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Employment Law Group and Pensions Group

Compulsory Retirement - a bygone concept?

In January 2014 the State pension age will increase from age 65 to age 66. The State pension age will thereafter increase to 67 years from 2021 and to 68 years in 2028. It is very likely that the increase in the State pension age from 65 to 66 in 2014 will result in requests from employees to work beyond age 65, which for the vast majority of employers, has traditionally been employees' normal retirement age. In this update, we look at the current state of the law in the area of compulsory retirement and the very real issues, from an employment and pensions perspective, that will arise when the changes in the State pension age take effect.

Retirement at 65?

Currently, there is no general compulsory retirement age in Ireland. For those working in the public sector, certain statutory retirement ages may apply. For all other employees, the Employment Equality Acts 1998 to 2011 (the “Employment Equality Acts”) afford employers a broad discretion in fixing compulsory retirement ages. Compulsory retirement ages typically exist as an express term of an employee's contract of employment. However, they can also arise as an implied term and/or by custom and practice. It is important to note that an employee's contractual retirement age may differ to the retirement age in the pension scheme of which he/she is member. In order to defend a compulsory retirement age discrimination claim, an employer must establish that a normal retirement age does in fact exist within its organisation and that the employee was aware or ought to have been aware of its existence.

Historic Irish position

Up until relatively recently, the accepted legal position in Ireland was that if an employee’s contract of employment contained an express retirement age clause, the employer could compulsorily retire the employee on attaining the specified retirement age. If the employee subsequently brought a claim of age discrimination, the employer could safely rely on Section 34(4) of the Employment Equality Acts as an absolute defence to such a claim. Section 34(4) provides as follows:

This document contains a general summary of developments and is neither a complete nor definitive statement of the law. Specific legal advice should be obtained before taking action.
“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”

However, as is highlighted below, recent case law from the Equality Tribunal makes clear that employers can no longer rely on the Section 34(4) defence alone, and must now be able to objectively justify compulsory retirement. Failure to do so will inevitably result in litigation exposure for employers.

It remains the case that employers who effect compulsory retirements are safe from liability for unfair dismissals claims, as the Unfair Dismissals Acts 1977 to 2007 (the “Unfair Dismissals Acts”) specifically provide that an employee who has reached the “normal retiring age for employees of the same employer or in similar employment” is precluded from bringing a claim for unfair dismissal under the Unfair Dismissals Acts. The onus in such cases is on employers to establish the normal retiring age.

**European position**

*Council Directive 2000/78/EC* (the “Directive”) was implemented in Ireland by the Equality Act 2004. On its enactment, concerns were raised that Section 34(4), a pre-existing statutory provision, could not be reconciled with the provisions in the Directive on normal retirement ages, as no reference was contained therein to any requirement to objectively justify a normal retirement age. Article 6 of the Directive states:

> “Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if... they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary”

In the past few years, there has been a steady stream of case law emanating from the Court of Justice of the European Union (“CJEU”) in which the issue of compulsory retirements throughout Member States of the EU have been vigorously contested. In *Palacios de la Villa –v- Cortefiel Servicies SA (Case C411/05)*, which concerned an employee’s challenge to his compulsory retirement on attaining age 65 in accordance with Spanish law, the CJEU held that compulsory retirement clauses set by law were discriminatory on grounds of age and could only be objectively justified in certain circumstances. In that case, the Court accepted that a legitimate aim of compulsory retirement at 65 was to create opportunities in the labour market for persons seeking employment. More recently, in *Fuchs and another v Land Hessen (C-160/10)*, it was held that a retirement age of 65 was not discriminatory where the German law imposing such a retirement age had the aim of establishing a balanced age structure, encouraging recruitment of young people and preventing disputes about the performance of older people.

**Current Irish position**

Somewhat surprisingly the apparent conflict between Section 34(4) of the Employment Equality Acts and Article 6 of the Directive was not considered by the Irish Courts until 2008. In his judgment in *Donnellan v Minister for Justice, Equality and Law Reform [2008] IIEHC 467*, Mr Justice McKechnie held that whilst national Governments could impose a retirement age by means of domestic legislation, that legislation must be “compatible and conformable” with the Directive. Mr Justice McKechnie went on to hold that the compulsory retirement age of Assistant Garda Commissioners of age 60, imposed by statutory instrument, was objectively justified by reference to a legitimate aim and the means used were appropriate and reasonable. The Court accepted the State’s argument that this retirement age was necessary in order to ensure “motivation and dynamism through the increased prospect of promotion” and the Court felt that these aims were “rational and legitimate”.

In the summer of 2011 the Equality Tribunal determined that private sector employers are similarly required to objectively justify the imposition of a normal retirement age. In *Saunders –v- CHC Ireland Limited (DEC- E2011-142)*, Mr Saunders, a helicopter winch man, sought to challenge his forced retirement on attaining age 55 on the basis that his forced retirement was discriminatory and could not be objectively justified. The Equality Officer referred to the Donnellan judgment and held that he was satisfied Mr Justice McKechnie’s comments were authority for the proposition that he could construe Section 34(4) in light of Article 6(1) of the Directive. He therefore concluded it fell to the respondent to satisfy him that retiring the complainant at age 55 was objectively and reasonably justified by a legitimate aim, and that the means of achieving that aim were appropriate and necessary. Ultimately the Equality Officer accepted that respondent’s objective grounds for setting a retirement age of 55, which included the need to protect the health and safety of the people who require rescue by winch men, and further accepted that the setting of the retirement age at 55, was appropriate and necessary in the circumstances.

The proposition that public and private sector employers must be able to objectively justify the imposition of normal retirement ages has been restated in a number of recent Equality Tribunal decisions. In *Doyle –v- ESB International (DEC-E2012-086)*, the Equality Tribunal dismissed a claim brought by a former employee of ESB International, who
argued that he was discriminated against on the grounds of age when he was forced to retire at the age of 65. In finding that the normal retirement age of 65 was objectively justified, the Equality Officer stated as follows:

“I am therefore satisfied that any exemption allowing for direct discrimination on the grounds of age must be objectively and reasonably justified by a legitimate aim and that the means of achieving such an aim must be appropriate and necessary...it is clear that such a justification test cannot be directed at the circumstances of the individual complainant...but must be based on comprehensive policy grounds”

In *Harte v Q Park Ireland Limited* (DEC-E2012-119), the Equality Tribunal concluded that the respondent had failed to establish that the complainant's retirement at age 65 “served any legitimate aim or purpose”.

**Allow employees to work beyond age 65?**

If an employer receives a request from an employee to work beyond age 65 or indeed, if an employee challenges an employer's entitlement to retire him/her at age 65, the question arises as to what an employer should do.

If an employer is amenable to allowing employees to remain on beyond their contractual normal retirement age, they can, with the employee's consent, postpone the employee's normal retirement date or retire the employee from permanent employment on attaining the normal retirement age and thereafter, employ the employee on a fixed term basis. The Employment Equality Acts specifically provide that it does not constitute age discrimination to offer an employee over the compulsory retirement age a fixed term contract.

The primary disadvantages of permitting employees to work beyond normal retirement age are that it dilutes the legitimacy of the employer's normal retirement age and creates precedent for other employees who may wish to challenge their compulsory retirement.

From a pensions perspective, consideration will have to be given to the normal retirement date under the pension scheme of which the employee is a member and whether late retirement is permitted. The fact that the State pension age is to increase in 2014 will also have to be borne in mind by the employer.

**Move normal retirement date?**

A more radical approach of dealing with the change in State pension age would be for employers to align their normal retirement age with the State pension age. For employers whose normal retirement age is currently 65, this would necessitate changing their normal retirement age to age 66 from January 2014. Any such change may require employee consent and may have cost implications for employers.

From a pensions perspective, aligning the normal retirement age under a pension scheme will require a scheme amendment, particularly in the case of Defined Benefit pensions that are integrated with the State pension age. It would be prudent for employers to obtain expert actuarial and legal advice well in advance of seeking to effect any such change. Furthermore, pushing back the normal retirement age could be considered as amending an accrued pension benefit and given that most schemes are set up under trust, trustee consent is likely to be required.

**Conclusion**

It is evident from the recent case law that compulsory retirements are not prohibited; rather, if they are to be effected, employers must be able to justify the retirement on a legitimate and objective basis. Precisely what constitutes such a basis will be teased out in coming years before the Equality Tribunal and Labour Court or their successors. It is quite possible that greater clarity will be brought to this area even sooner with the enactment of new legislation. In March 2012 a private members bill was published, the *Employment Equality (Amendment) (No 2) Bill 2012*, which if enacted, would have rendered unlawful any compulsory retirements at or over age 65 unless they were objectively justified. While the Government has not supported the Bill on the grounds that it is “premature” pending a report to be furnished to Government from an interdepartmental Working and Retirement Group convened by the Minister for Social Protection, it is quite likely that legislative change will occur in the near future to rectify the present disparity between Section 34(4) of the Employment Equality Acts and Article 6 of the Directive.

In the meantime, and given that the change in the State pension age is happening as soon as January 2014, employers need to start thinking about how they will address this live issue, start planning for future retirements and if employees are to be permitted to remain on in employment beyond what otherwise would be their normal retirement age, consider the employment and pensions implications of such a decision.
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