The changing state age for pension, contractual retirement ages and the impact on employers

Derek McKay gives an overview on the impact the changing State Age for pension has for employers.

Over the last number of years we have witnessed an increase in the number of cases relating to the enforcement of retirement ages. There are a number of factors contributing to this increase, one of which is that employees simply want to remain in the workplace and delay the date of retirement. Another is that organisations are attempting to use employees retiring as a method of cost cutting in the organisation, and are not replacing employees who have retired.

The State Pension age in Ireland is increasing:
- the 1st of January 2014 will see the State Pension age increase from 65 to 66
- from the 1st of January 2021, the State Pension age will increase to 67 years of age
- from the 1st January 2028, the State Pension age will increase to 68.

In Ireland there is no statutory mandatory age for retirement, with the exception of certain Public Sector occupations. As a result, organisations can set their own retirement age. The Employment Equality Acts 1998-2012 prohibit any unfavourable treatment by an employer based on any of the nine grounds, which includes age. However, Section 34(4) of the Act explicitly provides that fixing a required retirement age does not constitute age discrimination – yet the Employment Equality Acts are inconsistent with the European Council Directive 2000/78/EC which requires any differences in treatment on grounds of age to be objectively justified.

Successful Enforcement of Retirement Age

In Saunders v CHC Ireland Limited, the Complainant was a Winchman with the Respondent organisation; he signed a contract at the beginning of employment which provided that he retire on attainment of age 55. The Complainant contended that this constituted less favourable treatment of him on the grounds of age as other employees were permitted to work beyond 55. The Complainant accepted that the role was a physically demanding one. The Respondent argued that application of a mandatory retirement age is reasonable and objectively justified to protect the Health & Safety of Winchmen/Winch Operators and to ensure continued capacity of the Search and Rescue service. The Respondent submitted that high physical capacity is a genuine requirement for the role. The Equality Officer found that the operation of a mandatory retirement age of 55 was an appropriate necessary aim, and the possession of a high physical capacity is a genuine and determining occupational requirement. It was found that the Complainant was not discriminated against on the grounds of age.

In the case of Doyle v ESB International, the Complainant argued he was discriminated against on grounds of age when forced to retire at 65 and that his retirement was in breach of the Equality Acts and Council Directive 2000/78/EC. The Respondent
argued that retirement age of 65 “is a clear term and condition of the contract of employment and a long-standing custom and practice”, and that it must be able to provide promotional opportunities and career pathways in order to retain younger employees. The Tribunal was satisfied that the organisation had a “well established practice of compulsorily retiring employees” when they reach 65. The Equality Officer stated, “While I do note that such ‘genuine occupational requirement’ does not apply to the Complainant… I do find that legitimate employment policy means that a Respondent is entitled to maintain a retirement age that ensures cohesion among all of its employees. Employees may threaten the cohesion and open up other areas of discrimination that may not be subject to an objective justification test.”

**Unsuccessful Enforcement of Retirement Age**

A particularly interesting case arose in Nolan v Quality Hotel Oranmore (now trading as Maldron Hotel, Galway). The Complainant was a kitchen assistant working for the Respondent for nearly 10 years. She was certified sick for 1 week in 2008 when it came to the attention of the employer that she was in fact 68. She was subsequently compulsorily retired. The Complainant contended that she was unaware that the Employer had a retirement age in place and there was no custom and practice in relation to retirement. The Respondent contended that the Complainant lied on a medical form. The Equality Officer found that on the balance of probabilities the Complainant was not trying to deceive her Employer. The Equality Officer was not provided with any evidence or documentation to show the Complainant was aware of the retirement age. The Respondent did not submit reasons as to why they do have a mandatory retirement age and did not argue on objective and reasonable justification of implementing a retirement age. The Equality Officer found that the Complainant was discriminatorily dismissed on the grounds of age and was awarded €9,000 – the equivalent of 6 months’ salary.

In Elizabeth Sweeney v Aer Lingus Teo, the Complainant was employed by the Respondent for over 45 years. In September 2007 she was advised that retirement would commence on 1st January 2008. The Complainant challenged this and stated there was nothing about retirement in her contract, and that any date ever mentioned was for pension benefits, which was separate. On the 20th of December 2007 she was informed that she had to remove herself from the workplace within 4 working days on grounds of age and she felt she had to comply. The Respondent submitted that every employee’s contract of employment has an express or implied term that the employee consent and may have cost implications for the employer. The decision to retire the Complainant had to take into account the person’s age. The Equality Officer noted that a pension entitlement does not necessitate retirement and therefore there was no legitimate aim or purpose to justify enforcing the retirement age. The Equality Officer found that a prima facie case of discrimination had been established on the age ground, and the Respondent failed to refute this. The Complainant was awarded €5,000 in relation to discrimination suffered.

**Organisational Considerations**

We can see from the aforementioned cases the fact that compulsory retirement ages must be objectively justified by reference to legitimate purpose and aims.

If an organisation is open to allowing employees remain in employment beyond their compulsory retirement date, an employee can be retired from permanent employment and employed on a Fixed Term contract basis - with the consent of the employee. The Employment Equality Acts 1998-2012 provides that it does not constitute discrimination on the grounds of age to offer an employee who has reached the compulsory retirement age a fixed term contract. The issue for organisations is that this may set precedence, and may also weaken the meaning of the compulsory retirement age.

Organisations may wish to look at the option of aligning their normal retirement age with that of the State Pension age, however this change would require employee consent and may have cost implications for the employer.

Compulsory retirements as we see from the referenced cases are not prohibited; however it is critical for organisations to be in a position to justify retirements on a legitimate and objective basis.