



## Not Shy and Not Retiring

January 2018

New guidance on issues surrounding retirement has been published by the Department of Business, Enterprise and Innovation. This new Code describes principles and practices to be followed by both employers and employees during the retirement phase and includes responding to requests to work beyond the retirement age.

### The Beginning of Change

The traditional retirement age in Ireland was always 65, a time when employees qualified for the State pension and it was generally accepted that they would retire, whether it was an express term of their contract of employment or not. People were considered to have come to the end of their useful working lives and statistically, were not too far off the end of their natural lives. That has all changed. The State pension age has increased and is set to continue increasing and that has left some employees in a position where they have no income between retirement and the commencement of their pension. Much more significantly, people generally are living far longer and are often just as capable of working at and after 65 as they ever were. The 'set in stone' retirement age of 65 has gradually been eroded in more recent times.

### Enforceability of Retirement Ages

First there was the general prohibition on age discrimination which cast doubt on the enforceability of retirement ages. Some successful challenges were mounted to contractual and "custom and practice" retirement ages on the discrimination ground. The next shock wave

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to hit the traditional position was the commencement, on 1 January 2016, of the Equality (Miscellaneous Provisions) Act 2015 which amended Section 34 of the Employment Equality Act 1998 to provide that while it was not discriminatory to have different retirement ages, whether voluntary or compulsory, the retirement age had to be “objectively and reasonably justified by a legitimate aim and the means of achieving that aim was proportionate and necessary”. The difficulty with this, for an employer, was essentially twofold: first there was the uncertainty as to what might be accepted as a legitimate aim and if that could be established, the question then arose as to what retirement age would be accepted as being proportionate and necessary. The objective aspect of the test opened any contractual retirement age or retirement policy up to challenge.

### New Code of Practice

In the absence of court decisions to guide employers, a [Code of Practice](#) under the Industrial Relations Act has been introduced. While such a Code is not legally binding, it does have considerable persuasive authority and an employer who does not follow it will have to justify that decision. The Code does not provide any definitive answers and that is understandable since the possible scenarios are infinite but it does set out a best practice process for handling any requests from employees to work longer than the expected retirement age.

#### *Remit*

The Code draws attention to the benefits, in terms of skills and experience, which older employees can bring to an organisation. It recommends measures to utilise these assets through training, knowledge-sharing and flexible working arrangements.

#### *Legitimate Aims of Retirement*

The Code sets out examples of what may be accepted as being legitimate aims justifying a particular retirement age. These may not always be acceptable. The list, which is not exhaustive, includes allowing younger employees to progress, motivating younger employees through promotion prospects, health and safety, balancing the age structure, avoiding capability issues with older employees and succession planning.

#### *Discussion Surrounding Retirement*

The Code states that where there is no contractual retirement age it is reasonable for an employer to raise and discuss an employee’s retirement intentions with them. The Code recommends that employers provide good and timely information, guidance and support to employees in the lead up to their retirement. The Code recommends that employers should provide employees with clear information on retirement procedures both at recruitment and at regular intervals throughout their career, regardless of whether the employer provides a pension scheme. Perhaps it is worth mentioning here that while employers are not legally obliged to provide employees with a pension

scheme, they are legally obliged to facilitate an employee if the employee wishes to operate a Personal Retirement Savings Account (“PRSA”).

### *Timelines*

The Code states that it is good practice for employers to give employees six to twelve months’ notice of the employer’s intention to retire the employee on their contractual retirement date. The notice should be in writing and should be followed up with a meeting to ensure that the employee clearly understands the retirement date and to explore any measures which might be agreed such as, for example, flexible working or possible alternative roles up to retirement and to discuss any transitional arrangements or assistance in relation to guidance or information.

### Request to Work Beyond Retirement Age

Where an employee requests to work longer than their retirement age, the Code states that such requests should be considered carefully by the employer. The Code sets out a non-exhaustive list of the matters to be considered by both the employee and the employer. These include the employee’s competence, flexible working options, the duration of the requested extension and any pension or employment contract implications. The employer must consider whether there are good grounds to accept or refuse the request in light of the requirement for that aim to be objectively and reasonably justified and the means of achieving it being proportionate and necessary, as above. If a fixed term contract is to be used after retirement, the use of such a contract must be objectively justified. The employer should take care to apply criteria which will result in an equal and consistent approach to all such requests. The Code sets out a suggested procedure for handling such requests which includes the request being made in writing at least three months before the designated retirement age and subsequent meetings to discuss the issue. The employer’s decision should be communicated as soon as practical and the employer should provide a reasoned response stating that its decision is specific to that individual’s request and does not have universal application. Where a request is refused, the Code states that that should be communicated and explained in person and that the employee should have the right to appeal the decision, for example, through the employer’s usual grievance procedure.

### Conclusion

This new Code is a step in the right direction in offering guidance and clarification on this important issue which affects both employers and employees. We await the implementation of this Code and envisage a positive impact where guidelines now apply.

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