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LAW FIRM

20th Annual Local Authority Human Resource Conference 2018

LGMA - Review of Key Employment issues

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Topics

- Disability and Reasonable Accommodation
- Public Sector Equality and Human Rights Duty
- Retirement Ages
- Fair Procedures in Dismissals
- Forthcoming Legislation

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Disability and Reasonable Accommodation

Disability

- a) The total or partial absence of a person's bodily or mental functions including the absence of a part of a person's body,
- b) The presence in the body of organisms causing or likely to cause chronic disease or illness,
- c) The malfunction, malformation or disfigurement of a part of a person's body,
- d) A condition or malfunction which results in a person learning differently from a person without the condition or malfunction or
- e) A condition or disease which affects a person's thought processes, perception of reality, emotion or judgement or which results in a disturbed behaviour.

Disability

Employer is not required to employ someone who will not undertake the duties or is not fully competent or capable of doing the job.

However, a person with a disability is fully competent and capable of undertaking any duties if the person would be so fully competent and capable on reasonable accommodation being provided by the employer.

Reasonable Accommodation

Stand Alone Obligation

Employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability –

- a) to have access to employment;
- b) to participate and advance in employment; or
- c) to undergo training;

unless the measures would impose a disproportionate burden on the employer.

Reasonable Accommodation

What does “Reasonable Accommodation” mean?

- a) Effective and practical measures, to adopt the employer’s place of business to the disability concerned;
- b) Includes adaptation of premises and equipment, patterns of working time, distribution of tasks or provision of training or integration resources;

BUT

- c) Does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself.

Reasonable Accommodation

Disproportionate burden

In determining whether the measures would impose such a burden account should be taken, in particular, of:

- Financial and other costs entailed;
- The scale and financial resources of the employer's business;
- The possibility of obtaining public funding or other assistance.

Humphries v Westwood Fitness Club (2004)

- Labour Court decision upheld by the Circuit Court.
- Employee with anorexia dismissed by employer.
- Employer should make adequate enquiries to establish fully the factual position in relation to the employee's disability.
- Enquiries always involve looking at medical evidence to determine the level of impairment arising from the disability and its duration.
- If it is apparent that the employee is not fully capable, the employer is required to consider reasonable accommodation.
- Employee should be allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.

Daly v Nano Nagle School (2015)

- Special needs assistant in a school for children with disabilities.
- Became paralysed from waist down in an accident.
- Certified fit to return to her job provided that Ms Daly's tasks were reorganised to exclude certain physically demanding tasks.
- 16 categories of duties and claimant could do 9 "wholly or partly"
- School would not consider reorganising tasks in this way. Doing so would have entailed requiring the other SNAs to take on those physically demanding tasks.
- Labour Court and High Court - failure to *consider* reorganisation of tasks was a failure in the employer's obligation to provide reasonable accommodation.

Nano Nagle School v Marie Daly – High Court

- Reallocation of tasks “*cannot be fairly be characterised*” as creating a wholly new job.
- Adaptation of distribution of tasks must...include a consideration of whether a reduction of those tasks may be necessary to comply with Section 16(1).
- An appropriate point may be reached when “appropriate measures” transform the job into something entirely different.

Nano Nagle v Daly (2018)

- Court of Appeal overturned High Court
- Appropriate measures?

“If no reasonable adjustments can be made for a disabled employee, the employer is not liable for failing to consider the matter or for not consulting.”

Nano Nagle v Daly (2018)

*“It is correct to infer that the requirement (in section 16 of the Employment Equality Act) to be able to perform all the tasks of the position means the tasks after adjustment or distribution. Adjustment to access and workplace and hours and tasks does not mean removing all the things the person is unable to perform; in general it is reasonable to propose that tasks that are not essential to the position could be considered for distribution and/or exchange. **That does not mean stripping away essential tasks, especially the precisely essential elements that the position entails.** On a legitimate, reasonable interpretation it is incorrect to demand that redistribution however radical must be essayed no matter how unrealistic the proposal. The section requires full competence as to tasks that are the essence of the position....”*

Nano Nagle v Daly - Court of Appeal

- President Ryan said the “*central reality*” was Ms Daly was unable to perform the essential tasks of a SNA in this school “*and no accommodations put in place by the employer can change that, unfortunately*”.

“It is not a matter of review of process but of practical compliance. If reasonable adjustments cannot be made, as objectively evaluated the fact that the process of decision is flawed does not avail the employee.”

Post-Nano Nagle v Daly

Duties of an employer regarding reasonable accommodation:

- An employer must objectively evaluate what, if any, reasonable accommodations can be put in place and that process needs to be informed by expert medical advice and should be documented. A failure to consult with the employee is not of itself fatal.
- If necessary, consider the redistribution of non-essential tasks that a disabled employee is unable to perform, even with the provision of reasonable accommodation.
- If a decision to dismiss is made on the basis that a disabled employee is not fully competent and capable of undertaking essential duties, the employer will have to be able to justify the characterisation of those duties as ‘essential duties’.
- An employer is not required to create a new position for an employee who, with reasonable accommodation, is not in a position to perform the essential duties of the position they are employed to perform.
- *NB: The judgment of the Court of Appeal is now under appeal to Supreme Court.*

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Public Sector Equality and Human Rights Duty

The Duty

Section 42(1) of the Irish Human Rights and Equality Commission Act 2014 places a positive obligation on public bodies in the performance of their functions to:

1. Eliminate discrimination,
2. Promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and
3. Protect the human rights of its members, staff and its service users.

The Steps

Section 42(2) of the Irish Human Rights and Equality Commission Act 2014 sets out three core steps to be taken by public bodies in its functions as policy maker, employer and service provider:

1. In preparing strategic plans, public sector bodies must identify and **assess** the human rights and equality issues that are relevant to their functions.
2. Identify the policies and practices that they have in place or plan to put in place to **address** these issues.
3. In annual **reports**, or comparable documents, public bodies must report in a manner accessible to the public on their developments and achievement in that regard.

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Retirement Ages

Retirement and Objective Justification

- When a person who has reached a specified “retirement age” is dismissed by reason of that person reaching the retirement age, this on its face constitutes discrimination on grounds of age.
- Circumstances where such discrimination can be lawful provided certain conditions are met.
- Particular provisions permit the “objective justification” of age-based discrimination that do not apply to other categories of discrimination.

Employment Equality Acts

- Section 34(4) of the Employment Equality Acts (since 2015)
 - ... 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 –
 - it is objectively and reasonably justified by a legitimate aim, and
 - the means of achieving that aim are appropriate and necessary.

Risks

- Claim of discriminatory dismissal.
- Claim of unfair dismissal.
- Former claim is more likely given that compensation is not based on financial loss.

Objective Justification

The Bilka-Kaufhaus (C-170/84) Test

- CJEU set out a test for objective justification that is now accepted as the standard test.
- Measure must:
 - (a) correspond to a real need / legitimate objective on the part of the undertaking, and
 - (b) be both
 - (i) appropriate for and
 - (ii) necessary to achieving the objective pursued.

Is there a retirement age?

- Advisable to specify the retirement age in the employment contract.
- If not expressly included in the contract, it may be implied.
- **McCarthy v HSE (2010)**
 - Radiographer who had never received a written employment contract.
 - High Court held that a retirement age could be implied for two reasons
 - broad awareness of retirement age; and
 - on notice by reason of pension scheme.

Is there a retirement age?

Doyle v ESB International (2012)

- Retirement ages may be held to exist by reason of practice

“I am however satisfied on the full facts of this case that the respondent has a well-established practice of compulsorily retiring its employees to a pension when they reach the age of 65 (employees can also elect to retire earlier.”

Is there a retirement age?

Chrzanowski v Transdev (2016)

- Complainant was a tram driver whose contract did not provide for a retirement age.
- No contracts specified retirement ages until 2007.
- A “*normal retirement age*” was specified in the respondent’s occupational pension scheme.
- Labour Court held that a retirement age could be implied.

Recent case law

Cox v RTÉ

- Award of €50,000 made –claim re primary employment was out of time. This award concerned an ancillary contract.
- RTÉ contended:
 - that the mandatory retirement age was contained in the Staff Manual and that the termination of Ms. Cox’s employment on the grounds of her age was justified by intergenerational fairness; and
 - the progression of younger members of staff was crucial in order to present the public with variety and new ideas, and to reflect the diversity of Irish society.

Recent case law

Cox v RTÉ

- Adjudication Officer noted that two people on the roster of panellists were over the age of 65 years.
- Adjudication Officer held that there was no retirement age applicable to the complainant.
- Particular interpretation of staff handbook - reminder of importance of contractual documentation and relate documentation.

Code of Practice on Longer Working

- The WRC, in consultation with IBEC, ICTU and relevant State Departments, published the Code of Practice on Longer Working in December 2017.
- Aims to provide guidance on industrial relations best practice on managing the engagement between employers and employees in the run up to retirement.
- Not legally binding; however, compliance with its provisions will assist in defence of claims.
- The Code advises employers that, as an employee is nearing retirement age, it is good practice to notify an employee of his or her contractual retirement date 6-12 months before that date arrives.

Code of Practice on Longer Working

- Examples of legitimate objectives include:
 - (a) Intergenerational fairness (allowing younger workers to progress);
 - (b) Motivation and dynamism through the increased prospect of promotion;
 - (c) Health and Safety (generally in more safety critical occupations);
 - (d) Creation of a balanced age structure in the workforce;
 - (e) Personal and professional dignity (avoiding capability issues with older employees); or
 - (f) Succession planning.

Code of Practice on Longer Working

- 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.

Code of Practice on Longer Working

- The Code also outlines what employers should consider upon receipt of requests from employees to work beyond their mandatory retirement age.
- Procedure prescribed in these circumstances.

Guidelines: Retirement and FT Contracts

- The Irish Human Rights and Equality Commission published Guidelines on Retirement and Fixed-Term Contracts (the “**Guidelines**”).
- The Employment Equality Acts provide:
 - 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 if –
 - it is objectively and reasonably justified by a legitimate aim, and
 - the means of achieving that aim are appropriate and necessary

Guidelines: Retirement and FT Contracts

- The Guidelines set out the following test when seeking objectively to justify the offering of a fixed term contract to a person who is over the compulsory retirement age:
 - is the aim pursued in offering a fixed term contract legitimate?
 - is the offering of a fixed term contract objectively and reasonably justified by that aim?
 - is the offering of a fixed term contract an appropriate and a necessary means for achieving that aim?

Guidelines – Legitimate Aim

- (i) preserving the operational capacity of the armed forces, police, prison or emergency services;
- (ii) promoting the vocational integration of unemployed older workers;
- (iii) encouraging recruitment;
- (iv) sharing employment between the generations;
- (v) establishing a balanced age structure within a particular employment;
- (vi) workforce planning;

Guidelines – Legitimate Aim

- (vii) avoiding disputes concerning employees' fitness to work;
- (viii) the protection of health and safety;
- (ix) promoting the access of young people to professions;
- (x) ensuring the best possible allocation of positions between the generations within a given profession.

Guidelines – Objective Justification

- Generalised justifications will not be sufficient and Guidelines state that “*concrete evidence*” should be provided having regard to all of the relevant circumstances of the employment concerned, is rationally connected to the legitimate aim pursued.
- Guidelines make a distinction between pension age and retirement age.
- Guidelines identify 2 stages for objective justification – setting the retirement age and ending the employment/giving a fixed term contract.

Forthcoming Legislation

- Public Service Superannuation (Age of Retirement) Bill 2018.
- Published on 9 July 2018.
- The Bill aims to increase the compulsory retirement age from 65 years to 70 for public servants who were recruited before 1 April 2004.

Public Service Superannuation (Age of Retirement) Bill 2018

- Section 3 would insert new section 3A into the Public Service Superannuation (Miscellaneous Provisions) Act 2004 (the “**2004 Act**”) – the Minister for Public Expenditure may make an order to increase the compulsory retirement age in future:
 - (1) A relevant public servant shall retire from being a public servant at the latest upon attaining the age of 70 years or, where a higher age is prescribed by order under subsection (2), upon attaining that higher age.
 - (2) ... the Minister may, by order, prescribe an age, being higher than 70 years but not higher than 75 years, upon the attainment of which all relevant public servants shall, at the latest, retire.

Public Service Superannuation (Age of Retirement) Bill 2018

- Prior to making such an order, the Minister shall have regard to:
 - the likely effect of the order on recruitment, promotion and retention of staff in the public service as a whole,
 - the pensionable age applicable at the time of making the order,
 - any evidence of an increase in normal life expectancy in the State made available by the Central Statistics Office from time to time,
 - the likely cost (if any) to the Exchequer that would result from the order,
 - any order made under section 13(2) of the [Public Service Pensions (Single Scheme and Other Provisions) Act 2012], and
 - such other matters as the Minister considers appropriate.

Public Service Superannuation (Age of Retirement) Bill 2018

- The Bill provides that subject to accruing the statutory maximum of 40 years' service, service beyond the age of 65 will attract pension accrual in the normal way.
- The provisions in the 2018 Bill do **not** apply to:
 - “(f) a person who—
 - (i) before the coming into operation of section 3 of the Public Service Superannuation (Age of Retirement) Act 2018, retired from a public service body upon or after attaining the age of 65 years, and
 - (ii) on the coming into operation of that section, is employed by a public service body”

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Fair Procedures in Dismissals

Heinz-Peter Nasheuer v NUI Galway

- Complaint of bullying and harassment made by one staff member against another, the Plaintiff, and 8 other staff members
- Disagreement as to which policy/procedure applied
- Labour Court recommended an independent external investigator be appointed
- Investigator wrote to the Plaintiff in April 2017
 - Enclosing documents & terms of reference
 - Noted intention to interview each of the 9 staff members
- Plaintiff took issue with
 - Delay in the complaints being taken against him
 - The terms of reference
 - Investigator had previously acted as a trade union representative for the complainant
- Investigator made it clear she would continue in her role despite alleged bias

Heinz-Peter Nasheuer v NUI Galway

High Court

- Plaintiff took injunctive proceedings to prohibit the investigation from continuing
- Also argued that the terms of reference should have been discussed thoroughly with him
 - Alleged some kind of unequal treatment in this regard
- Injunction granted
 - Plaintiff had established a serious question to be tried

Heinz-Peter Nasheuer v NUI Galway

Court of Appeal

- Test to be deployed (objective bias)
 - Would a reasonable and fair minded observer with full knowledge of all the fact apprehend bias on the part of the proposed adjudicator?
- Trial just erred in law and in fact by finding that the plaintiff had established a serious question to be tried
 - *“...discounted entirely the past professional relationship...but relied upon a number of matters concerning the terms of reference as the basis for her conclusion that Professor Nasheuer had established a serious issue to be tried in relation to objective bias”*
- Noted Labour Court had in appointing the investigator stated:
 - *“It is the decision of the Court that the investigator, having reviewed the extensive documents submitted to the Court and having consulted with the parties, should determine the terms of reference and the scope of the investigation. In doing so the investigator must have regard to the University’s policies, including it’s Grievance Procedure and its Staff Anti-Bullying Policy. The investigator’s decision in these matters will be final. In carrying out the investigation, the investigator must have regard to fair procedures and natural justice rights of both the Claimant and the alleged wrongdoers”*

Heinz-Peter Nasheuer v NUI Galway

Court of Appeal

- Ms Justice Irvine:

“...whether the two principle factors....namely the prior professional relationship between the complainant and Ms Hughes and the failure to afford Professor Nasheuer equal treatment in respect of the terms of reference, can when considered cumulatively be said to raise a serious issue of objective bias in these proceedings.

“I find myself coming to a similar conclusion as that reached by Denham J in Bula when she said, concerning four of the seventeen links which the applicants had argued should be considered cumulatively, “Four noughts are still a nothing”. In this case I would say two noughts are still a nothing”

- Allowed the appeal to lift the stay on the investigative process
 - Union representation was a long time ago
 - Terms of reference were not discussed with the plaintiff, complainant, defendant or any of the other respondents

Towerbrook Limited t/a Castle Durrow Country House Hotel v Eugene Young

- Respondent employee was a general handyman employed by Appellant, Castle Durrow Country House Hotel
- Altercation between Respondent and Managing Director (“MD”)
 - Directed not to take refuse away from the hotel before 11am as it would wake hotel guests
 - Employee had to remove the refuse before 11am as he had also been directed to deliver food to the local café (also owned by the MD)
 - MD instructed Complainant to stop working
 - MD pushed or punched the Complainant in the chest
- Respondent spoke with MD an hour later and demanded apology
- Respondent returned next day
 - MD not there but further incident with Chief Financial Officer (“CFO”)
 - Was send home to cool down
 - Told him to return the next day to discuss

Towerbrook Limited t/a Castle Durrow Country House Hotel v Eugene Young

EAT and Circuit Court

- Respondent filed complaint that he was assaulted with Appellant
- MD served a letter suspending Respondent on full pay pending investigation
- MD decided to investigate incident of altercation himself
- Appeared that without any investigation, employee invited to disciplinary hearing
 - MD and CFO present to conduct the meeting
- Respondent suggested independent third party be appointed
 - Refused unless he made a financial contribution towards the cost of appointing same
 - Had transitioned to suspension without pay at the time this suggestion made
- Respondent dismissed August 2013
- EAT held dismissal was unfair
 - Awarded €32,000
- EAT decision upheld on appeal to the Circuit Court

Towerbrook Limited t/a Castle Durrow Country House Hotel v Eugene Young

High Court

- High Court reviewed the comprehensive grievance and disciplinary policies in place.
- High Court held:
 - It was “hardly surprising” that the employee objected to the MD conducting the investigation and disciplinary process
 - The entire process was “fundamentally flawed and contrary to the principles of natural justice”
 - “the investigation and ultimate decision making process involved was neither independent, thorough, impartial nor objective as it had to be if it was to comply with the policies which the Appellant had adopted.”
 - Appeal dismissed lower tribunals’ findings of unfair dismissal upheld.
- Case serves as a reminder of the maxim, *Nemo iudex sua causa* – one cannot be a judge regarding an allegation against oneself.

Pierce Dillon v The Board of Management of Catholic University School

- Alleged that Plaintiff called a student an unpleasant and offensive name
- A meeting was held between
 - The principal of the school
 - A nominee of the board of management
 - The Plaintiff (accompanied by trade union representative)
- Final written warning imposed for “inappropriate behaviour”

Pierce Dillon v The Board of Management of Catholic University School

High Court

- Rejected application for judicial review
- Found the proceedings moot
- Court should not interfere
- The final warning had expired by the time of the hearing
- It was *de minimis* or minimal in nature
 - Simply a warning
 - Not an imposition of liability

Pierce Dillon v The Board of Management of Catholic University School

Court of Appeal

- Trial judge wrong to find issues raised were minimal in nature
- Potential reputational damage
 - Sufficient degree of seriousness (therefore outside ambit of *de minimis*)
 - Could seriously impact on employment prospects
 - Could seriously impact his future opportunities to earn a livelihood
 - Grave reputational implications for applicant's good name
- Could not be said that the final written warning no longer had meaning, implications or effects for the applicant
- Proceedings not moot or *de minimis*
- Remitted to the High Court for fresh determination on the merits of the arguments

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Forthcoming Legislation

Gender Pay Gap Reporting

General Scheme of the Gender Pay Gap Information Bill published in June 2018

- Organisations with more than 50 employees will be required to publish certain information re the gender pay gap.
- More onerous than UK legislation: 50 versus 250 employees:
 - Initially, will apply to organisations with at least 250 employees,
 - then to those with at least 150 employees, and
 - finally, will apply to at least 50 employees over the next three years.

Gender Pay Gap Reporting

Employers will have to report differences between male and female employees in the following :

- Mean and median hourly and bonus pay for men and women
 - To include of full-time, part-time and temporary employees,
- Proportions of men and women receiving bonuses, and
- Number of men and women in each of four pay bands: lower, lower middle, upper middle and upper range.

Enforcement

- Circuit Court, on application of the Irish Human Rights and Equality Commission.
- Workplace Relations Commission for employees.

Maternity Shared Leave and Benefit

Maternity Shared Leave and Benefit Bill 2018

- Will amend the Maternity Protection Acts 1994 and 2004.
- Will enable parents to share ordinary maternity leave, including associated State maternity benefit.
 - Currently comprises 26 weeks.
- Not applicable to the additional unpaid maternity leave of 16 weeks.
- Shared maternity leave would be supplemental to paternity leave entitlement of 2 weeks.

Currently before Dáil, first stage

Parental Leave

Parental Leave (Amendment) Bill 2017

- Increase current entitlement
 - From 18 working weeks to 26 working weeks
- Increase age of child in respect of whom leave can be taken
 - From 8 years to 12 years

Passed by Dáil, proceeding to Seanad

Miscellaneous Provisions

Employment (Miscellaneous Provisions) Bill 2018

- Proposes a ban on “zero hours” contracts
 - Exceptions: genuine casual, emergency cover or short-term relief work
- Introduction of “banded hours” contracts
 - Employees on low-hour contracts, who consistently work more hours each week than provided in their contracts of employment, will be entitled to be placed in a band of hours that better reflects the reality of the hours they have worked over a reference period.
- Proposes to reduce period in which provide core terms of employment are to be provided to employee from 2 months to 5 days.

Passed by Dáil, proceeding to Seanad

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Discussion and Q&A

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Thank you



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