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THE DECREASE OF THE INCOME REPLACEMENT INDEMNITY AT 65 YEARS OF AGE IS JUDGED TO BE DISCRIMINATORY BY THE COMMISSION DES LÉSIONS PROFESSIONNELLES

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ON MARCH 18, 2010, ADMINISTRATIVE JUDGE RICHARD HUDON, OF THE COMMISSION DES LÉSIONS PROFESSIONNELLES (HEREINAFTER, THE "COMMISSION"), RENDERED A VERY INTERESTING DECISION IN THE CASE OF *CÔTÉ ET TRAVERSE RIVIÈRE-DU-LOUP ST-SIMÉON* (2010 QCCLP 2074) BY RULING THAT SECTION 56 OF THE *ACT RESPECTING INDUSTRIAL ACCIDENTS AND OCCUPATIONAL DISEASES* (HEREINAFTER, THE "ARIAOD") IS DISCRIMINATORY WITHIN THE MEANING OF THE *CHARTER OF HUMAN RIGHTS AND FREEDOMS* (HEREINAFTER, THE "QUEBEC CHARTER") AND *THE CONSTITUTION ACT, 1982* (HEREINAFTER, THE "CANADIAN CHARTER").

In this case, the Commission had to decide whether, on November 29, 2008, the income replacement indemnity paid to a worker could be reduced by 25% by the application of section 56 of the ARIAOD on the grounds that he was 64 years old when he suffered his employment related injury.

Section 56 of the ARIAOD reads as follows:

> "56. The income replacement indemnity is reduced by 25% from the sixty-fifth birthday of the worker, by 50% from the second year and by 75% from the third year following the said date.
>
> Notwithstanding the first paragraph, the income replacement indemnity of a worker who suffered an employment injury when 64 years of age is reduced, by 25% from the second year following the date of the beginning of his disability, by 50% from the third year and by 75% from the fourth year following the said date."

A SUMMARY OF THE FACTS:

- the worker held a position as a seaman;
- on August 1, 2007 upon the berthing of a ship, the worker slipped on a oil puddle and suffered injury to his right knee;
- the Commission de la santé et de la sécurité du travail (hereinafter, the "CSST") declared that the worker had suffered an employment related injury on August 1, 2007, which accident was rapidly consolidated on August 29, 2007;
- on November 29, 2007, then being 64 years of age, the worker suffered a recurrence, relapse or aggravation;
- when the employment related injury occurred, the worker was holding another part-time position as a janitor in a building containing 10 dwelling units, a position which he would have continued to hold had he not suffered an employment related injury;
- the worker received no pension from any pension plan, but received benefits from the Régie des rentes du Québec since he turned 65 years of age.

In fact, the worker acquired the right to an income replacement indemnity under the ARIAOD on November 29, 2007 since he became unable to carry on his employment by reason of the injury he suffered on that date. He was then 64 years of age. The CSST then fixed the amount of the income replacement indemnity to $73.81 per day.

On November 29, 2008, starting-off point of the second year following the beginning of the worker's disability, the CSST, in application of the second paragraph of section 56 of the ARIAOD, reduced the income replacement indemnity of the worker to $57.90 per day, that is, 25% less than the indemnity which had been initially awarded to him.

In support of his contestation, the worker maintained that section 56 of the ARIAOD was discriminatory within the meaning of section 10 of the Quebec Charter and section 15 of the Canadian Charter.

ANALYSIS OF THE DECISION

First, all the parties to the case agreed that the Commission had jurisdiction to rule on the interpretation of both the Canadian and Quebec charters.

In accordance with the teachings of the Supreme Court of Canada, the Commission carried out the three-step analysis which is necessary to establish the existence of discrimination under section 10 of the Quebec Charter. In order to do so, a plaintiff is required to demonstrate the following:

(1) that there is a "distinction, exclusion or preference";

(2) that the "distinction, exclusion or preference" is based on one of the grounds listed in the first paragraph of s. 10 of the Quebec Charter; and

(3) that the "distinction, exclusion or preference has the effect of nullifying or impairing" the "right to full and equal recognition and exercise of a human right or freedom".

Distinguishing its opinion from the one it expressed in the case of *Marie* and *Viande Richelieu inc.*[1], the Commission concluded that section 56 of the ARIAOD is discriminatory and contravenes section 10 of the Quebec Charter. This article creates a distinction, exclusion or preference based on age, which prevents a worker who suffers a professional injury from receiving all compensations available under the ARIAOD on the basis of his age:

> [Translation]
> "A worker who suffers a professional injury and files a claim with the CSST must expect that the object of the Act, namely, providing compensation for his employment related injury and the consequences it entails, will be respected. The injury compensation process includes the payment of various benefits, including the payment of income replacement indemnities based on the inability to carry on his employment.
>
> Section 56 of the ARIAOD provides for a reduction of the income replacement indemnity which results in the employment injury which a worker suffers in only compensated up to 75% when he reaches 65 years of age, 50% when he reaches 66 years of age and 25% when he reaches 67 years of age. A worker who is at least 64 years of age when he suffers an employment related injury is treated in the same way, the income replacement indemnity being reduced in the same proportion for the 2nd, 3rd and 4th years following the date the disability began due to the professional injury.
>
> This is a distinction based on age, which is not authorized under section 10 of the Quebec Charter since this provision prevents a worker who suffers an employment related injury when he is at least 64 years of age or when he reaches 65 years of age, if he suffered an employment related injury before the age of 64 years, to receive all the compensations under the ARIAOD and contained in its object as stated in section 1. Moreover, this distinction based on age results in the perpetuation of unfavourable biases against seniors, particularly with respect to their capacity to work."

The Commission also concluded that section 56 of the ARIAOD establishes a distinction which is prohibited under section 15 (1) of the Canadian Charter since the worker suffers a decrease of his income replacement indemnity based on his age and that distinction results in the perpetuation of unfavourable biases and stereotypes against persons aged 65 years or more while neglecting to take their situation into account.

[1] *Marie et Viande Richelieu Inc.*, [2008] C.L.P. 536

The object of the ARIAOD is to provide compensation and the income replacement indemnity following an employment related injury aims to compensate a worker for the loss of capacity to earn an income.
The provision enacted by the legislator at section 56 of the ARIAOD aims to coordinate various programs which provide benefits, based on the assumption that the vast majority of workers are retired by 65 years of age. According to the Commission, the measure passed by the legislator, reviewed in its entire context, constitutes discrimination based on age, which is prohibited under section 15(1) of the Canadian Charter:

> [Translation]
> "The Commission des lésions professionnelles is of the view that a worker who decides to work beyond the "normal" retirement age does not have to be penalized by his decision. If he suffers an employment related injury which renders him unable to work, he is entitled to the same protection as any other worker placed in the same situation, that is, having suffered an employment related injury which prevents him from working, which results in his being entitled to be compensated for his loss of capacity to earn an income.
>
> The measure under section 56 of the ARIAOD does not have the object or the effect of bettering the condition of such a worker. It rather tends to penalize or marginalize him simply on account of what he is, namely, a worker who suffered an employment related injury and has reached the age of 65 or a worker who suffers an employment related injury while being at least 64 years of age, this, exclusively on account of his age."

It remains to determine whether the discrimination is justified within the meaning of section 1 of the Canadian Charter. To this effect, the attorney-general of Quebec was relying on two goals sought by section 56 of the ARIAOD.

- the goal of the provision is to ensure coherence and balance between the various legislative schemes respecting replacement income and pension plans;
- the goal is also to ensure the viability of the scheme pertaining to the compensation of workers who suffer employment related injuries.

After analyzing these two goals, the Commission followed the opinion expressed by the Supreme Court of Canada (per Mr. Justice Laforest) in the case of *Tétreault* [2] and concluded that the distinction imposed under section 56 of the ARIAOD is not justified in view of section 1 of the Canadian Charter.

As expressed by Mr. Justice Laforest in the *Tétreault* case, the Commission was of the view that the goal of coherence and balance between the various legislative schemes was not in itself sufficient to justify a breach of the right recognized under the Charter. In fact, one of the goals of the ARIAOD is to compensate the loss of capacity to earn an income for a worker who is still active. This goal is certainly not reached by refusing to pay benefits to persons older than 65 years of age, particularly those who have to continue working because their pension is insufficient or they do not have a pension.

As to the second goal, the Commission was of the view that proof had not been made that the viability of the compensation scheme would be compromised if the income replacement indemnity was not reduced in accordance with section 56 of the ARIAOD.

The Commission thus declared that the CSST could not, from November 29, 2008, reduce the income replacement indemnity paid to the worker. The employment related injury of the worker being consolidated neither on November 29, 2008 nor at the date of the hearing, the worker was entitled to continue to receive the income replacement indemnity provided under section 45 of the ARIAOD, in view of his presumed inability to carry on his employment on account of the employment related injury suffered on November 29, 2007 (articles 44 and 46), without taking into account section 56 of the ARIAOD.

CONCLUSION

A joint motion for judicial review by the attorney-general of Quebec and the Commission de la santé et de la sécurité du travail was filed on April 13, 2010 before the Quebec Superior Court. Our team will be pleased to monitor the following developments.

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[2] *Tétreault Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22

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