1% to 7.1% for females contrasted with 1.8-11.5% for males from 2005 to 2013, suggesting that among the over age 65 group, men continue to work past age 65 at higher rates than women.

[169] This accords with the evidence of Dr. Berger (in reliance on census data) that an increasing proportion of the workforce is choosing to work past age 65 and that this applies to both men and women.

[170] Mr. Janzen's affidavit provided a table showing collective agreements and the breakdown in benefits continuation for workers 65 and older. The bargaining process resulted in different outcomes for different workplaces, often with a lessening of benefits for workers 65 and older compared to younger counterparts, particularly regarding life insurance benefits.

Fact Finding

[171] The data provided by Mr. Janzen is in keeping with Ms Whelan's conservative assumptions that 5-10% of the workforce is age 65 or older. With this % workforce assumption, Ms. Whelan was able to demonstrate plan sustainability, even with 10% year over year costs increases. In the instant Application, the evidence was that only 2 - 3% of GEDSB's workforce is over age 65 and thus, in my view, plan sustainability is assured.

Hugh Mackenzie

[172] Hugh Mackenzie, an economist, was put forward by OCUFA as an expert witness to respond to evidence given by the expert witness Prof. Chaykowski. He provided an expert report (Ex. 42) and *viva voce* evidence on January 12 and 15, 2016.

[173] Mr. McKenzie has been previously qualified as an expert to assist an arbitration panel on a "model to assess whether a municipality, in comparison to other municipalities, has the ability to pay based on property tax assessment base and effective rate of taxation": May 13, 2014 ruling in London Fire Interest Arbitration (by Mary Ellen Cummings and Steven Barrett with Michael Riddell in dissent)

[174] On consent of all the parties, Mr. McKenzie was put forward as having expertise in:

- collective bargaining in both the public and private sectors, including the education sector; and
- provincial funding and pensions.

[175] Mr. McKenzie has nearly 25 years' experience in the National Office of the United Steelworkers of America (Steel), one of the largest Canadian unions, where he provides research and technical support to the union's collective bargaining. He is also knowledgeable about the education sector, particularly regarding the funding formula applied to elementary and secondary schools between 2007- 2014. He has been

directly involved in bargaining at two universities, and has acted as a consultant to another union (CUPE) at the provincial discussion tables for elementary and secondary education sector bargaining. Outside of the education sector, he has been involved in hundreds of bargaining sessions.

[176] In the instant Application, Mr. McKenzie gave evidence concerning legislation in the education sector and constraints at bargaining tables (central versus local), the presence of the government as funder or employer etc. that mitigate against the notion of "free" collective bargaining articulated by the Board's expert witness Prof. Chaykowski. For the reason set out below, this part of McKenzie's evidence will not be summarized here as it is not relevant to a determination of the case that was re-framed by the AG during argument.

[177] As part of the research and technical support that Mr. McKenzie provides to his employer (Steel), he estimates the costs of employer's and union's proposals. This helps Steel's establishment of its priorities in bargaining. His "costings" assist with weighing the economic impact of a proposal in light of the expressed desire of the membership, and may also help to clarify what each party is proposing during bargaining. Full disclosure is required in pension matters, while none is required during benefit plan negotiations.

[178] Mr. McKenzie opined that with novel proposals, the "trade-off" costs for an item that the employer does not want to grant is usually *much higher than the true financial cost*. In his experience:

> When an employer wants to make a proposal go away, they make a trade off costs to make that proposal go away.

He stated that, in the instant case, the Board's demand for the removal of the workload term that was dear to the union in exchange for providing benefits for a few workers age 65 and older "is a perfect example of a trade-off cost".

[179] Mr. McKenzie also opined about an “anchoring effect” of legislation that he has noticed in his many years of practical experience: where a union’s proposal is not aligned with standards provided by legislation, the legislation can serve to anchor the result achieved through bargaining. In the instant matter, the legislation permits lesser payment of compensation to older workers, although there is no change in job duties between age 64 and 65, and this “permission” to lessen compensation becomes the norm.

[180] This witness also commented on whether the provision of benefits for 65 and older workers is a “break-through” concept – i.e. a non-linear development in the collective agreement as benefits are to be provided to persons who were deprived of these benefits to date. According to Mr. McKenzie, an improvement in benefits for workers 65 and older would be unlikely to succeed through bargaining without undue trade-offs by the union. He had no empirical studies to support his observations, but asserted that his observations over 40 years had led him to these opinions.

Professors Richard Chaykowski and Michael Lynk

[181] The intervenor AG called Prof. Richard P. Chaykowski as an expert to provide opinion evidence on Ontario’s labour relations regime. On July 14 and 15, 2015, he gave *viva voce* evidence and expanded on his report (Exhibit 6).

[182] Prof. Michael Lynk was put forward by OHRC as an expert in labour law, employment law, human rights in the workplace, industrial relations, and collective bargaining to respond to Prof. Chaykowski. On Nov 6, 2015, he gave *viva voce* evidence and expanded on his revised report (Exhibit 54).

[183] The AG abandoned its position that there was a third, post-facto purpose to the impugned provision, a purpose that gained currency as a justificatory “contextual” fact in the earlier decision in *Chatham-Kent*. The concession from AG’s counsel during argument on September 12, 2016, was as follows:

> I'm not putting forward that the legislative purpose was collective bargaining. I am not re-litigating Etherington [*Chatham-Kent*].

[184] I note that counsel for the AG rose to make the concession after OCUFA's counsel articulated that "collective bargaining is a red herring in this case" and that "the legislature can design a scheme that is finer than s. 25(2.1) to address collective bargaining; a law designed to capture 30% of the workforce but includes 100% goes far beyond minimal impairment". In light of the AG's concession, I do not find it necessary to address Prof. Chaykowski's, Prof. Lynk's and Mr. MacKenzie's expert evidence regarding the desirability of permitting employers and employees to bargain their own terms of employment in the post Bill 211 regime.

[185] It is therefore not essential that I review opinion evidence or resolve the debate regarding the voluntariness or the extent of freedom to bargain in the current legal climate for teachers or for any bargaining unit member in Ontario.

[186] The GEDSB however maintained some vestige of the above position, arguing that Mr. Talos' wages and benefits, derived from collective agreements for decades as a unionized professional, prepared him well to face life after age 65 without reliance on employer provided benefits, and thus the elimination of his benefits did not breach s. 15(1) of the *Charter*.

ISSUES TO BE DETERMINED

1. Does the applicant, Mr. Talos, have standing to bring this constitutional challenge as an individual or as a member of a group that experiences disadvantage?

2. Does the "carving out" of workers over age 65 from protection against discrimination in employment benefits as a result of the defence set out in s. 25(2.1) of the *Code,* in conjunction with the *ESA* and its Regulations, infringe the rights guaranteed by s. 15(1) of the *Charter*?

3. If the "carving out" as a result of s. 25(2.1) of the *Code*, in conjunction with the *ESA* and its Regulations, infringes the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms,* is this provision of the *Code* justified by s. 1 of the *Charter*?

LAW, ANALYSIS & DECISION

Relevant *Code* and *ESA* provisions

[187] As noted in the Introduction above, section 25(2.1) of the *Code* provides:

> 25(2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder.

And O.Reg. 286/01 under the *Employment Standards Act, 2000* provides:

> "age" means any age of 18 years or more and less that 65 years

[188] As also noted earlier, when these provisions are read together with s. 44(1) of the *ESA* and s. 7 of O.Reg. 286/01, it is *permissible* for employers to provide unequal benefits to employees age 65 and older, on a non-actuarial basis, compared to employees age 18 to 64. For the latter (younger) group, employers are *prohibited* from providing unequal benefits except in certain limited circumstances and only then on an actuarial basis.

Issue One: Does the applicant have standing to bring this constitutional challenge?

(a) Is the applicant directly affected by s. 25(2.1) of the *Code*?

[189] To determine whether an applicant has standing to bring a constitutional challenge to legislation, three aspects should be considered:

> First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine

> interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?
>
> *Vriend v. Alberta*, [1998] 1 SCR 493, at para. 44, citing *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at p. 253

[190] It is undisputed that Mr. Talos' benefits were terminated when he reached the age of 65, although he continued in his full-time employment as a teacher with the respondent GEDSB. He and his wife were dependent on his benefits coverage, particularly as she was seriously ill, unemployed and under the age of 65 so that she did not qualify for the Ontario Drug Benefits Plan (ODBP) in her own right. Without the benefits that he had enjoyed throughout his career, he and his gravely ill spouse were able to obtain financial relief from drug costs through the Trillium Drug Program (Trillium) and the Exceptional Access Program, both funded by Ontario. Trillium generally provides the same coverage as ODBP for persons under age 65 and has some of the same restrictions regarding not funding "high cost drugs" or novel treatments, hence the need for the Talos family to seek "exceptional access" for drug treatment that would have been covered by Talos' workplace benefits. It is also undisputed that Mr. Talos was required to pay out of pocket for life insurance and for deductibles associated with ODBP, as well as for the discretionary (needs-tested) Trillium program. In addition to these expenses, Mr. Talos gave evidence that he no longer enjoyed the peace of mind associated with insurance coverage for travel, dental, chiropractic, physiotherapy, vision care, medical equipment, counselling and mental health care and other health related care covered by the benefit plan that formed part of the teachers' collective agreement.

[191] The respondent and intervenor AG raised the issue of Mr. Talos' financial circumstances to counter his assertion that he and his family experienced hardship (or disadvantage) because of the "carve out" due to s. 25(2.1) of the *Code*. The applicant, supported by the intervenor OHRC, argued against the notion that any individual's wealth or solvency should have a bearing on determining any aspect of the

constitutional issue, including whether he experienced disadvantage sufficient to permit him standing to advance this constitutional challenge.

[192] In the usual course, employees' entitlement to equal wages and benefits for work performed is not linked to their personal financial circumstance. I agree with the applicant and OHRC that an individual's financial circumstance is irrelevant to determining the issue before the Tribunal. The respondent's extensive requests to the applicant to disclose his ownership of real property, inheritance, savings, the commuted value of his pension, his mortgages and indebtedness, and multi-year income tax returns were, in my view, intrusive and of little or no relevance to the constitutional issue under consideration.

[193] Indeed, it is helpful to compare a worker whose benefits are terminated at age 65 to a comparator group of workers age 64 and under who receive benefits for the same work done by the 65 and older workers. It is also important to distinguish employment benefits as part of an employee's total compensation package, from benefits derived from a private or government contributory pension plan or a government (universal or needs-tested) social benefits plan.

[194] For greater clarity, the denial of benefits in this Application relates expressly to dignity interests in the exclusion from *Code* protection and denial of the enjoyment of group benefits that are an incident of employment that Mr. Talos enjoyed until he turned age 65. At issue for Talos is earned compensation for his work, which includes his salary and benefits. This is distinguishable from the facts in the *Withler* case (discussed in depth below) where the gradual diminution (by age) of government provided insurance benefits (not earned compensation) to surviving spouses was considered by the Court against the backdrop of a suite of other government benefits that were available to the same claimant group.

[195] Had the Legislature intended for government benefits to supplement the earned compensation for workers age 65 and older, it could have expressly done so and legislated an "integration" of workplace benefits (particularly with the Ontario Drug

Benefit plan) to ensure that there is no net loss to workers 65 and older as compared to workers 64 and under. It did not do so. This is distinct from the government's approach to workplace pension plans where there are statutory provisions for integration of pension benefits and CPP at age 65 in Ontario. (This integration is addressed later, *infra,* para. 245).

[196] Furthermore, the Tribunal was not provided with any case-law or other authority for treating Mr. Talos' access to government programs and personal savings as relevant to offset his loss of employment benefits. I view the termination of his benefits as a diminution of Talos' earned compensation and a direct experience of disadvantage, sufficient to provide him with standing to challenge the "carve out" as a result of s. 25(2.1) of the *Code*.

[197] I conclude that all three aspects of the *Vriend* test have been met by the applicant. Firstly, the denial of *Code* protection through the "carve out" in s. 25(2.1) of the *Code* and the impact of this provision on equal compensation for workers age 65 and older is a serious issue. Secondly, Mr. Talos has a genuine interest in the issue given his and his dependent wife's direct experience of disadvantage from his loss of benefits at age 65. Thirdly, Mr. Talos' direct experience of disadvantage is sufficient to provide a factual basis to support a *prima facie* case of discrimination, and this Application is a reasonable way to challenge the validity of the "carve out" provision before this Tribunal.

(b) Is the applicant a member of a group that is adversely affected by the impugned law?

[198] It has long been recognized that the *Code* is quasi-constitutional in nature and applies to all persons engaged in certain activities, including government and private sector activity; and, in the area of employment, it applies to unionized and non-unionized workers. Similarly, it is recognized that the *ESA* establishes minimum standards for all workers carrying out work in Ontario, with limited exceptions for certain types of work (for example diplomats, judges, work performed as community service

etc.; see *ESA*, s. 3). Broadly speaking, both the *Code* and *ESA* offer protections for workers with very limited exceptions – like the impugned "carve out" provision (s. 25(2.1) of the *Code*) that is in issue here.

[199] It is undisputed that Mr. Talos' work as a unionized teacher is among the types of work covered by the *ESA* and the *Code*. It is also clear from a plain reading of both statutes that neither statute's guarantees are qualified (or diminished) by the individual worker's wealth or status as a professional or a union member. On a plain reading of the *ESA* and *Code,* I must also reject of the respondent's view that an individual worker's membership in a profession or a union is relevant to the statutory protections afforded to employees by these statutes. Furthermore, these membership statuses have no bearing on the definition of the group of workers over age 65 that is adversely affected by the "carve out" provision in the *Code*.

[200] Drawing on the Supreme Court of Canada's approach in *Egan v. Canada*, [1995] 2 S.C.R. 513 and *Eldridge, above*, which approach is binding on this Tribunal, an applicant in a constitutional challenge needs only to demonstrate her or his membership in a group that is adversely affected by the impugned legislation. See La Forest, J. writing for a unanimous court in *Eldridge* at para. 83:

> Finally, I note that it is not in strictness necessary to decide whether, according to this standard, the appellants' s. 15(1) rights were breached. This Court has held that *if claimants prove that the equality rights of members of the group to which they belong have been infringed, they need not establish a violation of their own particular rights*. In *Egan*, *supra*, *the government contended that, given the net benefit available to them pursuant to other legislation*, a homosexual couple was not negatively affected by the denial of a spousal allowance under the *Old Age Security Act*, R.S.C., 1985, c. O-9. In rejecting this submission, I commented as follows, at para. 12:
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> > . . . the *respondent contends that the appellants have suffered no prejudice*. . . . I would simply dispose of this argument on the ground that, while this may be true in this specific instance, there is nothing to show that this is generally the case with homosexual couples, *which is the point the respondent must establish.*

> Similarly, Cory J. stated in *Egan*, at para. 153, that the "appellants must demonstrate that homosexual couples in general are denied equal benefit of the law, not that they themselves are suffering a particular or unique denial of a benefit" (emphasis in original). That being said, it is fair to say that the absence of a publicly funded sign language interpretation service discriminated against the appellants by denying them the equal benefit of the British Columbia health care system. The evidence at trial established that, generally speaking, the quality of care received by the appellants was inferior to that available to hearing persons. [emphasis added]

[201] Relying on *Eldridge* above, I conclude that Mr. Talos need only demonstrate to this Tribunal that he is a member of a group that is adversely affected (namely, workers over age 65) and he need not establish a violation of his particular rights. The respondent contends that Mr. Talos was not adversely affected because of his access to other resources – whether personal savings or the benefits available to him "pursuant to other legislation" as per *Egan.* Paraphrasing La Forest J above, for the unanimous court in *Eldridge*, this argument can be disposed of on the ground that, *while this may be true in this specific instance, there is nothing to show that this is generally the case with "65 and older" workers, which is the point the respondent must establish.*

[202] The respondent's argument that in his specific case, Mr. Talos' eligibility for drug benefits under the ODBP, the Canada Pension Plan and Old Age Security (OAS), all of which are pursuant to legislation, diminishes the "prejudice" that he suffered as a full-time, actively employed teacher is unconvincing and off the mark. As in *Egan* and *Eldridge* above, I find that the respondent GEDSB needed to demonstrate that the alleged prejudice suffered by the group of workers age 65 and older is *de minimis* or non-existent. I conclude that the respondent's focus on Mr. Talos' inheritance and/or inter-generational wealth and his family's ability to accrete wealth to pay out-of-pocket for his and his wife's drug and other benefits or for replacement insurance costs, is misplaced in this constitutional challenge and does not negate Mr. Talos' membership in a group of age 65 and older workers who were deprived of benefits they had previously enjoyed.

[203] In my view, a plain reading of the *Code* and *ESA* support a finding that Mr. Talos is squarely among the group of "65 and older" workers who were carved out from *Code* protection pursuant to s. 25(2.1). This carve out provision permitted the respondent employer GEDSB to eliminate the benefits available to him at age 65 compared to employees age 64 and under, without any actuarial justification and without regard to whether the cost of the benefit was closely related to age.

[204] It is not disputed that the "carve out" provision in the *Code* applies to all *workers* 65 and older, whether they are males or females, unionized, professional, recent immigrants or Canadian-born residents. Whether a worker had a long or short career or was well paid or not are also irrelevant to the breadth of the application of the blanket "carve out" provision in the *Code*.

[205] I therefore find that Mr. Talos has standing to bring this constitutional challenge on two bases: as a person who directly experienced disadvantage and as a member of the group of "65 and older" workers who experienced disadvantage through the loss of workplace benefits and the loss of *Code* protection.

Issue Two: Does s. 25(2.1) of the *Code* infringe s. 15(1) of the *Charter*?

Relevant *Charter* provisions

[206] Section 15(1), the equality provision, of the *Charter* states:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[207] And, section 1, that provides both a guarantee of rights and freedoms and justification for limitations on those rights and freedoms, states:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits

prescribed by law as can be demonstrably justified in a free and democratic society.

Case law: Discrimination under s. 15(1) of the *Charter*

[208] To determine whether a distinction amounts to discrimination under s.15(1), the Supreme Court of Canada ("SCC") has provided guidance in *Law Society of British Columbia v. Andrews* ("*Andrews*"), [1989] 1 S.C.R. 143, that was recently affirmed in *Quebec (Attorney General) v. A ("Quebec"),* [2013] 1 S.C.R. 61 at page 155. To determine whether s. 15(1) has been infringed, a court must answer two questions, with the applicant bearing the onus:

1) Does the law create a distinction based on an enumerated or analogous ground?

2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[209] In the more than two decades between *Andrews* and *Quebec*, the SCC decided other cases that elaborated upon the two-part test articulated in *Andrews*, most notably *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 and in *R v. Kapp*, [2008] 2. S.C.R. 483. In *Law*, the Court clarified that the s. 15 guarantee is for substantive, not just formal, equality, and the two-part test was divided further into three parts, adding the impact of the law or program on the *human dignity* of the members of the claimant group. This "dignity" component was to be determined in reference to four contextual factors:

1) Pre-existing disadvantage, if any, of the claimant group;

2) Degree of correspondence between the differential treatment and the claimant group's reality;

3) Whether the law or program has an ameliorative purpose or effect; and,

4) The nature of the interest affected.

Law, above, paras. 62-75

[210] In *Kapp*, para. 22, the Court responded to criticism that the *Law* factors are not only confusing and difficult to apply, but have also created an additional burden on equality claimants; and that these factors also allowed for some of the artificial comparator analysis focussed on treating likes alike to resurface. In *Kapp,* at para. 23, the Court provided the following guidance:

> The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third *Law* factor) goes to whether the purpose is remedial within the meaning of s. 15(2).

[211] For even greater clarity, the SCC in *Kapp* elaborated further that the original *Andrews* test was reaffirmed:

> …*Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* – combating discrimination, defined in terms of perpetuating disadvantage and stereotyping. [emphasis added]
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> *Kapp*, *above*, para. 24

[212] With respect to the second *Law* factor, namely the degree of correspondence between the differential treatment and the claimant group's reality (or needs and circumstances), there has been some debate regarding whether this is an assessment that is appropriate at s. 15(1) stage of analysis or at the s. 1 justification stage after a

violation of s. 15(1) has been found. In a decision in the Ontario Superior Court, Code J. commented on the concurring decisions by McLaughlin C.J.C. and Abella J. that:

> Nothing in *Quebec v. A. supra*, suggests that this ["correspondence" *Law* factor] well established and usually decisive s. 15(1) factor has now been relegated to the s. 1 stage of the *Charter* analysis or that the "correspondence" factor has now been abandoned or changed.
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> …McLachlin C.J.C. expressly referred to "the degree of correspondence between the differential treatment and the claimant group's reality" as one of the relevant contextual factors (*Quebec*, at para. 418).
>
> …Abella J. held that "a significant proportion of unmarried spouses (the claimant group in that case, referred to as *de facto* spouses), suffered "*actual adverse impact*" due to the impugned legislation. She concluded that "many spouses in *de facto* couples" could be "left economically vulnerable or disadvantaged" as a result of the legislative distinction between the rights of married and unmarried spouses upon separation. In other words, *the legislative scheme in that case was not well tailored to the actual needs and circumstances* of significant numbers of unmarried spouses in the claimant group. It was on that basis that Abella J. held that the legislation "perpetuates historic disadvantage" of unmarried spouses. *In my view, both Abella J and McLachlin C.J.C. continued to apply the "correspondence" factor in its traditional form, at the s. 15(1) stage and not at the s. 1 stage of Charter analysis*. [emphasis added]
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> *R. v. T.M.B.*, 2013 ONSC 4019 at para. 56

[213] I adopt the analysis of Code J. in *T.M.B.*, rendered in the wake of the *Quebec v. A* decision, and conclude that the "correspondence factor" or whether "the legislative scheme is tailored to the actual needs and circumstances of the claimant group", or alternatively stated whether the claimant group experiences "actual adverse impact", is an appropriate consideration in the s. 15(1) stage and not at the s. 1 stage of *Charter* analysis. In my view, this is very much akin to the second step in the long established *Andrews* test that requires the applicant to establish substantive discrimination by proving that "the distinction creates a disadvantage". However, this does not mean that any s. 1 justification can be subsumed in the s. 15(1) analysis. Given this rationale, I reject the AG's and the Board's insistence that justificatory facts relating to the

"correspondence" of the impugned provision mitigates against a finding of a *prima facie* breach of s.15(1) in the instant matter.

[214] A recent decision of the Supreme Court of Canada on the approach to s. 15 is *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548. *Taypotat* reaffirmed the earlier ruling in *Quebec v. A* regarding the two steps to the s. 15 analysis: (1) whether the law creates a distinction based on an enumerated or analogous ground; and (2) whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. See also *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at paras. 24-28.

[215] In light of the above, this Tribunal will be guided by the most recent decisions *Quebec and Taypotat.* The AG's argument that s. 15 should involv*e a s. 1* evaluation of the purpose of the *impugned* legislation, under the guise that the needs of workers over 65 need not "perfectly correspond" with the *Code* provision, and ostensibly in reliance on *Withler*, is expressly rejected. I am guided in this by the Court's pronouncement in *Kapp*, cited above, that "the factors in Law should not be read literally as if they were legislative dispositions*".*

[216] Notwithstanding the framing of the arguments of the respondent Board and the AG, this decision will not be framed along the lines of the four *Law* factors (prejudice, stereotyping etc.), except where they have a bearing on the contextual analysis required in the second part of the s. 15 test from *Taypotat* outlined immediately above.

<u>Does s. *25(2*.1) of the *Code* create a distinction based on an enumerated or analogous ground under s. 15(1) of the *Charter*?</u>

[217] It is apparent on the face of the impugned *Code* section that a distinction is created between workers under the age of 65 who are members of workplace group benefits plans, and those who are 65 and older who perform the same work but suddenly lose a portion of their compensation. The former are protected by the *Code*

from age-differentiated group benefits, except in limited circumstances and then only on an actuarial basis, while the latter group is not afforded *Code* protection and is thus vulnerable to not being rewarded equally for work performed.

As a teacher, Mr. Talos received group healthcare benefits and life insurance throughout his career until he turned age 65. The only basis for this change according to the respondent Board is that his ability to access benefits at age 65 is no longer a "right", but is something that can be denied completely or be reinstated (partially or fully) if a suitable trade-off can be obtained in bargaining with his union. This Board conduct is permissible because the impugned section of the *Code* deems it non-discriminatory. This vulnerability to loss of benefits is akin to that experienced up to 2006 by workers age 65 and older, the same age group that faced involuntary retirement at the behest of their employer (or collective agreement) when the *Code* protected workers only up to age 64. This denial of *Code* protection is *prima facie* a distinction based on age, an enumerated ground under s. 15(1) of the *Charter*. The denial of compensation too is *prima facie* a distinction based on age, an enumerated ground.

Does the age distinction create a disadvantage?

[218] This constitutional challenge addresses age-differentiation in benefits (on a non-actuarial basis) that creates a disparity between workers 64 and under who receive benefits and workers who lose benefits entirely or receive lesser benefits on a non-actuarial basis on reaching age 65. Contrary to the AG's and the Board's submission, workers under age 64 without benefits throughout Ontario or even within the GEDSB are not the relevant reference group against which to assess the applicant's disadvantage in the instant s. 15(1) analysis.

[219] In this Application, the focus is appropriately placed on benefits received by employees age 64 and younger compared to those denied to Mr. Talos and other employees at age 65 and older. The undisputed evidence before the Tribunal was that at age 65 he was deprived of his employer sponsored group benefits that he had enjoyed as part of his compensation for decades. He and others employed by the

GEDSB were routinely informed in writing prior to their 65th birthday of the impending loss of life insurance benefits and of a 30 day window to convert their life insurance from the group plan to an individual plan. This caused Mr. Talos to experience various disadvantages (described more fully above under “standing”), including loss of peace of mind, financial outlay for certain deductibles exceeding $3,000, and being subject to needs-tested processes to obtain initial coverage and then “exceptional access” from the government supported Trillium Drug Benefit fund. He and his family also had to forego certain insurance (on which they relied for travel to their vacation home in the U.S.A.) because of their inability to afford replacement insurance.

Addressing the AG’s submission on s. 15(1)

[220] The respondent GEDSB and the AG did not concede that s. 15(1) of the *Charter* was breached in the instant Application although a *prima facie* breach was evident. The Tribunal notes that the fact that workers over age 65 were vulnerable to loss of benefits at age 65 was sufficient to support a finding of a s. 15(1) breach in the *Chatham-Kent* and *McKinney* decisions respectively that addressed the same impugned *Code* “carve out” provision in the grievance arbitration process. However, relying on *Withler*, the AG submitted that it is appropriate for this Tribunal to reach the same conclusion as in the *McKinney* and *Chatham-Kent* decisions, but to do so at the s. 15 stage of the analysis.

[221] In *Withler*, the constitutional challenge was initiated by widows whose federal supplementary death benefits were reduced because of the age of their husbands at the time of death. The *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* provided federal civil servants and members of the Canadian Forces, and their families, with a suite of work-related benefits, including a “supplementary death benefit”, a lump sum payment made to a plan member’s designated beneficiary upon the member’s death. The supplementary death benefit was reduced by 10 percent for each year by which the plan member exceeded a prescribed age. The court considered how the age-differentiated superannuation benefits operated in the context of a suite of employee benefit programs that provided for survivors; for younger survivors it operated like life insurance with a large lump sum payout, while for

older survivors it operated as a pension scheme with periodic payments for the lifetime of the survivor. The Court in *Withler* looked at the provisions for survivors made in the employer's two impugned superannuation plans as the survivors aged and had access to different employer benefits. The Court considered the value of the life insurance component as compared to pension payments within the plans, and determined that the benefits were sufficiently equivalent; and thus found there was no "disadvantage" at the s. 15 stage of the analysis.

[222] In *Withler*, after balancing the interests of different pension plan members, there was no inequality found under s. 15(1) of the *Charter*. In contrast, in the instant case, there is no alternative "suite" of benefits offered to employees age 65 and older that can be considered to be "sufficiently equivalent" to the benefits offered to employees age 64 and younger. The evidence was undisputed that the public benefits available to workers at age 65 are inadequate to replace lost employment benefits. In the instant case, there is no balancing of "complex issues", as the actuarial evidence was clear that the average plan cost increase for workers 65 and older is negligible for health care and nil for dental care. With regard to the evidence about the increase in cost for life insurance (and LTD if applicable) with age, an employer could be left room to reduce or eliminate such coverage for workers 65 and older if such reduction or elimination could be justified empirically as reasonable and *bona fide*, without resort to the impugned blanket "carve out" provision.

[223] In *Withler*, the Court viewed the trade-offs within the suite of benefits to be appropriately balanced, and thus found no disadvantage to group members as a whole because of the age-based reduction in certain benefits. Those facts are distinguishable from the instant case where age-differentiated benefits in an employer plan is not ameliorated or set-off by any other *employer* provided benefit. This Tribunal was not provided with any precedent that considered universal government benefits (such as CPP, OAS or ODBP) *as a supplement to earnings* to determine whether an employer compensation or benefits plan differentiated adversely against employees identified by an enumerated ground under s. 15 of the *Charter*.

[224] Similar to *McKinney* and *Chatham-Kent,* for reasons set out more fully below, I find that s. 25(2.1) of the *Code*, in conjunction with s. 44 of the *ESA* and the relevant provisions of O.Reg. 286/01, violates s. 15 of the *Charter.* I expressly reject the AG's submission that I should consider the s. 1 justifications in *McKinney* and *Chatham-Kent* as applicable to the s. 15 analysis, ostensibly based on *Withler*. The Court in *Withler*, in my view, did not import s. 1 considerations into the s. 15 analysis when making a determination of the equivalency in value of the different components of the superannuation funds. While a contextual approach is relevant in the second step of the s. 15 analysis to determine whether there is substantive discrimination, one need not consider the factors that relate to justifying the impugned law to ascertain "contextual" facts.

[225] The respondent bears the onus of providing cogent evidence for the s. 1 justification, and cannot obfuscate the finding of substantive discrimination under s. 15(1) by partially importing s. 1 justificatory facts under the guise of considering the "correspondence" factor per the *Law* test. As stated above, I adopt the test articulated in *Andrews* and, subsequent to *Law*, the test was recently confirmed in *Quebec v. A.* and *Taypotat*, and I reject the AG's submission that *Withler* serves to negate earlier findings of a s. 15(1) breach in *McKinney* and *Chatham-Kent*, both of which addressed the identical issue: the absence of *Code* protection for workers 65 and older.

<u>Addressing GEDSB's submission on s. 15(1)</u>

[226] As noted above, at the start of the hearing, the respondent GEDSB submitted to the Tribunal that there is no substantive disadvantage to Mr. Talos and thus no violation of s. 15(1) of the *Charter* for three reasons:

- With university education and professional status, the applicant is a member of an advantaged group in our society as he has received pay at the top of the pay scale $95,000; he had the security of a collective agreement for 40 years of his work life; he has benefited from a benefits plan to age 65; and his pension plan is generous and permitted him to retire well before age 65, in part because of a generous "factor 85" pension provision;

- The “carve out” provision does not impact the applicant by perpetuating stereotypes based on age as he can lead an economically viable life during his senior years, relying on the benefits bestowed on him through collective bargaining as a member of the union; and
- There is a social consensus that people retire by age 65 and transition to government supported programs like the Ontario Drug Benefit Plan (ODBP) and Ontario Trillium grants.

[227] Essentially, the respondent’s three reasons rely on the fact that age-based government benefits and private pension benefits and personal savings were available to Mr. Talos at age 65 to assert that he suffered no disadvantage or stereotyping based on age and thus his s. 15(1) *Charter* right to equality is not infringed by the *Code* carve out provision. Access to government supported age-based programs (including OAS) was addressed by the Supreme Court of Canada in an earlier *Charter* challenge involving the exclusion of an unemployed woman from receiving employment insurance (EI) benefits because she reached age 65. In *Tétreault-Gadoury v. Canada*, [1991] 2 S.C.R. 22, the Supreme Court expressed doubt about using the existence of government benefits, even at the justification stage, to excuse the denial of unemployment benefits to which a worker was entitled but for age. In discussing the role of Old Age Security (OAS) benefits (dependent on age and period of residency), La Forest J. writing for the unanimous court (L’Heureaux-Dubé J. wrote a separate concurring comment), at para. 43 stated:

> It is fair to take into account the possibility that a group deprived of benefits under one Act may be receiving equal, or even greater, benefits under another. In other words, one cannot ignore the fact that the economic needs of those over the age of 65 are also addressed in legislative measures such as the *Old Age Security Act*, R.S.C. 1985, c. O-9. Still, I *doubt* whether the objective of fitting the [Employment Insurance] Act within the government’s particular legislative scheme of social programs could in itself, be sufficiently important to justify the infringement of a *Charter* right. *In theory, the government could advance the same rationale to support virtually any piece of legislation that is challenged. In the end, the impact on the individual or group is what is of primary concern.* [emphasis added]

[228] In *Tétreault-Gadoury*, the Supreme Court ultimately ruled in favour of the applicant's *Charter* claim, such that she was entitled to receive EI benefits based on her eligibility through past contributions to the scheme during her employment and her commitment to actively seek re-employment, notwithstanding that she also became eligible to receive additional monies through OAS. In its ruling, the Supreme Court also noted at para. 52 that "the evidence adduced by the parties indicates that retirement is related more to financial incentive than to any particular age".

[229] Adopting the approach in *Tétreault-Gadoury*, and based on similar evidence in the instant case by Dr. Berger, Mr. Gorham and Ms Whelan that retirement age is largely determined by individual financial considerations, I can address the respondent's three submissions. In my view, the applicant's eligibility to receive OAS, ODBP, his teacher's pension benefits as well as his pension from the Canada Pension Plan has no bearing on his *Charter* claim. There is no authority for the proposition that deprivation of a worker from group plan benefits at age 65 was within the government's particular legislative scheme of social programs for residents over age 65. Further, Mr. Talos' lifetime of earnings as a unionized professional and his family's wealth are irrelevant to his assertion of his right to equality in relation to employment benefits as part of his total compensation package.

[230] Finally, in addressing the respondent Board's approach to s. 15(1), the Tribunal rejects the notion that "social consensus" has a bearing on determining whether there is or is not discrimination when a worker who is eligible for government benefits is deprived of his workplace benefits. In *Lavoie*, Bastarache J., writing for the majority, cautioned against policy considerations, including "international consensus", entering the s. 15 analysis to refute a discrimination claim. He clarified that the objectives of the impugned law do not have a bearing on determining whether the law is discriminatory:

> .. the exigencies of public policy do not undermine the *prima facie* legitimacy of an equality claim. A law is not "non-discriminatory" simply because it pursues a pressing objective or impairs equality rights as little as possible. Much less is it "non-discriminatory" because it reflects an international consensus as to the appropriate limits on equality rights.

> While these are highly relevant considerations at the s. 1 stage, the suggestion that governments should be encouraged if not required to counter the claimant's s. 15(1) argument with public policy arguments is highly misplaced. Section 15(1) requires us to define the scope of the individual right to equality, not to balance that right against societal values and interests or other *Charter* rights. [emphasis added]
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> *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para. 48

Substantive discrimination

[231] Turning now to the test articulated in *Taypotat*, the issue to be determined by this Tribunal is whether the age-differentiation permitted by the impugned section of the *Code* is substantively discriminatory. To do so, this Tribunal must determine whether the impugned section of the *Code* responds to the actual capacities and needs of workers over age 65 or instead imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.

[232] Ample evidence was provided to the Tribunal that health declines with ageing and correspondingly, mortality increases with ageing. One can readily conclude based on the concurrence of the evidence of Ms Whelan, Mr. Gorman and Dr. Berger that the need for healthcare resources increases as one ages. One might also note that it is very likely that as the employee/ plan member ages, so does his or her spouse and there is a corresponding increase in the family's need for resources with ageing. In instances where the employee (plan member) has a spouse who is ill and unemployed (as was the case with Talos), the family's reliance on the employed spouse's benefits plan is significant. As was the case here, the ODBP and other government provided (needs-tested) drug programs can be accessed with considerable effort, involving the revealing of personal financial information and with a $3,000 deductible, and proved to be a partial replacement for drugs only. Being stripped of benefits at age 65 and older is not responsive to the needs of older workers. Even if one were to consider the availability of ODBP to workers at age 65, there is no government sponsored replacement for para-medical and dental care benefits, or travel and life insurance.

[233] There was also undisputed evidence that older workers face significant cost hurdles in replacing their workplace benefits with individual insurance coverage. Mr. Gorman, expert witness for the AG, was frank in admitting that the average premium cost to the employer for insuring a worker at age 65 in a group plan is not a sufficient amount of money to enable such a worker to purchase equivalent healthcare and life insurance coverage in an individual plan. This is true for a healthy employee at any age. An employee at age 65 and older is likely to have developed some medical history as she aged, and thus would be required to pay considerably more for premiums as an individual with a pre-existing condition to replace, or obtain lesser benefits than, what was available through the workplace group plan. This inability to replace the benefits for reason of cost exacerbates the disadvantage experienced by older workers when they are stripped of workplace benefits.

[234] I also agree that absent healthcare benefits, an injured or ill worker who is 65 or over could be forced to retire because she cannot afford the healthcare supports (e.g. paramedical services) that would assist with her day to day health maintenance so that she is fit to remain at work, with or without accommodated duties. By removing healthcare benefits at age 65, it logically follows that older workers are deprived of the supports available to their younger co-workers to maintain their fitness for work. Indirectly, the older worker is faced with a decision to work while ill (or without full recovery) or to retire sooner than is financially desirable because of the removal of health care supports, notwithstanding the prohibition on “mandatory” retirement. This diminishes the well-being of workers 65 and older (and their dependents) on many levels: health, financial and job security. I conclude that the nature of the interest affected by the impugned law is varied but significant to older workers and their families, and the impugned carve out reinforces stereotypes and imposes a burden on workers 65 and older.

[235] In the instant Application, the respondent Board re-allocated the “flow-through” monies it received from the province for each teacher’s benefits package to its other spending priorities, while Mr. Talos was deprived of healthcare coverage at an age

when it was much needed by his family. Clearly, the impugned law is not responsive to the applicant's circumstances of requiring protection of his access to a group benefits plan as he aged, and allowed for the possibility that funds that were allocated for his benefit by the province could be diverted by the GEDSB.

[236] The cost burden of affording a replacement of a group plan with an individual plan or foregoing the peace of mind that comes with insurance is imposed on workers 65 and older who are stripped of group benefits. The impugned section of the *Code* also deprives workers 65 and older of access to redress through human rights protection. Reverting to the test in *Taypotat,* the only issue that remains for consideration is whether the impugned law has the effect of reinforcing, perpetuating or exacerbating disadvantage already faced by workers aged 65 and older.

[237] The Tribunal notes that for many decades prior to 2006, employers were permitted to terminate employees at age 65, and the employee had no legal recourse. This involuntary termination (a.k.a. mandatory retirement) was reflected in the *Code* and other workplace statutes, including the *Workplace Safety and Insurance Act* (*WSIA*) and *Unemployment Insurance Act* (as it was then known). To date, the *WSIA* denies employees age 65 and older re-employment protection and payment for lost earnings, while employment insurance benefits are now payable past age 65 because the exclusion provision was struck down as unconstitutional in *Tétreault-Gadoury*. In that ruling, the Court commented on the *stigmatization* of workers age 65 and older as follows:

> The most harmful and singular aspect of section 31 of the Act is that it permanently deprives the applicant, and any other person of her age, of the status of a socially insured person by making her a pensioner of the state, even if she is still looking for a new job. Regardless of her personal skills and situation, she is as it were stigmatized as belonging to the group of persons who are no longer part of the active population.
>
> *Tétreault-Gadoury v. Canada*, [1991] 2 S.C.R. 22, para. 58

[238] In *Chatham-Kent*, where the same impugned provisions were challenged as in the instant case, Arbitrator Etherington commented on pre-existing disadvantage as follows:

> First, the challenged provisions perpetuate a pre-existing disadvantage in that the denial of the benefit of protection against discrimination in the provision of employer benefit programs is denied to the same age group that was historically denied protection from mandatory retirement under the *Code* prior to the December 2006 amendments [Bill 211]. While the 2006 amendments brought about the end of mandatory retirement, the group of workers identified by the age of 65 or greater had their previous disadvantage of denial of protection against discrimination in acquiring or maintaining employment on the basis of age replaced by a different disadvantage – the denial of protection under the *Code* from discrimination in provision of employer sponsored benefits.

[239] In its submissions to the Ontario Legislature before the passage of Bill 211, the OHRC commented on the reinforcement of negative stereotypes by the impugned law as follows:

> The provisions of Bill 211 respecting benefits and workers' compensation are a form of age discrimination. They send a message that older workers are essentially of lesser worth and value than their younger co-workers, and reinforce negative and ageist stereotypes and assumptions about the abilities and contributions of older workers. They fail to recognize the contribution of older workers to their workplaces or the importance of work to older workers. These provisions are offensive to dignity, and the Commission believes they will be vulnerable to challenge under the *Charter*.
>
> *Hansard*, November 23, 2005 at JP-16 (Nancy Austin), Ontario Legislative Assembly, 38th Parliament, 2nd Session

[240] In the instant Application, Dr. Berger provided uncontested evidence that older workers, particularly those age 65 and older, continue to face disadvantages in the following respects:

1. They are disadvantaged in finding work and obtaining pay that values their experience from age 50's upwards and this difficulty increases with age (also backed by Statistics Canada data).

2. They face social ostracism in being omitted from work related activities and social events (confirmed by Mr. Talos as his personal experience).

3. They are mostly ignored in media images but when they are presented, the images are portrayed negatively as “greedy geezers” who will bankrupt the health care and pension systems. These negative portrayals can impact an individual’s view of ageing and can negatively impact their wellbeing.

4. Older workers, particularly those at 65 or over, are vulnerable to stereotypes that they are too old and should retire, that they are occupying a “spot” for a younger worker and asked “why don’t you retire?”, “Isn’t it time to take life easy?” and other remarks from colleagues and managers that older workers are not needed in the workplace (confirmed by Mr. Talos as his personal experience).

5. Employers hold stereotypical beliefs about why older workers continue to work past age 65 when government benefits associated with “old age” become available.

6. Employers believe that training older workers is not worth the financial commitment as they may retire soon.

[241] In a like vein, Mr. Talos gave evidence of his particular circumstance and his desire to continue to work after turning 65 to support his aging and ill spouse, to provide for her medical needs during her terminal illness, and to also provide for his extended family who were in financial straits. The above stereotypes do not reflect an individual worker’s particular circumstance that drives their need or desire to remain employed and they continue to operate today as they did over a decade earlier when *Chatham-Kent* was decided. These stereotypes are also not respectful of individual autonomy, financial circumstance, family responsibilities, health and abilities. As well, chronological age is not determinative of any particular individual’s health, ability or desire to work, or financial needs. The blanket operation of the carve-out provision in conjunction with the *ESA* and its Regulation serves to reinforce the above stereotypes that regard older workers as less deserving of compensation and equality protections than younger workers.

Impact on low wage workers and those with limited attachment to the workforce

[242] I accept the intervenors' submissions, supported by Dr. Berger's evidence, that for workers age 65 and older, their length of service, their previous attachment to the workforce, and whether they worked largely at minimum wage jobs can be determining factors in whether they are financially able to voluntarily retire at age 65. These workers who may work after turning 65 disproportionately include workers with young children from a second marriage or blended family, with disabled and dependent family members, and recent arrivals like new immigrants and refugees who enter the workforce in their 40's or later, workers who withdrew from the workforce or joined only in their later years because of time devoted to family responsibilities, and workers who were previously confined by illness, incarceration etc. (social conditions or personal characteristics that inform intersectionality) and were thus unable to contribute to a workplace pension plan or save for retirement. All of these workers tend to be among the least prepared financially for complete withdrawal from work at age 65. Some of these categories were accepted as historically disadvantaged by involuntary retirement in the court's ruling in *McKinney*. They too are affected by the impugned *Code* provision that permits a lessening or complete denial of group plan benefits at age 65, thus perpetuating and worsening their economic disadvantage. In considering the constitutionality of the carve out from human rights protections, it is appropriate to pay attention to individual circumstances as well as group characteristics in assessing disadvantage.

[243] Even if the analysis of age discrimination may be different from other grounds of discrimination in some cases (as stated in *McKinney*), I am not persuaded that a worker's lifetime of earnings is relevant to whether the impugned "carve out" is constitutional. The blanket carve out provision is a blunt tool that is not sensitive to whether a worker is a recent entrant to the workforce or whether the worker has been well or poorly compensated for decades. Given the prohibition on mandatory retirement and the change in social norms in the 26 years since the decision in *McKinney*, in my

view the reasoning based on then societal norms that contributed to treating “age” as different from other *Code* protected grounds no longer holds true.

[244] I conclude that the impugned law operates to permit *lower* compensation to older workers, without regard to individual circumstances and without regard to the social, political, economic and historical factors concerning the same group of workers over age 65 who, prior to Bill 211, were subject to involuntary retirement. This serves to devalue the contributions of workers age 65 and older in the workplace and entrenches the stereotype that their labour is worth less. I am persuaded to adopt the reasoning in *Chatham-Kent* that the impugned law disadvantages workers age 65 and older in the same manner that the pre-2006 *Code* historically disadvantaged the same age group by denying them protection from involuntary retirement, and thus infringes the equality guarantee of s. 15(1) of the *Charter*.

A note on other social legislation “entitlements” at age 65 and pension integration

[245] The Tribunal noted that at the outset of the hearing Mr. Talos excluded pension entitlements from his constitutional challenge. In Ontario, the *Pension Benefits Act* (*PBA*), 1990 R.S.O. c. P 8, explicitly permits variation in pension benefits as well as bridging pension to age 65 if a person is receiving benefits from the Canada Pension Plan (CPP) or the Quebec Pension Plan. This is sometimes referred to as the “integration” of a worker’s private pension benefits with CPP benefits: see ss. 54(7) of the *PBA* dealing with a variation (lowering) of benefits and s. 54(6) of the *PBA* regarding bridging reduction carried out in a “prescribed manner” per the pension plan instrument.

[246] The respondent employer provided no authority to support the request that the Tribunal consider the availability of government funded ODBP, OAS or CPP benefits with employer-provided benefits when conducting the s. 15 analysis. Indeed, the fact that the Legislature expressly contemplates such integration of benefits in the context of pension plans (and thus permits age-based differentiation in pension benefits) and the absence of any similar legislation in the context of workplace insurance benefits supports my determination that it is not appropriate for me to consider government

funded benefits as part of the s. 15 analysis to determine "substantive disadvantage" in the instant case. Furthermore, as noted above, ODBP is only a partial replacement in any event and is not tailored to the individual circumstances of the worker (i.e. need for para-medical services instead of or as an adjunct to drug therapy). In my view, Mr. Talos' entitlement at age 65 to OAS (dependent on length of residency) and CPP (that can be postponed to age 71) cannot justify the termination of workplace benefits that effectively reduces a worker's compensation package. There is no legislative basis for this reduction of workplace benefits in favour of receipt of publicly funded benefits, in contrast with the provisions of the *PBA* that provide for the "integration" of pension benefits at age 65.

Issue Three: Is the infringement justified under s.1 of the *Charter*?

[247] Regarding any section 1 justification of a breach of the equality guarantees, the government bears the onus of demonstrating a justification of the limitation on a right. The questions to be addressed were first articulated in *Oakes, above*, at paras. 69 and 70:

> Is there a pressing and substantial objective for the impugned statute?
>
> Is the means adopted to obtain this objective proportional and does it minimally impair the *Charter* right?

[248] Shortly after *Oakes*, the proportionality requirement was broken into three elements, and these have been routinely used since then to address a s. 1 justification (*R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713 at para. 117):

a. Is there a rational connection between the distinction made by the law and the state's objective?

b. Minimal impairment - Could the legislative goal could be achieved in a way that impacts the right less? Does the law fall within a range of reasonable alternatives to achieve the objective? See *R v. Chaulk* [1990] 3 S.C.R. 1303, para. 65

c. Are the detrimental effects of the law on the equality rights of the group proportionate to the legislative objective?

Legislative Goal / State's Objective

[249] As noted earlier, the purpose of the impugned provisions is to "carve out" workers who are 65 years of age and over from workplace benefit plans in order to give employers the flexibility to provide the same or lesser benefits as provided to younger workers in order to maintain the financial viability of the benefit plans. This "carve out" was included in Bill 211, which had an overarching purpose to expand *Code* protections to workers age 65 and older by prohibiting that group's involuntary retirement. This expansion was aligned with the scheme of the *Code* as a whole, which is to provide protection against discrimination for all Ontarians engaged in certain spheres of activities (employment, contracts, accommodation, recreation, vocational training etc.). The effect of the impugned provisions is to leave workers age 65 and older vulnerable to age-differentiated workplace benefits without recourse and without requiring that employers justify any lessening or elimination of benefits on a *bona fide* or actuarial basis.

[250] The AG and the Board provided expert evidence about Ontario's labour relations regime to support their view that a legislative purpose of the impugned section of the *Code* was to preserve flexibility in the collective bargaining process for employers and unions to address benefits for workers age 65 and older. This legislative purpose is not supported by the *Hansard* records concerning Bill 211 that were presented into evidence in the instant Application. This approach was abandoned by the AG during argument in the instant case.

[251] As a result, the only legislative goal advanced by the AG to support the impugned provisions is the goal of preserving the financial viability of workplace benefits plans in the aftermath of the prohibition on involuntary retirement in 2006. I find that, on

its face, this objective (financial viability of group plans) is pressing and substantial. The extent to which the “carve out” provisions are required to achieve this goal and are proportional to the detrimental effect caused by these provisions is addressed below at a later stage of the s. 1 analysis.

[252] Despite the fact that the AG abandoned reliance upon providing flexibility in the collective bargaining process as a legislative objective of the impugned provisions, I nonetheless will address this purported objective, as it played a role in the parties’ decision to lead expert evidence on this point and it was considered by Arbitrator Etherington in the *Chatham-Kent* decision. I first note that *Chatham-Kent* is similar in some respects to the instant challenge, in so far as the applicant is a member of a union and received less in benefits (nothing, in fact, in the instant case) when he turned 65. But *Chatham-Kent* can be distinguished on its facts as the union (the Ontario Nurses Association), in 2008, bargained for and obtained *some* benefits continuation for nurses 65 and older, except with a lesser amount of sick leave, a cap on the accumulation of unused sick leave, reduced life insurance coverage, and the elimination of LTD and AD&D insurance. In the instant case, no benefits were provided to employees age 65 and older, and when the union requested that item be negotiated, an impasse was quickly reached as the Board demanded that the union trade-off a workload clause that had been litigated repeatedly in the union's favour.

[253] Furthermore, in the instant case, money ear-marked for benefits for Mr. Talos was simply re-directed by the employer to other spending priorities. This is not a case where the employer pleads that funds were withheld by the province for workers age 65 and older or that extension of the benefit plans was cost prohibitive. The evidence provided by the Board’s witness was that the cost of extending benefits to workers 65 and older was explored by the Board, and that the Board was prepared to confer benefits on workers 65 and older but only on condition that they obtained a concession from the union. The Board has not disclosed the “aggregate cost” it discovered from its commissioned expert to the applicant or to this Tribunal. The Board also did not

respond with a proposal at the bargaining table to OSSTF's concession that the benefits it sought for workers age 65 and older would be "cost neutral" to the Board.

[254] It is noteworthy that there was no submission by the Board in the instant matter that it would experience financial hardship if it was required to provide Mr. Talos with benefits past age 65 or a lump sum payment in lieu of continued benefits. It simply maintained its position that the Board Trustees gave instructions to the management bargaining team to "get something" in return for conferring benefits on workers age 65 and older, and the bargaining team opted to demand the removal of "a thorn in the Board's side", i.e. the workload provision in the collective agreement.

[255] Even if I were to adopt Arbitrator Etherington's approach in *Chatham-Kent*, in which he treated the fostering of free collective bargaining processes as a contextual factor to be considered at the s. 1 justification stage, I am not persuaded that this "process" consideration is determinative of the issue. If I am wrong in this, I further note that within the collective bargaining regime in Ontario, there is a recognition that certain items cannot be bargained to impasse – e.g. recognition of the union's scope, or terms of employment that fall below minimum standards provided by the *ESA* or other legislation. In the wake of the prohibition on involuntary retirement at age 65, the parties to a collective agreement are no longer entitled to negotiate mandatory retirement provisions. As a result of the "carve out" provision in the *Code*, what was left to negotiate was only the extent of benefits coverage, if any, for workers 65 and older.

[256] If the purpose of the "carve out" provision was to maintain the financial viability of benefits plans for the entire workforce, an employer seeking to justify reduced or eliminated benefits for workers 65 and older should be required to do so on an actuarial basis, as is required under the *ESA* in relation to other kinds of *Code*-based differentiations in benefits coverage. The *ESA* and its Regulation 286/01 (ss. 5 - 10) provide guidance to employers and unions in respect of differentiations in benefits on certain *Code*-based grounds (such as age, sex and marital status), which requires any such differentiations to be made on an actuarial basis. It follows that for workers age 65 and older, collective agreement parties could similarly be required to negotiate any

differentiation in benefits for such workers on an actuarial basis as may be required to ensure the financial viability of the group plan.

[257] The fact that the "process" of collective bargaining is guaranteed by s. 2(d) of the *Charter* does not mean that the "result" of bargaining is subject to *Charter* scrutiny. Given the reality that some benefits costs may become cost prohibitive with age, achieving "substantive" equality in pay and benefits may require age-differentiation in benefits coverage or increased costs to employers and/or employees for premiums. In the instant case, there was an impasse in collective agreement negotiations, and the substantive issue of the cost of extending benefits to workers 65 and older was not addressed at the bargaining table, even though OSSTF indicated its commitment to cost neutrality and even though the employer received funds from the government that were ear-marked for workplace benefits for each employee, including workers 65 and older such as Mr. Talos. In my view, this demonstrates that the fostering of the collective bargaining "process" as a purpose of the "carve out" provision, that was persuasive in the context of the *Chatham-Kent* decision on its particular facts, was not achieved in the instant case as it yielded no results in the negotiation between the OSSTF (Mr. Talos' union) and the employer. The result in the instant case is consistent with the undisputed opinion of the labour relations experts that minority interests cannot be assured through a collective bargaining process that by design favours majority interests.

[258] After careful consideration of the evidence and the submission of the parties, I can address the respondent's argument that there are competing constitutional guarantees for the Tribunal to consider in the instant Application at the section 1 stage of analysis as follows:

- I have found that on a plain reading of the *ESA* and *Code,* the applicant's membership in a profession or a union is not relevant to the statutory protections afforded to employees by the *Code* and *ESA*, which extend to protect all employees whether unionized or non-unionized and regardless of profession. This is consistent with earlier rulings by this Tribunal in *Talos* (2013, Interim Decision, above) and

Repaye (above) where the interpretation of the "carve out" provision was raised.

- It thus follows that Mr. Talos' s. 2(d) *Charter* rights in relation to a collective bargaining process is not determinative of the instant matter, as this constitutional challenge could have been brought before the Tribunal by a non-unionized worker over age 65 who lost her benefits and who generally has little or no power to bargain individually with her employer to obtain benefits past age 65. The constitutionality of the impugned provision must be viewed in light of the breadth of its coverage that includes all workers, of which 60-70% are non-unionized.

Rational connection

[259] The applicant and OHRC conceded that there was a rational connection between the impugned section and the goal of preserving the financial viability of workplace benefits plans in the aftermath of the prohibition on involuntary retirement in 2006.

[260] The more difficult issue is to determine whether or not the second and third elements of the proportionality test are satisfied: the "minimal impairment" and "least restrictive means" criteria.

Minimal Impairment

[261] The scheme of the *Code* is not to provide income benefits, unlike the purpose of the statutes challenged in *Withler, Tétrault-Gadoury* and *Zaretski v. Saskatchewan (Workers' Compensation Board)*, [1997] S.J. No. 319 (S.C.Q.B.), examined in more detail below. The *Code* protects individual human rights and dignity interests.

[262] In *Withler, above,* the Supreme Court of Canada ruled that the substitution of a type of survivor benefit by another benefit in stepwise fashion as the plan member approached age 65 was non-discriminatory. The Court did not address any section 1 justification and thus the decision cannot be relied on for guidance regarding minimal impairment in the instant Application.

[263] In *Tétrault-Gadoury, above*, the Supreme Court of Canada found that the impugned provision of the *Unemployment Insurance Act* had the objective of providing income security to those persons entitled to benefits and able to establish their availability for work. The Court found that the provision that disentitled workers from benefits upon reaching age 65 was discriminatory and did not meet the minimal impairment test under s. 1 of the *Charter*. Justice La Forest, writing for the Court in *Tétrault-Gadoury*, stated at page 373:

> The challenged legislation in this case is similarly broad in scope [to *McKinney]*, resulting in the curtailment of benefits to any individual who has attained the age of 65, irrespective of economic need or continued membership in the "active" working population. [emphasis added]

[264] In contrast, in *Zaretski,* a decision of the Saskatchewan Queen's Bench, the substitution at age 65 of an annuity for lost pension benefits instead of lost employment income was found to be discriminatory but justified based on: (a) a policy of "measured deference" to the legislature as articulated in *McKinney* (at page 652) and referred to in *Tetrault-Gadoury* (at page 372); and (b) Statistics Canada data that the average retirement age for men was 61.4 years of age, that implicitly supported the impugned Act's approach that injured workers would normally work only to age 65. The Court in *Zaretski*, however, commented at para. 78:

> By contrast [to *Tétrault-Gadoury*] the termination of income replacement benefits to persons over the age of 65 in favour of the s. 74 annuity falls far short of the broad curtailment of benefits found to support an unacceptable degree of impairment failing the s. 1 test in *Tétreault-Gadoury*. [emphasis added]

[265] The scope of the impugned provisions in the instant case is as broad as that in *McKinney.* The disadvantage that results is the permissible termination or diminishment of "benefits to any individual who has attained the age of 65, irrespective of economic need or continued membership in the 'active' working population", as described in *Tétrault-Gadoury.* In like vein, this Tribunal finds that the scope and degree of impairment in the instant Application is unacceptable, as it does not minimally impair the

rights of workers age 65 and older to *Code* protection and results in a broad economic disadvantage similar to that found in *Tétrault -Gadoury*.

[266] The Tribunal was urged by the AG to consider whether the impugned law falls within a range of reasonable alternatives, such that the legislative choice should receive some deference: see *R. v. Chaulk*, [1990] 3 S.C.R. 1303, para. 65. The Tribunal notes however that the *Hansard* record does not disclose that alternatives were considered before the passage of Bill 211 (despite the warning then by the OHRC in its submission to the Legislature, as referenced above), nor did the respondent or AG demonstrate that the impugned provisions fell within a "range of reasonable alternatives" available to the Legislature in 2006 (e.g. the experience of other provinces where involuntary retirement had already been prohibited). The Hansard extract cited above indicates clearly that the policy choice at the time of passage of Bill 211 did not give any weight to the experience of other provinces (such as Manitoba and Quebec) that had abolished involuntary retirement decades earlier without carving out the 65 and older group from those provinces' human rights legislation in relation to benefits coverage.

[267] As noted earlier, the Minister of Labour stated in committee that the public servants' "independent" and "interjurisdictional" research had shown that there was no major impact to benefits plans with the abolition of mandatory retirement and that he had received no empirical data in the response from the insurance industry, but instead was "advised" by industry personnel of the potential for costs to increase:

> Independently, we could not find that there had been any major impact on the expense of pension plans, benefit plans or dental plans as the result of the ending of mandatory retirement. When the industry was asked to provide figures they may have that would assist us in that regard, my understanding, and to this date my knowledge, is that those figures were never provided. However, the advice that appeared to be coming from them is that there was a potential for increased expenses….
>
> Hansard, November 25, 2005, *above*

[268] In the period of over a decade since the passage of Bill 211, census data, Dr. Berger's and Dr. Janzen's evidence shows that an increasing number of workers continue to work past age 65. Effectively, over time, the impugned provision of the *Code*, in conjunction with the relevant provisions of the *ESA* and its Regulations, has resulted in an increasing number of workers being made vulnerable to the termination of workplace benefits without any actuarial justification. Nonetheless, Dr. Janzen's evidence demonstrated that, in academic settings, a considerable number of agreements have been reached to address the provision of benefits for workers age 65 and older, some without the reduction of healthcare benefits to age 70, consistent with the evidence provided by the expert actuary Ms. Whelan.

[269] I find that the policy choice to carve out workers age 65 and older relied on the insurance industry's expectation of costs increases, an expectation that was not empirically supported in 2005. This policy choice by the Legislature ignored "independent" research that indicated little change to the cost of benefit plans in Manitoba and Quebec post-mandatory retirement. Furthermore, Bill 211's purpose to maintain the financial viability of various benefits and pension plans was not supported by any empirical evidence concerning: (1) the proportion of workers who would likely remain active after age 65; (2) whether maintenance of these plans would be cost-prohibitive; and (3) whether age-differentiation in benefits was necessary to ensure the viability of the group insurance plans. It appears that there was no exploration of other approaches besides the "blanket" carve out that was legislated.

[270] It is also significant that in *Chatham-Kent,* heard in 2008-09, only 3 years after the prohibition on involuntary retirement, the arbitrator had expert evidence that led him to conclude at [L.A.C cite] page 63:

> Given the expert evidence put before me concerning the cost curve of providing employment benefits and group insurance plans, showing that the cost becomes higher as workers enter their late 40's and 50's, and increases on a steeper curve when employees enter their 60's, it would appear that any age between 60 and 71 could be said to provide a reasonable choice for the challenged limit on protection from age discrimination.

[271] As there has been a decade since the passage of Bill 211, there is now "credible" data (referring to large sample size) and experience/historical data that can be relied on instead of hypothesis/assumption. The evidence of a "steeper curve" was *not* borne out in the cogent actuarial evidence presented in the instant Application. Indeed, the age range that the expert actuary in the instant Application indicated is financially sustainable has an upper limit of 79. Given this difference in evidentiary terrain between *Chatham-Kent* and the instant case, the policy choice to exclude workers age 65 and older from equal protection in employment benefits appears arbitrary and not "within a reasonable range of choices" to which this Tribunal should accord deference.

[272] Even with giving expression to the policy of "measured deference" in my consideration of the impugned provisions, I find that the policy choice to deprive <u>all</u> active workers age 65 and older of *Code* protection from the elimination or reduction of workplace benefits is not a minimal impairment of these workers' rights. From the Hansard records, there appears to have been little or no thought given to minimizing the impairment of equal compensation and *Code* access for workers age 65 and older while preserving the viability of workplace group benefit plans. A blanket carve out is not, in my view, minimally impairing of the right of workers age 65 and older to equal compensation. The "carve out" is all encompassing and is insensitive to whether a particular benefit programs is closely related to age in terms of the cost or the need for the benefit for employees age 65 and older.

[273] I accept the OHRC's submissions that it would be less impairing if the impugned provision made it possible for employers to provide lesser benefits to workers age 65 and older, while permitting the affected worker the opportunity to have this Tribunal determine whether there is an actuarial basis to support this age-based differentiation in the employer's plan as is done under the *ESA* for certain other age-based differentiations in benefits plans for workers 64 and younger, or to have this Tribunal determine whether such age-based differentiation is reasonable and *bona fide* as is provided for under s. 22 of the *Code* in relation to insurance contracts. In my view, the objective of maintaining financial viability of the group benefits plans can be achieved

without hindering the right of an employee to raise a complaint before this Tribunal to examine whether the age-based differentiation is reasonable in the circumstances.

Proportionality

[274] The evidence before the Tribunal established that there is a sharp mortality increase at age 50 but nonetheless, there is an established practice of maintaining life insurance coverage in group plans as a workplace benefit to age 65 without attaching greater premium costs to workers who are over age 50. With this example, it was reasoned that a projected increase in cost for coverage of a particular group does not necessarily lead to the exclusion of that group from coverage, as there may be opportunities to spread the increased costs widely, a basic tenet of pooling risks in an insurance scheme.

[275] There was also clear evidence that there was a drop in costs for healthcare at age 65 (due to ODBP as the primary payor for drugs) and then a steady increase in the next five years, but the cost for the 65-70 age group was nonetheless similar to the costs associated with group plan members between ages 40-49. Also, for dental insurance there was no increase in costs with age. The experts Ms. Whelan and Mr. Gorman were in substantial agreement on these facts, as well as the fact that employers have been able to absorb increases in plan costs of 10-15% per annum in the recent past. More importantly, they agreed that there are methods available to employers like GEDSB to address plan cost increases, including stop loss insurance, increasing premium contributions from employees, or managing the compensation package by offsetting plan costs against wage increases.

[276] There was evidence from OCUFA's witness Dr. Janzen that in the University sector, many workers age 65 and older continue to receive benefits through negotiation between their employer and faculty association, but in nearly all cases, benefits have been reduced or offset for the workers over 65 to maintain a near constant average plan cost per plan member.

[277] The uncontradicted evidence of Mr. Mackenzie also established that during collective bargaining, a “break-through” item, like an expansion of a benefit that benefits only a few members, usually requires a significant trade-off. This need for “trade-off” was clearly borne out by the evidence of the respondent’s Human Resources Manager, Ms. Bell, who testified that the employer made a single request in return for expansion of benefits to include over 65 workers: that a long fought over workload provision requiring union consent be relinquished by the applicant’s union OSSTF.

[278] Given that collective bargaining regimes are, in the main, in service of the majority of members, it is intuitive and also borne out by the labour experts’ testimony that the interests of numerical minorities (e.g. older workers, who comprise 2 - 10% of the workforce) are unlikely to be advanced effectively through bargaining. In the instant case, the Board sought to “strip” a hard-fought for workload clause that potentially affected any teacher who was called upon to teach extra courses in a trade-off for benefits for a few older workers --- without any Board disclosure (to date) of the true cost of extending some or all benefits to Mr. Talos and a few others. The evidence of Mr. McKenzie, although not empirical, was uncontested that any “new” or “break-through” item is hard to achieve through bargaining, and if it is achieved, it is usually at a high trade-off cost. Given that no mutual agreement was reached by the union and the Board, this is a further distinction from the facts in *Chatham-Kent,* and thus Etherington’s reasoning linked to free bargaining and deference to mutual agreement does not apply to the instant case.

[279] In *Chatham-Kent*, Etherington stated (at page 75):

> The reasons provided above for the section 1 analysis upholding the legislative provision of the *Human Rights Code* and the *ESA* also support … the conclusion that the challenged collective agreement provisions constitute a reasonable limit on the equality rights of the grievors … The parties mutual agreement on how to best deal with workplace issues is entitled to some deference, even where important equality interests are at stake…

[280] In the instant case, there was no mutual agreement and thus no deference is to be accorded to the parties' approach to addressing Mr. Talos' substantive equality rights. A permissive regime, as contemplated by the impugned law, which permits an employer to demand high trade-off costs and results in impasse, does not, in my view, constitute a reasonable limit on Mr. Talos' s. 15 equality rights within a liberal democracy. In a democracy, it is trite to state that rights of numerical minorities require protection and are unlikely to be fostered within a process that by design serves majority interests, or that permits "hard" bargaining stances so that minority rights risk being assured only at a high trade-off cost.

[281] Given Ms. Whelan's actuarial evidence that it is not cost prohibitive to provide coverage to workers over age 65 and up to age 79, and given both actuaries' evidence that there are various ways to manage plan costs should increases become unsustainable, the Tribunal finds that the Legislature could have devised a less intrusive means to meet the objective of maintaining the financial viability of workplace group benefit plans. I am further persuaded that less intrusive means (other than the blanket denial of *Code* protection) was available to the Legislature (for example by requiring the exclusion or diminishment of benefits for workers 65 and older to be reasonable and *bona fide*, as is done in ss. 11 and 22 of the *Code* in other contexts). The AG and OHRC provided the Tribunal with examples of human rights protection in other provinces (e.g. Manitoba, Quebec, Alberta and British Columbia) where there was no "carve out" of workers age 65 and older in the context of workplace benefits, and examples of other provinces where age-differentiation in a benefits plan was permissible if it was *bona fide* (e.g. New Brunswick, Saskatchewan and Nova Scotia).

[282] I am also of the view that little deference should be accorded to the Legislature, as *Hansard* discloses that at the time of passing Bill 211, there was no empirical or actuarial evidence or claims history that was relied on to justify the blanket "carve out" provision as being required to protect the financial viability of workplace benefits plans. The record of the responses from the Government indicated that it adopted insurance companies' "advice", without empirical data, and assumed there would be cost

increases with ageing for all benefit and pension plans. From the evidence presented in the instant hearing (contrary to the actuarial evidence presented in *Chatham-Kent*), the assumptions regarding group healthcare, dental and other benefits costs increasing steeply when employees enter their 60's have not been borne out in the decade since the prohibition on involuntary retirement. In the instant case, pension and long term disability (LTD), 100% employee funded and union managed, were specifically excluded from the applicant's *Charter* challenge, while healthcare, dental and life insurance (with modification) were demonstrated to be "not cost prohibitive" if extended to workers age 65 -79.

[283] After considering all of the evidence, I conclude that the age 65 and older group need not be made vulnerable to the loss of employment benefits without recourse to a (quasi-constitutional) human rights claim in order to ensure the financial viability of workplace benefits plans. The government's age limit of 65 for protection from discrimination in the provision of benefit and insurance plans appears unacceptable given the cogent evidence to the contrary that there is no close link to costs and age. As stated above, there are other alternatives available to the Government that would less impair the rights of Mr. Talos and workers age 65 and older, such as requiring any age-based differentiation in a workplace benefits plan to be reasonable and *bona fide* with a protection against undue hardship available to employers.

[284] For greater clarity, this decision does not address long term disability insurance, pension plans and superannuation funds.

CONCLUSION

[285] With the passage of Bill 211, the Government ended the discriminatory practice of involuntary retirement. However, through the impugned provision, it permitted, in conjunction with the *ESA* and its Regulation, another practice to continue: unequal

compensation for workers age 65 and older. It did so on the basis of “advice” from insurers, contrary to public servants’ independent studies, that pension and benefit plans would suffer because of the presumed increase in costs associated with providing coverage for ageing workers. Furthermore, the impugned provision deprived these older workers of *Code* protection, such that employers were not required to justify any lessening or elimination of benefits coverage.

[286] The actuarial evidence presented in this matter made it clear that there are reasonable ways to protect older workers from discrimination in relation to workplace benefits, while protecting employers from the expense of unduly costly healthcare benefits and life insurance plans.

[287] In this matter, there was no assertion by the Board that it lacked funds to provide some form of benefits coverage for workers 65 and older. Instead, the Board opted to provide none unless it eked out a concession at the bargaining table.

[288] I find in favour of Mr. Talos’ claim that he experienced direct disadvantage on the basis of age, and that his s. 15(1) *Charter* right has been infringed. I have also concluded that there are less drastic means by which the Government could achieve its aims, by incorporating defences available in other contexts, such as in s. 22 of the *Code* and under the *ESA* and its Benefits Regulation. The impugned provisions could have been better tailored to preserve the viability of workplace benefit plans without the “carve out” that left older workers vulnerable to a lessening of their compensation based solely on their age, and not their ability, performance or any other *bona fide* qualification.

[289] Absent a cogent rebuttal of the actuarial evidence led by the OHRC to show that the “carve out” provision is necessary to maintain the viability of workplace benefit plans, I find that the respondent Board and the AG have not discharged their onus to demonstrably justify this infringement under s. 1 of the *Charter* as a reasonable limit in a free and democratic society.

ORDER

[290] For the foregoing reasons, I hereby make the following order:

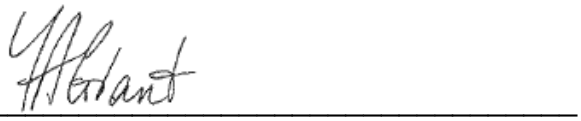
1. Section 25(2.1) of the *Code*, when read in conjunction with s. 44 of the *ESA* and O.Reg. 286/01, is unconstitutional as it violates s. 15 of the *Charter* and is not saved under s. 1 of the *Charter*, and as such is not available to the respondent as a defence in this proceeding;

2. The applicant and the respondent shall advise the Tribunal within 45 days of receipt of this Interim Decision whether they are interested in engaging in mediation to settle this matter;

3. If mediation is not desirable, the Tribunal shall schedule two days to address the merits of the Application and to determine an appropriate remedial order; and

4. This decision shall be sent to OSSTF by the Registrar.

Dated at Toronto, this 18th day of May, 2018.



Yola Grant
Associate Chair