



University of
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To: All Members of the Faculty Association
Date: March 29, 2010
Subject: Mandatory Retirement: Where Are We Now?

It has been about five weeks since the PEI Human Rights Commission issued its decision in regards to the University's Mandatory Retirement Policy. It might be useful at this time to provide some information to clarify the current situation.

The Commission ruled that this Policy is discriminatory on the basis of age and, therefore, contravenes the Province's Human Rights Act. As a result, the University can no longer enforce the Policy without being in breach of human rights. Consequently, mandatory retirement can no longer exist at UPEI for any employee group. This includes the Faculty Association, even though its collective agreements contain such provisions.

In law, two parties cannot contract out of protections against discrimination. Accordingly, our collective agreements provide that should one of their Articles be in conflict with a provincial statute then that Article is immediately declared null and void. In light of the Commission's decision, the Association has already served notice on President MacLauchlan that the relevant Articles are now effectively gone from the Agreements.

No member of the Association can now be forced to retire at age 65, or at any age for that matter. The choice of when to retire belongs wholly to the individual member. The only requirement is that written notice of one's intention to retire must be given to the Employer at least two months in advance of retirement for members of BU #1 (Article B7.1(b)) and at least one month in advance for members of BU #2 (Article B3.1(b)).

As a consequence of making the determination that the University's Mandatory Retirement Policy is discriminatory on the basis of age, the Commission also had to consider two further questions: 1) who then was responsible and liable for the discrimination? and 2) what damages must be awarded to the complainants?

In response to the first question, the Commission ruled that the University alone was fully responsible for the discrimination and fully liable for any damages being sought by the complainants. The Commission found that the Association did not act in any way to cause or to contribute to the discrimination against the complainants.

There has not yet been any resolution to the second question. The Commission reserved its decision on it and provided all parties with an opportunity to present further written submissions on the issue of damages by April 9, 2010. Following appropriate deliberations, the Commission will provide a decision regarding damages. It is not a foregone conclusion, though, that any damages awarded will include the reinstatement of any of the complainants to their former positions at the University.

Throughout all of this, the Association maintained that the Policy was discriminatory and supported the complainants in this regard. Now that only the question of damages remains to be answered, the Association takes on a broader obligation. The Association's role will be to ensure that the collective agreement rights provided to the complainants, the department and to other department members are all respected in regards to any possible reinstatement. Whatever decision is reached, the Association's position will be that the collective agreements and the rights of everyone involved must be respected.

As you are aware, the University has applied to the PEI Supreme Court for a judicial review or appeal of the Commission's decision. In its application, it has requested the following from the Court: 1) that it issue an order nullifying the decision; 2) that it prohibit the Commission from further consideration of the question on damages; 3) that it declare that the Mandatory Retirement Policy does not contravene the Human Rights Act; and 4) that the University be awarded compensation for its costs.

Notwithstanding the University's application for judicial review, the decision of the Human Rights Commission stands. There is no stay or suspension of it while the Court deals with the appeal. In written correspondence to the Commission, the University did suggest that it would be appropriate for the Commission to hold its proceedings on this matter in abeyance until the Court process, initiated by the University's application for judicial review, finally resolves things.

The Court would most likely not hear this application until at least the coming fall. The Commission, however, has made it quite clear that it intends to determine the damages to be awarded to the complainants as soon as practicable. At this time, it appears that the Commission could do so as early as June 2010.

Please feel free to contact the Association should you have any questions or concerns regarding any of the information presented here. And, of course, do not hesitate to notify the Association should you become aware of any instance in which the Employer maintains that the Policy still exists or that the Human Rights Commission proceedings have been suspended as a result of the appeal application now before the Court.