



This article was first published in Industrial Relations News Issue 34 on 21 September 2017 and is reproduced with the kind permission of Industrial Relations News.

Age In The Workplace – Lessons And Guidance For Employers

In light of an aging population, increased life expectancies and related financial strains, the issue of retirement ages is rarely out of the news. Jeffrey Greene of William Fry Solicitors explores age issues in the workplace, the legal requirements, as well as outlining recommended actions for employers.¹

Recently the State-supported think tank the Economic and Social Research Institute (ESRI) suggested that persons should become eligible for the State pension only upon reaching the age of 70 (up from the current age of 66).

An outcry ensued, which is to be expected as it is quite an emotional topic. However the reasoning behind the suggestion appears sound: because of demographics and people living for longer, every five years spending on the State pension increases by an additional €1 billion, and State pension spending is already over €7 billion.

But aside from the politics of the issue, what does the law currently say about age in Irish workplaces?

Despite the sometimes confused language used in media reports, there is no general mandatory retirement age in Ireland; i.e. there is no statutory retirement age.

What there is however is an age at which the State pension becomes payable. That age is currently 66, and due to rise to 67 in 2021 and 68 in 2028.

But because the State pension was payable from age 65 for so many years, and many private occupational pension schemes pay out at this age, very many people still see 65 as a de facto retirement age despite the fact that life expectancies have increased greatly.

For example, according to World Bank statistics, in the mid-1970s average life expectancy in Ireland was 71.5 years, so just 6.5 years following retirement (and State pension) at age 65.

Now life expectancy in Ireland is approximately 82 years, meaning those who retire at age 65 have to fund a further 17 years on average. As an aside, this also means that the State pension is being drawn down for a greatly increased period of time, with the obvious increase in cost.

¹ Jeffrey Greene is a Senior Associate in William Fry's Employment & Benefits Group. He was assisted by Killian Maher in the preparation of this article.

While many people are understandably concerned at being forced to work beyond their envisaged retirement age of 65 or 66, in fact the majority of the case law in this area concerns the imposition of mandatory retirement ages on employees.

MOST FEEL NEED TO WORK BEYOND 66

In a survey commissioned by William Fry Solicitors (Age in the Workplace 2016), 63% of those surveyed aged 55 or above stated that they believed they would need to work beyond 66. If a person believes that he/she will have to work beyond a "normal" retirement age, typically for financial reasons, the idea that a mandatory retirement age can be imposed by the employer is concerning.

The argument typically made is that it is discriminatory on grounds of age to effect a mandatory retirement age. The imposition of a mandatory retirement age is, however, not an absolute ground on which discrimination may be successfully claimed.

This is highlighted in the July 2017 decision by the Court of Justice of the European Union (CJEU) in the case of *Werner Fries v Lufthansa CityLine GmbH* (C-190/16). In this case a pilot claimed that a mandatory retirement age of 65 was discriminatory, however the court found that Lufthansa had acted proportionately based on the circumstances, and the imposition of the retirement age was in fact acceptable.

The relevant additional European and Irish case law are explored further below.

INFLUENCE OF EU LAW

Generally speaking, Irish discrimination laws are heavily influenced by EU law, and it is important therefore to have an understanding of the relevant EU laws.

The first step in European anti-discrimination legislation was the 1957 Treaty of Rome, but equal pay on the ground of gender was the focus at this point.

It took a further 40 years until age discrimination was tackled, and the 1997 Treaty of Amsterdam included for the first time powers to combat discrimination on a variety of grounds, including a specific reference to age discrimination.

The Lisbon Treaty in 2009 introduced a new Article (Article 19 of the Treaty for the Functioning of the European Union (TFEU) requiring States to "*take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, **age** or sexual orientation*".

And in addition the Charter of Fundamental Rights, which has been binding on the EU and member states since 2009 (just like a treaty), states that: "*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, **age** or sexual orientation shall be prohibited*".

Probably of most importance, from the point of view of the specific provisions it includes, is *Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, better known as the "Framework Directive". It was this Directive that has had the greatest impact on the local legislation of Member States, notably in Ireland the Employment Equality Acts 1998 to 2015.

Article 1 of the Framework Directive states that: "*The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, **age** or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment*".

Article 2 then differentiates between direct discrimination and indirect discrimination, allowing for justification of the latter in certain circumstances.

Article 4 provides for a derogation from the general prohibition against age discrimination if there is a "*genuine and determining occupational requirement*".

As will be seen further below, this derogation is often argued in the context of mandatory retirement ages, but even more so in cases of maximum *entry* ages in certain industries (e.g. police, military, fire service).

Finally, Article 6 provides for a two-limbed test for determining whether age discrimination is justifiable: firstly, is it objectively and reasonably justified by a legitimate aim; and secondly, are the means of achieving that aim appropriate and necessary. These concepts are discussed below in the context of relevant case law.

LAW IN IRELAND

EU law heavily influences employment laws in Ireland and other Member States. As stated above, there is no statutory retirement age in Ireland. It is however permissible to impose a retirement age on employees by way of contract, but until recently Irish law and EU law were in conflict in this regard.

The Employment Equality Acts had until recently stated, at section 34(4), that: "*...it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees*".

There was no requirement for employers to justify their use of such fixed retirement ages, and this meant that Irish law was in conflict with the Framework Directive which clearly called for justification under the two-limb test.

Confusion ensued as certain Equality Tribunal decisions applied the Irish law as drafted, and others applied the EU provisions even where there was seemingly no direct effect allowing them to do so (direct effect essentially allows persons to invoke EU laws directly in national courts in certain circumstances, even before the EU law has been transposed into the laws of that Member State).

This conflict was eventually fixed with the passing of the Equality (Miscellaneous Provisions) Act 2015, which amended section 34(4) of the Employment Equality Acts to read: "*...it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees if: (i) it is objectively and reasonably justified by a legitimate aim; and (ii) the means of achieving that aim are appropriate and necessary.*"

Although such a concept may be new in Ireland in the context of the justification of age discrimination, helpfully there is already a great deal of EU case law and guidance available to us in this regard.

MUST BE A 'LEGITIMATE AIM'

Prima facie, therefore, a compulsory retirement age is no longer allowed in Ireland, and if an Irish employer wishes to impose a mandatory retirement age it must now ensure it can objectively justify this in accordance with the Employment Equality Acts.

The first limb of the test requires employers to show that it is objectively and reasonably justified by a legitimate aim.

There is no definition of "legitimate aim" in the legislation, however the concept of legitimate aim has been extensively explored by the CJEU.

The CJEU have been very clear that they require a *specific* legitimate aim, and generalisations or vague aims are unacceptable (*Georgiev*, C-250/09 and C-268/09).

In saying this, the CJEU has set a low relatively bar for an aim to qualify as legitimate, and the following grounds have been accepted:

- To enable a balanced and diverse age structure and distribution of work in the workforce
- To create opportunities in the labour market
- To preserve the dignity of aging employees
- To ensure the health and safety of the employee and of the public
- National social and employment policies
- To promote intergenerational fairness

Example of these aims are contained in *Rosenbladt* (C-45/09), *Prigge* (C-477/09), *Palacios* (C-411/05) and *Hungary v Commission* (C-286-12).

These aims do not offer a significant barrier to an employer who wishes to impose a retirement age. Nonetheless, the employer should not disregard this requirement simply because the bar is not a high one; it must be clear as to the aim it is seeking to achieve, and illustrate that this is a legitimate aim.

APPROPRIATE AND NECESSARY

The second limb of the test requires that the fixed age of retirement be appropriate and necessary to achieve the aim set out in the first limb. Essentially this element requires the age at which mandatory retirement is set to be a proportionate and appropriate measure in the achieving of the proposed legitimate aim.

Again the CJEU has given guidance through case law over the years, and this shows that the elements by which proportionality/appropriateness may be measured include:

- The availability to the employee of a pension on retirement
- The concurrence of availability of a state pension with the retirement age chosen
- Agreement by all parties (or unions)
- Consistency and coherence throughout the workforce
- Flexibility (i.e. that the employer is willing to consider whether retirement could be deferred in some cases).

Typically the CJEU has determined that it is for the national/referring court to determine the question of whether appropriate and necessary means have been taken to achieve the proposed legitimate aim.

It has been suggested that the national court is best placed to examine this more factual question, including whether alternative measures may have been implemented instead in order to achieve the aim.

If there are less extreme alternative measures that may be taken in furtherance of the achievement of the aim, then the imposition of a mandatory retirement age may be disproportionate and therefore not justified.

HARDER TO JUSTIFY

The second limb of the test is arguably harder for an employer to justify, as it gives scope for employees to argue that there are less extreme measures that could be taken than the imposition of a mandatory retirement age.

Despite the cases previously examined by the CJEU its guidance is still sought on what is justifiable age discrimination, as shown in the July 2017 case of *Werner Fries v Lufthansa CityLine GmbH* (C-190/16) referred to briefly above.

In this case the employer set a mandatory retirement age of 65 for its pilots, and the applicant was dismissed upon reaching this age.

The CJEU confirmed that a mandatory retirement age is prima facie discriminatory, but having examined the employer's reasoning the court accepted the retirement age as justified here.

The court accepted that Lufthansa's stated objective of maintaining air traffic safety was a legitimate aim. It also determined that imposing the age limit of 65 was an appropriate means of achieving this aim in the circumstances, taking into account the high risk involved with commercial flights as opposed to flying other categories of aircraft.

In addition, Lufthansa's age limit was aligned with international civil aviation standards. The court determined that it was not necessary to undertake individual assessments of employees' physical capabilities so long as the rules on age limits could be properly applied and objectively justified in the majority of circumstances. Using age as the only criterion reflected a legitimate regulatory choice in this instance.

Although the two-limb test, in the context of age discrimination, was only expressly introduced into Irish legislation through the Equality (Miscellaneous Provisions) Act 2015, certain Irish fora had already been applying the test, whether by virtue of direct effect in cases involving an emanation of the State, or simply where the forum thought it appropriate (though their ability to do this was less legally sound).

We await seeing how future cases are dealt with under the express terms of the Employment Equality Acts as now amended by the Equality (Miscellaneous Provisions) Act 2015, but under the old regime a compulsory retirement age of 60 for Assistant Garda Commissioners was found to be objectively justifiable in order to ensure "*motivation and dynamism through the increased prospect of promotion*" (*Donnellan v Minister for Justice, Equality and Law Reform* [2008] IEHC 467).

Similarly, in *Saunders v CHC Ireland Limited* (Equality Tribunal, DEC-E2011-142) a compulsory retirement age of 55 for helicopter winchmen was determined to be objectively justifiable and appropriate based on the health and safety of those person whose lives would be in the hands of such winchmen.

So, already in Ireland similar reasoning to the CJEU has been applied even before the two-limb test was officially entered onto the statute book in the context of age discrimination.

MAXIMUM AGE OF ENTRY

A second age discrimination issue arises when organisations impose a maximum age of entry; for example if a police force states that it will not accept entrants over the age of 35.

Though far less referred to in media discussions concerning age issues in the workplace, there have been a number of cases in this regard also.

Maximum ages for entry tend to appear in occupations such as the police, the defence forces and the fire services, and it is these types of vocations that have appeared in the case law to date.

The requirements the courts have imposed as regards justifying such a maximum entry age mirror those imposed for mandatory retirement, as they stem from the same legislative sources (Articles 4 and 6 of the Framework Directive referred to above).

Similar to mandatory retirement ages, an employer cannot simply impose a maximum entry age without reason; a maximum entry age for one role may be acceptable in one instance but unjustifiable in another.

For example, the CJEU determined that the age of 30 was an acceptable cut off point for the recruitment of fire services personnel in Frankfurt (*Wolf*, C-229/08), however it found that 30 was not an acceptable cut off point for the local Spanish police forces (*Perez*, C-416/13), on grounds of proportionality.

It is noteworthy however that a cut off age of 35 was deemed acceptable for the Basque police force, on the basis that the work involved by this police force was more physically demanding than 'ordinary' police work (*Salaberria*, C-285/15).

Employers have in particular leaned on Article 4 of the Framework Directive in this regard, whereby age discrimination is allowed where a certain age is a "*genuine and determining occupational requirement*".

The CJEU has therefore accepted that the objective reasons as to why certain careers can justify a maximum age for entry include: the physical demands which may be placed on recruits in the early stages of their career; and the short period an older recruit may work for due to the type of work involved and the consequent imposition of an early retirement age (so long as such is objectively justifiable).

In Ireland, a case regarding the maximum 35 year age limit for joining the Garda Síochána has been taken by a number of applicants. Earlier this year the Supreme Court referred to the CJEU the question of whether the Equality Tribunal (now Workplace Relations Commission), has the power to decide if this maximum entry age is discriminatory.

RECENT DEVELOPMENTS

The Citizens Assembly has recently considered the matter of mandatory retirement ages and overwhelmingly voted to recommend that the Oireachtas consider prohibiting the imposition of a mandatory age of retirement (i.e. not even allow objective justification of such an age).

This subject was addressed as part of the "Challenges and Opportunities of an Aging Population" module. Interestingly, the issue of the disharmony between the commonly imposed retirement age of 65 and the current State pension age of 66 was also discussed. The Assembly is to recommend that the Oireachtas address this issue also.

The Employment Equality (Abolition of Mandatory Retirement Age) Bill 2016 (the "Bill"), a private members bill currently making its way through the Oireachtas, would have the effect of restricting an employer's ability to contractually impose a mandatory age of retirement.

The Bill has received cross-party support, with the Government indicating its broad agreement with the principle. The Bill in its proposed form carves out certain exceptions allowing an employer to impose a retirement age; these exceptions include the Gardai, defence forces and fire services.

The Bill also provides that an employer may incentivise early retirement. Discussion of the Bill at this stage however should come with a health warning: the Bill is a private members bill which has been put to the Oireachtas by members of the Opposition.

It has been passed to the select committee stage, which means it is progressing, but it could be subject to significant amendment if it is to ever become law. It is noteworthy also that this is not the first time a private members bill has been put to the Oireachtas with the aim of eliminating mandatory pension ages.

RECOMMENDED ACTIONS

The William Fry Age in the Workplace Survey in 2016 found that 48% of organisations did not have a retirement age in place. However, employers implementing a mandatory retirement age should be cognisant of the objective justification and proportionality requirements.

Consultation with staff is preferable based on CJEU guidance, involving the discussion of the requirements of the company in an open and transparent process.

At the very least employers should themselves have considered what their legitimate aim is and be able to show that the means of achieving that aim are appropriate and necessary.

They should be certain that there are no acceptable alternatives, as this may be fatal to a justifiable mandatory retirement age. Practically, employers should also implement the mandatory age as consistently as possible (but bearing in mind that the CJEU frowns upon inflexible mandatory ages).

It is vital that the mandatory retirement age is communicated to employees at the commencement of their employment. And it is advisable that dialogue is commenced with the employee well in advance of him/her approaching the mandatory retirement age.

Although there are likely employees who wish to work beyond 'normal' retirement age simply because they enjoy working, it is more likely that it is a financial need that forces persons to continue working.

There are at least two reasonably obvious ways an employer can try to alleviate this:

Firstly, by ensuring that there is no time gap between the imposed retirement age in the company and the age at which the employee will be eligible for the State pension.

Secondly, the employer should consider what it can do to ensure that employees will feel financially able to retire at the age chosen by the employer.

The most obvious method of doing this is for the employer to encourage all employees to utilise a private pension scheme from an early stage.

If the employer educates its employees regarding the 'power of compounding' and the generous tax breaks on pensions savings, and perhaps agrees to match employee pension contributions to a certain level, an employee who starts his/her pensions saving early enough and at a reasonable rate is much more likely to be closer to financial security by "retirement age".