

AIRM

Recent developments in Discrimination Law

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Introduction

- When might employment equality law be relevant in the workplace
- Recruitment
- Management of absence - Disability Discrimination
- Retirement - Age Discrimination

Pre-employment

- Access to employment
- Conditions of Employment
- Training experience for or in relation to employment
- Promotion or re-grading
- Classification of posts

Recruitment

- Job description
- Agree skills and attributes required
- Qualifications – required and desirable
- Analyse whether any potential indirect discrimination
- Conditions of employment
- Evaluation system

Interview process guidelines

- Ensure all documentation is discrimination proofed ie. Application form, interview forms
- Ensure interview facilities are accessible for all candidates
- *Anne Harrington -v- East Coast Health Board*
- Transparent process – agree essential criteria
- Where discriminatory questions are asked this may raise an inference sufficient to move the burden of proof to the respondent employer

Interview process guidelines

- Most meritorious candidate should be appointed
- Questions asked should relate only to job requirements
- Interview notes should be retained and an agreed marking system should be in place – what weight is to be applied to different criteria and qualifications
- Gender balance on the interview board

Labour court guidance

- Denial of discrimination not conclusive
- May be discrimination if conclusions drawn based on preconception without adequate appraisal
- Discrimination may be inferred from questions
- Failure to maintain notes – Fatal to employer

Data protection

- Maintenance of records
- Time periods
- Data protection request

Pre-employment medical

- On notice of medical history
- Triggers consideration of section 16 exception grounds
 - Whether competent or capable to perform the particular job
 - Whether appropriate measures required
 - *A complainant -v- Bus Eireann*
 - *Niall Walsh -v- Webprint Concepts*

Absence

- Absence -v- absenteeism
- Statutory leave periods – Health & safety, maternity, parental, paternity, adoptive, carer's leave
- Long term incapacity

Absenteeism – the Unfair Dismissals Acts

- Regular pattern of absence
- Reasonable to conclude no substantial improvement likely
- Unacceptable to continue at this level
- Adequate warnings

Fitness for Work – The Employment Equality Acts

- Section 16 (1) of Employment Equality Acts
- Exclusion where employee:
 - will not undertake the duties of the role
 - will not accept the conditions of the role
 - is not (or is no longer) fully competent and available having regard to the conditions of the role

Scenario A

- Jane employed by Betterbuys Limited as sales assistant
- Suffers from lower back pain – has had protracted absence
- Occupational health – fit to return to work 3 days per week on reduced hours for 2 weeks and then return to work full time
- Can do 6 out of 9 tasks

Disability

- Total or partial absence of bodily or mental functions
- Chronic disease or illness
- Learning disability
- Mental health illness

Appropriate Measures

- Effective and practical measures
 - adaptation of premises and equipment
 - patterns of working time/distribution of tasks
 - provision of training/integration of resources

Disproportionate Burden

- Financial and other costs entailed
- Scale and financial resources of employer
- Possibility of obtaining public funding or other assistance
- *Nano Nagle School -v- Marie Daly*
 - Adaptation included patterns of working time and redistribution of tasks
- *Ring -v- Dansk*

Interaction with Unfair Dismissals Acts

- Capability, competence or qualifications of the employee
- For the work of the type which he was employed to do

Scenario A – continued

- To facilitate Jane's return to work:
 - full medical advice
 - can the adjustment to working hours be accommodated
 - what other measures are required
 - disproportionate burden

Labour Court Guidelines – 2 stage process

- *A Health and Fitness Club -v- A worker*
- *Humphries -v- Westwood Fitness Club*
- *Nano Nagle -v- Marie Daly*
- *Ms M (represented by INTO) -v- HSE*

Scenario B – absence/incapacity

- Tom is out of work continuously for more than 1 year
- Company policy has a stated tolerance level for absence
- After 1 year the Company requires a definite return to work date – Tom is unable to confirm his return to work date
- Dismissal of employee being considered

Case example

Clear procedures required

- Grainne Hoey – White Horse Insurance

Telephone review meeting with HR without medical evidence unfair: €20,000 award

Case example

- *Majella Long -v- Dunnes Stores*
 - Protracted absence – periods of absence over 5 year period
 - 23 years service
 - No return to work date provided – dismissal because could not hold position open indefinitely
 - Should have had medical evidence
 - Re-engagement ordered

Case example

No blind application of company policy

- *Stobart (Ireland) Limited -v- Beashel*
 - Depression
 - Dismissed because absence exceeded tolerance levels for management
 - Unfair because dismissing manager was not advised that employee suffered from depression
 - €15,000 award

Case example

Dismissal after long term absence

- *Eugenia Carroll -v- HJ Heinz*
 - 3 years absence
 - Temperature, weight and shift work restrictions due to medical condition
 - Dismissal upheld because employer engaged with employee, her medical advisors, company doctor and occupational health and sought to accommodate her

Fair Procedures

- *Delaney -v- Central Bank of Ireland*
- *McGrath -v- Irish Distillers*
- *Kennedy -v- Leonard & Tolan*

Sick Pay

- Sick leave policy
- Terms of employment (Information) Act

Recommendations

- Assess if sickness a disability
- Education about the disability – medical advice
- Consider any changes to workplace to accommodate
- Disproportionate burden test

Recommendations

- Dismissal only where no accommodation possible
- Personal injury action
- Have consultation process with employee about return to work or dismissal – afford opportunity to influence outcome

Age Discrimination

- Change to State Pension Age
 - DOB on or after 1 January 1948 – 66
 - DOB on or after 1 January 1955 – 67
 - DOB on or after 1 January 1963 – 68

Report of Interdepartmental Group on Fuller Working Lives – August 2016

Employment and Equality Law

- Unfair Dismissals Acts – normal retiring age
- What is the retirement age:
 - Contractual retirement age
 - Implied contractual retirement age
 - Retirement age – occupational pension scheme
 - State pension age

Case examples - Establishing a contractual retirement age

Firefighter – collective agreement set retirement age

Contractual age specified different age

- *Michael Kavanagh -v- Kilkenny County Council*
- *Contract said 65 – collective agreement was 60*
- *Active involvement in union - deemed consent*

Case examples - establishing a contractual retirement age

— *Reilly -v- Drogheda Borough Council*

Retained firefighter

➤ *Contract said 65 collective agreement reduced it to 58*

➤ *Breach of contract – no consent*

Case examples: establishing a contractual retirement age

- *Aoife McCarthy -v- HSE*
 - *Public sector retirement age*

- *O'Mara and Hynes -v- College Freight Limited*
 - *No retirement policy or custom and practice*
 - *€35,000 award*

Equality Law

- Directive 2000/78/EC
- *Calor Teo -v- McCarthy*
- *Donnellan -v- Minister for Justice*
 - objectively and reasonably justified by a legitimate aim ... and the means of achieving that aim are appropriate and necessary.
- *Elizabeth Sweeney -v- Aer Lingus*

Legitimate aim or purpose

- Health and safety concerns
- Staff planning
- Physical capability to do the job
 - *Doyle -v- ESB International*
 - *O'Neill -v- Fairview motors*
 - *Saunders -v- CHC Ireland*
 - *Minister for Justice and Law Reform -v- Equality Tribunal*

Objective justifications

- Interdepartmental report:
 - labour market opportunities for job seekers
 - encourage recruitment of young people
 - prevent disputes on fitness of workers
 - distribution of work between generations
 - ensure quality of service
 - avoid age imbalance
 - ensure motivation and dynamism

Legitimate aims and justifications

- CJEU case law:
 - unrelated to discrimination based on age
 - not purely financial/cost based
 - Member States social policy
 - aims not purely individual to employment
 - collective agreement
 - availability of retirement income

Equality (Miscellaneous Provisions) Act 2015

- Objective justifications to fix retirement age
- Post retirement age fixed term contracts

Management of Retirement

- Is there an established retirement age
- Is there legitimate aim or purpose to justify retirement at particular age
- Is that proportionate to achieve that purpose

Fixed Term contracts

- Principle of fairness and equal treatment

Recommendations of Interdepartmental report

- WRC Code of Practice
- Employers to have retirement policy and clear articulation of policy
- Department to review position for public sector workers
- Human Rights Commission – guidance for fixed term contracts
- Training and development measures

Thank You