EMPLOYMENT EQUALITY:
THE LEGISLATIVE AND JUDICIAL
EXPERIENCE IN IRELAND

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1. Introduction

At common law an employer was at liberty to treat workers, regardless of their race, religion, age, disability, sexual orientation or gender, unequally either by the bestowal of favours or by the imposition of burdens. The sanctity of freedom of contract ensured that employers were free to engage, promote and dismiss on any basis they chose. If an employer chose only to engage women at half the normal rate of pay or on condition that they resigned on marriage that was his legal prerogative. An employer could discriminate absolutely in his choice of employee. The state of the law was thus described by Lord Davey in *Allen v Flood* [1898] AC 1, 172-173:

“An employer may refuse to employ [a workman] from the most capricious, malicious or morally reprehensible motives that can be perceived but the workman has no right of action against him - a man has no right to be employed by any particular employer and has no right to any particular employment if it depends on the will of another.”

Moreover the common law positively discriminated against *inter alia* women by debarring them from any public office: see Wiles J. in *Charlton v Lings* (1868) LR 4 CP 384, 392 and Lord Esher MR in *Beresford - Hope v Lady Sandhurst* (1889) 23 QBD 79, 95. The proposition was thus stated by Fitzgerald B. in *R v Crosthwaite* (1867) 17 ICLR 463, 479:

“But without holding any essential infirmity of women to men in judgment and discretion, I can have no doubt that in substance the reason of the common law still applies; and that the course of education and mental training to which women, happily for us and themselves, are subject does render them far less fit than men for the administration of public affairs and interference in the election to offices concerned in such administration.”

The Sex Disqualification (Removal) Act 1919 (the 1919 Act) removed most of the legal restrictions on the appointment of women to public offices in the professions but did nothing to assist them to obtain such appointments nor to prevent discrimination in practice. The impetus for this legislation arose out of the vacancy in June 1915 in the Office of Petty
Sessions clerk for the district of Six-Mile-Bridge and Newmarket-in-Fergus in County Clare. For many years Miss Frost had acted as her father’s (the previous incumbent) assistant and on his retirement she was unanimously elected to the office by the justices sitting at Petty Sessions. When the matter was submitted to the Lord Lieutenant he was advised that a woman could not legally be elected or appointed as clerk. Miss Frost thereupon petitioned the King for a declaration that she was qualified, notwithstanding her gender, to hold the office of Petty Sessions clerk. Her claim was rejected by Barton J. at first instance and by the Irish Court of Appeal: see [1919] 2 IR 81. Miss Frost appealed to the House of Lords and, on the case being opened, the Lord Chancellor suggested that, in view of the provisions of the 1919 Act which had by then been enacted, the Lord Lieutenant might consider a retrospective appointment (see the report in [2000] 1 ILRM 479).

Although removing all disqualifications based on gender, the 1919 Act conferred no rights. So in Price v Rhondda Urban District Council [1923] 2 Ch 372, Eve J. ruled that the dismissal of 58 married women teachers by the defendant council did not violate the Act. Similar judicial attitudes were displayed by the House of Lords in Roberts v Hopwood [1925] AC 578. A Labour dominated borough council had decided to equalise pay rates between its male and female employees. The decision was held to be so unreasonable, having regard to the Council’s duties as trustees of the ratepayers’ money, as to be ultra vires. Lord Atkinson, in particular, warned Councils that they must not be swayed “by some eccentric principles of socialist philanthropy or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour”.

Indeed the policy inherent in Price’s case was enshrined in section 10 (1) of the Civil Service Regulation Act 1956 which provided that women holding positions in the Civil Service were required to retire on marriage. This position was only altered by the Civil Service (Employment of Married Women) Act 1973 which removed the marriage bar as and from July 31, 1973.

2. Introduction of Equal Pay and Employment Equality in Ireland

In February 1974, the Minister for Labour (Michael O’Leary TD) introduced the Anti-Discrimination (Pay) Bill which was signed into law in July 1, 1974. Section 13 of the 1974 Act provided that it was to come into operation on December 31, 1975.

The 1974 Act provided that it should be “a term of the contract under which a woman is employed in any place that she shall be entitled to the same rate of remuneration as a man who is employed in that place by the same employer…..if both are employed on like work”.

Section 3 of the 1974 Act provided that two persons should be regarded as employed on “like work” where:

(a) both perform the same work under the same or similar conditions, or where each is in every respect interchangeable with the other in relation to the work, or

(b) the work performed by one is of a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is
performed by each occur only infrequently or are of small importance in relation to the work as a whole, or

(c) the work performed by one is equal in value to that performed by the other in terms of the demands it makes in relation to such matters as skill, physical or mental effort, responsibility and working conditions.

However, section 2(3) provided that nothing in the Act should prevent an employer from paying to its employees who are employed on like work in the same place “different rates of remuneration on grounds other than sex”.

Discrimination in relation to access to employment, conditions of employment (other than remuneration), training, promotion or regrading was addressed by the Employment Equality Act 1977 which came into effect on July 1, 1977 (see S.I. No.176 of 1977). This Act outlawed discrimination (both direct and indirect) on grounds of sex and marital status.

Over the years a number of defects were identified in the 1974 and 1977 Acts and various commitments were given by different Governments to amend and consolidate the legislation. Ultimately an Employment Equality Bill was introduced in 1996 which consolidated and updated the earlier legislation and extended its coverage to other grounds of discrimination. This Bill was referred by the President to the Supreme Court for a decision under Article 26 of the Constitution as to whether the Bill or any part thereof was repugnant to the Constitution.

On May 15, 1997 ([1997] 2 IR 321) the Supreme Court held that three provisions of the Bill were repugnant to the Constitution. On taking office the new Fianna Fail/Progressive Democrat government examined the constitutional issues raised and returned the Bill, appropriately amended, to the Oireachtas. Despite the observations of Dr Michael Woods TD when in opposition (see 470 Dail Debates Col. 726) that the 1996 Bill, as drafted, was “cumbersome, legalistic and complex”, the 1997 Bill was almost identical in its provisions to the 1996 Bill.

The Employment Equality Act 1998 came into operation on October 18, 1999 (see S.I. No. 320 of 1999). It outlaws discrimination on nine distinct grounds: namely gender, marital status, family status, sexual orientation, religion, age, disability, race (including colour, nationality or ethnic or national origin) and membership of the Traveller community (see section 6). Like the earlier legislation, the Act deals only with discrimination in work-related activities such as vocational training, access to employment and pay and conditions of employment. The 1998 Act was extensively amended by the Equal Status Act 2000 and the Equality Act 2004.

The principal provisions of the 1998 Act (as amended) are set out below. Section 18 (1) provides that “A” and “B” represent two persons of opposite sex so that where “A” is a woman, “B” is a man and vice versa.

Section 19(1) provides that it shall be a term of the contract under which A is employed that she shall at any time be entitled to the same rate of remuneration for work she is employed
to do as B who, at that or any other relevant time, is employed to do “like work” by the same or an associated employer. Section 19(5), however, permits an employer to pay, on grounds other than the gender ground, different rates of remuneration to different employees. Section 29 of the Act provides for a similar entitlement in respect of the other eight discriminatory grounds.

The concept of “like work” is defined by section 7 of the 1998 Act in identical terms to those of the 1974 Act, subject to the express inclusion in subsection (3) of the situation where the work of the claimant is superior in value to that of the comparator. The subsection thus incorporates the decision of the Court of Justice in Case 167/86, Murphy v Bord Telecom Eireann [1988] ECR 673 that the principle of equal pay prohibited a difference in pay where the lower paid category of worker was engaged in work of higher value.

The definition does not encompass the concept of the “hypothetical comparator”. A claimant must be able to point to “an actual concrete real life comparator of the opposite sex” performing like work within “the same establishment or service”: see Budd J. in Brides v Minister for Agriculture [1998] 4 IR 250, 270. This person need not be contemporaneously employed; they may be the claimant’s predecessor or successor.

The concept of “remuneration”, as defined in section 2 (1) of the 1998 Act, does not include pension rights but includes “any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment”. Equal treatment in occupational pension schemes is regulated by Part VII of the Pensions Act 1990, as inserted by the Social Welfare (Miscellaneous Provisions) Act 2004, and amended by the Equality Act 2004. The definition of “remuneration” is broad and generous and covers “any payment or material benefit which an employee receives from his or her employer in respect of his or her employment”: see the Labour Court in A Credit Union v A Worker DEP7/1998. Once it appears that the benefit or payment is in respect of employment, it matters not whether it is contractual or ex gratia. The definition has been interpreted as including travel allowances, bonus payments, provision of car, overtime payments, free accommodation, skills allowance, redundancy lump sum payments, hire purchase loans and sick pay: see, for instance, Field v Irish Carton Printers DEP 5/1994 where the Labour Court held that the male claimant was entitled to be afforded the provision of a taxi facility, during times when public transport was not available, as was provided by the company for its female staff, on the basis that the provision of taxis for the female staff was “remuneration”.

According to research carried out by the Economic and Social Research Institute, the female-to-male wage ratio increased from 80.1% in 1987 to 84.5% in 1997. Part of this gap was attributable to “differences in the labour-market-relevant characteristics of men and women” (principally age and experience). Using widely applied statistical techniques, the Institute “decomposed” the total wage gap into a part which was explained by such differences and a part which was unexplained. This unexplained wage gap is sometimes treated as the basis for calculating how much higher the average female wage would be “if a woman were paid like a man”, the so-called “discrimination index”. In 1987 this index
stood at 15.9% whereas by 1997 it had fallen to 5.8%: see Callan ed, *How Unequal? Men and Women in the Irish Labour Market* (Oak Tree Press, 2000).

Section 19(5), as noted above, provides an employer with a defence to an equal pay claim. If the difference between the rates paid to the claimant and the comparator is genuinely based on grounds other than gender, no entitlement to equal pay can arise. The onus of proof is on the employer: see *Irish Crown Cork Co v Desmond* [1993] ELR 180 and *Minister for Transport v Campbell* [1996] ELR 106. Moreover in *Flynn v Primark* [1997] ELR 218, Barron J. emphasised that the issue involved not merely consideration as to whether there was a reason unconnected with gender for the difference in remuneration but also as to whether the difference was objectively justified on economic grounds.

Section 8 of the 1998 Act outlaws discrimination in relation to

(a) access to employment;  
(b) conditions of employment;  
(c) training or experience for or in relation to employment;  
(d) promotion or regrading; and  
(e) classification of posts.

As far as access to employment or promotion is concerned, the cases stress that it is not a question of determining who was the most meritorious candidate but whether the gender (or any of the other eight grounds) influenced the choice of the interview or selection board. Account will be taken of whether the interview was conducted in a non-discriminatory manner such as by asking discriminatory questions (see *Medical Council v Barrington* EE9/1998 where the claimant, a single female, alleged that she was asked whether she was thinking of getting married, a question not asked of the male or married female interviewees; *Corrib Airport Ltd v Worker* DEE3/1989 and *Good v City of Cork VEC* EE 29/1997 in which the female claimants were allegedly asked about their child-minding arrangements). In this context, it should be noted that the new definition of “employee” (inserted by section 3 of the Equality Act 2004) does not include, as far as access to employment is concerned, “a person employed in another’s home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons”.

The principle of equal treatment enshrined in the 1998 Act means that there shall be no *direct* or *indirect* discrimination on the nine grounds. The former occurs where one person is treated less favourably than another. Indirect discrimination occurs where an apparently neutral provision puts persons in the relevant category at a particular disadvantage compared with other employees unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (see sections 19, 22 and 31 of the 1998 Act).

Section 25 of the Act provides that it will not be unlawful to confine a post to a man or a woman where gender is a genuine and determining occupational requirement by reason of the particular occupational activities concerned or the context in which they are carried out.
Section 26(1) of the 1998 Act provides that it will not be unlawful for an employer to arrange for or provide treatment which confers benefits on women in connection with pregnancy and maternity (including breast-feeding) or adoption.

3. Harassment

Sexual harassment may be defined as unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of men and women at work. Even though no specific reference was made to sexual harassment in the Employment Equality Act 1977, the Labour Court in *A Worker v A Garage Proprietor* EE02/1985 ruled that “freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect”. Accordingly the Labour Court (and Equality Officers) in subsequent cases (on which see McAuley “Sexual Harassment in Ireland” (1995) 10 *JISLL* 215) treated any denial of that freedom as discrimination within the terms of the 1977 Act. So in *A Boys’ Secondary School v Two Female Teachers* DEE1/2002, the Labour Court recognised that sexual harassment constituted “an intolerable affront to the dignity of men and women at work” and emphasised that employers should have in place effective measures to ensure that such harassment does not occur and, if it does occur, to ensure that adequate procedures are readily available to deal with the problem and prevent its re-occurrence.

The matter is now governed by section 14A of the 1998 Act (inserted by section 8 of the Equality Act 2004). This provides that, where an employee is sexually harassed either in the workplace or otherwise in the course of his or her employment by the employer, a fellow employee or a client, customer or other business contact of the employer, that harassment constitutes discrimination.

The section further provides that it shall be a defence for the employer to prove that he took reasonable practicable steps to prevent the harassment.

The section ascribes a wide ambit to the concept of “sexual harassment” and provides that “sexual harassment” includes reference to any form of “unwanted verbal, non-verbal or physical conduct of a sexual nature”, being conduct which has “the purpose and effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person”. Such unwanted conduct may consist of “acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.” Regard must also be had to the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002 (S.I. No. 78 of 2002) which acknowledges that sexual harassment “pollutes the working environment” and that it can have a “devastating effect upon the health, confidence, morale and performance of those affected by it”.

Harassment on the other eight discriminatory grounds is covered in similar terms in section 14A of the 1998 Act.
4. Disability


Section 16 (5) of the 1998 Act (as amended by section 9 of the Equality Act 2004) provides that an employer is not required to recruit, retain, train or promote a person, who, inter alia, is not fully competent to carry out the duties concerned. In order to form a belief that an employee is not fully competent, an employer will be expected to make adequate enquiries to fully establish the factual position in relation to the disabled employee’s capacity: see Humphries v Westwood Fitness Club [2004] ELR 296 and An Employer v A Worker (Mr O) ELR 113 [2005]. The section goes on to provide, however, that a person with a disability is considered fully competent to undertake the duties attached to a job, if the person could do the duties with the assistance of “special treatment or facilities”.

In An Employer v A Worker EDA13/2004 the Labour Court stressed that the provision of special treatment or facilities was not an end in itself. The Court continued:

“It is a means to an end and that end is achieved when the person with a disability is placed in a position where they can have access to or, as the case may be, participate in or advance in the employment or to undergo training. This can involve affording the person with a disability more favourable treatment than would be accorded to an employee without a disability. Thus it may be necessary to consider such matters as adjusting the person’s attendance hours to allow them to work partially from home. The duty to provide special treatment may also involve relieving a disabled employee of the requirement to undertake certain tasks which others doing similar work are expected to perform. The scope of the duty is determined by what is reasonable, which includes consideration of the costs involved.”

When the Employment Equality Bill 1996 was introduced, it provided that an employer was required to do all that was reasonable to accommodate a disabled person’s needs unless the cost of the provision would give rise to undue hardship. The Supreme Court, however, considered that this constituted an unjust attack on employers’ property rights and when the Bill was reintroduced in 1997 the obligation to make reasonable accommodation was only subject to a “nominal cost” requirement. The section now requires employers to take appropriate measures to accommodate persons with a disability “unless the measures would impose a disproportionate burden”. In determining whether measures would impose such a burden, account is to be taken of the financial and other costs entailed, the scale and financial resources of the employer’s business and the possibility of obtaining public funding or other assistance.

The broader focus of this provision (which is required by virtue of Article 5 of Directive 2000/78/EC) should contribute to increased access for disabled persons to the workplace.
5. Enforcement

The 1998 Act (as amended) establishes the Equality Tribunal (the Tribunal) as the forum for seeking redress for a person who claims that he or she has been discriminated against. The Act provides, however, an alternative to an investigation and adjudication. Once a case has been referred to the Tribunal, it may be referred for mediation where the Director of the Tribunal considers that it could be resolved in that way. A case will not be referred to mediation if there is an objection from either party.

Mediation is an informal process in which the officer of the Tribunal, who is an impartial third party with no power to impose a resolution, helps the persons in dispute to try to reach a mutually acceptable settlement. The process is private and agreements, which are legally enforceable, are not published. In the event that agreement is not reached at mediation the complainant may seek to have the investigation commenced. If the case returns to investigation both sides are precluded from using information disclosed at mediation without consent. The advantage of mediation is that it can achieve a “win-win” situation if the parties reach a settlement and innovative and creative solutions are also possible.

In 2004 a total of 253 cases were referred to mediation, as compared with 109 in 2003. The increase reflected a shift of policy on the part of the Tribunal during 2004 whereby the Director chose to exercise her statutory powers to assign cases to mediation where no objection was received from either party rather than by seeking their specific consent. There was however a slight decrease in the number of cases which were resolved at mediation in 2004: 59 compared to 64 in 2004. In general mediation agreements were achieved in less than a third of the time a case would take to be investigated and adjudicated upon.

If a party objects to mediation or the process fails to secure an agreement, the investigation of the complaint is carried out by an Equality Officer of the Tribunal. This service is free and the parties are not required to have legal or other representation. Equality Officers are civil servants, selected by open competition, who are given specialist training to carry out their functions under the Acts.

The Equality Officer’s duty is to investigate and decide complaints referred to the Tribunal. This is different from the role of a court which decides only on the evidence brought before it and does not conduct any investigation of its own. If a question arises from the material submitted to the Tribunal, the Equality Officer may make additional enquiries in the interests of trying to establish what has happened. Extensive powers to do so have been conferred on Equality Officers, such as the power to enter premises and to inspect and copy relevant records. The Director may also require any person believed to possess relevant information to attend before an Equality Officer and provide that information. Failure to comply is punishable by criminal sanctions.

The process normally involves the filing and exchange of written submissions by both parties followed by a private hearing at which the Equality Officer asks questions of both parties, and any witnesses they bring. The Equality Officer will also give each party the opportunity to ask questions of their witnesses and will entertain closing submissions by
them. Given the Tribunal’s objective to provide an accessible forum, the Equality Officer will intervene to ensure that unrepresented parties are not placed at a disadvantage. The Equality Officer will then issue a written decision which is published on the Tribunal’s website. In cases raising particular sensitivities, such as sexual harassment cases or cases on the disability ground, the decisions are published in a form which does not identify the individuals concerned.

6. Redress

A decision of an Equality Officer which finds in favour of a complainant will provide for one or more of the following as appropriate:

(i) equal pay from the date of referral of the claim;
(ii) arrears of the shortfall necessary to make up equal pay for a maximum of three years before the date of referral;
(iii) compensation for the effects of acts of discrimination up to a maximum of two years gross pay;
(iv) an order for equal treatment in whatever respect is relevant to the complaint; and
(v) an order that a person take a specified course of action.

In measuring the appropriate quantum of compensation, regard is had to all the effects which flowed from the discrimination which occurred. This will include not only the financial loss suffered by the complainant arising from the discrimination but also the distress and/or indignity suffered in consequence thereof.

The Tribunal, however, has no power to award costs whether by way of legal or other representational costs or by way of witness or travelling expenses.

7. Representation

A complainant or respondent may deal with the case themselves at all stages of the hearing. They may, if they wish, be represented by a trade union, employer body, support group or by a lawyer. Tribunal complaints, however, do not fall within the scope of the Civil Legal Aid scheme. Many complainants, particularly those who are not members of a trade union, apply to the Equality Authority for assistance and representation.

The Equality Authority is an entirely different body from the Equality Tribunal. The Authority (which had previously been known as the Employment Equality Agency) was set up with a range of functions including that of providing advice and representation to those seeking information or wishing to make a complaint.

The Authority’s general functions are to work towards the elimination of discrimination in relation to employment and to promote equality of opportunity. It is also empowered to prepare Codes of Practice, to conduct inquiries or equality reviews and to assist complainants. In considering whether and to what extent it may provide assistance, the Authority must consider whether the complaint raises “an important matter of principle” or whether it is reasonable to expect the complainant to adequately present the case without
assistance. Among the criteria to which the Authority will have regard are the following: whether the complaint raises issues that refer to grounds where any significant case law has not been developed, whether the proceedings are likely to have a beneficial impact for the development of equality policies or practices and whether the matter falls within the themes of the Authority’s current strategic plan (at present one of which is the development of initiatives specific to the disability and race grounds).

There is no doubt that a properly resourced Authority is well positioned to make an ongoing impact in the significant challenges that are posed by the discrimination and inequalities experienced across so many sectors in Irish society. An important element of this is the Authority’s ability to engage in strategic litigation thereby addressing individual experiences of discrimination as well as stimulating change in key sectors and promoting a culture of compliance in relation to the Equality Legislation.