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Industry Information

## Ireland Update: Time to Justify Retirement Age

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Many Irish employers include a mandatory retirement age in their contracts of employment or employee handbooks.

The Employment Equality Acts 1998-2021 (“Equality Acts”) prohibit discrimination in employment on a number of grounds, including age. However, there is an exception that allows employers to impose a mandatory retirement age on employees, provided the retirement age can be objectively justified.

The retirement age must be objectively and reasonably justified by reference to a legitimate aim and the means of achieving that aim (compulsory retirement at the appointed age) must be appropriate and necessary. Health and safety concerns in safety critical occupations, intergenerational fairness, the preservation of personal and professional dignity by avoiding capability issues with older employees, succession planning, and the creation of a balanced age structure in the workforce have all been accepted by the Workplace Relations Commission (“WRC”) as legitimate aims.

However, mandatory retirement ages have become increasingly difficult to justify and enforce in recent years. A recent Adjudication Officer (“AO”) decision affirms this position, resulting in an award of €85,000 compensation to the aggrieved former employee.

### ***A Senior Staff Nurse v A Nursing Home (In Liquidation)***

The employer had a mandatory retirement age of 65. The claimant was notified in advance of her 65th birthday that her nursing role would be compulsorily retired in line with the employer’s retirement policy. She notified her employer that she did not wish to retire and it was agreed that she would be employed on a fixed term contract for a one year period entitled “Post Retirement Fixed Term Contract of Employment”. No objective justification was provided by the employer, either verbally or in writing, for the mandatory retirement age or the issuance of a fixed term contract.

Towards the end of the fixed term contract, the claimant discussed continuing her employment beyond its expiry and she was invited to apply in writing to remain in employment. Having done so, she did not receive a response to her request. She followed up and a brief meeting was arranged during which the claimant was informed it would not be possible for her to remain in employment and that there was a plan to recruit non-EEA nurses to fill such positions. No objective justification was provided at this stage either.

One week before the expiry of the fixed term contract, the claimant again wrote to her employer requesting that she be allowed to continue her employment. The claimant received only a one line reply to her final request, which confirmed her last day of employment.

The employer company was wound up on the grounds of insolvency eleven months after the claimant’s retirement. Some staff were redeployed to other locations and other employees received statutory redundancy payments and ex gratia payments in the region of €3,000.

By the time of the hearing, the employer company was in liquidation and the facts of the claim were not disputed.

The AO held that, as the employer failed to provide an objective justification at the time of issuing the post retirement fixed term contract, the fixed term contract was no defence to the claim of discrimination on the basis of age.



The AO also had regard to the Code of Practice on Longer Working (“Code”) which sets out the procedure which should be followed where an employee requests to continue working beyond the employer’s mandatory retirement age. The AO noted that the employer had in no way adhered to the Code even though the claimant had followed its procedure. The AO also noted that there was a continuing role available for the claimant. This was evidenced by the recruitment of non-EEA nurses to fill her position. It was also noted that the claimant was fit, capable and willing to fulfil the role. In the circumstances, the AO found that the claimant had been discriminated against on the basis of age and awarded her compensation of €85,000. The AO emphasised their intention for this award to be a deterrent to future employers.

Importantly, the AO stated that section 34(4) of the Equality Acts (which provides that setting ages for retirement shall not constitute age discrimination) requires an employer to demonstrate that fixing a retirement age is not only objectively and reasonably justified by a legitimate aim but also that retirement at that age is an appropriate and necessary means of achieving that aim. This high standard of proof is likely to make it difficult for many employers to justify mandatory retirement ages.

### ***Pat O’Donnell & Company v Denis O’Keeffe***

However, mandatory retirement ages can be lawful in certain circumstances.

A recent Labour Court decision found in favour of the employer’s mandatory retirement age for service engineers. The employer provided evidence that the role was a safety critical one. In addition, the alternative to a mandatory retirement age would be to require employees to undergo medical examinations which could result in their employment coming to an abrupt end and could undermine their dignity at work. The employer also provided evidence that a mandatory retirement age was necessary for succession planning as it takes six years to train an individual from apprenticeship to the required skillset of a service engineer and that their recruitment schedule aligned with the retirement dates of exiting employees.

In these circumstances, the Labour Court found that the employer had a legitimate aim to ensure a through flow of appropriately qualified service engineers and to ensure that employees are not required to continue working until they are unable to perform the duties.

Another recent decision also featured the health and safety critical nature of the role as a defence, albeit unsuccessfully. In *Anthony Kenny v Bord na Mona*, the employer was found to have discriminated against its former employee by refusing the claimant’s request to continue working past the employer’s mandatory retirement age. Crucially in this case, the reasons provided by the employer to decline the claimant’s request were held not to be legitimate aims that were objectively justifiable. The reasons provided by the employer at the relevant time related only to their own custom and practice, contracts of employment, and pension rules. The employer had never maintained that health and safety was a reason for retirement until after it issued a decision following an appeal by the claimant. The AO was also critical of the employer’s failure to follow the procedure set out in the Code before reaching its decision to terminate by reason of retirement.

Both of these cases demonstrate that although mandatory retirement ages are becoming more difficult for employers to defend, any claims arising from such terminations will turn on their own facts.

### **Code of Practice on Longer Working**

The Code provides helpful guidance on how employers should approach requests by employees to work beyond their contractual retirement age.

Such requests should be considered carefully, taking into account matters such as the duration of the extension being sought, whether flexible working options or alternative roles would be suitable, and whether there are any pension or contractual implications for the individual. Where such requests are made, the employer should carefully document the reasons for granting or refusing any such request. The employer should assess requests from comparable employees based on the same objective criteria to ensure that a fair and consistent approach is taken. If the employer decides to refuse a request, the objective grounds for this decision should be set out in writing and communicated to the employee in a meeting. The employee should be informed of their right to appeal.

The Code provides that requests to work beyond the retirement age can be facilitated by means of a fixed-term contract, as permitted by the Equality Acts, provided it can be objectively justified by a legitimate aim and that the means of achieving that aim are appropriate and necessary. However, the AO’s decision in *A Senior Staff Nurse v A Nursing Home (In Liquidation)* demonstrates that accepting an employee’s request to work beyond the retirement age by providing a fixed term contract is no defence to an age discrimination claim if there is no objective justification for the use of a retirement age and/or if the retirement age is not an appropriate and necessary means of achieving that aim in the first place.



If an employer is in a position to offer a fixed-term or specified-purpose contract to an employee who wishes to work beyond the retirement age, they should ensure that the duration or purpose of the contract is specified, that the objective justification for the fixed-term or specified-purpose contract is set out in the contract (ie to facilitate the employee's request to work beyond the retirement age and the basis for the length of the fixed term or purpose, such as the completion of a particular project or to facilitate the employee's request to continue work until the State pension age or other determined date).

## Pensions Commission's Recommendations

Traditionally, employers specified a retirement age of 65, as this was the State pension age for many years. However, the State pension age was increased to 66 in 2014. It was intended to further increase the State pension age to 67 from 2021. However, legislation was enacted in 2020 that suspended this increase. At that time, the Government also established a Commission on Pensions ("Pensions Commission") to review current State pension arrangements and submit recommendations to government.

The Pensions Commission's report has recommended that legislation should be introduced to prohibit employers setting a retirement age below the State pension age. It is proposed that this would not affect an employee's ability to retire at an earlier age if they so choose.

It is also recommended that, in strictly limited cases where an earlier retirement age continues to apply as a result of legislation, collective agreements or individual employment circumstances, employers should be required to notify employees that a retirement age below the State Pension age applies, and to confirm the objective justification it is relying upon.

The Pensions Commission also recommends that the State pension age should increase gradually by three months per year from 2028 to reach 67 in 2031 and that further increases should be implemented every second year after 2031, with the State pension age eventually reaching 68 in 2039.

We await to see whether these recommendations are implemented.

## Key Takeaways for Employers

- » The WRC continues to award significant financial compensation to claimants under the Equality Acts in mandatory retirement cases. (See our previous advisory discussing the *Roper and Cox* case [here](#)).
- » Mandatory retirement ages have been successfully defended by employers on health and safety grounds where their employees have been in safety critical roles.
- » Employers who include a mandatory retirement age in their contracts of employment or employee handbook should follow the procedure set on in the Code by engaging and consulting with employees about their potential retirement at least twelve months before they reach the mandatory retirement age.
- » If an employee requests to work beyond the mandatory retirement age, such request should be considered and the procedure in the Code followed before making any decision. It may be possible to agree alternative arrangements with the employee.
- » Considering the standard of proof required to objectively justify a mandatory retirement age, legal advice should be sought before attempting to enforce compulsory retirement.
- » The Code recognises that good workforce planning is a critical element in any workplace and that maintaining appropriate employee numbers by planning recruitment and departures is a central element. The Code states that, where no contractual retirement date exists, it is reasonable as part of workforce planning for an employer to raise and discuss with employees their retirement intentions.

## Key Contacts

Please contact the below, or your usual Walkers contacts if you would like further advice or information on this topic.



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