**Galway Solicitor Bar Association**

**CPD**

**Employment Law Update**

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**Right to cross examine/legal representation**

1. In the summer of 2017, a number of High Court judgments issued pertaining to the extent to which fair procedures and natural justice applied in workplace investigations (*Lyons v Longford Westmeath Education and Training Board* [2017] IECH 272; *E.G. v Society of Actuaries in Ireland* [2017] IEHC 392; and *N.M. v Limerick and Clare Education and Training Board* [2017] IEHC 588). These judgments consider important issues such as which types of investigations attract the full rigours of procedures and when a right to cross examination and legal representation are required in workplace investigations.
2. The judgment of Eager J. in *Lyons v Longford Westmeath Education and Training Board* received much publicity since it was published. It appeared initially to be a dramatic development by confirming the right of an employee facing a possible dismissal to legal representation and rights of cross examination within a fact-finding investigation process.
3. Turning to the *Lyons* judgment, Mr Lyons was the subject of an investigation into a complaint of bullying made against him by a colleague in 2015. The complaint cited a number of incidents, some of them going back to 2008. The employer engaged an external HR company, to carry out the investigation. Four allegations of bullying were upheld. At no stage throughout the process, culminating in their report was the applicant permitted to cross-examine his accuser. The applicant invoked the appeal which was afforded to him by the employer’s procedure but his appeal was rejected. In accordance with the Education and Training Board circular, he was then advised in writing by the Chief Executive that because his appeal had not been upheld, the investigation report “stands” together with the “findings” against him. He was required to attenda disciplinary meeting which could result in dismissal. In their report, the external investigators clearly made findings including that Mr Lyons had undermined the complaint on two occasions specifically in relation to failing to acknowledge her contribution to a staff meeting and to keeping possession of the school arts camera.
4. Eagar, J. found that there was a right to cross-examination and legal representation on the particular facts and that the proceedings adopted by the external investigators were in breach of Art. 40(3)(1) and (2) of the Constitution by the refusal to allow legal representatives to appear and failed to vindicate the applicant’s good name in failing to allow cross-examination. He stated:

*“Where investigative processes can lead to dismissal, cross examination is a vital safe guard to ensure fair procedures*”.

1. Eagar J on well-known dicta in reaching that conclusion including *Borgas v. The Fitness to Practice Committee*[[1]](#footnote-1), *Maguire v. Ardagh*[[2]](#footnote-2) and *in Re Haughey*[[3]](#footnote-3). He was very clear in stating that

“*it is the actual investigation that requires the right to cross examination and representation, that takes place prior to initiation of the disciplinary procedure under Circular 71/2014*”.

He therefore concluded that the investigation carried out by Graphite Recruitment “*failed to adopt fair procedures, in contradiction of the dicta of Supreme Court in the above cited decisions*”.

1. The decision in *Lyons* was very clear in confirming the right to cross examination and legal representation in a pre-disciplinary investigation process, albeit in factual circumstances where the applicant was facing the possibility of the loss of his employment and where serious findings had been made against him in respect of which conflicts arose. There was no ability of Mr Lyons to have these findings reconsidered in the disciplinary hearing which was stated to be to determine the disciplinary action, if any, which might arise from the findings of the investigation. Those facts seem to confine the findings of the High Court judgment in *Lyons,* at least insofar as the same issue of the right to cross-examination has been treated in subsequent decisions.
2. The more recent judgment in *E.G. v The Society of Actuaries in Ireland* involved an allegation of professional misconduct made against the applicant, who was a member of the respondent society. The nature of the investigation differed from the investigation in *Lyons*. However the *E.G.* judgment—published subsequently but not referring to the *Lyons* judgment—appears to have tempered the judgment in *Lyons*. In the *E.G.* judgment, the High Court upheld as a lawful an investigation process which did not make final or binding findings of fact. This was on the basis that the right to legal representation and cross examination would be provided at the disciplinary stage before a final decision on sanction could be made. The principles propounded in *Lyons,* therefore, appear not to have been established as a general principle and rather were based on the facts and circumstances—including the nature of the investigation.
3. In *E.G.,* the role of the investigation committee appointed was to determine (a) whether there was prima facie evidence of misconduct, and (b) whether to refer the matter to a disciplinary tribunal. Mr EG alleged that he had been denied the right to fair procedures in the investigation as no oral hearing had been held and he had been denied the right to cross-examine his accusers. The investigation did not make findings of fact and it appears from the judgment that, where an investigation process leaves the final decision on findings of fact to a separate decision maker, then the full extent of the rights of fair procedures, including the right to cross examine, will not necessarily apply. In examining the nature of the investigation conducted, McDermott J. was satisfied that the findings in the investigation were not final, no sanction was imposed, and rather it was a preliminary step prior to a disciplinary hearing such that less formal procedures could apply. It was also the case that the full panoply of fair procedures, including the right to cross-examine, and the right to legal representation, would apply at the disciplinary hearing, factors of which cognisance was taken by McDermott J. That is what seems to have enabled McDermott J. to hold that the refusal of cross-examination within an investigative process which did not make final findings of fact did not render the investigation unlawful*.*
4. A similar protection of the employee’s rights at the disciplinary stage as occurred in *EG* were afforded (again ironically by an Education Training Board) in *NM v. Limerick and Clare Education and Training Board*[[4]](#footnote-4). In that case the court was satisfied that

*“The decision to be taken by the investigators in this case could not be regarded as a final or binding finding of fact against the applicant. The procedure under the Circular requires an extensive hearing before determination could be made by the Chief Executive that a particular sanction should be applied*”.

1. Following on the furnishing of the investigator’s report to the Chief Executive, the employee was provided with an opportunity to attend a meeting at which he must be furnished with an opportunity to make his case in full and to challenge any evidence relied upon by the Chief Executive for a decision. McDermott, J. concluded on that basis that the Applicant “*has a right to challenge any evidence that is being relied upon*”. However he also pointed out that because there was an allegation of sexual harassment which was of a very serious nature “*that would necessarily require that [the applicant] be afforded the opportunity to cross examine any person making an allegation against him or whose testimony he seeks to challenge.*” McDermott, J. also observed that the procedure provided for an appeal which could invite any person to give oral evidence and there was a full opportunity to make written submissions on the appeal.
2. Interestingly whilst McDermott, J. was not prepared to recognise the right to cross examination in the investigation stage in *NM*, he did point out that the applicant had secured a right to legal representation at any interview held by the investigators with him and had a full opportunity to respond to any statements furnished. McDermott, J. did confirm that before any finding of gross misconduct could be made by the Chief Executive, a hearing must be held at which the applicant must have the right to give evidence and examine and challenge all evidence advanced and call persons providing such evidence for questioning. He said that it was particularly important that the applicant be afforded the opportunity to cross examine the witnesses given *“the nature of the post held by the applicant, the seriousness of the allegations of gross misconduct made against him and the clear conflict of evidence in respect of the events under review*”.
3. The different findings made at the investigation stage (or the lack thereof) in *NM* as compared to *Lyons* enabled the court to take a different approach. The context-specificity of the nature of the right to cross-examine was also considered extensively in Shortt *v* Royal Liver Assurance.  The plaintiff was subject to a disciplinary process following a complaint by his personal assistant that he had bullied her. The plaintiff argued that the defendant had breached his right to fair procedures in that the plaintiff was neither afforded the opportunity to cross-examine the personal assistant nor provided with some alternative means of testing her evidence. While it was conceded on behalf of the plaintiff that not every disciplinary process would give rise to a right to cross-examine the complainant, it was asserted that the graver the allegation, the more important it was that the employee under investigation should have a right to test the evidence. Rejecting the plaintiff’s argument, the High Court (Laffoy J) considered whether, given the refusal of the personal assistant to submit to being questioned at a disciplinary hearing by or on behalf of the plaintiff, the plaintiff was likely to be exposed to the risk of an unfair hearing or an unfair result. It noted that because the nature of the conflict related primarily to the delivery and tone of exchanges rather than their content, the adjudicator was entitled to proceed on the basis that to do so was not likely to imperil a fair hearing or result. In addition, taking account of the nature of the complaint and the respective positions of the complainant and the plaintiff, the adjudicator was entitled to consider the likelihood of a detrimental effect on her by being confronted by the plaintiff or by someone on his behalf. The requirements of natural justice depend on the circumstances of each case and the nature of the particular enquiry. This was emphasised by the High Court (Shanley J) in *A Worker v A Hospital.* The plaintiff (the employee) working for the defendant (the hospital), was accused by a patient in the defendant’s care of sexually abusing her. There were no third-party witnesses to the alleged incidents. The complainant (the patient), who was suffering from a schizophrenic condition, was stated by the defendant’s medical experts to be in a mentally fragile condition. A validation interview with the patient was carried out by the medical experts on behalf of the hospital. The patient’s mental condition was found to be very frail and it was suggested that she be interviewed about the allegations only by a person specially trained in interviewing mentally handicapped people. The employee was permitted to nominate a suitable expert to assess the patient in the presence of the hospital’s experts. However, it was decided that the patient herself would not be produced for questioning by the employee in the course of the investigation. The allegations of the patient would therefore be conveyed by experts and would, of necessity, contain hearsay. The employee sought an interlocutory injunction restraining the hospital from commencing and determining a disciplinary charge against him without affording him an opportunity to hear and test the patient’s evidence by cross-examination.
4. The High Court reaffirmed the principle that, in considering the question of the admissibility of hearsay evidence, all the facts must be examined and the rights and interests of all the parties must, as far as practicable, be safeguarded. The court sought to balance the risk of serious damage to the patient’s health if she were forced to give evidence against the risk that a serious injustice would be done to the employee if she did not. Injustice to the employee could be avoided by directing that further validation of the patient’s complaints be carried out, in the presence of her doctor, by an expert nominated by the employee. The court directed that such validation was to be carried out in advance of the hearing and any report produced was to be the property of the employee.

*WRC decisions*

1. Both the dicta of *Lyons* and *NM* were cited and relied on by a Workplace Adjudication Officer in a recent decision[[5]](#footnote-5) where an employee was dismissed for two findings of misconduct, the first for failure to isolate equipment while working on it and the second for sleeping while at work. An investigation was carried out which involved interviewing the employee in the presence of his trade union representative and considering statements taken from his line managers. A disciplinary hearing followed which upheld both allegations. The decision maker relied in relation to the first allegation on the fact that the employee had admitted during the investigation and at the disciplinary hearing that he was working on the machine and therefore the decision maker was satisfied that he knew or should have known that what he was doing was contrary to safe working practice and constituted a significant risk. In relation to the second charge of sleeping while at work, the decision maker found that the employee was at least resting if not actually sleeping and they concluded that the charge was proven. Whilst the company had only allowed the employee to question his line manager via correspondence, the decision maker said this was sufficient. The Workplace Adjudication Officer, in expressly considering the *Lyons* and *NM* decisions, found that the company’s proposed cross examination by correspondence was not sufficient and that it resulted in a flawed process but only in relation to the second complaint *i.e.* sleeping on the job. She found the process in relation to the first allegation of failure to isolate the equipment while working on it, was carried out in fair and reasonable manner. The decision does not specifically rely on the fact that the employee had admitted to working on the machine during the investigation, but that would appear to be the basis for the upholding of that aspect of the process and the decision to dismiss on that finding of misconduct.
2. Whilst ultimately the decision to dismiss was upheld, it is interesting to note that the Workplace Adjudication Officer seemed willing to set aside a finding of misconduct based on a process that limited a right of cross examination to asking questions by correspondence. That demonstrates a willingness to critically evaluate investigative and disciplinary procedures in the light of the High Court dicta in Lyons and NM in terms of ensuring that an employee had the right to cross examine their accusers at some stage whether at the investigative or the disciplinary state, prior to findings of fact that could ground a decision to terminate the employment.
3. There appears to be a reluctance by AO to apply Lyons, ADJ-00006788, which involved alleged fabrication of injury in the workplace. In rejecting the claim of unfair dismissal, the AO found no requirement for cross examination, evidence was looked at (CCTV) at all stages and even if employee represented by more skilled and more robust representation than a workplace colleague, little difference would have arisen. It appears the AO was influenced by the fact that the employee had legal representation in personal injuries claim during the disciplinary process but no request was made for legal representation. In the context of a redundancy process, an AO found Lyons was distinguishable “ as In the High Court judicial review case being relied upon the Complainant, a Mr. Lyons, was at hazard of considerable personal and reputational damage arising from most serious alleged internal employment related allegations and investigations.[[6]](#footnote-6)

*Concluding remarks*

1. It now appears, in the light of *Lyons*, that where a person who is facing allegations that may lead to dismissal-including those of sexual harassment-they have a right to cross-examine their accusers, they also have a right to legal representation in order to ensure the vindication of their Constitutional rights. This would arise at the final decision stage which could be the disciplinary stage depending on the nature of the investigation. If the investigation is merely a fact-gathering exercise to determine whether a prima facie case is made out, prior to a disciplinary hearing which will consider whether the allegations are proven or not, then the right to legal representation and cross-examination are unlikely to apply in particular if these rights will be provided at the disciplinary stage, as per McDermott J. in *E.G.* The right to legal representation was located by Eager J within the particular facts of the case i.e. the seriousness of the findings of bullying and the sanction of dismissal that Mr Lyons was potentially facing, including the final nature of the findings. By contrast, if the findings made in the investigation stage are final and cannot be challenged at a subsequent disciplinary hearing, full rights of fair procedures apply.
2. Where an employee is facing a sanction falling short of dismissal, they may not be entitled to legal representation as held by the Supreme Court in the case of *Burns and Hartigan v Governor of Castlerea Prison*  ([2009] IESC 33). Two prison officers had refused to participate in disciplinary hearings arising from alleged unauthorised absences without legal representation. The hearings proceeded in their absence and the Governor imposed a disciplinary sanction of a pay reduction and a one-year confinement of duties on each of them. They challenged the denial of legal representation. They succeeded in the High Court but on appeal, the Supreme Court determined that there was no right to legal representation at internal disciplinary meetings other than in exceptional circumstances. Those circumstances were specified as follows:- the seriousness of the charge and the potential penalty, whether any points of law are likely to arise, the capacity of a particular individual to present their own case, procedural difficulties, the need for reasonable speed in making the adjudication and the need for fairness as between the parties. As this judgment was not cited in either *E.G.* or *Lyons*, the issue of whether a right to legal representation in a disciplinary process arises may be considered differently in future cases.

**Harassment/ Sexual harassment**

1. The definition of sexual harassment[[7]](#footnote-7) and harassment in the EEA is set out in broad terms at section 14A(7)(a)(i) which provides that harassment is any *“unwanted conduct related to any of the discriminatory grounds”* whereas sexual harassment is any *“form of unwanted verbal, non-verbal or physical conduct of a sexual nature”*.[[8]](#footnote-8) This unwanted conduct must have the *“purpose or effect of violating a person’s dignity and creating and intimidating, hostile, degrading, humiliating or offensive environment for the person.”*[[9]](#footnote-9) This imports a subjective test which focuses on the inevitably personal response of the individual to the conduct to which they have been subjected, without any limitations of perceived reasonableness.
2. The Code of Practice provides a non-exhaustive list of forms of behaviour which can constitute sexual harassment, even if there is only one single incident.[[10]](#footnote-10) The types of behaviour set out in the Code of Practice include physical conduct of a sexual nature such as unnecessary touching, patting or pinching, verbal conduct of a sexual nature such as unwelcome sexual advances, propositions or pressure for sexual activity or suggestive remarks[[11]](#footnote-11), non-verbal conduct of a sexual nature such as the display of pornographic or sexually suggestive pictures or leering, whistling, or gender based conduct such as conduct that denigrates or ridicules or is intimidatory or physically abusive of an employee because of her sex such as derogatory or degrading abuse or insults which are gender-related.
3. The section also helpfully prescribes the types of conduct or behaviour which are potentially capable of falling into the definition of unwanted conduct as including:

 “*acts, requests, spoken words, gestures, or the production, display or circulation of written words, pictures other material.”[[12]](#footnote-12)*

1. It is important to remember that the scope of harassment on a protected ground (gender, civil status, member of traveller community, race, disability, sexual orientation, religion, family status, age) is an act which subjects a person to unwanted conduct on any of the protected discriminatory grounds, for example, sexual harassment, religious harassment or racial harassment. The EEA do not apply to a generalised bullying or harassment which has no link to the discriminatory grounds.[[13]](#footnote-13) In addition the definition of bullying which has been accepted by the Supreme Court[[14]](#footnote-14) and High Court[[15]](#footnote-15) refers to *“repeated inappropriate behaviour”*[[16]](#footnote-16)and specifically excludes a single event. There is no similar requirement in the definition of harassment or sexual harassment in the EEA. Therefore a single complaint of harassment or sexual harassment can breach the Acts.[[17]](#footnote-17)
2. The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012[[18]](#footnote-18) confirms that harassment and sexual harassment can occur outside the workplace:

*“The scope of the sexual harassment and harassment provisions extends beyond the workplace for example, to conferences and training that occur outside the workplace. It may also extend to work-related social events.”*

The harassment complained of must, however, occur “*in the course of his or her employment”*[[19]](#footnote-19).

1. Sections 14A(2) and 15(3) of the Employment Equality Acts allow an employer a defence to a claim of harassment and/or sexual harassment where the employer can show that it took such steps as were reasonable practicable to prevent the employee from doing the act which is found to have constituted harassment or from doing in the course of his employment acts of that description. There is no definition of what steps are *“reasonably practicable”* for an employer but guidance is forthcoming from the case law and the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012. Generally an employer is required to have a complaints procedure in place for the harassed employee to invoke in order that their complaints can be investigated and dealt with appropriately under this procedure by properly trained staff.[[20]](#footnote-20) Recently the Equality Tribunal held that an employer had taken all steps to prevent harassment by having a strict policy in place whereby cleaning staff where told to clean changing rooms before 7am and checking the changing rooms were clear of cleaning staff before they were open to members of public entered the changing rooms.[[21]](#footnote-21)
2. The existence of a policy which has been effectively communicated to employees can provide a defence to an employer, even where an employee has been found guilty of harassment or sexual harassment. The absence of a policy can make it difficult if not impossible for an employer to avoid liability for harassment or sexual harassment perpetrated by an employee or business contact. An employer will not be able to argue that in the absence of a policy, an informal procedure or open door procedure operated for employees to raise complaints of harassment or sexual harassment.[[22]](#footnote-22) Even if an employer takes steps to investigate alleged complaints of harassment, the fact that it does not have a policy in place at the time of the complaints appears to be fatal. The clear emphasis is on prevention not just being better than cure but prevention not being able to be replaced with a cure. In ***An Employer v. A Worker****[[23]](#footnote-23)* the Court would not allow an employer to rely on section 14A(2) where there was no policy in place at the time of the allegations, but where the employer did investigate the incidents and take action and after the incidents it formulated a policy on bullying and harassment. The Labour Court was unequivocal in holding that whilst the putting in place of the bullying and harassment policy after the event:

*“may be commendable in itself, it is insufficient to make out the defence contemplated by section 14A(2) of the Act. In order to avoid liability it is essential for the Respondent to establish that it had in place, at the time at which the harassment occurred, arrangements intended to prevent and deal with the occurrence of such conduct.”*

Despite the employer taking immediate steps after it became aware of the alleged harassment, this was not sufficient to enable it to rely on the section 14A defence.

1. As technology has advanced comments are frequently made by employees outside of work on social media. Unsurprising, the issue of whether employment law statutes have remained sufficient to deal with such occasions has come to the fore in recent years. The decision of the Labour Court in ***McCamley v Dublin Bus***[[24]](#footnote-24) is timely as it considers harassment through social media and whether an employer is liable for this pursuant to the Employment Equality Acts 1998–2014.
2. The employee in this case was an employee of Dublin Bus and an active member of a trade union. He alleged that at a social function of the respondent in 2008 he was subjected to an assault which was motivated by an imputation of a certain religious affiliation. In 2012, he received an abusive message on Facebook from a colleague which related to a religion and nationality imputed to him. The company dealt with his complaints by way of an investigation which culminated in the charging the perpetrator in line with its company rule book. Following the lodging of the complaint by the complainant with the Equality Tribunal, personalised and offensive graffiti relating to the complainant was visible in the staff bathrooms. The Labour Court found the latter not to be properly before it as it could not have been in the contemplation of the claimant when he lodged his claim with the Equality Tribunal.
3. The respondent argued that it was not liable for the acts of its employees as the alleged harassment was unrelated to his employment and therefore no jurisdiction arose to consider these complaints. These arguments were rejected by the Labour Court which found that as the offending Facebook messages were directed at the complainant in his role as representative of a group of employees within the respondent organisation and were directed at his role as worker representative which he performed as part of his employment:

*The liability that subs.(1) of this section imposes on employers is not akin to vicarious liability in common law. Rather, this provision applies a form of constructive direct liability on an employer where an employee is harassed by another employee, or a person in a category referred to at subs.1(a)(ii) or (iii) of s.14A. That is clear from the use of the words “the harassment or sexual harassment constitutes discrimination by the victim's employer in relation to the victim's conditions of employment” in the final sentence of subs.(1) of that section.*

 On that basis, s.14A(7) of the Acts applied and the employer was responsible for the harassment in the form of the Facebook posts made by a colleague. In making this conclusion, the Labour Court approach is consistent with the Code of Practice on Harassment issued under the Employment Equality Acts (S.I. No. 208 of 2012) which holds an employer liable for acts which occurred at a social function.

1. The noteworthy element of the approach of the Labour Court in determining whether s.14A of the Acts imposed liability, was not whether the wrongdoer was acting in the course of his employment but rather that the victim suffered the harassment in the course of his employment. This effectively adopts an approach to harassment which is diametrically opposed to the approach for common law vicarious liability. Therefore, if the complainant was not a worker representative and the comments were not directed at him in this capacity, then the questions arises as to whether liability would have attached. It is difficult to see how comments made by employees about their colleagues could ever not be directed at a victim in the course of his or her employment, given the reason for connection being employment. Given the very broad prohibition against harassment in the Employment Equality Acts and the Equality Directives, the broad approach of the Labour Court may be correct.
2. It is prudent for employers to adopt a cautious approach and to invoke the provisions of their harassment policies to investigate incidents even if a question mark arises over whether the comment was made in the course of employment. This was the approach taken by the respondent when the head of human resources was contacted, although the local manager refused to address the complaints on the basis of his view that the comments fell outside of the terms of the relevant harassment policy. On the basis that an investigation was undertaken by the respondent and a disciplinary sanction was imposed on the harasser, the respondent was entitled to rely on the defence in s.14A(2) of the Acts.
3. A recent constructive dismissal claim under the Unfair Dismissals Acts 1977-2016 shows a high level of award for a successful claim involving sexual harassment. The employee was employed as a chef in a restaurant. From the commencement of her employment, she was subjected to serious sexual harassment in the form of attempts by the head chef to kiss her, comments of a sexualised nature being made towards her by the head chef, the head chef attempting to open her bra, biting her neck, being pushed against a wall in an attempt to kiss her. When the complainant raised the issue, the owner of the restaurant was found by the AO not to have taken it seriously as he decided to determine whether to deal with it informally or formally by way of seeing how uncomfortable she was, the employer suggested the complainant move to a sister restaurant, there was no formal investigation-in spite of the head chef admitting the behaviour-he was not suspended and there was no anti harassment policy. A formal investigation took place where again the head chef admitted the behaviour and he was invited to apply for a position in a sister restaurant, in which he was successful and continues to work there. The Complainant was not involved in this investigation and rather was told the chef had been fired, which was not correct. She commenced a period of sick leave and resigned. Her claim was successful and she was awarded the full value of her losses €15,000:-

*that having been subjected to a campaign of daily unwanted physical and verbal behaviour of a sexual nature and where her complaints were not taken seriously and then to be the subject of snide remarks by various members of staff following the chef’s departure, it was reasonable for her to terminate her contract of employment.*

1. In CA-00010268, the sum of €7,500 was awarded for sexual harassment in the form of dissemination and discussing by colleagues of a picture of the Complainant in a compromising position published on the internet.
2. Recently just short of two years compensation was awarded in a claim of sexual harassment (where the employee was ultimately dismissed) following raising of complaints of sexual harassment. The employer was found to have made vile sexual comments regarding the complainant on a live chat, the owner had made sexual advances towards her at the Christmas party and she was dismissed following her raising of concerns regarding advances by the owner. The employer argued that the employee was dismissed for poor performance but had no documentation to corroborate this. When the employee raised a concern regarding the live chat, no action was taking by the MD and the sexual harassment policy was not brought to her attention.[[25]](#footnote-25)

 **Age discrimination: challenging retirement ages**

1. A compulsory retirement can be challenged, by either a claim for age discrimination under the Employment Equality Acts 1998-2016 or for unfair dismissal under the Unfair Dismissals Act, 1977, as amended.
2. However, the Unfair Dismissals Act does not protect employees of “*normal retiring age for employees of the same employer*”[[26]](#footnote-26). In these circumstances if an employer can successfully establish that it had a *“normal”* retirement age which is consistently applied across its workforce[[27]](#footnote-27), it is immune to claims for unfair dismissal by virtue of compulsory retirement[[28]](#footnote-28).
3. Section 34(4) of the Employment Equality Acts permits compulsory retirement age as non discriminatory but only where it is objectively justified:

*(4) Without prejudice to subsection (3), 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 if—*

*(i) it is objectively and reasonably justified by a legitimate aim, and*

*(ii) the means of achieving that aim are appropriate and necessary*

1. The amendment of section 34(4) clarifies that employers may continue to set compulsory retirement ages provided they can show that it is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are proportionate and necessary.  An employer must now demonstrate that its compulsory retirement age is in place to achieve a legitimate aim, which is reasonable and proportionate to the needs of the organisation. The proportionality test requires that an employer must consider if there is a less or non-discriminatory alternative means of achieving the same ends. For example, if there are health and safety concerns with the continued employment of an employee (on the basis of established medical evidence), then the fixing of a retirement age can be lawful. Or it can be lawful to place an employee on fixed term contracts post their retirement age where there is good reason to do so, such as to finish a particular project.
2. Certainly a number of potentially legitimate aims for compulsory retirement have been established within the case law as follows:
* The physical demands and requirements of the role[[29]](#footnote-29) but this will only arise where there is a position having a significant physical element and where it can be demonstrated on the basis of medical evidence that a person’s capacity to perform the task diminishes with age.
* Promoting access to employment for younger people and the concept of inter generational fairness[[30]](#footnote-30). However this may not apply where there are no difficulties with the recruitment of younger workers.[[31]](#footnote-31)
* The case of *Seldon* which was appealed all the way to the Supreme Court of England and Wales concerned a claim by a partner in a firm of solicitors that his compulsory retirement at the age of 65 in accordance with the terms of the partnership deed was unlawful direct age discrimination. The Supreme Court held that there were legitimate aims and these were:
* Retaining staff, by being able to offer them the opportunity of partnership after a reasonable period;
* Facilitating partnership and workforce planning, by giving staff realistic expectations as to when vacancies would arise; and
* Contributing to a congenial and supportive workplace culture, by limiting the expulsion of older partners through performance management processes.
* Protecting the health and safety of employees or customers[[32]](#footnote-32).
* Cohesion among its employees and the benefit of having one normal retirement age for all employees[[33]](#footnote-33).
* Potential carrying out of compulsory medical assessments could lead to embarrassment by reason of their being found to be incapable of undertaking their duties of employment means that a retirement age can be legitimate. This essentially is a dignity defence.
* Motivation and dynamism through the increased prospect of promotion.[[34]](#footnote-34)
* The creation opportunities in the labour market for persons seeking employment, access to employment by better distribution of work between generations[[35]](#footnote-35)

*Guidance on retirement/recent case law*

The WRC published a Code of Practice on Longer Working (SI 6000/2017) which is important and legally binding. It sets out the following as objective justification:

* Intergenerational fairness (allowing younger workers to progress);
* Motivation and dynamism through the increased prospect of promotion;
* Health and Safety (generally in more safety critical occupations);
* Creation of a balanced age structure in the workforce;
* Personal and professional dignity (avoiding capability issues with older employees); or
* Succession planning.

The Code provides that it is good practice for an employer to notify an employee of the intention to retire her/him on the mandatory retirement date, within 6-12 months of that date.  This allows for reasonable time for planning, arranging advice regarding people succession etc.  The Code provides that the initial notification should be in writing and should be followed with a face-to-face meeting which should focus on addressing the following;

* Clear understanding of the retirement date and any possible issues arising;
* Exploration of measures (subject to agreement) which would support the pathway to retirement, for example flexible working, looking at alternative roles up to the date of retirement;
* Transitional arrangements in regard to the particular post; and
* Assistance around guidance and information.
1. The Irish Human Rights and Equality Commission recently published Guidelines on Retirement and Fixed Term contracts. In dealing with the latter, it states on objective justification-including for the provision of fixed term contracts and retirement ages. It states that employers should be in a position to provide concrete evidence that the offering of a fixed term contract, having regard to all of the relevant circumstances of the employment concerned, is rationally connected to the legitimate aim pursued.
2. Recently in Valerie Cox v RTE, Valerie Cox was found to have been discriminated against on the basis of her age, and awarded Ms Cox €50,000. Ms Cox was also reinstated in her position. The Adjudication Officer ("AO") found that there was no reference to a compulsory retirement age of 65 years in either Ms Cox's contract of employment or in the RTÉ staff manual. It was held that RTÉ had failed to objectively justify the termination of Cox's employment at 65 years of age.
3. In another high profile age discrimination decision, an AO has found that University College Dublin discriminated against a lecturer on the grounds of age, and in terms of access to promotion. In Dr Anne Cleary v University College Dublin, Dr Cleary claimed that she had been discriminated against on gender and age grounds contrary to the Employment Equality Acts 1998 to 2015. Dr Cleary failed on the gender ground, however the AO was satisfied that Dr Cleary had been discriminated on age grounds in terms of promotion, pointing out that 'not a single of the four candidates in the 60-65 age group, to whom the complainant belongs, was promoted'.

*Establishing a retirement age*

1. Many of the recent decisions concerning the lawfulness of retirement ages imposed by employers have focused on whether the retirement age is objectively justified within the meaning of s. 34(4) of the Employment Equality Acts. By contrast, the decision in *Connaught Airport Development Ltd v Glavey[[36]](#footnote-36)* examined whether the employee had a contractual retirement age-express or implied-which his employer could rely upon as the reason for his termination of employment. The employment contract did not contain a standard retirement clause. Furthermore, the claimant employee was not a member of the employer pension scheme and therefore could not necessarily be fixed with knowledge of the pension retirement age. Evidence was adduced that whilst there had been approximately 10 retirements over many years, two of these employees worked beyond the age of 65. On that basis, the Labour Court was satisfied that there was no express or implied contractual retirement age in existence requiring the mandatory retirement of the employee.
2. As such, the question of whether the retirement was objectively justified was not relevant as the employer fell at the first test by being unable to establish the existence of a contractual retirement clause. The importance of contractual provisions referring to mandatory retirement clauses is evident from this case, coupled with the difficulties employers will have with establishing the evidence necessary to imply such a clause into the employment relationship. In spite of the unlawful termination of employment and this found to constitute age discrimination where considerations of objective justification did not arise, a very modest award of compensation of €6,500 was ordered by the Labour Court.
3. In *Transdev v Michael Chrzanowski*[[37]](#footnote-37), the Complainant tram driver appealed against the decision of an Adjudication Officer to dismiss his claim that he was subjected to discrimination on the ground of age when he was required to retire at the age of 65 years. The Complainant asserted that the mandatory retirement age was not a term of his contract of employment. The Labour Court noted that s.34(4) of the Employment Equality Acts, prima facie, allowed the Respondent to fix a retirement age without contravening the prohibition of discrimination on the ground of age. It noted, however, that the jurisprudence of the CJEU on the circumstances in which compulsory retirement was saved by Art. 6 of Directive 2000/78/EC was relevant only if the Court found that a retirement age had in fact been fixed by the Respondent and that the retirement age applied to the Complainant.
4. Finding that the policy of retirement at 65 years had been established by virtue of custom and practice, the Labour Court pointed to a number of factors. These factors included (i) the Group Pension Scheme had been collectively negotiated by the Union and the Complainant had signed the agreement; (ii) the Complainant had become a member of the Pension Scheme, which made explicit reference to retirement at 65 years, a number of years before; (iii) all workers (with some exceptions) who retired from their employment did so at 65 years; and (iv) the Complainant had, some months before, sought to extend his employment beyond his 65th birthday. As to whether the retirement age was objectively justified, the Labour Court accepted the Respondents arguments that it was justified on the basis of health and safety concerns – as a tram drive, the Complainant was in a safety critical role.The Labour Court concluded in

“*the instant case, the Court notes that the medical opinion furnished, which was not disputed by the Union, associates age related changes and visual perception with conditions thati ncrease the risk of driving for older workers. In such circumstances, the Court accepts that to impose an upper age limit on the retention of tram drivers in order to protect the health and safety of drivers, passengers and the general public is reasonable in the circumstances and can constitute genuine and determining occupational treatment and is legitimate and proportionate. The Court finds that the Respondent has set out reasonable grounds that objectively justify a retirement age of 65 for tram drivers (including the Complainant) who are classified as safety critical employees, in the interest of the safety of drivers, passengers and the public.*

1. The Labour Court was also satisfied that the aim of the respondent to establish workforce planning was a legitimate aim, as follows:

*In the instant case, the Respondent demonstrated for the Court how the Respondent conducts its workforce planning in the case of tram drivers. In January 2014, over eight months before the Complainant’s retirement, to ensure the Respondent met its manning levels - levels which were agreed with the Union which required it to employ 173 tram drivers at any time, it sought approval for the recruitment of extra drivers. Due to the impending retirement of the Complainant (and others), it sought to recruit additional tram drivers commencing from 24thFebruary 2014. This action was required in order to ensure that the new drivers were properly trained prior to the Complainant’s (and others) retirement.*

1. The provision of a fixed term contract to a person over the retirement age is ostensibly lawful by reason of section 6(3)(c) of the Employment Equality Acts which provides as follows:

*“ Offering a fixed term contract to a person over the compulsory retirement age for that employment or to a particular class or description of employees in that employment shall not be taken as constituting discrimination on the age ground.”*

1. If an employer wishes to rely on a retirement age they would be well advised to consider any application for an extension of employment or provision of a fixed term contract post the normal age of retirement on a consistent basis also applying criteria in a fair and transparent manner. In the earlier decision of *ESB v. Doyle[[38]](#footnote-38)* the Equality Officer had expressed regard for the fact that the application of Mr Doyle for an extension of his employment post his normal retirement age was considered by ESB but he did not meet any of the exceptional circumstances criteria as well established within the organisation.

*Breach of contract*

1. Finally, it may be possible to challenge termination of employment which is in breach of contract-where no retirement age exists-by way of seeking injunctive relief in appropriate circumstances. In *Quigley v HSE*, Unreported, High Court, Gilligan J 26 October 2017, the importance of the terms of a contract of employment being examined by an employer prior to effecting any termination of employment is obvious. It is particularly noteworthy in the context of a different approach for employees to challenge the termination of employment on grounds of alleged reaching of retirement age by way of breach of contract before the High Court as opposed to the more common statutory claims such as a claim for unfair dismissal under the Unfair Dismissals Acts 1977-2015 or Employment Equality Acts 1998-2015.
2. Dr Quigley is employed as a general practitioner specialising in substance abuse and was notified of the purported termination of his employment by reason of attaining the maximum age of retirement within the HSE being 65. This notification was provided less than four weeks before his 65th birthday. He argued that the purported termination of employment was invalid as the terms of his contract did not provide for a retirement age. Dr Quigley had been provided with a contract of employment in 2001 which applied to all general practitioners specialising in substance abuse and which provided that this employment was on an indefinite basis and could be terminated by the Chief Executive of the Defendant in accordance with employment protection legislation on the provision of one months notice. The contract of 2001 had no reference to a retirement age. This contract was negotiated between the union representing medical practitioners who specialise in addiction services and the Defendant. There was also evidence on Affidavit of two other doctors within the addiction services being retained beyond the age of 65 and who continued to provide services.
3. The Defendant argued that Dr Quigley’s contract was governed by section 19 of the Health Act 1970 which provided that permanent officers of the Defendant “*cease to be a permanent officer on attaining the age of 65”* and as Dr Quigley had become a member of the public sector superannuation scheme he had become subject to a retirement age of a maximum age of 65 such that his employment coming to an end at 65 was not unlawful.
4. Dr Quigley succeeded at restraining the termination of his employment on the basis that the High Court was satisfied of the following:

“*the plaintiff makes out a strong case which is likely to succeed on the basis that the contractual situation of 2001 was to the effect that the period of his employment was to be for an indefinite period and that that contractual position as between the plaintiff and the HSE has never been altered by the HSE and no one else in the same position as the plaintiff who was involved in employment with the defendant in 2001 has been forced to retire at age 65 and at least two medical doctors working in the substance abuse area who were employed in 2011 have continued on in their employment beyond the age of 65”.*

1. It is fair to say this judgment is factually specific but it gives rise to the potential for an application for injunctive relief to be sought in appropriate cases where no retirement age exists within contractual documentation, or could be implied. The *Quigley v HSE* proceedings will proceed to the trial of the action before the High Court where an oral hearing of the proceedings will take place.

**END**

1. [2004] 1 I.R. 103 [↑](#footnote-ref-1)
2. [2002] 1 I.R. 385 [↑](#footnote-ref-2)
3. [1971] I.R. 217 [↑](#footnote-ref-3)
4. [2015] 308 JR [↑](#footnote-ref-4)
5. ADJ- 00006103 [↑](#footnote-ref-5)
6. ADJ-00006177. [↑](#footnote-ref-6)
7. It is worth noting that sexual harassment may also amount to a tort and damages have been awarded for sexual harassment by the civil courts in this jurisdiction on at least two occasions. See A. Kerr, Irish Employment Legislation, (Dublin, Thompson Round Hall, 2012) at LB 138B. [↑](#footnote-ref-7)
8. Section 14A(7)(a)(ii) of the Employment Equality Acts 1998-2011. [↑](#footnote-ref-8)
9. Section 14A(7)(b) of the Employment Equality Acts 1998-2011. [↑](#footnote-ref-9)
10. Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 (SI 208/2012) which came into force on 31 May 2012. [↑](#footnote-ref-10)
11. See ***Ms A v. A Retail Chain*** DEC-E2013-070 [↑](#footnote-ref-11)
12. Section 14A(7)(b) of the Employment Equality Acts 1998-2011. The alteration of conditions of employment does not constitute harassment in circumstances where express provision is made in the Acts for discriminatory treatment in terms of conditions of employment. See ***A Complainant v. A Publishing Company*** DEC-E2010-161. [↑](#footnote-ref-12)
13. This is made clear in the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 (SI 208/2012) which came into force on 31 May 2012 replacing the 2002 prior Code of Conduct. [↑](#footnote-ref-13)
14. ## Quigley v. Complex Tooling and Moulding Ltd *[2009] 1 I.R. 349, [2008] 19 E.L.R. 297.*

 [↑](#footnote-ref-14)
15. ***Kelly v .Bon Secours Health Systems Ltd*** [2012] IEHC 21. [↑](#footnote-ref-15)
16. Industrial Relations Act 1990 (Code of Practice detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order 2002, SI 17/2002. [↑](#footnote-ref-16)
17. See for example see ***A Complainant v. A Health Board*** DEC-E2003,-055, ***Ms A v. a Gym*** DEC-E2004-011, ***Ms A v. A Contract Cleaning Company*** DEC-E2004-068 and ***Insitu Company Ltd v. Heads*** [1995] I.R.L.R. 4 where one incident of sexual harassment was sufficient for liability to arise. [↑](#footnote-ref-17)
18. SI 208/2012. [↑](#footnote-ref-18)
19. Section 14(A)(1)(A) of the Employment Equality Acts 1998-2011. [↑](#footnote-ref-19)
20. ***A Worker v. A Hotel*** [2010] 21 E.L.R. 72, where the Labour Court stated that an employer is obliged to take such steps as are reasonably practical to prevent harassment of women in the work place: it is not sufficient to show that measures were taken to prevent a reoccurrence of harassment after it has taken place. The Court held that this approach requires the employer to show, at a minimum, that a clear anti-harassment or dignity at work policy was in place before the harassment occurred and that the policy was effectively communicated to all employees. Moreover, the Court opinion that management personnel should be trained to deal with incidents of harassment and to recognise its manifestations. [↑](#footnote-ref-20)
21. ***Skopinska v Portmarnock Sports and Leisure Club*** DEC-E2014-006. [↑](#footnote-ref-21)
22. ***Atkinson v. Carty***[2005] 16 E.L.R. 1 and ***A Worker v A Hotel*** [2010] 21 E.L.R. 72. [↑](#footnote-ref-22)
23. EDA0916. [↑](#footnote-ref-23)
24. EDA164, [2016] 27 E.L.R. 81. [↑](#footnote-ref-24)
25. A Receptionist v A Car Parts Company ADJ-00009794 [↑](#footnote-ref-25)
26. s.2(1)(b), Unfair Dismissals Act, 1977, as amended [↑](#footnote-ref-26)
27. ***Mysie Foran v. Candela Limited t/a Actons Hotel*** UD /2009, ***William O’Mara v. College Freight t/a/ Target Express*** UD/2010, **O’Sullivan v. S.C.A./ Len Park Limited** UD/2007 [↑](#footnote-ref-27)
28. See ***Molloy v. Connaught Gold*** UD 281/2009 where although there was no contractual retirement age, the bulk of employees left at age 65 which established a custom and practice of a normal retirement age of 65. If employees had specialist skills, they were re-engaged on a new temporary or part time contract. No employee had remained working past 65 in the claimant’s division and two requests to remain working had been refused. [↑](#footnote-ref-28)
29. Saunders v. CHC Ireland Limited DEC-2011-142. [↑](#footnote-ref-29)
30. Palacios de la Vila v. Cortefiel Servicios SA [2007] E.C.R. 1-08353. [↑](#footnote-ref-30)
31. Seldon v Clarkson Wright and Jakes (and Secretary of State for Business Innovation and Skills, and Age UK - Intervenors) [2012] UKSC 16, [[2012] IRLR 590](http://www.lexisnexis.com/uk/legal/search/enhRunRemoteLink.do?A=0.22635267366934408&service=citation&langcountry=GB&backKey=20_T21309162813&linkInfo=F%23GB%23IRLR%23sel1%252012%25page%25590%25year%252012%25&ersKey=23_T21309162811), SC; [[2010] EWCA Civ 899](http://www.lexisnexis.com/uk/legal/search/enhRunRemoteLink.do?A=0.6617717948947038&service=citation&langcountry=GB&backKey=20_T21309162813&linkInfo=F%23GB%23EWCACIV%23sel1%252010%25page%25899%25year%252010%25&ersKey=23_T21309162811), [[2010] IRLR 865](http://www.lexisnexis.com/uk/legal/search/enhRunRemoteLink.do?A=0.1588879235605476&service=citation&langcountry=GB&backKey=20_T21309162813&linkInfo=F%23GB%23IRLR%23sel1%252010%25page%25865%25year%252010%25&ersKey=23_T21309162811) [↑](#footnote-ref-31)
32. ##  *Saunders v. CHC Ireland Limited DEC-2011-142 and O’Neill v. Fairview Motors [2012] 23 E.L.R. 340*

 [↑](#footnote-ref-32)
33. *Doyle v. ESB International Limited* [2013] 24 E.L. 34. [↑](#footnote-ref-33)
34. *Donnellan v. Minister for Justice, Equality and Law Reform* [↑](#footnote-ref-34)
35. Palacios de la Vila v. Cortefiel Servicios SA [2007] E.C.R. 1-08353 [↑](#footnote-ref-35)
36. EDA1710 [↑](#footnote-ref-36)
37. EDA1632, 29 November 2016 [↑](#footnote-ref-37)
38. [2013] 24 E.L.R. 34 [↑](#footnote-ref-38)