



**DECISION:**

March 6, 2009

[1] William Talbot worked for the Cape Breton Regional Municipality (“CBRM”) and its predecessor, the City of Sydney, for almost 30 years. He was required to retire on November 1, 2004, a few weeks after his 65<sup>th</sup> birthday. Mr. Talbot did not want to retire. He filed an age discrimination complaint with the Nova Scotia Human Rights Commission. This Board of Inquiry convened on September 10, 2008, to hear his complaint.

[2] CBRM has a written policy of mandatory retirement at age 65. The policy is reflected in CBRM’s collective agreement with Mr. Talbot’s union, the Canadian Union of Public Employees, Local 759 (“CUPE”). CBRM has enforced its mandatory retirement policy in a consistent, uniform manner. No CBRM employee has been permitted to work later than the first day of the month after reaching age 65.

[3] Mr. Talbot’s defined benefit pension plan through CBRM also contains a mandatory retirement provision. The pension plan is a high quality plan with assets valued at \$101,741,836.23 as at December 31, 2007. The plan is duly registered under Nova Scotia’s *Pension Benefits Act* and the federal *Income Tax Act*.

## **Issue**

[4] The Respondents CBRM and CUPE acknowledge a *prima facie* case of age discrimination, and as such, the burden shifts to them to show that CBRM's pension plan meets the test of legitimacy set out in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] S.C.J. No. 46, 2008 SCC 45 (S.C.C.) The only issue for me to decide is whether the employer has demonstrated that the CBRM pension plan is a *bona fide* pension plan, which would bring it within the age discrimination exception in section 6(g) of the *Human Rights Act*.

## **Preliminary Motion**

[5] Counsel for CBRM made a preliminary motion for a directed verdict in the absence of an allegation that the CBRM pension plan was illegitimate. He argued that if the Commission is not contesting the legitimacy of CBRM's pension plan, then there is no case for the Respondents to meet.

[6] A directed verdict typically comes at the close of the plaintiff's case (see for example, Nova Scotia Civil Procedure Rule 51.06). There was some discussion about the procedural characterization of this sort of motion. Essentially, CBRM was seeking to have the pleading (in this case, the complaint) struck as clearly unsustainable in light of the Supreme Court of Canada's decision in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.* Counsel for CUPE supported CBRM's motion. Counsel for the Commission argued that I do not have the jurisdiction to strike a complaint prior to hearing evidence. CBRM counsel did not provide any authority in support of his motion.

[7] I reserved decision on the motion and offered the parties the option of adjourning the hearing pending my decision, or electing to proceed, since everyone was present and ready to do so. The parties elected to proceed, and I am able to dispose of the matter on its merits. As such, it is unnecessary for me to rule on CBRM's preliminary motion to strike the complaint.

## **Evidence**

[8] In addition to an agreed statement of facts filed by the parties, I heard evidence from Doug Brake, a consulting actuary and principal with Mercer, who was called by the respondent CBRM. Mr. Brake was qualified as an expert witness on the design, operation, and funding of pension plans in Canada. He has consulted on the CBRM pension plan for the past fifteen years and is very familiar with that pension plan. He testified that the CBRM pension plan is registered both federally and provincially and has always complied with the stringent rules governing pension plans. He testified that the plan has a substantial asset base in excess of \$100 million and received employer and employee contributions in excess of \$3 million in 2007. It is a long-standing plan that has existed through good and bad markets since it was first registered federally in 1964, and continues “in good shape” at a time when many pension plans are struggling. It pays out approximately \$3.6 million per year. He was asked to rate the CBRM pension plan on a scale from one to ten and replied, “I’d give it a ten out of ten.” Nothing in his cross-examination detracted from this conclusion.

***The Nova Scotia Human Rights Act***

[9] Nova Scotia's *Human Rights Act* prohibits age discrimination in employment. Section 5(1) of the *Act* states:

**Prohibition of discrimination**

5(1) No person shall in respect of

...

(d) employment;

...

discriminate against an individual or class of individuals on account of

(h) age;

However, the *Act* contains an exception for *bona fide* retirement or pension plans:

**Exceptions**

6 Subsection (1) of Section 5 does not apply

...

(g) to prevent, on account of age, the operation of a bona fide retirement or pension plan or the terms or conditions of a bona fide group or employee insurance plan;

(h) to preclude a bona fide plan, scheme or practice of mandatory retirement;

[10] In 2007, the Legislature amended the *Human Rights Act* in *An Act Respecting the Elimination of Mandatory Retirement*, S.N.S. 2007, c.11.

The amendment will come into force on July 1, 2009. It repeals section 6(h) of the *Act* relating to bona fide plans, schemes, or practices of mandatory retirement, but retains exceptions for the operation of *bona fide* pension plans and *bona fide* group or employee insurance plans, as well as adding an exception for any *bona fide* occupational requirement.

## **Analysis**

[11] In *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] S.C.J. No. 46, 2008 SCC 45 (S.C.C.) the Supreme Court of Canada considered the pension plan exception to the age discrimination provisions of New Brunswick's *Human Rights Act*, S.N.B. 1973, c.45. Abella, J. concluded for the majority:

33 ...what this [exception] immunizes from claims of age discrimination is a legitimate pension plan, including its terms and conditions, like mandatory retirement. It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements. This is not to say that

the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy. But the inquiry is into the overall *bona fides* of the plan, not of its constituent components.

[12] Abella, J. went on to state that the purpose of the pension plan exception in the New Brunswick *Human Rights Act* is to provide:

42 ...generic protection for all legitimate pension plans. Unless there is evidence that the plan as a whole is not legitimate, therefore, it will be immune from the conclusion that a particular provision compelling retirement at a certain age constitutes age discrimination.

[13] A “bona fide” pension plan must be “a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights,” *Potash*, at para. 41. Justice Abella pointed out that registration of the plan with the appropriate authorities is one helpful indication of *bona fides*, *Potash*, at para. 37.

[14] Commission counsel acknowledged that the test set out in *Potash* applies to the use of the term “bona fide” in section 6(g) the Nova Scotia *Human Rights Act*.



[15] Counsel for the Commission urged me to include in my decision a list of relevant factors by which to evaluate whether a pension plan is *bona fide* (that is, legitimate and genuine) or a sham. Counsel for CUPE argued that this case was not one where I need to determine where the line is between a sham pension plan and a legitimate and genuine one. I agree with counsel for CUPE. I heard absolutely no evidence to suggest that the CBRM plan is illegitimate or a sham. By whatever relevant factors one chooses to apply, the evidence clearly establishes that the CBRM pension plan is a legitimate and genuine one.

## **Conclusion**

[16] Access to a pension plan, even a high quality one, does not ensure that employees will willingly retire at a predetermined age. Indeed, Mr. Talbot was not ready to retire, despite his long service and access to an excellent pension plan. Employees may wish to continue to work for many reasons beyond bare economics, including a desire to contribute to their community or profession, to maintain their sense of identity, for achievement of personal goals, or to feel a daily sense of purpose.

[17] While Mr. Talbot is fortunate to be a member of such a healthy and stable pension plan, my finding that it is a *bona fide* pension plan is fatal to his complaint of age discrimination. The Nova Scotia *Human Rights Act* permits mandatory retirement as part of the operation of a *bona fide* pension plan. The recent amendments to the *Human Rights Act* will not change the law in this regard. Only further legislative revision or a successful constitutional challenge will do that.

[18] Having reached a conclusion that Mr. Talbot's mandatory retirement was lawful under the *bona fide* pension plan exception to age discrimination contained in section 6(g) of the *Human Rights Act*, there is no need to go on to afford the Respondents the opportunity to make out a defence under s.6(h) of the *Act*. I must dismiss Mr. Talbot's complaint.

**DATED** at Halifax, in the Halifax Regional Municipality, Province of Nova Scotia, this 6<sup>th</sup> day of March, 2009.

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**Cynthia L. Chewter**, Chair  
Human Rights Board of Inquiry