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I - RETIREMENT AGES

A new Bill has been published by the Government which proposes to increase the compulsory retirement age in the public sector. The Public Service Superannuation (Age of Retirement) Bill 2018 will raise the compulsory retirement age of most public servants employed before April 2004 from 65 to 70. The Bill also provides that the Minister for Public Expenditure and Reform may make an order to further increase the compulsory retirement age for public servants in the future, up to a maximum age of 75. Before the Minister can do so, they must consider a number of factors including the likely effect of changes on recruitment, promotion and retention of staff in the public service; evidence of an increase in normal life expectancy in the country and; the likely cost to the Exchequer. The Bill follows previous changes made to retirement ages of people who joined the public service during the economic recession. For people newly employed in the public service from January 2013, the Public Service Pensions (Single Scheme) and Remuneration Act 2012 increased their minimum retirement age to 66 and their maximum age to 70. Significantly also, the 2012 Act changed the pension rules for new employees so that their pension will be based on career average pay and rather than on final salary. Public servants employed before 2013 are still entitled to have their pension based on final salary, a more favourable position than for new entrants.

The changes to retirement ages had been expected given that the Government had changed the qualifying age for the state pension during the economic downturn. The qualifying age for the pension rose from 65 to 66 in 2014, and will rise to 67 years in 2021 and to 68 years in 2028, making it one of the highest pension ages in the OECD. There has been generally little opposition to the new Bill as concerns had been raised by groups such as trade unions about the potential gap in incomes for workers in the time between their retirement age and their access to the state pension. Workers in the private sector are in a more precarious position in regard to pensions. There is no statutory retirement age for employees in the private sector and their retirement age is set by their contract of employment, usually at age 65. National data indicates that in 2015, half of employees in the country did not have a personal or occupational pension, with particularly low rates in personal services such as retail and accommodation/food¹. The current state pension represents approximately a third of average earnings, meaning many private sector employees reliant on it will have low incomes in retirement.

A new Code of Practice On Longer Working developed by the state body, the Workplace Relations Commission, offers guidance to employers on how to manage requests from employees to work beyond normal retirement ages. This an issue of growing importance and there are increasing numbers of employment law cases about retirement ages.

1 Central Statistics Office (2016) *Quarterly National Household Survey Pension Provision Q 4 2015*. Available www.cso.ie

Many of these cases are concerned with whether mandatory retirement ages satisfy the tests of being objectively and reasonably justified by a legitimate aim and whether the retirement ages are appropriate to achieving that aim. A recent high profile case was *Valerie Cox v RTE*, the State broadcaster. In March 2018, a decision was issued by the Workplace Relations Commission on a case taken by an employee, Ms. Cox, under employment equality legislation. She claimed she was discriminated against when her employment was terminated at 65. The employer argued that a compulsory retirement age of 65 was in the employee handbook and was justified by the need to create promotions opportunities for younger employees. However, the employee won the case on the grounds that the handbook was not clear on a compulsory retirement age, that the employee's contract did not stipulate a retirement age and there was no union agreement on a retirement age. In addition, the decision noted that other people over the age of 65 continued to work for the employer as independent contractors. Therefore, the Workplace Relations Commission concluded that there was no objective justification for the employee's termination and it awarded the employee €50,000 in compensation.

II - DISABILITY EQUALITY CASE

A long-running employment equality case is continuing with a recent decision by the Court of Appeal which followed decisions by the Equality Tribunal (now the Workplace Relations Commission), the Labour Court and the High Court. The case centres on the extent to which an employer must accommodate an employee with a disability. In *Daly v Nano Nagle School*, the employee, Ms. Daly, worked as a special needs assistant and part-time secretary in a school for 12 years when she was involved in a car accident that left her with significant disabilities and using a wheelchair. Ms. Daly wanted to return to her role as a special needs assistant but the school decided that she was medically unfit and did not have the capacity to undertake the role. Ms. Daly initiated a case against the school to the Equality Tribunal under the Employment Equality Acts 1998 to 2011 and argued that her employer had not complied with the legislation by affording her appropriate measures to enable her to work with a disability.

The Employment Equality Act 1998 as amended states that nothing in the Act is to be construed as requiring any person to, amongst other things, retain an individual in a position if the individual is not (or, as the case may be, no longer) fully competent and available to undertake and fully capable of undertaking, the duties attached to that position having regard to the conditions under which those duties are, or may be required to be performed. A person who has a disability is fully competent to undertake, and fully capable of undertaking any duties if the person would be so fully competent and capable by the employer providing "appropriate measures".

The school argued that many of the duties of a special needs assistant were beyond Ms. Daly's ability and that funding was not available to allow them to employ her in a 'floating' role in addition to their requirement for certain numbers of special needs assistants. There was no disagreement amongst both sides that Ms. Daly could not perform the full range of tasks of her original special needs assistant role. In 2013, the Equality Tribunal found against Ms. Daly on the grounds that she was no longer fully competent and capable of performing

the job she was hired to do and that if the school had to provide appropriate measures to accommodate her return to work, this would involve a cost other than a nominal cost. Ms. Daly appealed the decision and, in 2014, the Labour Court, a quasi-judicial forum, overturned the Equality Tribunal's decision. It found that the school had not considered the possible options available to it to accommodate Ms. Daly such as redistributing some of the duties to other colleagues or offering her part-time employment. It found that the school management had construed its obligations under equality legislation too narrowly by believing that it would have to accommodate Ms. Daly in such a way to enable her complete the full range of tasks of the job and it had not consulted Ms. Daly about alternative options. The Labour Court awarded Ms. Daly compensation of €40,000.

The school appealed this decision on a point of law to the High Court in 2015, arguing that the Labour Court had erred in its decision by ignoring certain evidence and had made a decision that was not rational or of common sense. It argued the Labour Court misinterpreted equality legislation by indicating that the school could have reorganised Ms. Daly's job allowing her to carry out essential duties of the job as restructured rather than the original job for which she was hired and had not given consideration to the disproportionate financial burden involved in reorganising Ms. Daly's job. However, the High Court dismissed the appeal. It found the Labour Court had not decided that Ms. Daly should have been accommodated by the school in any particular way but had decided that the school had not considered the possible options that were available to make an informed decision. The school appealed the High Court's decision to the Court of Appeal.

In 2018, the Court of Appeal found in favour of the school and set aside the decision of the Labour Court. The Court of Appeal concluded that the Labour Court had focused on the position of Ms. Daly to the exclusion of the other legitimate interests that the school had to accommodate such as ensuring the safety of the children and staff. The Court of Appeal believed the Labour Court was wrong to dismiss the school's attempts to re-hire Ms. Daly as a special needs assistant in a 'floating' capacity which were not successful due to lack of funding. The Court of Appeal was critical of the Labour Court for dismissing the fact that this 'floating' role involved creating an entirely new position and for suggesting that the school should disregard the tasks the employee could not do and focus on the ones she could. The Court of Appeal agreed with the approach of the first decision by the Equality Tribunal by focusing on the fact that Ms. Daly was not competent to do the essential tasks of the role she was hired for. For this reason also, the Court of Appeal concluded that if no reasonable adjustments can be made for a disabled employee, the employer is not liable for failing to consider alternative options or for not consulting with the employee.

This is a significant decision. According to Sexton², the implications for employers are that "if the employee cannot undertake the essential tasks of the role then this may be

2 E. Sexton, *Nano Nagle School v Daly* [2018] IECA 11. Available www.legalisland.ie

grounds for termination of the employee's employmentand in considering reasonable accommodation for an employee with a disability, an employer is entitled to take into account other legitimate interests which they may also have to accommodate". The employee has now appealed the decision of the Court of Appeal arguing that as a result of its decision, it will be "less likely that employment positions (as opposed to physical premises) will be reorganised by employers in ways that facilitate persons with disabilities entering or remaining in the workplace"³. To date then, the case has resulted in two decisions in favour of the employee and two decisions in favour of the employer. We await the Supreme Court's hearing of the appeal.

3 A. Prendergast, «Major Employment Law Cases Appealed to Supreme Court», *Industrial Relations News*, 27, 12th July 2018.