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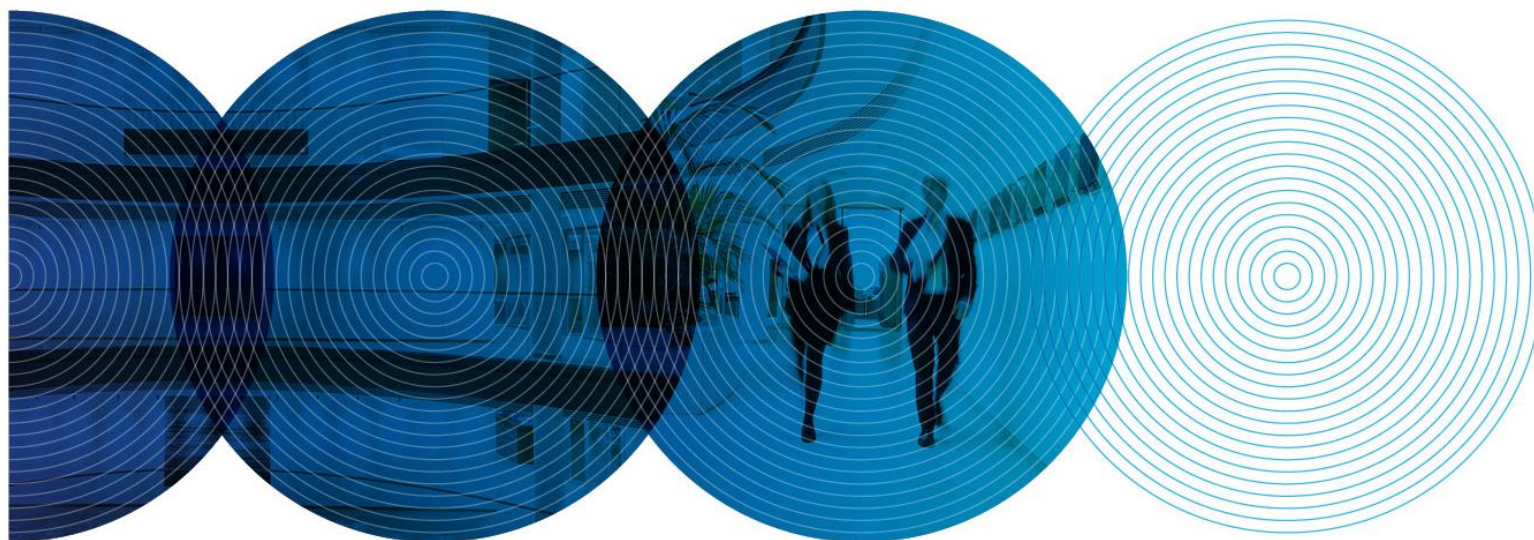
# Irish Institute of Pensions Management

## Retirement Age Flexibility - Employment Law Aspects

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McCANN FITZGERALD



# Today's agenda

- Sources of equal treatment law
- Demonstrating that a mandatory retirement age exists as a matter of fact
- Objectively justifying mandatory retirement ages
- Remedies
- Political developments
- Code of Practice



# Equal Treatment Directive (2000/78/EC)

- Prohibition on direct and indirect discrimination on age grounds – Article 2
- General principle of EU law – **Mangold v Helm** C-144/04
- Article 6 –

Differences of treatment on grounds of age shall not constitute discrimination if they are objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.



# Employment Equality Acts 1998-2015



- Prohibition on age discrimination – section 6(2)(f)
- Section 34(4)

*“[I]t 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 if—*

*(a) it is objectively and reasonably justified by a legitimate aim, and (b) the means of achieving that aim are appropriate and necessary.”*
- Section 85A – burden of proof on employer

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# Pensions Act 1990

- Section 70(1) – “the principle of equal pension treatment is that there shall be no discrimination on any of the discriminatory grounds... in respect of any rule of a scheme.”
- Section 72 – savings in relation to age ground
  - Not breach of principle of equal pension treatment for scheme to fix retirement age
- No legislative requirement to objectively justify “normal retirement date” in scheme

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## ***Rosenblatt (C-45/09)***

*“By guaranteeing workers a certain stability of employment and, in the long term, the promise of foreseeable retirement, while offering employers a certain flexibility in the management of their staff, the clause on mandatory termination of employment contracts is thus a reflection of a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment...”*

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## **Rosenblatt (C-45/09)**

*“It does not appear unreasonable for the social partners to take the view that a measure such as (the provision containing the retirement age) may be appropriate for achieving the aims set out above. The authorisation of clauses on automatic termination of employment contracts on the ground that an employee has reached retirement age, cannot, generally be regarded as unduly prejudicing the legitimate interests of the workers concerned.”*



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## **Rosenblatt (C-45/09)**

*“Legislation such as that at issue in the main proceedings is not based only on a specific age, but also takes into account of the fact that the persons concerned are entitled to financial compensation by means of a replacement income in the form of a retirement pension at the end of their working life.”*



# Having a retirement age as a matter of fact

- A clause incorporating a retirement age should be express or implied in the contract of employment
  - **A Secretary v A Solicitor's Firm** (ADJo0016645)
- Staff handbook
  - **Earagail Eisc Teo v Richard Lett** (EDA1513)
- Custom and practice

*“A custom or usage of any kind is a difficult thing to establish... I have to be satisfied that it is so notorious, well-known and acquiesced in that in the absence of agreement in writing it has to be taken as one of those terms of the contract between the parties”*

Maguire P in **O'Reilly v Irish Press**  
[1937] 71 I.L.T.R 194

# Recent example from the Labour Court

- **Connaught Airport Development Limited v John Glavey** (EDA1710)
  - No clause in the written contract of employment
  - Employer asserted it was custom and practice for employees to retire upon attaining 65 years of age
  - No evidence employee knew of a retirement age
  - Evidence of two employees working beyond age 65
  - Retirement age unenforceable



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# Beware of Normal Pensionable Age

- Bear in mind that a Mandatory Retirement Age is different to an employee's Normal Pensionable Age
- The fact that pension scheme rules contain an NPA should not be exclusively relied on as employers have had mixed success.
  - **HSE v Quigley**
  - **Marine Pilot v Port**

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# Reminder

- Section 34(4) of the Employment Equality Acts

*[I]t 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 if—*

- (a) it is objectively and reasonably justified by a legitimate aim, and*
- (b) the means of achieving that aim are appropriate and necessary.”*

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# Objective justification

## Examples:

1. Intergenerational fairness;
2. Motivation and dynamism through increased prospect of promotion;
3. Health and safety;
4. Creation of a balanced age structure in workforce;
5. Personal and professional dignity; and
6. Succession Planning.

# Objective justification



*“Mandatory retirement provides intergenerational fairness”*

- Prevents job-blocking and allows promotion of younger workers;
- Allows for balanced generational structure across workforce; and
- Allows business plan for recruitment and departure of staff
  - **Valerie Cox v RTÉ** [ADJ-00006972]

# Objective justification

*“Mandatory retirement preserves the dignity of older workers”*

- Limits the need to dismiss older workers for capacity or performance reasons
  - **Irish Ferries Ltd v Martin McDermott**  
[EDA1631]
- Unlikely to be acceptable to avoid deploying performance management procedures for older workers only





# Objective justification

*“Mandatory retirement protects the health and safety of colleagues and clients”*

- **Transdev Light Rail Ltd v Michael Chrzanowski** (EDA1632)
  - Luas tram driver required to retire at age 65
  - Objectively justified on the basis of health and safety concerns for drivers, passengers and the public
  - “Safety critical role”
- Also, *Marine Pilot v Port Company* (ADJ-00004560)



# Objective justification

*“and the means of achieving that aim are appropriate and necessary.”*

Proportionality is a 3 prong enquiry:

1. Assess the appropriateness of the measure
2. Assess its necessity
3. Could the aim have been achieved by more lenient means?
  - Examine supply/demand in the sector
  - Examine the financial implications for the employee
  - Examine the impact on the right to work
  - Analyse consent

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# Reliefs

- Section 82(1) of the Acts – types of redress include
  - Compensation for the effects of the discrimination;
  - Order for equal treatment in whatever respect is relevant;
  - Order for the taking of a specified course of action; and
  - Order for re-instatement or re-engagement – *Connaught Airport v Glavey* (EDA1710)
- Wide discretion when awarding compensation – no requirement to show financial loss
- Awards of compensation usually modest - **A Receptionist v A Packaging Company** [ADJ-00005241]
- Option to bring Court proceedings for breach of contract

# Injunctions

- **Quigley v HSE [2017] IEHC 654**
  - Interlocutory injunction restraining termination
  - Colleagues unaware of age and working beyond 65
  - Employer relied upon Health Act and Pension Scheme
  - Adequacy of damages
  - Balance of convenience – loss of skill and experience
- Likely to be rare



# Political developments

- Citizens Assembly recommendations
  - 86% of the members recommended abolishing mandatory retirement based on age.
  - 96% of the members recommended the removal of the “pension pay gap” anomaly, which arises when a person who must retire at 65 is not entitled to the State pension until 66.

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# Recent developments

- Employment Equality (Abolition of Mandatory Retirement Age) Bill 2016
  - Retrospective prohibition on mandatory ages
- A Roadmap for Pensions Reform 2018-2023
  - Proposal to allow deferral of old age pension and receive actuarial adjustment in return;
  - Proposal to standardise upper age limit for drawdown of benefits
- Public Service Superannuation (Age of Retirement) Act 2018
  - Increase to public sector retirement age

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# WRC Code of Practice



- Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017 (the “Code of Practice”)
- Adherence likely to be taken into account by employment tribunals
- Requirements:
  - Guidance at recruitment and throughout career
  - Written notification in advance of stipulated age
  - Ensure the employee understands consequences



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# Requests to work longer

- Approach of Labour Court
  - **Irish Ferries Limited v Martin McDermott**  
[EDA1631]
    - No obligation to agree to such requests.
    - Once retirement age consistently applied, employer not obliged to consider whether the employee was capable of undertaking the work for which he was employed.
- Code looks set to alter this position...

# Managing requests to work longer under the Code of Practice

- Employee may request to work longer in writing within 3 months of the stipulated age
- Employer must “consider carefully”
- Objective criteria to assess request
- Communicate the decision giving reasons
- Employer should have formal policy including an appellate mechanism



# Implementing 'Longer working'

- Fixed-term contracts
- Section 6(3)(c), the Acts – requirement for objective justification
- Ensure the decision to offer contract is made solely in relation to the employee
  - **A Box Office Cashier v An Arts and Entertainment Centre** [ADJ-00006654] – a word of caution
- Guidance being prepared by IHREC



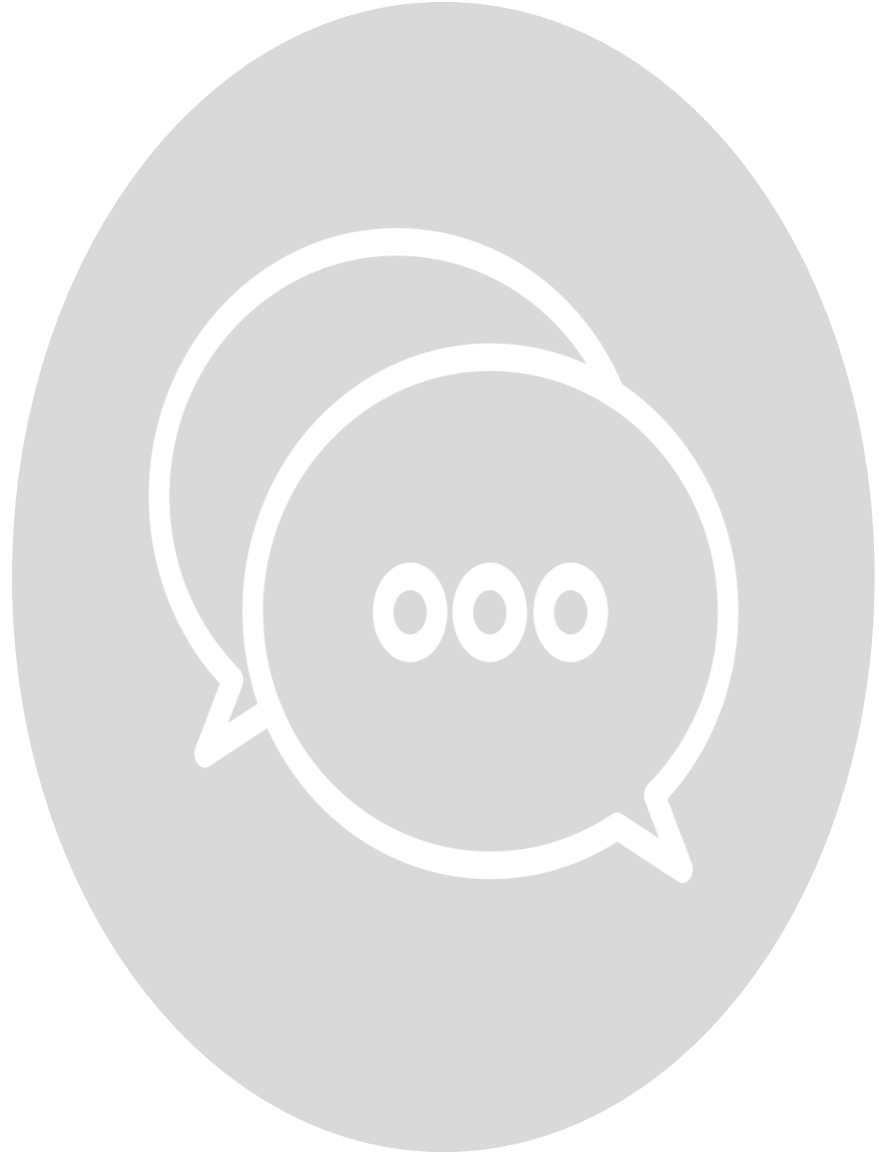
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# Conclusions

- Highly litigated for foreseeable future
- Scope for having mandatory age is narrowing
- Ensure retirement policy is communicated to employees and regularly reviewed
- Consider the objective justification for the age
- Scrupulously adhere to the Code of Practice
- Legislative abolition is possible
- Alignment with state pension age is probable

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# Questions?



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