

Retirement and Fixed-Term Contracts

Guidelines

April 2018



Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

**First published in April 2018
by Irish Human Rights and Equality Commission
16–22 Green Street, Dublin 7, D07 CR20.**

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The Irish Human Rights and Equality Commission (IHREC) was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

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INTRODUCTION

The Irish Human Rights and Equality Commission (the 'Commission') is an independent body that accounts to the Oireachtas. It was established under the Irish Human Rights and Equality Commission Act 2014 (the '2014 Act').¹

The Commission is Ireland's national equality body for the purpose of a range of EU anti-discrimination measures,² and is Ireland's national human rights institution.³ Its work is determined by the 15 members of the Commission, including a Chief Commissioner, appointed by the President, Michael D Higgins.⁴

In 2016, the report of the Interdepartmental Working Group on Fuller Lives was published.⁵ In its report, the Working Group recommended that the Department of Justice and Equality ask the Commission to ensure that 'appropriate guidance material [be] made available for employers on the use of fixed-term contracts beyond normal retirement age'.⁶

These guidelines are being issued by the Commission in response to the recommendation made by the Working Group, and at the request of the Minister for Justice and Equality. The Commission has reserved its position with respect to the issuing of a code of practice in relation to the wider issues arising in the area of retirement and age discrimination.

These guidelines should be read in conjunction with any relevant statutory code of practice as may be enforced from time to time, including the Workplace Relations Commission's Code of Practice on Longer Working.⁷

The purpose of these guidelines is to provide guidance to legal professionals, HR professionals, trade unions, employers and others in relation to the interpretation and application of section 6(3)(c) of the Employment Equality Acts which provides –

Offering a fixed term contract to a person over the compulsory retirement age for that employment or to a particular class or description of employees

¹ The Commission was established on 1 November 2014 by virtue of the Irish Human Rights and Equality Commission Act 2014 (Establishment Day) Order 2014, SI No 450/2014. On its establishment the functions of the Human Rights Commission and the Equality Authority were transferred to the Irish Human Rights and Equality Commission.

² Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 13(2), Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 12(2)(a), Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 20(2)(a), Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, Article 11(2)(a), Directive 2014/54/EU of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement of workers, Article 4(2)(a).

³ The Commission has been granted 'A' status by the then International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, indicating full compliance with the Principles Relating to the Status of National Institutions ('the Paris Principles', A/RES/48/134).

⁴ Further details in relation to the membership of the Commission are available at: www.ihrec.ie/about/the-commission.html.

⁵ The Interdepartmental Working Group on Fuller Lives was established under the chairmanship of the Department of Public Expenditure and Reform in January 2016. The terms of reference of the Working Group included the making of 'recommendations to Government on a policy framework aimed at supporting fuller working lives'.

⁶ Report of the Interdepartmental Group on Fuller Working Lives, (August 2016), at p.18.

⁷ Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017, SI No 600/2017.

in that employment shall not be taken as constituting discrimination on the age ground if –

- (i) it is objectively and reasonably justified by a legitimate aim, and
- (ii) the means of achieving that aim are appropriate and necessary.⁸

In these guidelines, the Commission seeks to situate the practical issues arising from this provision within the wider framework of anti-discrimination law, and to provide guidance as to how these issues may be addressed by employers and employees.

In doing so, the guidelines consider separate but closely related provisions of the Employment Equality Acts in respect of the fixing of retirement ages,⁹ and the effecting of dismissals on the grounds that an employee has reached the normal retirement age for his or her employment,¹⁰ both of which provisions are subject to the requirement of objective justification.

The first section of these guidelines summarises the legal framework relating to age discrimination, retirement, and fixed term contracts, while the second provides guidance as to the interpretation and application of the specific exemption provided for under the Employment Equality Acts in respect of the offering of fixed term contracts to persons who are over compulsory retirement age.

It should be stressed that these guidelines do not include within their scope a variety of issues otherwise arising under the Employment Equality Acts in relation to retirement.¹¹

These guidelines seek to reflect the law as it stood on December 31 2017.

⁸ As substituted by section 4 of the Equality (Miscellaneous Provisions) Act 2015. This provision commenced on 1 January 2016 by virtue of the Equality (Miscellaneous Provisions) Act 2015 (Commencement) Order 2015, SI No 610/2015.

⁹ Employment Equality Acts, section 34(4).

¹⁰ Unfair Dismissals Act 1977, section 2(1)(b) as amended by the Equality Act 2004, section 4(c). Discrimination in respect of dismissals is prohibited by the Employment Equality Acts, section 8(6)(c).

¹¹ Such as the setting of maximum ages for recruitment which take into account the need for there to be a reasonable period of time prior to retirement age during which the employee will be effective in that job (section 34(5)), the provision of different rates of severance payment which are based on the period between the age of an employee on his or her employment and his or her compulsory retirement age (section 34(3)(d)), and the fixing of ages for admission to occupational benefits schemes or the use of age criteria in actuarial calculations in the context of such a scheme (section 34(3)(a)).

LEGAL FRAMEWORK

Introduction

The fundamental right to equality before the law and protection against discrimination on the grounds of age is recognised under the Constitution,¹² as well as in a number of international¹³ and regional¹⁴ human rights instruments.

The principle of non-discrimination on the grounds of age has been recognised as a general principle of EU law, flowing from the constitutional traditions common to the Member States.¹⁵

The general principle of equality and non-discrimination is enshrined in the Charter of Fundamental Rights of the EU,¹⁶ which guarantees the right to equality before the law and non-discrimination on a number of grounds, including that of age.¹⁷ The provisions of the Charter apply to the Member States when they are implementing EU law.¹⁸

The Treaty on the Functioning of the European Union¹⁹ confers competence on

¹² Article 40.1 of the Constitution provides that all citizens shall, as human persons be held equal before the law, but goes on to provide that the State may in its enactments have due regard to differences of capacity, physical and moral, and of social function. The compatibility of differences of treatment on the grounds of age with Article 40.1 of the Constitution was considered by the Supreme Court in *Re Article 26 of the Constitution and in the matter of the Employment Equality Bill, 1996* [1997] 2 IR 321. Hamilton CJ, delivering judgment for the Supreme Court, was satisfied that classifications based on age fell within the ambit of Article 40.1, and that as such the guarantee of equality before the law extended to both the young and old: 'The aged are thus entitled as human beings to protection against laws which discriminate against them, unless the differentiation is related to a legitimate objective and is not arbitrary or irrational. The young are also so entitled, although the need for protection may be less obvious and pressing in their case' (at pp.347 – 348).

¹³ Universal Declaration of Human Rights, UN Doc A/810 at 71, Article 7, International Covenant on Civil and Political Rights, UN Doc A/6316, Article 26, International Covenant on Economic, Social and Cultural Rights, UN Doc A/6316, Article 2(2), International Convention on the Elimination of All Forms of Racial Discrimination, UN Doc A/6014, Convention on the Elimination of All Forms of Discrimination against Women, UN Doc A/34/46, Convention on the Rights of Persons with Disabilities, Article 5, UN Doc A/61/49, Discrimination (Employment and Occupation) Convention (International Labour Organization No 111).

¹⁴ Of particular relevance in this context is the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS no 5, 'the Convention'). The Convention prohibits discrimination on a number of grounds in the enjoyment of the rights and freedoms set forth in that Convention (Article 14), together with a free-standing prohibition of discrimination in the enjoyment of any rights provided for by law (Protocol No. 12, Article 1). While age is not among the grounds expressly enumerated under Article 14 and Article 1 of Protocol No 12, the list of grounds is not exhaustive. The European Court of Human Rights has found that 'age' falls within the scope of 'other status' for the purpose of Article 14 (*Schizgebel v Switzerland* (Application no 25762/07)). See also the European Social Charter (Revised), ETS No 163, Articles 1(2) and E, Framework Convention for the Protection of National Minorities, ETS No 157, Article 4.

¹⁵ Case C-144/04 *Mangold v Helm*, paras.74 – 75.

¹⁶ The Charter was given legal force by Article 6(1) of the Treaty of the European Union, as amended by the Treaty of Lisbon, and has the same legal value as the Treaties. The Charter was proclaimed in a revised form on 12 December 2007 ([2007] OJ C 303/1), while the Treaty of Lisbon was signed by the Member States on 13 December 2007 and entered into force on 1 December 2009.

¹⁷ Articles 20 and 21 of the Charter, respectively, as provided for in Title III of the Charter, entitled 'Equality'. The Explanations to the Charter ([2007] OJ C 303/02) provide that Article 21(1) draws on Article 14 of the Convention, and that insofar as this corresponds to Article 14 of the Convention, it applies in compliance with it. Any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. Such limitations may be imposed only if they are necessary and genuinely meet objectives of general interest recognised by the EU, or the need to protect the rights and freedoms of others (Article 52(1)). Insofar as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights is the same as those laid down by the Convention, though this does not prevent EU law from providing more extensive protection (Article 52(3)).

¹⁸ Article 51(1). The Court of Justice has held that the concept of 'implementing Union law' as referred to at Article 51 of the Charter 'requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other' (Case C-206/13 *Siragusa v Regione Sicilia* at para.24).

¹⁹ [2012] OJ C 326/47.

the EU to take appropriate action to combat discrimination on certain specified grounds, again including that of age.²⁰ The measures adopted by the EU in this sphere include Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive').²¹

Employment Equality Directive

The purpose of the Employment Equality Directive is to lay down a general framework for combatting discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting the principle of equal treatment into effect in the Member States.²²

For the purposes of the Employment Equality Directive, direct discrimination occurs where a person is treated less favourably than another person is, has been, or would be treated in a comparable situation, on any of the discriminatory grounds.²³ Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage on any of the discriminatory grounds, unless that provision is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.²⁴

While affirming the need to encourage diversity and increase the participation of older persons in the work force, the Employment Equality Directive recognises that differences in treatment on the grounds of age may be justified in certain circumstances. The Directive provides that it is essential to distinguish between differences in treatment that may be justified, and discrimination which must be prohibited.²⁵

To this end, the Directive permits Member States to provide that differences of treatment on the grounds of age will not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, provided that the means of achieving that aim are appropriate and necessary.²⁶

While the Employment Equality Directive is expressed to be without prejudice to national provisions laying down retirement ages,²⁷ it is now well established as a

²⁰ Treaty on the Functioning of the European Union, Article 19(1).

²¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16, adopted pursuant to what was then Article 13 of the Treaty establishing the European Community.

²² Employment Equality Directive, Article 1.

²³ Employment Equality Directive, Article 2(a).

²⁴ Employment Equality Directive, Article 2(b).

²⁵ Employment Equality Directive, recital 25.

²⁶ Article 6(1) of the Employment Equality Directive provides that such differences of treatment may include:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

²⁷ Employment Equality Directive, recital 14.

matter of EU law that both the fixing of retirement ages²⁸ and the offering of fixed-term contracts to those who have reached compulsory retirement age²⁹ must be objectively justified.

Employment Equality Acts

The Employment Equality Acts are the principal means by which the State has transposed the Employment Equality Directive into Irish law. The Employment Equality Act 1998 has been amended on a number of occasions with a view to implementing the Employment Equality Directive, notably by the Equality Act 2004 and the Equality (Miscellaneous Provisions) Act 2015.³⁰

The Employment Equality Acts prohibit both direct and indirect discrimination on a number of grounds, including that of age.³¹ The prohibition of discrimination on the grounds of age is however expressed to be subject to certain exemptions.³²

Two such exemptions are of particular relevance for the purposes of these guidelines. First, the Employment Equality Acts provide that it will 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, if it is objectively and reasonably justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.³³

Secondly, the Acts provide that the offering of a fixed term contract to a person over the compulsory retirement age for that employment, or to a particular class or description of employees in that employment, 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.³⁴

Both of these exemptions are discussed more fully in the following section of these guidelines.

²⁸ Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA*, Case C-388/07 *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Case C-45/09 *Rosenblatt v Oellerking GmbH*, Joined cases C-250/09 and C-268/09 *Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv*, Joined cases C-159/10 and C-160/10 *Fuchs and Köhler v Land Hessen*, Case C-141/11 *Hörnfeldt v Posten Meddelande AB*, Case C-286/12 *European Commission v Hungary*, Case C-109/09 *Deutsche Lufthansa AG v Gertraud Kumpan*. See also Case C-190/16 *Werner Fries v Lufthansa CityLine GmbH*.

²⁹ Case C-144/04 *Mangold v Helm*.

³⁰ It may be noted that the Employment Equality Acts also transpose Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22, and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204/23.

³¹ The discriminatory grounds, as set out at section 6(2) of the Employment Equality Acts, are gender, civil status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community.

³² The age ground only applies in relation to persons above the maximum age at which a person is statutorily obliged to attend school (section 6(3)(a)). The principal age related exemptions are set out at subsections 34(3) – (7A) of the Employment Equality Acts. Employees in the Defence Forces are excluded from the protection from discrimination on the age ground (section 37(5)).

³³ Employment Equality Acts, section 34(4). This provision was substituted by the Equality (Miscellaneous Provisions) Act 2015, section 10.

³⁴ Employment Equality Acts, section 6(3)(c). This provision was substituted by the Equality (Miscellaneous Provisions) Act 2015, section 4.

Unfair dismissal

Under the Unfair Dismissals Acts 1977 – 2015 ('the Unfair Dismissals Acts'), the dismissal of an employee will be deemed to be unfair unless, having regard to all the circumstances, there are substantial grounds justifying the dismissal.³⁵ The Unfair Dismissals Acts do not however apply to employees who, on or before the date of their dismissal, have reached the normal retiring age for employees of the same employer in similar employment.³⁶

Fixed-term work

The Protection of Employees (Fixed-Term Work) Act 2003 ('the Fixed Term Work Act') was enacted with a view to implementing Directive 1999/70/EC concerning the framework agreement on fixed-term work.³⁷

A fixed-term contract is a contract of employment in which the end of the contract is determined by an objective condition, such as the arrival at a specific date, the completion of a specific task, or the occurrence of a specific event.³⁸

A fixed-term employee must not be treated less favourably than a comparable permanent employee in respect of his or her conditions of employment, unless such treatment can be justified on objective grounds.³⁹ Such treatment will not be regarded as being objectively justified unless it is based on considerations other than the fixed-term status of the employee concerned.⁴⁰

The renewal of successive fixed-term contracts is subject to certain restrictions.⁴¹ Where a fixed-term employee is employed on two or more continuous fixed-term contracts, the aggregate duration of those contracts must not exceed four years.⁴² Where a fixed-term contract contravenes this four year threshold, the contract will be deemed to be a contract of indefinite duration,⁴³ unless there are objective grounds justifying such renewal.⁴⁴

It should be stressed in this context that neither the Fixed Term Work Act, nor the Directive which it implements, require that the *initial* entry into a fixed-term contract be objectively justified.⁴⁵ The requirement of objective justification only arises, for the purposes of the Fixed Term Work Act, where a second or subsequent fixed-term contract is renewed beyond the four year threshold.

³⁵ Unfair Dismissals Acts, section 6(1).

³⁶ Unfair Dismissals Acts, section 2(1)(b).

³⁷ [1999] OJ L 175/43.

³⁸ Protection of Employees (Fixed-Term Work) Act 2003, section 8(1), which sets out the requirement that an employee employed on a fixed-term contract must be informed of the objective condition determining the contract. See also the definition of 'fixed-term employee' set out at section 2(1).

³⁹ Protection of Employees (Fixed-Term Work) Act 2003, section 6.

⁴⁰ Protection of Employees (Fixed-Term Work) Act 2003, section 7(1).

⁴¹ Protection of Employees (Fixed-Term Work) Act 2003, section 9.

⁴² This rule applies where the fixed-term contract was entered into after the passing of the 2003 Act, i.e. on 14 July 2003. Different rules apply where the fixed-term contract was entered into before this date – in this regard, see section 9(1) of the 2003 Act.

⁴³ Protection of Employees (Fixed-Term Work) Act 2003, section 9(3).

⁴⁴ Protection of Employees (Fixed-Term Work) Act 2003, section 9(4).

⁴⁵ Case C-144/04, *Mangold v Helm*, Opinion of Advocate General Tizzano (30 June 2005) at para.39.

GUIDANCE

Scope of exemption

The Employment Equality Acts provide that offering a fixed term contract to a person over the compulsory retirement age will not amount to discrimination on the grounds of age if it is objectively and reasonably justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

This provision represents a limited exemption from the general prohibition of discrimination on the grounds of age in employment and occupation. As such, it is to be strictly construed.

This exemption is limited in its application to the offering of fixed term contracts, as opposed to the offering of contracts of indefinite duration. The 'defence' of objective justification does not on its face apply to the offering of contracts of indefinite duration to persons over the compulsory retirement age.⁴⁶

Further, this exemption only applies to the offering of a fixed term contract, rather than to the terms of the fixed term contract itself. Where the fixed term contract contains a term that gives rise to discrimination on the grounds of age, or any other protected ground, employers will not be in a position to avail of this exemption.⁴⁷

Establishing a compulsory retirement age

In order for an employer to objectively justify the offering of a fixed term contract to a person over the compulsory retirement age, it is first necessary for the employer to establish that the employee concerned is in fact subject to a compulsory retirement age.

Where the employee is not subject to a compulsory retirement age, then an employer will not be in a position to objectively justify the offering of a fixed term contract of employment.⁴⁸

Fixing a compulsory retirement age: the contract of employment

A compulsory retirement age will normally be fixed by the contract of employment. A contract of employment may be oral or in writing. While it is not necessary for a contract of employment to be in written form,⁴⁹ it is best practice that employers issue employees with a written contract of employment at the commencement of their employment, which includes an express term as to the

⁴⁶ *McPhillips v ISS Facility Services* DEC-E2013-042.

⁴⁷ Discrimination by employers in respect of conditions of employment is prohibited by section 8(1)(b) of the Employment Equality Acts.

⁴⁸ See *Harte v Q Park Ireland Limited* DEC-E2012-119

⁴⁹ While section 3 of the Terms of Employment (Information) Act 1994 requires that a written statement of employment be furnished to an employee, it may be noted that the written statement does not need to contain written particulars as to the terms of employment with respect to compulsory retirement.

employee's compulsory retirement age (if applicable).⁵⁰

Express terms

The terms of a contract of employment may be express or implied. Express terms may be set out in the contract of employment itself, or may be incorporated by means of an outside source, such as an employee handbook, collective agreement, or by virtue of custom and practice.⁵¹

Employee handbook

A contractual term as to compulsory retirement age may be incorporated by means of an employee handbook.

Where a compulsory retirement age is set out in an employee handbook, it is desirable that the contract expressly incorporates the employee handbook, and that the employee is furnished with a copy of the handbook at the commencement of his or her employment. It is prudent for employers to require employees to sign acceptance and receipt of the handbook.⁵²

Where an employer seeks to introduce an implied compulsory retirement age into the contract of employment by means of a new or revised employee handbook, it must take steps to ensure that employees are aware of the relevant provisions of the handbook and that they have given their informed consent to the variation of their contract.⁵³

Collective agreement

Where an employee's employment is subject to a compulsory retirement age under a collective agreement, again it is prudent that this be expressly incorporated into the contract of employment.⁵⁴ Where express reference is not made to any such collective agreement, it will be necessary to incorporate the terms of the collective agreement into the contract by implication. In order to incorporate a collective agreement by implication, it will be necessary to establish (a) specific knowledge of the agreement, (b) employee conduct that shows he or she accepts the incorporation of the agreement, and (c) some indication of incorporation of the agreement into the contract.⁵⁵

⁵⁰ Pursuant to section 3 of the Terms of Employment (Information) Acts 1994 - 2014, an employer shall, not later than 2 months after the commencement of an employee's employment with the employer, give or cause to be given to the employee a statement in writing containing particulars of the terms of the employee's employment (while the required particulars do not expressly include reference to a compulsory retirement age, section 3(1)(m) requires a reference to any collective agreements which directly affect the terms and conditions of the employee's employment).

⁵¹ Notwithstanding the existence of a contract of employment which contains an express compulsory retirement age, where an employer applies such a compulsory retirement age inconsistently, the policy of applying a mandatory retirement age may not satisfy a legitimate aim or the means to achieve that aim may not be considered appropriate or necessary within the meaning of Directive 2000/78/EC. See *A Worker v Health Service Provider* ADJ-00004755, *A Box Office Cashier v An Arts & Entertainment Centre* ADJ-00006654.

⁵² See Murphy and Regan (eds), *Employment Law* (2nd ed) (Dublin: Bloomsbury Professional; 2017), at para.3.13.

⁵³ In *Earagail Eisc Teoranta v Lett* EDA 1513 the Labour Court held that while a provision of an employee handbook can, in principle, give rise to an implied contractual term as to compulsory retirement, this can only arise where the policy is 'promulgated in such a manner that the employees to whom it applies either knew, or ought to have known, of its existence'. See also *Maguire v Neville's Bakery* DEC-E2015-124, *A Receptionist v A Packaging Company* ADJ-00005241.

⁵⁴ Under section 3(1)(m) of the Terms of Employment (Information) Act 1994, employers are required to issue employees with a written statement of employment which makes reference to any collective agreements which directly affect the terms and conditions of the employee's employment.

⁵⁵ *Duke v Reliance Systems Ltd* [1982] IRLR 347 per Browne-Wilkinson J. See generally Cox et al, *Employment Law in Ireland* (Dublin: Clarus Press; 2009) at para. 4-29.

Implied terms

A term as to compulsory retirement may be implied into the contract of employment having regard to well-established custom and practice in the employment or industry sector concerned, if the practice of requiring employees to retire at a certain age is 'so generally known that anyone concerned should have known of it or easily become aware of it'.⁵⁶

A term as to the existence of a compulsory retirement age may also be implied into the contract of employment by means of the 'officious bystander test', where based on all the circumstances, the inclusion of a compulsory retirement age was so obvious that the parties would have inserted such a term if they had considered the issue when entering into the contract of employment.⁵⁷

Terms implied by statute

A term as to compulsory retirement may also be implied by statute. A retirement age of 65 years is implied into the contracts of employment of civil servants by virtue of the Civil Service Regulation Act 1956.⁵⁸ This mandatory retirement age does not however apply to a civil servant who is a new entrant within the meaning of the Public Service Superannuation (Miscellaneous Provisions) Act 2004, having been appointed on or after 1 April 2004.⁵⁹ Civil servants who were appointed on or after 1 January 2013 and who are members of the Single Public Service Pension Scheme are subject to a mandatory retirement age of 70 years.⁶⁰ Certain employees within the public service are subject to specific statutory retirement ages, such as members of the Garda Síochána⁶¹ and the Defence Forces.⁶²

⁵⁶ *O'Reilly v Irish Press* [1937] 71 ILTR 194. See also *Mr Q v Employer*, ADJ - 00001616, 7 July 2017, *A Bookkeeper v A Retail Business*, ADJ - 00005391, 17 August 2017, *Connaught Airport Development Limited T/A Ireland West Airport Knock v John Galvey*, Determination No. EDA1710, 24 April 2017.

⁵⁷ *Shirlaw v Southern Foundaries Limited* [1939] 2 KB 206, *Carna Foods Limited v Eagle Star Insurance* [1997] 2 ILRM 99, *Mr Q v Employer*, ADJ - 00001616, 7 July 2017, *A Bookkeeper v A Retail Business*, ADJ - 00005391, 17 August 2017, *Connaught Airport Development Limited T/A Ireland West Airport Knock v John Galvey*, Determination No. EDA1710, 24 April 2017. See also *McCarthy v Health Service Executive* [2010] IEHC 75 (Unreported, High Court, 19 March 2010) where the High Court (per Hedigan J) held that a compulsory retirement age of 65 formed an implied term of the applicant's contract of employment on the following basis:

[...] the crux of the application lies in whether the retirement age of 65 could be viewed as having been implied into the contract as submitted by the respondent. Two alternative approaches were suggested utilising the "officious bystander test" on the one hand and implication by custom on the other. It is my opinion that in the circumstances of the case, the former provides a more suitable formula to determine whether such a term has been implied, although there is necessarily a large degree of overlap.

The court is of the opinion that such a term should indeed be implied into the applicant's conditions of employment. The applicant is a highly intelligent woman who is legally qualified. It is difficult to accept that she had no knowledge of the retirement age applicable in that part of the public service in which she worked. Furthermore, irrespective of any actual knowledge of this fact, I would consider the dicta of Maguire P. in *O'Reilly* that anyone concerned "should have known of it or could easily have become aware of it" to be particularly apt in this case. Moreover in addition to the broad awareness of the retirement age among most working adults, the applicant may be deemed as "on notice" that there was an applicable retirement age by virtue of the superannuation scheme. The superannuation scheme, of which she was a member, made reference to the existence of a retirement age, and more specifically, a cut off for contributions at age 65. I therefore find that such a term can be implied into the terms and conditions of employment. [at paras 23 – 24]

⁵⁸ Civil Service Regulation Act 1956, section 8.

⁵⁹ Public Service Superannuation (Miscellaneous Provisions) Act 2004, section 3, inserting a new subsection 8(5A) into the Civil Service Regulation Act 1956.

⁶⁰ Public Service Pensions (Single Scheme and Other Provisions) Act 2012, section 13. Scheme members may however retire when they reach 66 years of age, or at the age at which a person is eligible to receive a contributory State pension, whichever is later. The maximum age of 70 years may be extended by the Minister for Public Expenditure and Reform. The Single Public Service Pension Scheme commenced on 1 January 2013, by virtue of the Public Service Pensions (Single Scheme and Other Provisions) Act 2012 (Commencement of Single Public Service Pension Scheme) Order 2012, SI No 574 of 2012.

⁶¹ Garda Síochána Act 2005, section 122(1)(h), and the Garda Síochána (Retirement) Regulations 1934 – 2013.

⁶² Defence Act 1954, section 47.

Retirement age and pensionable age

Where a contract of employment does not contain an express term as to compulsory retirement, and where the employee concerned is a member of an occupational pension scheme, the employer will frequently seek to rely on the scheme rules as well as the annual benefit statements⁶³ issued to the employee in order to establish that he or she knew, or ought to have known, that their employment was subject to a normal retirement age.

It is necessary however to distinguish between normal retirement age, and normal pensionable age. Normal pensionable age, in the context of an occupational pension scheme, is defined as the earliest age at which a member is entitled to receive benefits under the rules of the scheme.⁶⁴

Since the normal retirement age and the normal pensionable age will not necessarily be the same for every employment, employers should exercise caution in placing reliance on pension scheme rules and benefit statements in seeking to establish the existence of a contractual retirement age for the employment concerned.

Introduction of compulsory retirement age

An employer may wish to introduce a new compulsory retirement age, or to vary an existing retirement age, after the contract of employment has commenced.

Where the contract of employment contains an express variation clause, the right of variation must be exercised reasonably.⁶⁵

The introduction or variation of a compulsory retirement age in the absence of a variation clause requires the informed consent of the employee or employees concerned to be enforceable.⁶⁶

In the absence of such informed consent, the employer has not 'fixed' a compulsory retirement age for the purposes of the Employment Equality Acts, such that it cannot avail of the exemption provided in respect of the offering of fixed term contracts.

⁶³ The issuing of annual benefit statements forms part of the disclosure obligations of occupational pension scheme trustees under section 54 of the Pensions Act 1990 and the Occupational Pension Schemes (Disclosure of Information) Regulations 2006 to 2013.

⁶⁴ See the definition of 'normal pensionable age' at section 2(1) of the Pensions Act 1990.

⁶⁵ *Wandsworth London Borough Council v D'Silva* [1998] IRLR 19.

⁶⁶ See generally Cox et al, *Employment Law in Ireland* (Dublin: Clarus Press; 2009) at paras 4-123 – 4-131.

Objective justification

As outlined above, the offering of a fixed term contract to a person over the compulsory retirement age will not be taken to constitute 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.

It should be stressed that *both* (a) the fixing of a compulsory retirement age,⁶⁷ and (b) the offering of a fixed term contract to a person of the compulsory retirement age,⁶⁸ require to be objectively justified. As such, the test of objective justification requires to be applied at different points of time in the employment relationship.

Generally, the fixing of a compulsory retirement age will require to be objectively justified prior to the commencement of the employment relationship (unless a compulsory retirement age is introduced or varied after the commencement of the employment relationship).

The offering of a fixed-term contract to a person over the compulsory retirement age will generally require to be objectively justified at the point at which either an existing employee, or a prospective employee, is offered a fixed-term contract rather than a contract of indefinite duration, solely on the basis that he or she is over the compulsory retirement age for the employment concerned.

The objective justification advanced for (a) fixing a compulsory retirement age, and (b) offering a fixed term contract to a person over the compulsory retirement age, may not necessarily be the same.⁶⁹

The test of objective justification is a complex one, and can be difficult for both employers and employees to apply in practice. In seeking to objectively justify the offering of a fixed term contract to a person who is over the compulsory retirement age, the following questions may be asked –

- a. is the aim pursued in offering a fixed term contract legitimate?
- b. is the offering of a fixed term contract objectively and reasonably justified by

⁶⁷ For the purposes of section 34(4) of the Employment Equality Acts.

⁶⁸ For the purposes of section 6(3)(c) of the Employment Equality Acts.

⁶⁹ In the Report of the Interdepartmental Working Group on Fuller Lives, this issue was addressed in the following terms:

Where an employer chooses to offer a fixed term contract to an employee to work beyond the normal retirement age, the justification underpinning this decision should be driven by considerations which are different to those considerations underpinning the overall normal retirement age in the firm.

In this way, (a) retirement and (b) awarding of a fixed term contract prior to and following reaching retirement age are two separate issues which are separated in time as distinct decision-making processes. Rather than being two (contradictory) assessment processes running in parallel and simultaneously, these two assessments should, in reality, take place at different times. The decision on a fixed retirement age is made at recruitment and forms part of the contract of employment. However, the employer either on their own initiative or by agreement with the employee concerned can at a later date decide, rather than reopening the original contractual term, or invalidating the reasoning that led to its inclusion in the employment contract, nonetheless decide to offer a fixed term contract after the employee has reached the retirement age.

In other words, the objective justification underpinning the normal retirement age will take place at the "macro level", while the objective justification for the awarding of a fixed term contract will take place at the "micro level". These need not be contradictory.

An employer in such an instance would also of course have to take account of the principle of fairness in terms of equal treatment for a cohort of other employees of that organisation who do or do not want to continue to work after their contractual retirement age and have a legitimate and objective justification for different approaches in relation to different employees or different classes of employees. [at page 8]

that aim?

- c. is the offering of a fixed term contract an appropriate and a necessary means for achieving that aim?

Legitimate aim

Differences in treatment on the grounds of age may be objectively justified by a range of legitimate aims, including legitimate employment policy, labour market and vocational training objectives.⁷⁰

The following have been identified as amounting to legitimate aims which are capable of objectively justifying differences of treatment on the grounds of age for the purposes of the Employment Equality Directive and/or the Employment Equality Acts⁷¹ –

- a. preserving the operational capacity of the armed forces, police, prison or emergency services;⁷²
- b. promoting the vocational integration of unemployed older workers;⁷³
- c. encouraging recruitment;⁷⁴
- d. sharing employment between the generations;⁷⁵
- e. establishing a balanced age structure within a particular employment;⁷⁶
- f. workforce planning;⁷⁷
- g. avoiding disputes concerning employees' fitness to work;⁷⁸
- h. the protection of health and safety;⁷⁹
- i. promoting the access of young people to professions;⁸⁰
- j. ensuring the best possible allocation of positions between the generations within a given profession.⁸¹

This list is not exhaustive. In principle, an employer may justify the offering of a fixed term contract to a person over the compulsory retirement age by reference to any legitimate aim.

For an aim to be legitimate, however, it must correspond to social policy objectives, related to employment policy, labour market, or vocational training. The aim should correspond to a public interest, rather than a purely private interest particular to the employer, such as cost reduction or improving competitiveness, though employers

⁷⁰ Employment Equality Directive, Article 6(1).

⁷¹ The list provided is not exhaustive. It may be noted that this list is drawn from decisions of the Court of Justice of the EU which, strictly speaking, relate to the grounds on which Member States may provide that differences on grounds of age shall not constitute discrimination under Article 6(1) of the Employment Equality Directive, rather than to the grounds on which employers (whether public or private) may justify differences of treatment on the grounds of age.

⁷² Employment Equality Directive, Article 18. See Case C-229/08 *Wolf v Stadt Frankfurt am Main and Donnellan v Minister for Justice, Equality and Law Reform, Commissioner of An Garda Síochána, Ireland, Attorney General* [2008] IEHC 467 (Unreported, High Court, McKechnie J, 25 July 2008).

⁷³ Case C-144/04 *Mangold v Rüdiger Helm*.

⁷⁴ Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA*.

⁷⁵ Case C-45/09 *Rosenblatt v Oellerking Gebäudereinigungsges. mbH*.

⁷⁶ Joined cases C-159/10 and C-160/10 *Fuchs and Köhler v Land Hessen*.

⁷⁷ *Transdev Light Rail Limited v Chrzanowski* EDA1632 (Labour Court, 29 November 2016).

⁷⁸ Joined cases C-159/10 and C-160/10 *Fuchs and Köhler v Land Hessen*.

⁷⁹ *Transdev Light Rail Limited v Chrzanowski* EDA1632 (Labour Court, 29 November 2016).

⁸⁰ Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*.

⁸¹ Joined cases C-250/09 and C-268/09 *Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv*.

are to be afforded a degree of flexibility in this regard.⁸²

While commercial and financial considerations may underpin employer policy with respect to the offering of fixed term contracts over compulsory retirement age, such considerations cannot in and of themselves constitute a legitimate aim.⁸³

Objective justification

It is not sufficient for an employer simply to identify a legitimate aim which may in principle be capable of justifying the offering of a fixed term contract to a person over the compulsory retirement age.

An employer must also establish that the offering of a fixed term contract is objectively justified by the legitimate aim relied upon. Mere generalisations as to the capacity of such a measure to contribute to legitimate employment policy, labour market, or vocational training objectives are insufficient to show that the aim pursued justifies a difference in treatment on grounds of age.

Employers should be in a position to provide concrete evidence that the offering of a fixed term contract, having regard to all of the relevant circumstances of the employment concerned, is rationally connected to the legitimate aim pursued.⁸⁴

Appropriate and necessary means

Offering a fixed term contract to a person over the compulsory retirement age must be both an appropriate and a necessary means of achieving the legitimate aim relied upon by the employer.

Where offering a fixed term contract to a person over compulsory retirement age goes beyond what is appropriate and necessary to obtain the legitimate aim pursued by the employer, this will fall outside the exemption provided for under the Employment Equality Acts, and may amount to discrimination on the grounds of age.⁸⁵

⁸² Case C-388/07 *The Queen (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* at para.46.

⁸³ Joined cases C-159/10 and C-160/10 *Fuchs and Köhler v Land Hessen* at para 74.

⁸⁴ Case C-388/07 *The Queen (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* at para.51.

⁸⁵ Case C-144/04 *Mangold v Helm* at para. 65.

Genuine occupational requirements

A difference in treatment on grounds of age may not amount to discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.⁸⁶

In particular, it is an occupational requirement for employment in the Garda Síochána, the prison service, or any emergency service that employees are fully competent and capable of undertaking the range of functions that they may be called upon to perform so that the operational capacity of such services may be preserved.⁸⁷

Where a high level of physical fitness constitutes a genuine occupational requirement for a particular employment, particularly in the emergency services or other safety critical services, it may be legitimate to retain employees on fixed term contracts beyond the compulsory retirement age, subject to periodic medical examination, to ensure that the employee concerned continues to be competent and capable of performing the functions assigned to him or her.⁸⁸

⁸⁶ Employment Equality Directive, Article 4(1); Employment Equality Acts, section 37(2).

⁸⁷ Employment Equality Directive, Recital 18; Employment Equality Acts, section 37(3).

⁸⁸ Case C-229/08 *Wolf v Stadt Frankfurt am Main*, *Donnellan v Minister for Justice, Equality and Law Reform, Commissioner of An Garda Síochána, Ireland, Attorney General* [2008] IEHC 467, (Unreported, High Court, McKechnie J, 25 July 2008), *Transdev Light Rail Limited v Chrzanowski* EDA1632 (Labour Court, 29 November 2016).

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