

## RETIREMENT

*Last Updated: July 2017*

Retirement is a fundamental headline employment issue in light of the recent increase of the state pension age from 65 to 66, and the impending further increases to 67 and 68 in 2021 and 2028 respectively. The issue of retirement is one which comes up regularly for employers and has attracted much recent attention due to case law. Deputy Anne Ferris has commented previously that many highly skilled people should be able to continue working after the age of 65 and should not be made retire.

### LEGISLATION

**The Employment Equality Acts 1998-2015** prohibit discrimination in employment on a number of grounds, including age. It is unlawful to discriminate against anyone in employment on grounds of age. The Acts only apply to persons above the maximum age at which a person is statutorily obliged to attend school (16 currently). Under the Employment Equality Acts 1998–2015 an employer may:

- Set a minimum age requirement (not more than 18 years) for potential applicants for a job
- Offer a fixed-term contract to a person over the compulsory retirement age provided it is objectively justified.

**Article 6 of Council Directive 2000/78/EC** (“the Directive”) provides that Member States may provide that differences in treatment on the grounds of age shall not constitute discrimination, provided that the difference may be objectively and reasonably justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

**Equality (Miscellaneous Provisions) Act 2015, Section 4, Amendment of Section 6 of the Employment Equality Acts**

*“Offering a fixed term contract to a person over the compulsory retirement age for that employment or to a particular class or description of employees in that employment shall not be taken as constituting discrimination on the age ground if:*

*It is objectively and reasonably justified by a legitimate aim, and*

*The means of achieving aim are appropriate and necessary”*

### COMPULSARY RETIREMENT AGE IN IRELAND

There is no single fixed mandatory retirement age for employees in Ireland. Employers are lawfully entitled to set individual retirement ages in an employee’s contract of employment.

An employee’s contractual retirement age is an entirely separate issue to the age at which individuals are entitled to draw down the state pension - some employers may however seek to link these two.

### OBJECTIVELY JUSTIFIED

There is no legislative requirement for employers in Ireland to objectively justify mandatory retirement ages in contracts of employment but a number of rulings of the Court of Justice of the European Union (“the CJEU”) have held that a mandatory retirement age must be objectively and reasonably justified.

This leaves Irish employers in the unsatisfactory position of having to reconcile inconsistent Irish and European legal positions regarding the retirement issue.

### EQUALITY LEGISLATION

As Irish Employment Equality legislation is currently drafted, there is no such obligation to objectively justify the setting of a mandatory retirement age.

Section 34(4) of the Employment Equality Act 1998 states that

*'...it shall not constitute discrimination on the age ground to fix different ages for retirement (whether voluntary or compulsory) of employees or any class or description of employees).'*

The Equality Tribunal has begun to depart from a plain reading of the Irish legislation and has recently published decisions that interpret our legislation in line with the CJEU's thinking. It has held in a number of cases that an employer must provide objective justification for the imposition of a mandatory retirement age, notwithstanding that no such requirement is provided for in Irish Employment Equality legislation.

### **A SET RETIREMENT AGE**

Equality Tribunal case law makes clear that an employer who sets a mandatory retirement age must be able to justify the setting of such a retirement age by pointing to a legitimate aim of the business. It is important that an employer is in a position to objectively justify why they have a mandatory retirement age.

It is more straightforward to do this in safety critical workplaces than it is to do in sedentary type workplaces on the basis that an employer's occupational health advisor may conclude that an older employee is unfit to carry out safety critical tasks.

The employer must also demonstrate that the setting of such a retirement age is an appropriate and necessary means of achieving that aim.

Any less favourable treatment on the grounds of age must be objectively justified. In the recent case of *Richard Lett v Earagail Eisc Teo* (DEC E2014-076) [see below for summary of the case] the Equality Tribunal found that there was a failure on the part of the employer to objectively justify a mandatory retirement age and this led to the award of the sum of €24,000 in compensation for discriminatory dismissal on the grounds of age.

### **HOW TO OBJECTIVELY JUSTIFY A CONTRACTUAL RETIREMENT AGE**

The current Irish legal position is that forced retirement is discrimination on the grounds of age which must be objectively justified by a legitimate aim of the business and that the means of achieving this aim are necessary and proportionate.

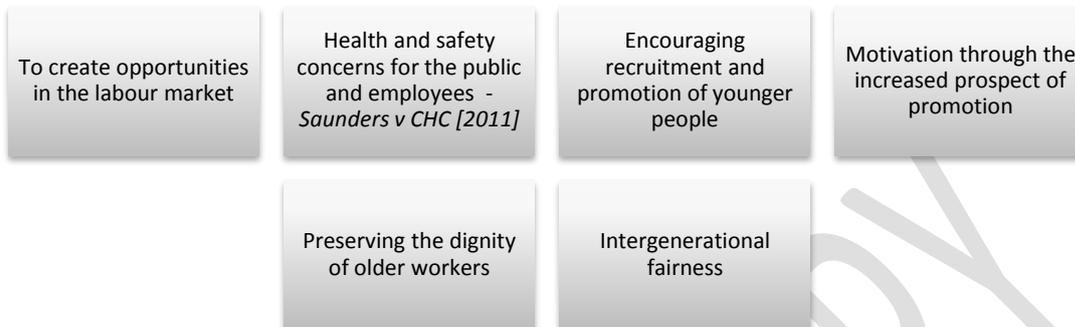
The case law shows that there are a number of questions which an employer will have to answer in seeking to objectively justify the setting of a mandatory retirement age, including:

- Do the measures seek to achieve a legitimate aim?
  - Intergenerational fairness and dignity (avoiding disputes about concerning fitness to work beyond a certain age) have been held to be legitimate aims but reasons particular to the employer such as cost reduction improving competitiveness are not.
- Is the aim legitimate in the particular circumstances of their business?
  - It is the particular circumstances of the business rather than the individual that should be considered.
- Are the means of achieving the aim proportionate?
  - Or are there other, less discriminatory measures possible.

These are all questions which an Equality Tribunal would consider in any action claiming that mandatory retirement ages are discriminatory.

Additional questions may arise in line with an employer's particular business culture.

#### EXAMPLES OF OBJECTIVE JUSTIFICATIONS



#### DEALING WITH REQUESTS FROM EMPLOYEES TO REMAIN IN EMPLOYMENT

More employers are being faced with requests from employees to remain in employment beyond the mandatory contractual retirement date. The volume and frequency of these requests is likely to continue to grow, in light of the upwards only trajectory of the state pension age.

Assuming that an employer has provided for a contractual retirement age and a retirement policy which objectively justifies the retirement age, the following is a non-exhaustive list of items that should be taken into consideration by an employer in assessing a request by an employee to remain in employment past a contractual retirement age:

- **Custom & Practice:** Is there a custom and practice, upon which the employee may seek to rely, of allowing employees to work beyond the contractual retirement age?
  - Have other employees carrying out similar roles been allowed to work beyond the contractual retirement age?
  - Any such custom and practice may undermine the strength of an employer's retirement policy.

An Equality Tribunal decision against Longford County Council is insightful in highlighting the reliance on normal practice for retirement ages before the Courts and Tribunals. Here, the complainant claimed that he had been discriminated upon by virtue of the fact that he was forced to retire at the age of 66, despite other employees having been allowed to work beyond this age, and in some cases into their 70's. The respondent relied on a Superannuation Code which provided for a set retirement age. The equality officer found in favour of the complainant, and in awarding €10,000 in compensation, concluded that working beyond the age of 66 was at the discretion of the employees and that nobody who asked to work on had been refused. Therefore, at the time the complainant reached the age of 66 it was custom and practice within the respondent that there was no retirement age.

- **Safety:** Is the work being carried out by the employee in question safety critical?
  - It may be that it is not appropriate on safety grounds for the employee to continue to carry out the work in question.

In *Saunders v CHC Ireland Limited* DEC-E/2011/142, decided in July 2011, the Equality Tribunal was asked to consider whether an employer's retirement age of 55 was discriminatory. The Equality Officer

construed Section 34 of the EEA in light of Article 6 of the Directive. The implication of this was that the employer was required to satisfy the Equality Officer that the retirement age of 55 was justified by a legitimate interest, and that the retirement age was a proportionate and necessary means of achieving that interest. The complainant was employed as a winchman, which is a safety-critical, physically demanding occupation. In this particular case, the objective aim put forward by the employer was: (i) the protection of the health and safety of both the winchmen and the civilians requiring rescue; and (ii) the proper operational functioning of the employer's search and rescue service. The Equality Officer was satisfied that the employer had established a legitimate aim. The Equality Officer next considered whether the imposition of a retirement age of 55 was a necessary way of achieving this aim. In light of the published research that a person's physical endurance, musculature and respiratory capacity decrease with age, the Equality Officer determined that the retirement age of 55 was objectively justified.

- **Benefit Implications:** Consider whether there are any pensions implications, or implications for other employee benefits if the employee is to continue to work.

## HIRING PAST THE MANDATORY RETIRMENT AGE

If an employer is agreeable to allowing an employee to work beyond the contractual retirement age then the following steps should be taken:

- **Health Assessment:** Arrange for an occupational health assessment to determine whether or not the employee is fit to continue out the work in question.
  - This does not apply solely to safety critical work.
  - If the occupational health physician determines that the employee is fit to continue to carry out the work, an employer should have this position reviewed routinely, e.g. every 6 months to ensure that the employee remains fit to carry out the work in question.
- **Fixed Term Contract:** Offer the employee a fixed term contract, stating the reason that the contract is being offered and stating that retirement will take effect from the expiry of the term of the contract.
  - This contract should also state that the Unfair Dismissals Acts do not apply to the termination of the employee's employment on the expiry of the contract term.
  - We suggest drawing this important term to the employee's specific attention in a cover letter attaching the fixed term contract.
  - We also suggest that an employer considers the impact of section 9 of the Protection of Employees (Fixed Term Work) Act 2003. An employer must ensure that there is objective justification for continuous back to back fixed term contracts and that the employee is aware that his or her service for in excess of 4 years post the normal retirement age will not give rise to a permanent contract in accordance with section 9 of the Protection of Employees (Fixed Term Work) Act 2003.

## PRACTICAL CONSIDERATIONS – RISK ANALYSIS

An employer should consider carefully any request by an employee to work beyond the contractual retirement age. These should be assessed on a case by case basis and an employer should keep in mind that any deviation from the contractual retirement age could have the effect of undermining the contractual position.

There may of course be situations where the merit of keeping the employee beyond the contractual retirement age outweighs any potential dilution of the contractual position and an employer must balance these factors in coming to a decision.

## OPEN DISCUSSIONS

In seeking to future proof against issues with employees in respect of retirement issues, there may be merit in an employer engaging in discussion forums with employees to ascertain general views in relation to retirement, in light of the changing State Pension ages. This may assist an employer in creating a retirement policy which unites the needs to the employer with the wishes of the employees and reduce the risk of unforeseen issues arising when an employee approaches the contractual retirement age.

## CASE LAW

### *Richard Lett v. Eargail Eisc Teoranta (DEC-E2014-076)*

- Tribunal did not accept 'workplace planning' & having an age balanced workforce & intergenerational fairness or sharing job opportunities amongst the generations
- Acknowledged these had previously been accepted as objective justifications in the past
- Complainant was never replaced, employer advertised externally rather than internally.
- The retirement was not used for internal promotion.
- There was no evidence presented by the Company that they would lose valuable staff if there were no promotions.
- The Tribunal criticized the employer for taking a "one size fits all approach" to setting a retirement age.
- The employee was awarded €24,000 based on discriminatory dismissal and discrimination
- Labour Court cross appeal
- Totality of evidence adduced Court cannot accept the Complainant had actual or constructive knowledge of the handbook or of a fixed retirement age of either 65 or 66
- He wasn't informed of retirement age & No express condition in contract
- Therefore respondent cannot rely on s.34(4)
- Held €24,000 to be fair and equitable in the circumstances
- To read the full case please use this link: <https://www.irn.ie/article/19138>

## COMPLAINTS

Complaints under the Employment Equality Acts 1998–2015 must be brought within 6 months of the last act of discrimination.

## CONTACT THE HR SUITE

If you have any queries please do not hesitate to contact our office on 066-7102887 and we would be happy to deal with your query.