

WILLIAM FRY



Age in the Workplace

Employment Report 2019

Welcome to the William Fry Employment Report 2019 which looks at some of the current issues around two well debated topics - the ageing workforce and mandatory retirement.

According to recent Central Statistics Office (CSO) figures, there were 81,600 workers over the age of 65 in the Irish workforce in the first quarter of 2019, up from 78,600 in 2018. Improved longevity, higher living costs and delayed receipt of State pension mean that several generations can be found working alongside one another. With the majority of employees believing that they will have to work longer than ever before now is the time for employers to act and prepare for a more age-diverse workplace.

The research for our Report included a survey of 1,000 respondents to gauge how Irish business is preparing to cope with an ageing workforce. In this Report you will find an overview of:

- the current legal position in Ireland
- key survey findings
- best practice tips and guidance
- what employers are doing to promote age diversity in their workplace
- the position on retirement ages in other jurisdictions

We hope you find this Report interesting and informative and we welcome your feedback.



Catherine O'Flynn

Head of Employment & Benefits
+ 353 1 639 5136
catherine.oflynn@williamfry.com



Alicia Compton

Partner, Employment & Benefits
+ 353 1 639 5376
alicia.compton@williamfry.com

Legal Position in Ireland

Generally, the Employment Equality Acts 1998 to 2015 prohibit age discrimination in the workplace.

Whilst setting a mandatory retirement age is permitted under the Irish Employment Equality Acts, the retirement age must be **objectively justifiable**. With no statutory retirement age in Ireland, mandatory retirement is enforced through the contract of employment.

Examples of accepted objective justification include succession planning, health and safety issues and intergenerational fairness

According to the 2018 Workplace Relations Commission (**WRC**) Annual Report, there were 1449 equality complaints made to the WRC in 2018. 49% of these complaints alleged age discrimination.

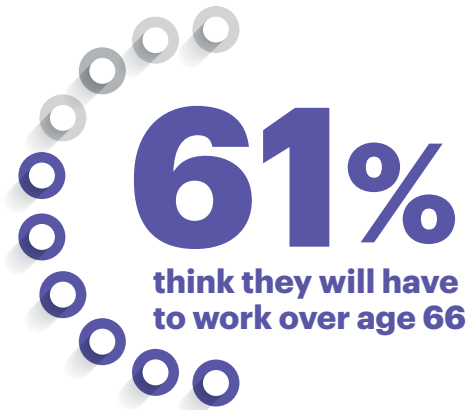
These figures show a significant increase in age related disputes at the WRC compared to 2017 when discrimination on the ground of age was alleged in only 24% of equality claims.

Our Survey Results

Our survey results (shown overleaf) suggest that the mindset amongst the Irish workforce is changing when it comes to career longevity and anticipated retirement ages. 61% of those surveyed believe that they will have to work beyond the age of 66. 68% of respondents believe there is no upper age limit for customer facing jobs. Conversely, only 32% of these surveyed would actually like to work beyond the age of 66, while 61% of respondents believe that older workers are inhibited by technological change. These figures, when considered in conjunction with the age discrimination claims statistics in the 2018 WRC Annual Report, suggest mixed attitudes towards the subject of age in the workplace.



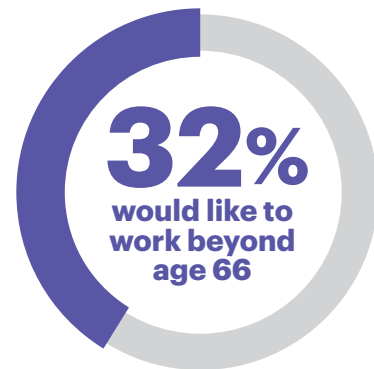
Key Survey Findings



47% of over 55 year olds

63% of 35 - 54 year olds

65% of 18 - 34 year olds



41%
of over 55 year olds

28%
of 35-54 year olds

33%
of 18-34 year olds



61%
believe that older workers are inhibited by technological change

Key Survey Findings



state current job has a retirement age



53% females state job has a retirement age



44% males state job has a retirement age



68%

believe there is no upper age limit for customer facing jobs



of those over 55 believe there is no such limit



58%

of 19 - 34 year olds believe it is difficult for younger employees to manage older colleagues

46% of those over 55 agree





Recent Irish Case Law

The majority of age-related claims against employers in Ireland have arisen out of complaints concerning recruitment, promotion and retirement. Recent case law suggests that these areas are likely to remain the most problematic in the workplace.

Recruitment

In **James Peter Maloney v Ability West (2019)**, a WRC adjudication officer found that the respondent had discriminated against 65 year old Mr Maloney during the recruitment process. Mr Maloney was offered the position of part-time minibus driver. The Company's Assistant HR Director then contacted Mr Maloney to say that having realised his age, the offer of employment was being withdrawn as the company operated a policy of mandatory retirement at age 65. A fixed term position was later offered to Mr Maloney. However, the adjudication officer was satisfied that the offer of a fixed term contract was made after the act of discrimination took place and did not negate the discrimination. In determining that Mr Maloney's complaint was well-founded, the adjudication officer made an award of €2,500 in his favour.

In **Miley v Tennis Ireland (2017)**, a WRC adjudication officer found that Tennis Ireland had discriminated against Mr Miley on the grounds of age, following what Mr Miley alleged was a flawed recruitment process that lacked transparency and failed to give due consideration to his 24 years of experience in sports management. The adjudication officer noted that the successful candidate was "significantly less qualified" than Mr Miley and this, taken together with a 14 year age difference between the two, established a case of age discrimination. Mr Miley was awarded €6,500 in compensation.

Promotion

In **Cleary v UCD (2018)**, the adjudication officer found in a claim brought under the Employment Equality Acts that University College Dublin had discriminated against a lecturer, Dr Cleary, for age reasons and ordered that Dr Cleary be promoted to senior lecturer and paid retrospectively. Dr Cleary was also awarded €30,000 in compensation. The decision noted that *none of the four candidates in the 60-65 age group was promoted.*

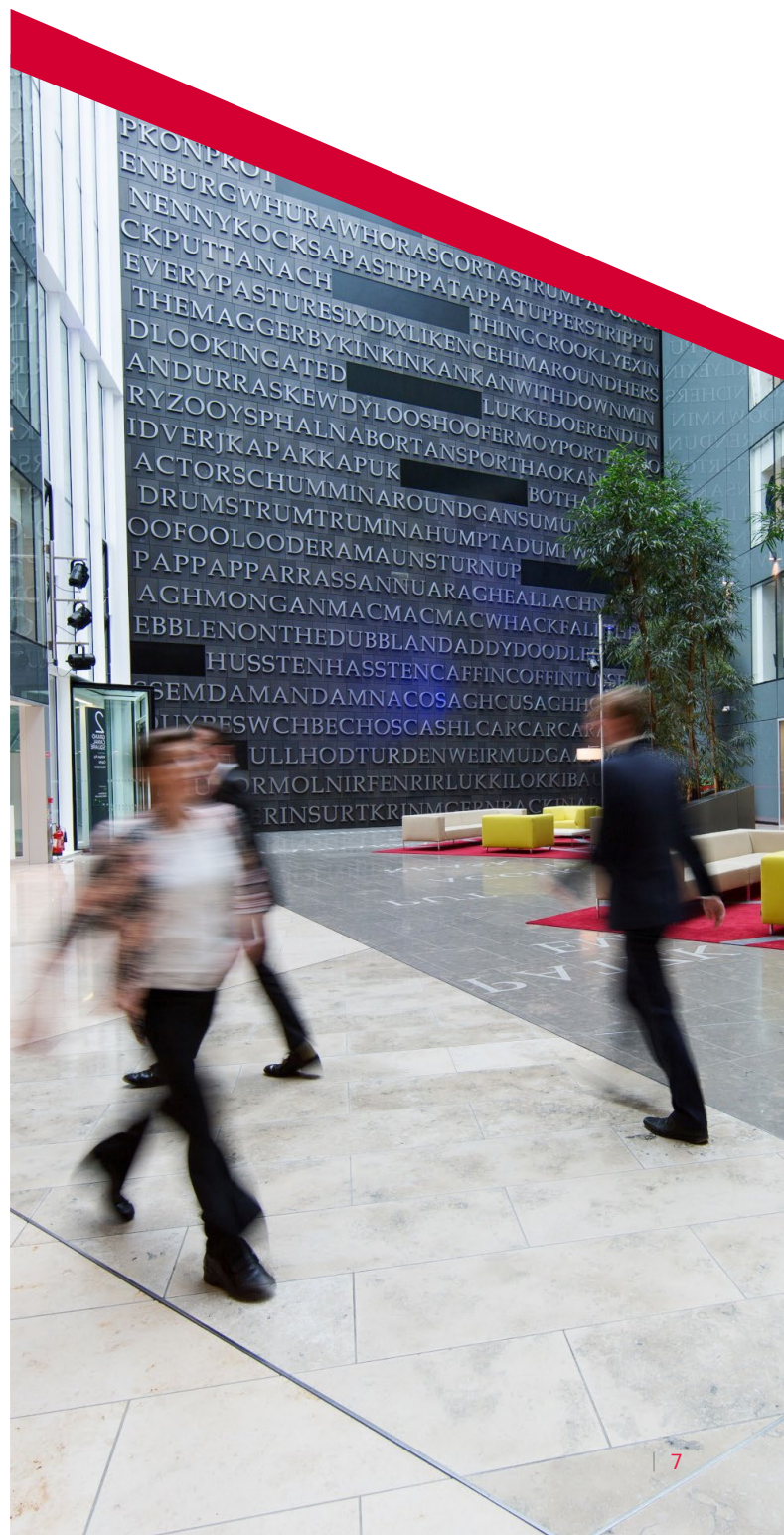
In **A Lecturer v A University (2018)**, where a candidate 15 years younger than the complainant (aged 55) was promoted, the adjudication officer questioned the transparency of the evaluation process and the absence of an explanation for the ranking process. The adjudication officer noted the proximity of the complainant's qualifications and experience to the substance of the role in contrast to that of the successful candidate whose experience was more remote. In finding that the university discriminated against the complainant on the age ground, the adjudication officer ordered the university to pay €35,000 to the complainant.

Retirement

In **Cox v RTÉ (2018)**, the adjudication officer decided that Ms Cox had been discriminated against on the basis of her age when she was required to retire at age 65. Ms Cox was awarded €50,000 and reinstated in her position. The adjudication officer found that there was no reference to a compulsory retirement age of 65 years in either Ms Cox's contract of employment or in the RTÉ staff manual. The adjudication officer stated that RTÉ had failed to objectively justify the termination of Ms Cox's employment at 65 years of age.

In **Louth County Council v Mary Clarke (2019)**, Louth County Council appealed a decision of the WRC where the adjudication officer held that a complaint on the age ground was well founded. The Labour Court found that the employer had failed to set out grounds that objectively justified the selection of the retirement age in question, ultimately upholding the WRC decision and awarding the complainant €20,000 in compensation.

In March 2019, a UK Employment Tribunal found that the dismissal of an 88-year-old NHS medical secretary was unfair and 'tainted by discrimination' following unfavourable treatment during an investigation process, capability hearing and decision to dismiss based on alleged grounds of capability.



Code of Practice on Longer Working Hours

The Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017 gives guidance for employers on how to best achieve good practice around longer working in each workplace. The Code recommends that employers consider employee requests to remain at work beyond the retirement age set by the employer and includes a sample procedure for dealing with requests.

The Code provides that where an employee wishes to work beyond retirement age, that employee should make the request at least three months before the contracted retirement date. An employer's decision should be made on fair and objective grounds and communicated to the employee as early as possible. Should the decision be to offer a fixed-term contract post-retirement age, the period should be specified, setting out the timeframe and the justification for the fixed period. Where an employer refuses the request, a meeting should be held to explain the grounds for refusal and the employee should be permitted to appeal the decision.

Employee obligations are also highlighted in the Code. Before requesting to work beyond retirement age, an employee should consider whether he/she is confident that he/she can continue to perform the role to the required standard. Employees should also be open to discussion around retirement where there is no retirement date set in the employment contract.

The Guidelines on Retirement and Fixed-Term Contracts published by the Irish Human Rights and Equality Commission, complement the Code and summarise the law on mandatory retirement and fixed term contracts.

Offering a fixed term contract to a person over the compulsory retirement age will 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 that aim are appropriate and necessary.



Best Practice

Recruitment and promotion processes are particularly prone to age bias, whether conscious or unconscious. To avoid this employers should:

- **Ensure** that recruitment material is age neutral and non-discriminatory.
- **Provide** anti bias training to internal recruiters and decision makers.
- **Aim for** diversity amongst recruitment and decision makers.
- **Use** objective assessment criteria when recruiting or promoting.
- **Never** base a decision to hire, not hire or promote on a candidate's age (or any other discriminatory ground).
- **Keep** records of job interviews and promotion assessments.
- **Specify** the retirement age in operation where a retirement age is required.
- **Apply** a set retirement age consistently.
- **Implement** a written policy on retirement age. Cross reference content with the obligations set out in the Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017.
- **Communicate** the retirement policy to employees.

What are Employers Doing?

Many employers have developed age-diverse policies and initiatives, such as:

- **Introducing return to work programmes** for older workers looking to re-enter the workforce.
- **Implementing “soft landing” programmes** that allow workers to reduce hours gradually up to retirement.
- **Offering flexible working options**, including remote-working, part-time and flexi-time roles.
- **Looking to Artificial Intelligence** and introducing virtual workspaces and online collaboration spaces.
- **Removing upper age limits** on apprenticeships, intern and graduate programmes.
- **Adapting the workplace physically** to allow workers to work longer.
- **Implementing continuous learning** for workers at all career levels.
- **Investing** in occupational health and assistive technologies.
- **Raising or removing** the age of retirement.
- **Aligning retirement age** with the State pension age.
- **Encouraging knowledge sharing** programmes, to minimise the loss of client and business know-how when employees retire.
- **Rolling out retirement transition programmes** to help employees plan and prepare for retirement.

Around the World*



UK

Mandatory retirement: No**

Average retirement age: Male - 65
Female - 65.6

Contractual retirement age permitted if objectively justified



Japan

Mandatory retirement: Yes

Mandatory retirement age: Male - 60
Female - 60



France

Mandatory retirement: Yes

Current retirement age: Male - 62
Female - 62



China

Mandatory retirement: Yes

Mandatory retirement age: Male - 60
Female - 55 for government workers;
50 for non-government workers



Sweden

Mandatory retirement: No**

Average retirement age: Male - 65
Female - 65

Contractual retirement age permitted if objectively justified.



Australia

Mandatory retirement: No**

Average retirement age: Male - 57
Female - 65.5

Contractual retirement age permitted if objectively justified



India

Mandatory retirement: Yes

Mandatory retirement age: Private workers - 58
Government workers - 60



USA

Mandatory retirement: No**

Average retirement age: Male - 66
Female - 66

Contractual retirement age permitted if objectively justified

* Information collated from verified sources.

** Save in limited exceptions.

Key Contacts



Catherine O'Flynn

Partner

Head of Employment & Benefits

+353 (1) 639 5136

catherine.oflynn@williamfry.com



Alicia Compton

Partner

Employment & Benefits

+353 (1) 639 5376

alicia.compton@williamfry.com



Jeffrey Greene

Partner

Employment & Benefits

+353 (1) 639 5043

jeffrey.greene@williamfry.com



Louise Harrison

Partner

Employment & Benefits

+353 (1) 489 6580

louise.harrison@williamfry.com



Ian Devlin

Partner

Head of Pensions

+353 (1) 489 6611

ian.devlin@williamfry.com



Michael Wolfe

Partner

Pensions

+353 (1) 639 5204

michael.wolfe@williamfry.com



Boyce Shubotham

Consultant

Employment & Benefits

+353 (1) 639 5362

boyce.shubotham@williamfry.com



Maura Roe

Consultant

Employment & Benefits

+353 (1) 639 5246

maura.roe@williamfry.com



Ciara McLoughlin

Senior Associate

Employment & Pensions

+353 (1) 489 6611

ciara.mcloughlin@williamfry.com



Nuala Clayton

Senior Associate

Employment & Benefits

+353 (1) 489 6648

nuala.clayton@williamfry.com



Aoife Gallagher-Watson

Senior Associate

Employment & Benefits

+353 (1) 639 5358

aoife.gallagher-watson@williamfry.com



Ben Conway

Senior Associate

Employment & Pensions

+353 (1) 639 5084

ben.conway@williamfry.com

williamfry.com

Dublin

2 Grand Canal Square
Dublin 2, D02 A342
Ireland
T: +353 1 639 5000
info@williamfry.com

Cork

Phoenix House,
Monahan Road,
Cork, T12 H1XY, Ireland
T: +353 21 237 60100
E: info@williamfry.com

London

17th Floor
110 Bishopsgate
London, EC2N 4AY, UK
T: +44 20 7571 0495
london@williamfry.com

New York

100 Park Avenue
Suite 1600, New York
NY, 10017, USA
T: +1 212 572 4850
newyork@williamfry.com

San Francisco

535 Mission Street
14th Floor, San Francisco
CA 94105, USA
T: +1 650 255 0212
sanfrancisco@williamfry.com

Silicon Valley

800 W. El Camino Real
Suite 180, Mountain View
California, CA 94040, USA
T: +1 650 947 9987
mountainview@williamfry.com