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The 2018 Human Resource Business Agenda – New Code of Practice on Retirement Ages

Jennifer Cashman looks at the New Code of Practice on Retirement Ages and what employers, employees and their representatives should be considering in the run-up to retirement.

Introduction

Retirement ages remained very much in the news in 2017 and it is a topic that continues to dominate the HR agenda during 2018. The Workplace Relations Commission ("WRC") has published a Code of Practice, Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017 ("the Code"), in consultation with the Irish Business and Employers Confederation (IBEC), the Irish Congress of Trade Unions (ICTU) and relevant government departments, to guide employers, employees and their representatives on best practice in the run-up to retirement in the workplace, including responding to requests to work beyond the employer's mandatory retirement age.

The Code sets the standard for dealing with mandatory retirement in the workplace and for requests to work beyond the mandatory retirement age; and should now be the starting point for all employers and Human Resource (HR) practitioners when addressing this issue on the HR business agenda. The Code is also likely to be referred to and relied upon in cases brought before the WRC and the courts under the Employment Equality legislation.

Background

In July 2017, the Citizens Assembly called for an end to mandatory retirement from the workforce and recommended that the time gap between retirement and eligibility for the State Pension should be eliminated. A recommendation to seek the introduction of some form of mandatory pension scheme to supplement the State Pension was also supported.

In late March, Taoiseach Leo Varadkar announced a roadmap for pension reform, with one of the key decisions being the introduction of auto-enrolment for workers by 2022.

The New Code of Practice

In 2016, an Interdepartmental Group on Fuller Working Lives ("the Group") reported to the then Minister for Public Expenditure and Reform, Pascal Donohoe, that retirement at the age of 65 was increasingly impractical. That Group said that workers and employers need to accept that working for longer is both necessary and desirable. One of the Group's recommendations was that the then Labour Relations Commission (LRC) issue a Code of Practice. The LRC has since become the WRC and just in advance of the Christmas break 2017, the WRC published the Code which sets out best practice over the following headings:

1. Utilising the skills and experience of older workers;

2. Objective justification for mandatory retirement;
3. Standard retirement arrangements;
4. Requests to work longer.

The Code reminds employers of the current legal position on setting mandatory retirement ages in the workplace.

Mandatory Retirement Ages and the Law

In the private sector, there is no mandatory retirement age and employers are free to choose the age at which employees must retire, subject to some conditions as outlined further below. The Employment Equality Act 1998 prohibits unfavourable treatment by an employer based on nine grounds of discrimination, and age is one of these nine grounds. However, the Act goes on to state at s.34 (4); “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.”

This means that, with the exception of certain public sector occupations, there is no set mandatory retirement age in Ireland. There was also no prohibition on employers setting a certain age at which employees must retire. While the State pension age has increased to 66, and will ultimately rise to 68 over the coming years, this does not mean that employers have an obligation to set a mandatory retirement age to match the State pension age. They are entirely separate issues from a legal perspective.

However, while these provisions of the Employment Equality Act 1998 gave employers the discretion to set retirement ages as they saw fit, it appeared to be in conflict with EU law (European Council Directive 2000/78/EC), which requires any form of discrimination based on age to be objectively justified. Regardless of the absence of this requirement in domestic legislation until quite recently, the Irish courts and tribunals have tended to follow the European approach of the CJEU due to the need to harmoniously interpret EU law and national law.

To address this gap in our domestic legislation, the Equality (Miscellaneous Provisions) Act 2015 (“the Act”) was enacted, which amended the rules on mandatory retirement and age discrimination to bring Irish law fully in line with EU law. The Act introduced the legal requirement that mandatory retirement ages must be objectively justified by the employer. The Act was signed into law on 10 December 2015 and fully commenced on 1 January 2016 and amended s.34 (4) of our existing employment equality legislation.

Arising out of this amendment, while the right of employers to fix a mandatory age of retirement still exists, it is now only permitted if: (a) it is objectively and reasonably justified by a legitimate aim, and (b) the means of achieving that aim are appropriate and necessary.

It is also noteworthy that, prior to the Act, it was not discriminatory for employers to offer fixed term contracts to employees once they reached the employer’s mandatory age of retirement, as provided for by s.6 of the Employment Equality legislation. This remains the position and fixed term contracts may still be legitimately offered to those at retirement age.

However, under s.4 of the Act, the same requirement of objective justification that now applies in the context of setting the mandatory retirement age is now also applicable to such fixed term contracts and s.6 of our Employment Equality legislation is amended accordingly. The issuing of such fixed term contracts to employees who have reached the employer’s retirement age has become more popular in recent years, perhaps due to the rising State pension age, so this legislative change is set to have quite an impact on employers.

Objective Justification

The Act (Employment Equality Acts) is silent on what is needed to satisfy requirements of objective justification to justify a retirement age. However, previous decisions of the European and Irish courts do provide some useful guidance and the Code, in turn, sets out some examples of what might constitute a legitimate aim of the employer, thereby providing the objective justification necessary for a mandatory retirement age. The examples set out in the Code are as follows:

- Intergenerational fairness (allowing younger workers to progress);
- Motivation and dynamism through the increased prospect of promotion;
- Health and Safety (generally in more safety critical occupations);
- Creation of a balanced age structure in the workforce;
- Personal and professional dignity (avoiding capability issues with older employees); or
- Succession planning.

The Retirement Process

The Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017) provides that it is good practice for an employer to notify an employee of the intention to retire him or her on the mandatory retirement date, within 6–12 months of that date. This allows for reasonable time for planning, arranging advice regarding people succession etc. The Code provides that the initial notification should be in writing and should be followed with a face-to-face meeting which should focus on addressing the following:

- Clear understanding of the retirement date and any possible issues arising;
- Exploration of measures (subject to agreement) which would support the pathway to retirement, for example flexible working, looking at alternative roles up to the date of retirement;
- Transitional arrangements in regard to the particular post; and
- Assistance around guidance and information.

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Requests to Work Longer

The Code provides that all requests from employees to work beyond their mandatory retirement age should be considered carefully and the following matters must be considered by the employer and employee in this regard:

For the employee:

- Is the employee confident that he/she can continue to perform the role to the required standard?
- Can flexible working options or alternative roles be considered?
- What is the duration of the extension being sought?
- Are there any pension implications?
- Are there contract of employment implications?

For the employer:

- Are there good grounds on which to accept or refuse the request e.g. can the retirement be justified on a legitimate and objective basis? It is important to note that the Equality (Miscellaneous Provisions) Act 2015 requires that a fixed-term contract post-retirement age must be objectively justified. Unfortunately, the Code does not provide any guidance on, or examples of, what might be acceptable objective justification for placing an employee on a fixed term contract postretirement age.
- What are the objective criteria applicable to the request? This should form the basis of any assessment of a request to work beyond retirement age to ensure an equal and consistent approach to addressing this and other future requests.
- How would the arrangements for the employee remaining on in the workforce be contractually framed (e.g. fixed term contract)?
- Could granting the request be on the basis of a more flexible working arrangement (e.g. less than full hours or an alternative role)?

Request to Work Longer Procedure

The Code sets out a procedure for engagement between an employer and an employee who has requested to work beyond his or her retirement date. This procedure should now be adopted (and adapted where necessary and/or



appropriate) by all employers and managers should be trained in this procedure in order that requests to work longer are dealt with in accordance with the Code.

1. The employee should make such a request in writing no less than three months from the intended retirement date to be followed up with a meeting between the employer and employee. This meeting gives the employee an opportunity to advance the case and allows the employer to consider it. It is important that the employee is listened to and that any decision made is on fair and objective grounds.
2. The employer's decision should be communicated to the employee as early as practical following the meeting.
3. Should the decision be to offer a fixed-term contract post-retirement age, the period should be specified, setting out the timeframe, and the legal grounds underpinning the new contract should be made clear (i.e. fixed term contract). It is good practice to include a reference that the decision is made solely having regard to the case being made by the employee and does not apply universally.
4. Where the decision is to refuse the request, the grounds for the decision should be set out and communicated in a meeting with the employee. This will help the employee to understand why the request has not been granted, and give the employee confidence that his or her case has been given serious consideration and that there are good

grounds for refusing the request. The applicant should have recourse to an appeals mechanism, for example through the normal established grievance procedures in the organisation.

5. An employee may be accompanied to a meeting by a work colleague or union representative to discuss a request to the employer to facilitate working longer and in any appeals process around same.

Conclusion

For now, employers can continue to enforce mandatory retirement ages, provided they are express or implied terms in the contract of employment and provided they can be objectively justified. Watch this space, however, as the law will continue to evolve and perhaps be amended completely over the course of the next 12 months. However, when enforcing mandatory retirement ages, and dealing with requests from employees to remain in employment beyond the mandatory retirement age, employers and HR practitioners must operate within the guidelines set out in the Code, as outlined above. This may require amendments to be made to existing policies and procedures and will require training of managers who receive such requests on a regular basis.