



**ADVISORY**  
Industry Information

## Time to Retire Mandatory Retirement Ages?

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RTE has been ordered to pay €100,000 (the equivalent of one year's salary) to a former employee as compensation for age discrimination. This case, *Anne Roper v Radió Teilifís Eireann [2019]*, also demonstrates the great difficulty an employer will face when trying to justify imposing a mandatory retirement age.

This follows on from a remarkably similar case in 2018, *Valerie Cox v RTE*, in which RTE was ordered to pay €50,000 compensation to a former employee who had been compulsorily retired at 65.

Retirement related age discrimination claims have sharply increased in Ireland due to the rising State pension eligibility age. The current age of eligibility for the State pension is 66, but this is set to increase to 67 from 2021 and to 68 from 2028.

### Legal Position on Retirement Ages

The Employment Equality Acts 1998-2015 (the "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.

In order to establish that a retirement age is objectively justified, the 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; preservation of personal and professional dignity by avoiding capability issues with older employees; succession planning and creation of a balanced age structure in the workforce have previously been accepted as legitimate aims.

### Anne Roper v Radió Teilifís Eireann

The employee was obliged to retire at the age of 65 despite her requests to continue working for a period of eighteen months in order to sort out her finances before retirement.

RTE submitted that its retirement age of 65 was objectively justified on the grounds of intergenerational fairness and to facilitate the promotion of younger employees. RTE stated that turnover was low within the organization and that this prevented younger employees' careers from progressing, which in turn deprived RTE of the benefit of being able to produce programmes of interest and relevance to a younger audience. RTE had acknowledged that a limited number of employees had been permitted to work beyond 65 but contended that these had been exceptional cases and these employees had been offered short term contracts in order to ensure cover for specific projects.

The Adjudication Officer ("AO") noted that approximately 17% of comparable employees had been allowed to work beyond the normal



retirement age and found that the employee was therefore treated less favourably in comparison with these employees.

The AO found that in order for RTE to objectively justify the mandatory retirement age on the grounds of intergenerational fairness and the promotion of younger employees, the employee's retirement must have actually contributed to intergenerational fairness within RTE. The AO acknowledged that the employee's retirement had secured the promotion and recruitment of two younger employees but held that the effect of her retirement was so confined and limited to one department that it did not contribute to intergenerational fairness within the organisation and was therefore not objectively justified on that ground.

This aspect of the decision is quite significant as it will undoubtedly be extremely difficult for an employer to rely on intergenerational fairness to justify a mandatory retirement age where it is required to demonstrate that imposing a retirement on an individual had the effect of achieving intergenerational fairness.

The AO found that the aim of intergenerational fairness could have been achieved by more appropriate means than compulsorily retiring the employee and referred to the "disproportionately negative effect" on the employee compared to the "dubious positive impact" on RTE of her retirement. The AO also distinguished previous case law in which employers were found to have lawfully obliged employees to retire at 65 by pointing out that in those cases the employees were entitled to generous occupational pensions in comparison with the employee and that the employee was not even qualified for the State pension.

RTE has indicated that it will appeal the finding to the Labour Court.

## Code of Practice on Longer Working

Considering the difficulty with defending the use of mandatory retirement ages evident in the *Roper* case, employers should exercise caution before refusing a request from an employee to work beyond the employee's stated retirement age. The Code of Practice on Longer Working provides helpful guidance on how an employer should approach such requests. The Code provides that a request from an employee to work beyond the retirement age should be considered carefully, taking into account matters such as the duration of the extension sought, whether flexible working options or alternative roles would be suitable and whether there are any pension or contractual implications. Where such requests are made, the employer should carefully document the reasons for granting or refusing any such request. The AO in the *Roper* case was critical of what was termed a "rather subjective" business case for retaining one employee beyond the age of 65. The employer should assess employee requests based on the same objective criteria to ensure there is a fair and consistent approach taken.

If the employer decides to refuse the request, the 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.

Requests to work beyond the retirement age can be facilitated by means of a fixed-term contract. The Equality Acts permit an employer to offer an employee who has reached the compulsory retirement age a fixed term contract provided it can be objectively justified by a legitimate aim and that the means of achieving that aim are appropriate and necessary.

Should the employer elect to offer a fixed-term contract post-retirement age, the duration of the contract should be specified and the objective justification for a fixed-term contract should be set out in the contract (ie to facilitate the employee's request to work beyond the retirement age. It would be helpful if additional reasons could be set out that justify the duration of the fixed-term contract, such as completion of a particular project or to facilitate the employee's request to continue work until the State pension age or other determined date). It should be set out that the decision to offer a fixed-term contract was made in an exceptional case.

## UK Comparison

An alternative to imposing a mandatory retirement age and facilitating ad hoc requests for longer working would be to have no retirement age at all. In the UK, the default retirement age of 65 was abolished in 2011 and employees generally can work for as long as they wish. The concept of a mandatory retirement age still exists, however few employers impose a mandatory retirement age as it is difficult to defend if challenged by employees.

Despite this, according to an OECD study, the average retirement age between the years 2013 and 2018 in the UK was 64.7 compared to Ireland's 65.6 which indicates that allowing employees to work until they choose to retire does not necessarily lead to employees



retiring later in life. It would appear that most employees wish to retire at some point and most will do so before their abilities have declined to the point that an employer needs to take action on performance grounds. The UK public body workplace advisory service, ACAS, advises UK employers to manage retirement by having periodic workplace discussions with ageing employees about the employee's plans in the short, medium and long term, transitioning employees to retirement by creating "flexible retirement" with practices such as reduced working hours, remote working, graduated payments to encourage early retirement and/or alternative roles. Where an employee insists on continuing to work past their ability to do so, an employer can always terminate employment on capability grounds if necessary.

## Key Lessons for Employers:

- > Both the *Roper* and *Cox* case demonstrate that the Workplace Relations Commission will impose significant financial awards in cases of age discrimination.
- > Employers should expect increased requests for longer working due to the increasing State pension age.
- > It will be undoubtedly extremely difficult for an employer to rely on intergenerational fairness to justify a mandatory retirement age unless it can prove that an individual's retirement contributed to intergenerational fairness, the threshold for this was not examined in detail, however, it is clear that more than a few promotions in one department will be required.
- > It is important to note that the employer in the *Roper* and *Cox* case sought to rely on intergenerational fairness as the justification for imposing a mandatory retirement age. Mandatory retirement ages have been successfully defended by employers on health and safety grounds where their employees are employed in safety critical roles, such as in the recent cases of *A Marine Pilot v A Port Company* (2019) and *Transdev Light Rail Limited v Michael Chrzanowski* (2017).
- > Considering the expected increase in age related discrimination claims, the significant compensation awarded by the WRC in recent cases and the difficulty in defending such a claim, it may be more cost effective for employers to allow employees to retire in their own time or to utilise flexible retirement practices.
- > Any request to work beyond a mandatory retirement age from an employee should be seriously considered and all alternatives to compulsory retirement discussed and explored.

Walkers can assist you in reviewing your retirement policies and practices, advise in respect of requests for longer working and assist in putting in place fixed-term contracts, as well as advise on age discrimination claims taken by employees.

## Contacts

For further advice or information on this topic, please speak with your usual contact at Walkers or with any of the following members of Walkers' Global Employment Group:



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