AGING EMPLOYEES: WHEN MUST THEY RETIRE?

“Retirement at sixty-five is ridiculous. When I was sixty-five I still had pimples” (Comedian George Burns)

Record numbers of Baby Boomers are now reaching their 60s, and if you are an employer in any size of business (from the smallest family-owned enterprise to the largest corporate), make sure now that you have a policy in place to handle the thorny question of compulsory retirement.

This is vital – sooner or later you are going to have an employee turning 55 or 60 or 65, and if you think you can just say “Happy Birthday Kim, time for you to retire, see you around” you are in for big trouble.

So what’s the legally required retirement age?

The problem is that nothing in our law imposes a standard retirement age on employees. So trying to force someone to retire at an age that you unilaterally choose (no matter how much you may think that 65 is the universally-accepted gold standard for being put out to pasture) opens you up to a claim for ‘age discrimination’. And that would amount to an automatically unfair dismissal, for which our courts will make you pay dearly.

What our law does say is that “a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity” (our emphasis).

Let’s look at each of those options –

“Agreed”: Clearly your best course of action is to have a written agreement with every employee specifying a compulsory retirement date. Ideally have such a clause in every new employment contract, and if any existing contracts have no such clause, negotiate one now (it’s essential to do this bilaterally not unilaterally – see case below).

“Normal”: You can always try to convince a court that you have, through past practice in your business, established a “normal” retirement age. You will have to prove that you have consistently applied this age in previous retirement situations and that the employee in question was aware of it. Far safer of course is to have in place a formal “retirement policy”.

Whatever you do, don’t act unilaterally.

A recent Labour Court case shows how dangerous it can be to try to alter any term of employment without negotiating and agreeing it with your employees –

An employee’s employment contract made no direct mention of a compulsory or automatic retirement age, but his employer’s ‘Human Resources Policy and Procedure Manual’, which was incorporated into and formed part of his contract, stipulated a retirement age of 65.

This was reduced to 60 when the Manual was replaced by a “Terms and Conditions of Employment” policy. The new policy excluded employees “expressly entitled to retire at 65 in terms of their individual contracts of employment”.

The employee’s services were terminated when he turned 60 and he approached the Labour Court for assistance.

The Court held that the employer is “not permitted to unilaterally amend terms and conditions contractually agreed to” and was therefore in breach of contract. The employer must now reinstate the employee retrospectively to the date of termination, his compulsory retirement age being confirmed at 65.

What to do when retirement age is reached.

Preferably your employment contracts should specify an agreed procedure to be followed on retirement date, but in any event don’t let the date just float past. Rather, if you agree on an extension period, have your lawyer draw up an amended employment contract to avoid any uncertainty or dispute.

Employees – know your rights

Age discrimination is just one form of automatically unfair discrimination prohibited by law. Stand up for your rights if you think you are being discriminated against, directly or indirectly, “on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”