

Fitness and Probity: an HR perspective

This article is based on the HR implications of the revised Fitness and Probity Regime, which was put on a comprehensive statutory footing in the Central Bank Reform Act 2010, thereby enforcing mandatory obligations on regulated financial service providers (RFSPs) (excluding credit unions).

The Regime applies to all persons occupying what are described as “pre-approval controlled functions” (“PCFs”) or “controlled functions” (“CFs”). The Fitness and Probity Standards appear straightforward: to hold a CF, including a PCF, role one must be (1) competent and capable; (2) honest, ethical and act with integrity; and (3) financially sound. It is mandatory for employment of all PCFs and CFs to meet these Standards.

So why all the consternation? It centres on how a RFSP determines whether its PCFs and CFs comply with the Standards, especially where they have been regarded as ‘Fit and Proper’ under the previous Regime.

Whilst regulated financial institutions should by now be aware of their obligations to educate on the “Standard” required of such persons, deliver training and update employment legislation to reflect the required employee protections, they should also ensure that they keep their employment policies, procedures and practices up-to-date.

RFSPs must be rigorous to ensure they collate appropriate proof of qualifications, obtain written consent to reference checking the individuals, whilst at the same time ensuring fair procedures which are transparent for all involved. As a good practice an employer should have a written fitness and probity policy on how they will handle the requirements of the Regime and how they will adhere to them. Contingency planning and risk management is also important where the Central Bank does not approve, either now or in the future, RFSPs’ PCFs and CFs. This could potentially bring a legal challenge by virtue of either the Unfair Dismissals Act and the Central Bank Reform Act (see further below).

The Standards highlight many issues to include:

- assessing that the RFSP’s department is adequately resourced to handle their fitness and probity obligations;
- the work involved in complying on an ongoing basis;
- the magnitude of getting the Standards wrong;
- RFSPs’ response to a Central Bank challenge, e.g., defend their PCF or react quickly appointing another PCF;
- acknowledging that CEOs’ personal background and competence are under added scrutiny (evidenced recently in some of our larger RFSPs).

To ensure HR compliance with the Standards these issues raise matters to be addressed such as:

- Offers/letters of appointment for board members require Central Bank pre-approval;
- Employee contractual terms should be modified;
- Policies and procedures should include a fitness and probity policy;

- Training requirements and staff communication about the Standards;
- Records management;
- Natural justice, e.g., right to respond and defend a challenge;
- Internal appeal;
- Recruitment and selection;
- References. The Central Bank requires references from past/existing employers before a prospective new employer will appoint them which is the subject of much debate especially when the practice of giving detailed references is diminishing;
- Data protection. RFSPs must adhere to data protection laws and reflect on whether the new Regime results in a requirement for them to register with the Office of Data Protection Commissioners as a data controller and/or data processor;
- Central Bank administrative sanctions could arise such as:
 - An offending individual may be subject to a fine of up to €500,000 and an offending service provider may be subject to a fine of up to €5 million. It should be noted that in October 2008 the Irish Financial Regulator agreed with Quinn Insurance and Sean Quinn that penalty payments of €3.4 million in respect of breaches of regulatory requirements be paid. Perhaps a rhetorical question however would this penalty be more now?
 - Also, under the *Central Bank Supervision and Enforcement Bill 2011* it is proposed to increase these amounts to €1 million and the greater of €10 million or 10% of the previous year's turnover respectively. The Bill imposes obligations on persons occupying PCFs to make disclosures where they know or believe that a contravention of a financial services legislation has or may have been committed and a service provider may have its authorisation revoked, suspended and administrative sanction imposed upon it;
- Employment rights. Consider the implications where a person is suspended or prohibited from performing a PCF or CF role, and whether this will be sufficient ground to justify their dismissal within the meaning of the Unfair Dismissal Acts 1977-2007. There could be two conflicting answers to this question leading to a contractual or statutory claim, namely:
 1. Sections 27(4) and 43(11) of the Central Bank Act, states "A suspension notice does not alter the contractual rights of any person to remuneration or benefits. Those rights shall continue to be determined in accordance with the relevant contract".

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 2. Section 6(4)(d) of the Unfair Dismissals Acts provide that a dismissal will not be unfair where it results from an employee "*being unable to work or continue to work in a position which he held without contravention (by him or by his employer) of a duty or restriction imposed by or under any statute or instrument made under statute*";
- Other risk management issues, e.g., where a PCF or CF is not "financially sound" in the future – given Ireland's current economic circumstances this is not inconceivable;

- Implications of non-compliance may result in:
 - an internal investigation;
 - Central Bank notification obligation;
 - PCF or CF application for appointment being refused;
 - invoking administrative sanctions;
 - an investigation into the fitness and probity of a person performing a PCF or CF role;
 - prohibition of a person performing either a PCF or CF role from continuing to do so.

The above highlights the importance of having a fitness and probity policy, strategy and ongoing risk management process.

We have devised a due diligence checklist for satisfying HR compliance to the fitness and probity Standards. This checklist can be summarised into 5 key areas: policies and procedures, hiring process, maintenance, investigation, and review and monitoring.

In order to mitigate against risks we believe RFSPs should have:

1. robust all-inclusive policies and procedures modified to reflect the new Regime's requirements;
2. communications and training;
3. a document retention plan, e.g., policies, file per person, checklist of information submitted to the Central Bank, annual review monitoring of data, diarised actions;

as to do so will be important if the Central Bank conduct an RFSP audit.

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Note: this article is written by a seasoned HR practitioner and should not be construed as legal opinion or advice.