Mckinney v. University of Guelph [1990] 3 S.C.R. 229: Age discrimination -- Mandatory retirement at age 65 -- Whether or not mandatory retirement policy "law"

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dub&#65533;, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law -- Charter of Rights -- Applicability of Charter -- Government -- Whether or not university "government" so as to attract Charter review of policies -- If so, whether or not mandatory retirement policy "law" -- Canadian Charter of Rights and Freedoms, ss. 15, 32.

Constitutional law -- Charter of Rights -- Equality rights -- Equality before the law -- Age discrimination -- Mandatory retirement at age 65 -- Whether or not mandatory retirement policy "law" -- If so, whether or not s. 15(1) of the Charter infringed -- Canadian Charter of Rights and Freedoms, ss. 15, 32.

Consitutional law -- Civil rights -- Age discrimination -- Protection against age discrimination in employment not extending to those over 65 -- Whether provision infringing s. 15 of the Charter -- If so, whether justified under s. 1 -- Canadian Charter of Rights and Freedoms, ss. 1, 15 -- Human Rights Code, 1981, S.O. 1981, c. 53, s. 9(a).

The appellants, eight professors and a librarian at the respondent universities, applied for declarations that the universities' policies of the mandatory retirement at age 65 violate s. 15 of the Canadian Charter of Rights and Freedoms and that s. 9(a) of the Human Rights Code, 1981, by not treating persons who attain the age of 65 equally with others, also violates s. 15. They also requested an interlocutory and permanent injunction and sought reinstatement and damages. The mandatory retirement policies had been established through various combinations of resolutions of the board, by-laws, pension plan provisions and collective agreements, depending on the university.

Several of the appellants filed complaints with the Ontario Human Rights Commission but the Commission refused to deal with the complaints because its jurisdiction was confined with respect to employment to persons between eighteen and sixty-five. It advised the appellants that it would review its position when their application concerning the constitutional validity of s. 9(a) was decided.

The High Court dismissed appellants' application and a majority of the Court of Appeal upheld that decision. Five constitutional questions were stated for consideration by this Court: (1) whether s. 9(a) of the Human Rights Code, 1981 violated the rights guaranteed by s. 15(1) of the Charter; (2) if so, whether it was justified by s. 1 of the Charter; (3) whether the Charter applies to the mandatory retirement provisions of the respondent universities; (4) if applicable, whether their respective mandatory retirement provisions infringe s. 15(1); and finally, (5) if s. 15(1) is infringed, whether the respective mandatory retirement provisions are demonstrably justified by s. 1.

The Attorneys General of Canada, Nova Scotia and Saskatchewan intervened.

Held (Wilson and L'Heureux-Dub&#65533; JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and La Forest and Gonthier JJ.: The wording of s. 32(1) of the Charter indicates that the Charter is confined to government action. It is essentially an instrument for checking the powers of government over the individual. The exclusion of private activity from Charter protection was deliberate. To open up all private and public action to judicial review could strangle the operation of society and impose an impossible burden on the courts. Only government need be constitutionally shackled to preserve the rights of the individual. Private activity, while it might offend individual rights, can either be regulated by government or made subject to human rights commissions and other bodies created to protect these rights. This Court, in limiting the Charter's application to Parliament and the legislatures and the executive and administrative branches of government in RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, relied not only on the general meaning of government but also on the way in which the words were used in the Constitution Act, 1867.
The fact that an entity is a creature of statute and has been given the legal attributes of a natural person is not sufficient to make its actions subject to the Charter. The Charter was not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing.

While universities are statutory bodies performing a public service and may be subjected to the judicial review of certain decisions, this does not in itself make them part of government within the meaning of s. 32. The basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision makers.

The fact that a university performs a public service does not make it part of government. A public purpose test is simply inadequate. It is fraught with difficulty and uncertainty and is not mandated by s. 32. Although the Charter is not limited to entities discharging inherently governmental functions, more would have to be shown to make them subject to Charter review than that they engaged in activities or the provision of services that are subject to the legislative jurisdiction of either the federal or provincial governments.

The universities are legally autonomous. They are not organs of government even though their scope of action is limited either by regulation or because of their dependence on government funds. Each has its own governing body, manages its own affairs, allocates its funds and pursues its own goals within the legislated limitations of its incorporation. Each is its own master with respect to the employment of professors. The government has no legal power to control them. Their legal autonomy is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom.

The actions of universities do not fall within the ambit of the Charter because they do not form part of the government apparatus. The universities were not implementing government policy in establishing mandatory retirement. If, however, universities formed part of the "government" apparatus within the meaning of s. 32(1) of the Charter, their policies on mandatory retirement would violate s. 15 of the Charter.

For section 15 of the Charter to come into operation, the alleged inequality must be one made by "law". Had the universities formed part of the fabric of government, their policies on mandatory retirement would have amounted to a law for the purposes of s. 15 of the Charter. Indeed, in most of the universities, these policies were adopted by the universities in a formal manner. The fact that they were accepted by the employees should not alter their characterization as law, although this would be a factor to be considered in deciding whether under the circumstances the infringement constituted a reasonable limit under s. 1 of the Charter.
Acceptance of a contractual obligation might well, in some circumstances, constitute a waiver of a Charter right especially in a case like mandatory retirement, which not only imposes burdens but also confers benefits on employees. On the whole, though, such an arrangement would usually require justification as a reasonable limit under s. 1 especially where a collective agreement may not really find favour with individual employees subject to discrimination.

On the assumption that these policies are law, they are discriminatory within the meaning of s. 15(1) of the Charter, given Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, since the distinction is based on the enumerated personal characteristic of age. The Charter protects not only from direct or intentional discrimination but also from adverse impact discrimination. The similarly situated test has not survived Andrews.

The distinction made in the universities' policies, though based upon an enumerated ground to the disadvantage of individuals aged 65 and over, constitutes a reasonable limit under s. 1 of the Charter to the right to equality accorded under s. 15.

The combined objectives of the impugned provisions meet the "objectives test". Excellence in higher education is an admirable aim and should be fostered. The preservation of academic freedom too is an objective of pressing and substantial importance.
Mandatory retirement is rationally connected to the objectives sought. It is intimately tied to the tenure system which undergirds the specific and necessary ambience of university life and ensures continuing faculty renewal, a necessary process in enabling universities to be centres of excellence on the cutting edge of new discoveries and ideas. It ensures a continuing, and necessary, infusion of new people. In a closed system with limited resources, this can only be achieved by departures of other people. Mandatory retirement achieves this in an orderly way that permits long-term planning both by the university and the individual.

In assessing whether there has been minimal impairment of a consitutional right, consideration must be given not only to the reconciliation of claims of competing individuals or groups but also to the proper distribution of scarce resources -- here access to the valuable research and other facilities of universities. The universities had a reasonable basis for concluding that mandatory retirement impaired the relevant right as little as possible given their pressing and substantial objectives. Against the detriment to those affected must be weighed the benefit of the universities' policies to society. Academic freedom and excellence is necessary to our continuance as a lively democracy. Staff renewal is vital to that end. It ensures infusion of new people and new ideas, a better mix of young and old that is a desirable feature of a teaching staff, and better access to the universities' outstanding research facilities which are essential to push forward the frontiers of knowledge. As well, while mandatory retirement has serious detrimental effects on the group affected, it has many compensatory features for them, notably an enriched

working life comprising a large measure of academic freedom with a minimum of supervision and demeaning performance tests. These are part of the "bargain" involved in taking a tenured position, a bargain long sought by faculty associations and other groups in society.

The effects of the universities' policies of mandatory retirement are not so severe as to outweigh the government's pressing and substantial objectives. The same factors had to be balanced in dealing with deleterious effects.

Following a long history, mandatory retirement at age 65 became the norm and is now part of the very fabric of the organization of the labour market in this country. It has profound implications for the structuring of pension plans, for fairness and security of tenure in the workplace, and for work opportunities for others. This was the situation when s. 9(a) of the Human Rights Code, 1981 was enacted and when the Charter was proclaimed. There are factors that must be considered in a Charter evaluation.

The section 1 analysis of s. 9(a) of the Human Rights Code, 1981 cannot be restricted to the university context as was done in the court below. The appellants in this case were denied the protection of the Code, not because they were university professors but because they were 65 years of age or over. To restrict its application to the university context would be inconsistent with the first component of the proportionality test enunciated in R. v. Oakes.
The objective of ss. 9(a) and 4 of the Human Rights Code, 1981 is to extend protection against discrimination to persons in a specified age range, originally those between 45 and 65. Those over 65 benefited from numerous other social programmes. In enacting the provision, the Legislature balanced its concern for not according protection beyond 65 against the fear that such a change might result in delayed retirement and delayed benefits for older workers, as well as for the labour market and pension ramifications. Assuming the test of proportionality can be met, these warranted overriding the constitutional right of the equal protection of the law. The Legislature also considered the effect on young workers, but the evidence on this is conjectural, and should be accorded little weight.

The legislation is rationally connected to its objectives as is evident from the considerations concerning whether it impairs the right to equality "as little as possible." But consideration of the propriety of the legislature's cautious conduct involves recognition of the fact that it was motivated by concern for the orderly transition of values. The United Nations Resolution aimed at discouraging age discrimination justifies its recommendation by limiting it to "wherever and whenever the overall situation allows".

Mandatory retirement impairs the right to equality without discrimination on the basis of age as little as possible. The historical origins of mandatory retirement at age 65 and its evolution as one of the important structural elements in the organization of the workplace was very relevant to making this assessment. The repercussions of abolishing mandatory retirement would be felt in all dimensions of the personnel function with which it is closely entwined: hiring, training, dismissals, monitoring and evaluation, and compensation. The Legislature was faced with competing socio-economic theories and was entitled to choose between them and to proceed cautiously in effecting change. On issues of this kind, where there is competing social science evidence, the Court should consider whether the government had a reasonable basis for

concluding that the legislation impaired the relevant right as little as possible given the government's pressing and substantial objectives.

The concern about mandatory retirement is not about mere administrative convenience in dealing with a small percentage of the population. Rather, it is with the impact that removing a rule, which generally benefits workers, would have on the compelling objectives the Legislature has sought to achieve. Mandatory retirement is not government policy in respect of which the Charter may be directly invoked. It is an arrangement negotiated in the private sector, and it can only be brought into the ambit of the Charter tangentially because the Legislature has attempted to protect, not attack, a Charter value. The provision in question had no discriminatory purpose.

The legislation simply reflects a permissive policy which allows those in different parts of the private sector to determine their work conditions for themselves, either personally or through their representative organizations. Mandatory retirement was not government policy and it was not a condition imposed on employees. It was favoured both by the universities and labour organizations.

For the same considerations as were discussed with the issue of minimum impairment, there was a proportionality between the effects of s. 9(a) of the Code on the guaranteed right and the objectives of the provision. The Legislature sought to provide protection for a group which it perceived to be most in need and did not include others for rational and serious considerations that, it had reasonable grounds to believe, would seriously affect the rights of others. A Legislature should not be obliged to deal with all aspects of a problem at once. It should be permitted to take incremental measures to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal globally with them.

The cut-off point was within a reasonable range according to the evidence and was appropriately defined in terms of age, notwithstanding the fact that age was a prohibited ground of discrimination. The precise point was not an issue for the Court. The Charter itself by its authorization of affirmative action under s. 15(2) recognized that legitimate measures for dealing with inequality might themselves create inequalities. Section 1 therefore should allow for partial solutions to discrimination where there are reasonable grounds for limiting a measure.

A measure of deference for legislative choice is invited by the fact that the Charter left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. Generally, the courts should not lightly use the Charter to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection but the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right.

Per Sopinka J.: The reasons of La Forest J. for concluding that a university is not a government entity for the purpose of attracting the provisions of the Canadian Charter of Rights and

Freedoms were agreed with. The core functions of a university are non-governmental and therefore not directly subject to the Charter. This applies a fortiori to the university's relations with its staff which in the case of those in these appeals are on a consensual basis. Some university activities, however, may be governmental in nature.

The determination as to whether the policies and practices of the universities relating to mandatory retirement are law cannot be made on the assumption that the universities are governmental bodies. In attempting to classify the conduct of an entity in a given case it is important to know, first, that it is a governmental body and, second, that it is acting in that capacity in respect of the conduct sought to be subjected to Charter scrutiny. The role of the Charter is to protect the individual against the coercive power of the state. This suggests that there must be an element of coercion involved before the emanations of an institution can be classified as law. In order to make the determination in this case that the policies and practices relating to mandatory retirement are law, highly relevant factors would have to be assumed as being present. Such a determination would have a wholly artificial foundation and would simply distort the law. The conclusion that mandatory retirement is justified under s. 1 is more in accord with the democratic principles which the Charter is intended to uphold. The contrary position would impose on the whole country a regime not forged through the democratic process but by the heavy hand of the law.

Per Cory J.: The tests put forward by Wilson J. for determining whether entities not self-evidently part of the legislative, executive or administrative branches of government are nonetheless a part of government to which the Charter applies were agreed with. So too were her findings that universities form part of "government" for purposes of s. 32 of the Charter, that their mandatory retirement policies were subject to s. 15 scrutiny, and that they contravened s. 15 because of discrimination on the basis of age. These policies, however, survive Charter scrutiny under s. 1. Although s. 9(a) of the Human Rights Code, 1981 contravenes s. 15(1) of the Charter by discriminating on the basis of age, it is a reasonable limit prescribed by law under s. 1.

Per Wilson J. (dissenting): Under s. 32 the Charter applies to legislation broadly defined and to acts of the executive or administrative branch of government. It does not apply to private litigation divorced from any connection to government. The government/private action distinction may be difficult to make in some circumstances but the text of the Charter must be respected. The Charter was not intended as an alternate route to human rights legislation for the resolution of allegations of private discrimination.

The concept of government purely restrictive of the people's freedom is not valid in Canada. Government has also played a beneficent role. Freedom is not co-extensive with the absence of government; rather freedom has often required the intervention and protection of government against private action.

A concept of minimal state intervention should not be relied on to justify a restrictive interpretation of "government" or "government action". Government today must assume many different roles vis-�-vis its citizens and some of these cannot be best effected directly by the apparatus of government itself. Form therefore should not be placed ahead of substance: the Charter should not be circumvented by the simple expedient of creating a separate entity and

having it perform the role. The nature of the relationship between that entity and government must be examined in order to decide whether when it acts it truly is "government" which is acting.

The following questions should be asked about entities that are not self-evidently part of the legislative, executive or administrative branches of government in order to determine if they are subject to the Charter: (1) does the legislative, executive or administrative branch of government exercise general control over the entity in question; (2) does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state; (3) is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

Each test identifies aspects of government in its contemporary context. An affirmative answer to one or more of these questions would be a strong indicator, but no more, that the entity forms part of government. The parties can explain why the body in question is not part of government, or in the case of a negative answer, why some other feature of the entity not touched upon by the questions listed makes it part of government.

Given the various connections between the province and the universities, the state exercises a substantial measure of control over universities in Canada. This control is exercised: (1) through heavy provincial funding; (2) through the statutory basis of their governing structure; (3) through some of their decision-making processes being subject to judicial review; and, (4) through some of their policies and programs requiring government approval.

The government had no direct involvement in the policy of mandatory retirement instituted by the universities. A specific connection between the impugned act and government, however, is not required. The universities' internal policies and practices should have to conform to the dictates of the Constitution. The principle of academic freedom, which is narrow in focus and protects only against the censorship of ideas, is not incompatible with administrative control being exercised by government in other areas.

Education at every level has been a traditional function of government in Canada as evidenced from the legislation dealing with it both before and after Confederation. The universities perform an important public function which government has decided to have performed and, indeed, regards it as its responsibility to have performed. The universities therefore form part of government for the purposes of s. 32 of the Charter and their policies of mandatory retirement are subject to scrutiny under s. 15 of the Charter.

Section 15 is declaratory of the rights of all to equality under the justice system. If an individual's guarantee of equality is not respected by those to whom the Charter applies, the courts must redress that inequality.

The term "law" in s. 15 should be given a liberal interpretation encompassing both legislative activity and policies and practices even if adopted consensually. The guarantee of equality applies irrespective of the particular form the discrimination takes. Discrimination, unwittingly

or not, is often perpetuated through informal practices. Section 15 therefore does not require a search for a discriminatory "law" in the narrow context but merely a search for discrimination which must be redressed by the law.

It was not strictly necessary for the Court to come to a definitive conclusion on this aspect of s. 15 in this case. Under the more liberal approach, the policies instituting mandatory retirement constitute "law" within the meaning of s. 15. But even given the most restrictive interpretation of "law", the discrimination took place under the universities' enabling statutes and, accordingly, the denial of equality was effected in one of the prohibited ways.

All the methods used by the universities to institute mandatory retirement constituted "binding rules" in the broad sense. It made no difference that some of the rules came about as a result of collective agreement negotiations. It was, in effect, the "law of the workplace". Mandatory retirement distinguished between different individuals or different classes of individuals in purpose or effect and this distinction gave rise to discrimination.

The purpose of the equality guarantee is to promote human dignity. This guarantee focuses on stereotype and prejudice as the principal vehicles of discrimination and is meant to protect against them. The similarly situated test has no place in equality jurisprudence because of the centrality of the concept of "prejudice".

The grounds enumerated in s. 15 represent some blatant examples of discrimination which society has at last come to recognize as such. Their common characteristic is political, social and legal disadvantage and vulnerability.

The mere fact that the distinction at issue was drawn on the basis of age did not automatically lead to some kind of irrebuttable presumption of prejudice. Rather it compelled a number of questions. Was there prejudice? Did the mandatory retirement policy reflect the stereotype of old age? Was an element of human dignity at issue? Were academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity? The answer was clearly yes and s. 15 was therefore infringed.

The universities derived their authority over employment relations with their faculty and staff through their enabling statutes which in and of themselves do not infringe the Charter. The action taken pursuant to them, however, lead to the violation. It was not necessary to determine specifically whether the actual policies compelling retirement at age 65 were "law" within the meaning of s. 1. The measures instituting mandatory retirement, if not reasonable and demonstrably justified, would fall outside the authority of the universities and be struck down. The mandatory retirement policies cannot meet the minimal impairment test. The test is only met where alternative means of dealing with the stated objective of government are not clearly better than the one which has been adopted by government. There are better means in this case.
In a period of economic restraint competition over scarce resources will almost always be a factor in the government distribution of benefits. Moreover, recognition of the constitutional rights and freedoms of some will in such circumstances almost inevitably carry a price which must be borne by others. To treat such price as a justification for denying the constitutional rights of the appellants would completely vitiate the purpose of entrenching rights and freedoms. There

may be circumstances, however, in which other factors militate against interference by the courts where the legislature has attempted a fair distribution of resources. Even if fiscal restraint simpliciter were a sufficient reason to take a more relaxed approach to the minimal impairment requirement, the facts here do not support the application of this standard of review.

The Oakes standard presumptively applies and only in exceptional circumstances should the full rigors of Oakes be ameliorated. The respondent universities did not meet the onus of showing that the application of a more relaxed test under s. 1 was appropriate. And even if that test were appropriate, that standard was not met. Clearly better alternatives exist given the documented success of alternative techniques.

Young academics are not the kind of "vulnerable" group contemplated in those cases applying a relaxed standard of minimal impairment. Their exclusion flows solely from the government's policy of fiscal restraint and not from their condition of being young or from the nature of their relationship with the universities.

It is doubtful whether citizens should be able to contract out of equality rights having regard to the nature of the grounds on which discrimination is prohibited in s. 15 and the fact that the equality rights lie at the very heart of the Charter. It is not necessary to decide this in this case.

Section 24(1) of the Charter confers a broad discretion upon the Court to award appropriate and just relief, including the relief of the type sought by appellants. Ordinary principles of contract should not necessarily dictate which remedies are appropriate and just within the meaning of s. 24(1). The courts should strive to preserve agreements while ridding them of their unconstitutional elements.

Reinstatement was an appropriate and just remedy for righting the wrong caused to the appellants, especially given the paucity of academic positions available and difficulties in relocating. An award of compensatory damages was also just and appropriate because the loss of income and benefits sustained by the appellants arose because of the breach of their s. 15 rights. Compensation for losses which flow as a direct result of the infringement of constitutional rights should generally be awarded unless compelling reasons dictate otherwise. Impecuniosity and good faith are not a proper basis on which to deny an award of compensatory damages.

An interlocutory and a permanent injunction should not be awarded. Appellants were "made whole" by virtue of their having been awarded the declaration, the order for reinstatement and the order for damages.

Section 15 of the Charter is infringed by s. 9(a) of the Human Rights Code, 1981 which strips all protection against employment discrimination based upon age from those over the age of 65. Once government decides to provide protection it must do so in a non-discriminatory manner and this the province failed to do. Indeed, in the field of human rights legislation, the standard of Charter scrutiny should be more rigorous, not less, than that applied to other types of legislation. By denying protection to these workers the Code has the effect of reinforcing the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with.

Section 9(a) must be struck down in its entirety. This section did not confine itself to the legislature's stated objective enabling mandatory retirement but extended to permit all forms of age discrimination in the employment context for those over the age of 65. The rational connection branch of the Oakes test was accordingly not met. The Court, in choosing the appropriate disposition of the constitutional challenge, must be guided by the extent to which the provision is inconsistent with the Charter.

Section 9(a) would not, in any event, pass the minimal impairment test which is the second branch of the Oakes proportionality test. When the majority of individuals affected by a piece of legislation will suffer disproportionately greater hardship by the infringement of their rights, the impugned legislation does not impair the rights of those affected by it as little as reasonably possible. Even if it is acceptable for citizens to bargain away their fundamental human rights in exchange for economic gain, the majority of working people in the province do not have access to such arrangements.

Per L'Heureux-Dub&#65533; J. (dissenting): Universities may not have all of the necessary governmental touchstones to be considered public bodies and yet neither are they wholly private in nature. Their internal decisions are subject to judicial review and their creation, funding and conduct are governed by statute. Some public functions performed by universities, therefore, may attract Charter review.

The fact that universities are substantially publicly funded cannot be easily discounted. But the level of government funding does not establish government control over the employment contracts at issue so as to attract Charter review. Mandatory retirement was not adopted because of legislative or executive mandate. Furthermore, the universities' private contracts of employment, not their delegated public functions, were alleged to conflict with the Charter.

Wilson J.'s broad test for determining the scope of government and government action for the purposes of s. 32(1) of the Charter was agreed with. The universities, however, do not qualify even under that test for essentially the reasons outlined by La Forest J. An historical analysis yields the same result as the functional approach: Canadian universities have always fiercely defended their independence. The word "government", as generally understood, never contemplated universities as they were and are constituted. Therefore, questions four and five did not need to be answered.

Section 9(a) of the Human Rights Code, 1981 constitutes unreasonable and unfair discrimination on the basis of age against persons over 65 contrary to s. 15(1) of the Charter. It constitutes an arbitrary and artificial obstacle which prevents persons aged 65 and over from complaining about employment discrimination.

The breach of s. 15(1) cannot be justified under s. 1. There is no convincing evidence that mandatory retirement is the quid pro quo of the tenure system. The value of tenure is threatened by incompetence, not by the aging process. The presumption of academic incapacity at age 65 is not well founded. The discrepancies between physical and intellectual abilities amongst different age groups may be more than compensated for by increased experience, wisdom and skills

acquired over time. There is therefore no pressing and substantial objective addressed by the mandatory retirement policy.

Even assuming a legitimate objective exists, the means used are too intrusive. Persons over 65 are excluded from the protection of the Code solely because of age and, regardless of circumstances, are denied access to protective and remedial human rights legislation covering employment. Since retirement was set at 65, advances in medical science and living conditions have significantly extended life expectancy and improved the quality of life. An "elite" group of people can afford to retire, but the adverse effects of mandatory retirement are most painfully felt by the poor. Women are particularly affected as they are less likely to have adequate pensions. There is no reasonable justification for a scheme which sets 65 as an age for compulsory retirement.

Section 9(a) of the Code is severable and accordingly should be struck out in its entirety as unconstitutional.