SUMMARY

2010/64: Dismissal at age 65 implied term of employment and not in breach of Directive 2000/78 (IR)

<p>An employee brought judicial review proceedings of a decision by her employer, the Health Service Executive (HSE), to terminate her employment upon her reaching the retirement age of 65. Although the employee was never furnished with a contract of employment, the Court held that a mandatory retirement age of 65 was an implied term of her contract of employment, and that the employer’s decision to terminate the employee’s employment on her reaching the age of 65 was lawful.</p>

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An employee brought judicial review[1] proceedings of a decision by her employer, the Health Service Executive (HSE), to terminate her employment upon her reaching the retirement age of 65. Although the employee was never furnished with a contract of employment, the Court held that a mandatory retirement age of 65 was an implied term of her contract of employment, and that the employer's decision to terminate the employee's employment on her reaching the age of 65 was lawful.

Facts

The Applicant, Ms McCarthy, commenced employment as a senior radiographer in Orthodontic Services in St. James' Hospital, Dublin in June 2002. Initially employed on a part-time basis, Ms McCarthy also practised as a barrister at the Irish Bar. Following the enactment of the Health Act 2004 Ms McCarthy was transferred to and became an employee of the

Health Service Executive (HSE) as a temporary part-time officer. Ms McCarthy left the Bar in 2004 and in 2005 her hours of work were increased to full-time at the hospital.

Section 19 of the Health Act 1970, which applied when Ms McCarthy commenced her employment, provided for a mandatory maximum retirement age of 65 for permanent officers of Health Boards. The Applicant was not furnished with a contract of employment on commencing work in 2002, despite requesting one.

In April 2009, the Applicant sought clarification from her manager in Orthodontic Services, as to whether she was obliged to retire on reaching the age of 65 in October 2009. Her manager assured the Applicant she would 'do [her] best' to keep the Applicant in employment. As a result Ms McCarthy believed that it would be very likely that she would be able to continue to work, particularly as she had worked with others whom she knew to be over 65 years of age.

In August 2009, Ms McCarthy received a letter from the Assistant National Director of the HSE, stating that she was due to retire on 28 October 2009. Subsequent to enquires made to her manager, the Applicant was informed that owing to budgetary constraints, there was no possibility of remaining in the employment of the HSE after reaching the age of 65. In October, Ms McCarthy's contract was terminated. She applied to the High Court to restrain the HSE from terminating her employment and sought an Order quashing the decision to terminate.

The Applicant submitted she had a legitimate expectation that this retirement age would not apply to her circumstances. She contended that, as she did not hold a permanent position, section 19 of the Health Act 1970 did not apply to her. Furthermore, new entrants to the public service after April 2004 were not subject to the mandatory retirement age of 65[2]. Ms McCarthy contended that this further supported her stance that the retirement age did not apply to her as a non-permanent officer. Ms McCarthy also claimed that she had worked with other radiographers whom she knew to be over the age of 65. Ms McCarthy strongly maintained that she was never aware of, nor could have been deemed to have been aware of, the mandatory age of retirement applying to her until she was told in August 2009, as she had never received a written contract.

Ms McCarthy further relied upon the prohibition on age discrimination contained in Council Directive 2000/78[3] and argued that the HSE had failed to justify the alleged discrimination by reference to legitimate social policy objectives. The Applicant cited the judgment of the ECJ in the Age Concern case[4] of March 2009, in which it was stated that the option to derogate operates "*only in respect of measures justified by legitimate social policy objectives*" and that there

exists a "*high standard of proof [to show that] the legitimacy of the aim relied on [is suitable] justification*". The Applicant's legal team submitted that these criteria had not been fulfilled, nor had the standard of proof been discharged by the HSE.

The HSE acknowledged that no written contract had ever been furnished to the Applicant, but stated that contracts furnished to other employees in a similar position to Ms McCarthy, who also commenced work in 2002, provided for a retirement age of 65. The HSE submitted that, although the Applicant was not furnished with a written contract of employment, an oral agreement existed between the parties which contained an implied contractual term that the retirement age of 65 was applicable to Ms McCarthy's position. It was contended that such a term could be implied as a matter of fact and/or on the basis of custom and practice. Furthermore, the Respondent's superannuation scheme of which Ms McCarthy was a member, referred to a normal age of retirement of 65. It was submitted that it would have been obvious to an 'officious bystander'[5] that such a retirement age was applicable to Ms McCarthy.

In response to the claim that a legitimate expectation was created by the assurance of the manager of Orthodontic Services to 'do [her] best', the Respondent cl aimed that no factual evidence supported that such a representation had been made, and furthermore, the manager was not the relevant decision maker in this regard.

The HSE rejected the contention that Directive 2000/78 had been infringed and referred the Court to the case of *Palacios de la Villa v Cortefiel Servicios*[6] in which the ECJ dealt specifically with the legality of terminating employment at 65. The ECJ held that it is "*not unreasonable for the authorities of a Member State to take a view that a measure… may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy*".

Judgment

The High Court ruled that the mandatory retirement age of 65 could be viewed as having been implied into Ms McCarthy's conditions of employment. Taking into account that Ms McCarthy was legally qualified, the court refused to accept that she was unaware of the retirement age applicable to her position in the public service. The Court deemed the Applicant to have been 'on notice' of the implied term by virtue of the broad awareness of the retirement age amongst most working adults, and, furthermore, due to the reference to the retirement age and the cut off for contributions at age 65, as contained in the HSE's superannuation scheme.

The Court did not believe any legitimate expectation arose in this case, as her manager was

not in a position to make a representation which could give rise to a legitimate expectation, and there was no evidence that any representation was in fact made.

In ruling that Council Directive 2000/78 had not been breached, the Court endorsed the decision of the ECJ in Palacios de la Villa, which held that a law providing for a retirement age of 65 could not be seen as discriminatory or unreasonable in its effect, and further noted the universal existence of such laws across Europe. The Court deemed Ms McCarthy's termination of employment "*lawful by reason of her having reached the retirement age relevant to her*" and refused to grant the reliefs sought.

Commentary

A mandatory retirement age in Ireland has not been established by law, but the majority of employment contracts, including those in the public service, specify a compulsory retirement age of 65. Some occupations, including the police, doctors (general practitioners) and the judiciary have statutory mandatory retirement ages. Generally, in the absence of legislation, it is often the employer's pension scheme that dictates the retirement age for its members. An additional factor, which has been influential in affecting the setting of retirement ages by employers, is the state pension scheme, which is applicable from age 65 onwards. The Employment Equality Acts 1998 – 2007, while prohibiting discrimination on the age ground, allow Irish employers to set different retirement ages for employees or different classes or types of employees in an organisation. Section 34(4) of the Act provides that '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'.

Note that the 1998 statutory provisions pre-date the Directive and we cannot gleam any insights as to the reasoning for inclusion of section 34(4) in the Employment Equality Bill 1996. However, some legal commentators in Ireland today would argue that the age-related derogations of section 34(4) are not only compatible with the Directive but are in fact allowed for under Article 6(1). This is why the only amendment to be made to section 34 of the 1998 Act by the Employment Equality Act 2004, clearly post-Directive, was only concerned with fixing ages in relation to occupational benefits schemes. Section 34(4) remained unaltered. It could be argued that these derogations outlined in Article 6(1) of the Directive, and by extension section 34(4) of the 1998 Act, have since been supported by the ECJ's decision in Palacios de la villa in 2007.

However, this must be balanced with the opinion of other Irish commentators who believe that section 34(4) is incompatible with the Directive. Judgments in cases such as Age Concern

England (C388/07) and *Rosenbladt v Ollerking Gebaudereinigungs mbH* (C45/09) before the ECJ, and *Seldon v Clarkson Wright & Jakes* [2009] IRLR 267 before the English Court of Appeal indicate that a compulsory retirement age will only be upheld where it is as a result of national measures or it has not been unilaterally imposed by an employer (e.g. negotiated by the unions or by an individual with equal bargaining power such as a partner in a firm). The ECJ has stated in each of its judgments that compulsory retirement of workers is discriminatory on grounds of age and must be justified. On this basis, it could be argued that Section 34(4) of the Employment Equality Act 1998 seems to allow automatic compulsory retirement and, is therefore incompatible with the Directive.

The current approach to retirement age in Ireland is somewhat confusing. On the one hand, there has been a call to reduce unemployment for younger employees in certain professions, such as teaching, by ensuring that employees leave at normal retirement age. Such was the approach in *Palacios de la Villa*, where the ECJ held that Spain's compulsory retirement age of 65 was justified in allowing employers to compel staff to retire at that age, as it helped to reduce unemployment and stabilise the Spanish workforce. On the other hand, there have been calls to increase the State pension age, to reduce pressure on the public finances and to increase economic productivity. The National Pensions Framework[7] was published by the Department of Social Protection in March 2010. One of the Framework's recommendations is an increase in the State pension age from 65 to 66 in 2014, increasing to 67 by 2021 and 68 by 2028.

This case is an illustration of differing approaches and contradictions to retirement ages within Irish public bodies. On the one hand, the legislature has introduced laws to remove retirement age[8] for public servants who commence their employment from April 2004. On the other hand, a public institution will insist that public servants who have commenced employment prior to 2004, are terminated. This is done by relying on an implied contractual term and the terms of a superannuation scheme, this being the case even when it is alleged that some other radiographers aged over 65 have remained employed. What is a mandatory retirement age for one radiographer is not for another.

Contrasts in approach to retirement age are illustrated further when one compares a recent case before the Employment Appeals Tribunal (EAT). In *Smith v Provincial Security Services Limited*[9] the Claimant worked as a security guard with the Respondent company. He moved to the Company within the group through a series of transfers. He was dismissed when it was

discovered that he was over 65. Despite having signed a contract containing a mandatory retirement clause, the Claimant was of the belief that there was no retirement age specified in his contract. The EAT determined that he was justified in thinking that he was not contractually bound to retire at the age of 65 when he had been allowed to continue with one group company until the age of 69 and continued after transferring to the Respondent until the age of 72. The EAT found that the Claimant was unfairly dismissed and deemed that the most appropriate remedy was to reinstate the Claimant to his position.

Whilst *Palacios de la Villa* and *Age Concern* have provided some clarity/guidance in this area, there is still a level of uncertainty in Ireland as to what constitutes 'appropriate and necessary' when it comes to individual cases. The National Pensions Framework has highlighted that Ireland will almost certainly be entering a transitionary period as regards entitlement to the state pension, which will become more out of line with compulsory retirement ages fixed by employers. This will only heighten the potential for legal challenges against employers on grounds of age discrimination, or for unfair dismissal arising from the discrepancy between state, contractual and superannuation retirement ages, in both the public and private sectors alike.

Comments from other jurisdictions

Austria (Martin E. Risak): Austrian employment contracts normally do not include clauses which terminate the contract automatically when the employee reaches the statutory retirement age. However, one comes across them sometimes, especially in cases involving subsidiaries of German companies, as in Germany, these clauses are quite common. The EJC decisions on *Palacios de la Villa* and *Age Concern* have introduced this concept to employers and there are moves by some to have them included in standard contracts. This is understandable, because under Austrian employment law a termination with notice can be contested in court if the employee is employed in an organisation employing more than four employees and if the termination impairs the employee's substantive interests. The Supreme Court has established that if an employee can claim the maximum statutory pension, his substantive interests are not impaired – it therefore is not so much the age of the employee that is taken into consideration but rather his other sources of income, of which pension is one. It can be therefore quite hard to dismiss an employee who has reached the age of 65, especially if he or she has had a scattered employment history and is unable to claim a high pension.

The said recent ECJ decisions have therefore given some Austrian employers ideas about how they can get rid of employees of a certain age by including age clauses in their employment

contracts – but, as the Dutch commentator points out below, the legal situation is not as clear-cut as it might seem at first glance.

France (Claire Toumieux and Aude Pellegrin): By law in France, employment agreements must not contain any implied terms which force employees to retire upon reaching the retirement age. Any contractual or conventional provision which provides for the automatic termination of an employment agreement by virtue of the age of the employee or the fact that he or she may benefit from an old age pension scheme is void by virtue of Article L.1237-4 of the French Labour Code. Under French employment law, even though an employee may start receiving old-age pension, usually at age 65, the employer may only propose retirement to the employee and the employee is entitled to refuse until he or she turns 70.

Germany (Dr. Gerald Peter Müller): Under the rules of German employment law, an implied contractual term to terminate an employment relationship at the age of 65 years would not be enforceable. The applicable statute (*Teilzeit- und Befristungsgesetz*, "TzBfG") requires that any stipulation limiting the duration of an employment relationship must be in writing and (with limited exceptions) supported by a material reason.

Employment contracts in Germany usually include an explicit term that the employment will come to an end when the employee reaches the retirement age (65 years now, but this is being incrementally extended to 67 years). Furthermore, applicable CLAs do typically include such a clause. As to the material reason, the German constitutional court ("*Bundesverfassungsgericht*") ruled in 2007 that a retirement clause can be valid if it allows the employee to reach a sufficient level of economic security. It is accepted that participating in the statutory pension scheme itself will satisfy this requirement. This being said, it must be noted that German courts only apply a general test as to whether the 'economic security' criterion can be satisfied. Therefore, it is not necessary to actually prove that an adequate pension claim can be built up within the employment and this would in fact be impossible to do without hindsight. This – in my view – makes sense as long as the retirement clause is agreed upon in the employee's younger years – thus allowing for a sufficient build-up of pension entitlement, or at least allowing the opportunity to do so. After all, it is still a matter of consensus in Germany that the statutory pension scheme will be sufficient to provide for the needs of a retired employee. However, whether these assumptions remain valid in future will

no doubt become a matter of debate, given the recent demographic changes in the German workforce. In addition, for employees who are already close to the retirement age, the question of whether the test of economic security should really be concrete and tangible instead of merely abstract – and therefore include any pension entitlements already accrued – is also likely to be explored.

As in The Netherlands (see below), German colloquial language usually uses only one expression to indicate that a person is ending active employment and starting to receive a state pension – '*in Rente gehen*' – 'to go on pension'. The idea is that the ending of the employment and the beginning of receiving a pension coincide. However, this simply reflects the usual pattern that has existed until recently. Although it has always seemed to be common sense to assume that after working for many years, German employees are able to live on their pension, this appears to be fading away. Without launching into the details of the German pensions system, it is certainly the case that the idea that the active work force pays the pensions of retirees (the so-called 'contract between the generations' – "*Generationenvertrag*", as opposed to a funded pension system) becomes more and more problematic, owing to the gradual reduction in the number of active workers as compared to the number of retirees. It is probably not too pessimistic to say that in the not-too-distant future, the number of post-retirement-age employees who would either like to or have no choice but to work beyond that age, will increase. At the same time, and also as a result of the changes in demographics in Germany, employers will feel a growing urge to retain highly qualified employees in their workforce because fresh recruits with sufficient training will be ever harder to find. The fact that such an employee is also receiving pension benefits will become less important. In sum, it appears to me that changes in working life will reflect on the expressions used and 'going on pension' may soon only mean the ending of active work life but not necessarily the starting of receiving pension benefits, or the other way around.

The Netherlands (Peter Vas Nunes): a 2009 judgment by a court of first instance (Ktr. Delft 23 April 2009) confirmed what most lawyers already held to be the case, namely that employment contracts cannot be deemed to contain an implied term that they terminate at age 65 or on retirement.

The English language distinguishes between 'retirement' and 'pension'. The Dutch language does not. We say 'to go on pension' (*met pensioen gaan*), which can mean either or both of two things. It can signify that a person's employment contract is coming to an end in connection

with age. It can also mean that a person will start receiving old-age pension payments. Usually, someone who says he is 'going on pension' means both: he will cease working for a living and, simultaneously, he will start receiving benefits. Increasingly, however, these situations need not coincide. It is perfectly possible for someone to stop working before his retirement benefits kick in. Alternatively, there is nothing to prevent a person from continuing to work for the same employer and collecting pension benefits at the same time, in which case he receives two monthly checks. The reason I mention this is that Article 6 of Directive 2000/78/EC has two sections. The first allows objectively justified differences of treatment on grounds of age (which includes dismissal), whereas the second section allows – *inter alia* – 'the fixing [...] of different ages for employees' for occupational social security schemes (which includes pension schemes), even where such fixing of different ages is not objectively justified. Section 34(4) of the Irish Employment Equality Acts 1998-2007 appears to be incompatible with the Directive inasmuch as it allows employers 'to fix different ages for the retirement (whether voluntarily or compulsorily) of employees' My view is that that this provision seems to be lumping sections 1 and 2 of Article 6 of the Directive together and allowing termination on the sole ground of age regardless of justification. The Dutch Age Discrimination Act includes a provision which allows employers to terminate employment contracts at age 65 without requiring justification. There is considerable debate in The Netherlands as to whether this provision is euro-proof. Most authors believe it is, arguing that the ECJ gave its blessing in *Palacios* and, again, in *Age Concern*. Personally, I am not convinced that this is the case, particularly as the government in its explanatory memorandum to Parliament at the time the Bill was introduced, reasoned that an exception to the prohibition of age discrimination was necessary to allow forced retirement, not (as was the case in Palacios and, to a lesser extent, in Age Concern) in order to combat youthful unemployment, but merely to avoid employers having to give a reason for dismissing staff at age 65. As the Irish correspondent explained above, it is not clear why the Irish legislator adopted said Section 34(4). Depending on that reason, I would argue that Section 34(4) may not be compatible with Directive 2000/78 or, more precisely, with the general principle of non-discrimination based on age as codified by Directive 2000/78.

United Kingdom (Richard Lister): Events in relation to mandatory retirement in the UK have been moving rapidly since the High Court's ruling in the *Age Concern* case in September 2009 (see *EELC* 2009/46). Soon after the UK's new coalition government came to power last May, it decided to phase out the legal regime allowing employers to require employees to retire at age 65 – the so-called 'default retirement age' (DRA). It has since been consulting on proposals to

remove the DRA by 1 October 2011, with transitional arrangements for compulsory retirements taking effect in the preceding six months. The consultation closed on 21 October 2010 and the Government will confirm its intentions in due course.

Assuming this reform goes ahead as planned, employers wanting to retain their own retirement age will need to demonstrate that it is 'objectively justified' – i.e. a proportionate means of achieving a legitimate aim or aims. It seems probable that tribunals will require cogent empirical evidence as to both the decision to implement a retirement age and the choice of any particular age. It is likely to become more difficult in future for employers to justify an across-the-board retirement age for all grades and occupations.

Footnotes

1 Judicial review is a procedure in which the Irish courts can provide remedies against the abuse of executive powers by the State and public bodies. It allows the courts to supervise public authorities in the exercise of their powers.

2 Section 3.1 of the Public Services Superannuation (Miscellaneous Provisions) Act, 2004 removed the mandatory retirement age for the majority of public service positions for any new entrants to the public service from April 2004.

3 Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78).

4 Case 388/07; The Incorporated Trustees of the National Council on Aging (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform [2009] IRLR 373 ECJ.

5 The 'officious bystander test' is used to incorporate obvious implied terms into a contract. The test is to the effect that if, while the parties were making their contract, an officious bystander were to suggest some express provision that should be included in it, they would both reply, 'oh, of course.' The test derives from a UK Court of Appeal case on contract law - Shirlaw v Southern Foundries [1940] AC 701.

6 Case 411/05; *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531.

7 www.pensionsgreenpaper.ie/publications_nationalframework.html.

8 Public Services Superannuation (Miscellaneous Provisions) Act, 2004.

9 Employment Appeals Tribunal MN573/09 RP586/09 UD565/09; 4 February 2010.

Subject: Unfair dismissal, terms of employment

Parties: Aoife McCarthy (Applicant - employee) – v – Health Service Executive (Respondent – employer)

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