



Equality Before
the Law

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EQUALITY BEFORE THE LAW

Introduction

Employment Equality legislation in Ireland is to be found in the Employment Equality Act 1998 as amended by the Equality Act 2004. This legislation is extremely detailed but in effect makes it unlawful for employers to discriminate against a person on the basis of gender, marital status, family status, sexual orientation, religion, age, disability, race, and membership of the traveller community. These are referred to as the “discriminatory grounds”.

The legislation applies to existing employees in relation to terms and conditions of employment and such issues as access to training and promotion. However, perhaps less obviously and just as importantly, it also applies to potential employees and has a significant impact in relation to the entire recruitment process from job descriptions, advertisements and the interview and selection process itself. Unsuccessful job applicants may potentially bring a claim that they were discriminated against because they were not interviewed or were interviewed but were not successful.

Discrimination

Discrimination occurs where one person is treated less favourably than another person based on any of the discriminatory grounds. A person may bring a claim under several of the discriminatory grounds in appropriate circumstances and this is not at all uncommon. In 2004, a quarter of claims referred were on multiple grounds.

Claims

A person who believes that they have been discriminated against may bring a claim to the Equality Tribunal. A complaint must be brought within six months of the alleged act of discrimination. Before formally lodging a complaint, the person may request certain information from the company to enable them to consider their options. The company is not obliged to provide the information but if it fails to do so that fact may be taken into account by the Equality Officer in deciding the case.

The Equality Tribunal will offer the parties the possibility of resolving the dispute through mediation and if this option is either refused or is unsuccessful, an Equality Officer will be appointed to investigate the case and issue a decision.

The six month time limit for bringing a claim does not apply to equal pay cases. In equal pay cases the person must name at least one individual with whom they say they are directly comparable and who they believe is being paid more than they are for doing “like work” or work of equal value. For example, a woman who brings an equal pay claim would nominate at least one male fellow employee who she says is doing similar work to her but is being paid more than she is.

Onus of Proof

A serious difficulty which a company may face is that where an Equality Officer is satisfied that the Claimant has established on the balance of probabilities primary facts of sufficient significance to raise a presumption of discrimination, then the onus falls on the company to prove that there has been no discrimination. This can be a very serious problem for a company as it can be very difficult to establish that a difference in treatment of two individuals was based on grounds other than the discriminatory grounds which are alleged. For example, the company might wish to show that while a woman was doing similar work to a man but was paid differently this was justified on the basis of difference in the qualifications, experience or performance of the individuals concerned. On a practical level, an employer would be required to produce evidence of qualifications and documentation such as performance reviews.

In appropriate cases, an Equality Officer has the power to conduct the investigation by way of on site work inspections. For example, where a person alleges that somebody else is being paid more than they are for the same work, it is open to the Equality Officer to attend at the company’s premises and carry out a visual inspection and interview the various employees to try to establish whether the work is indeed “like work” or whether there are any significant differences.

Redress

Where an Equality Officer upholds an equal pay claim, the employee may be awarded compensation in respect of a three year period.

In claims other than equal pay claims, if an Equality Officer decides that there has been discrimination the officer may make a number of different awards the most usual one of which is compensation. The maximum amount of compensation which can be awarded to an employee is equal to two years' remuneration. Regardless of the outcome, the Equality Tribunal does not award legal costs to either of the parties.

Appeal

A party who is dissatisfied with the outcome of a case before the Equality Tribunal may appeal the decision to the Labour Court which will conduct its own new full hearing into the case. Unlike unfair dismissals cases, an unusual feature of some of these cases is that the employee may continue to be employed while the claim is being prosecuted and the employer needs to ensure that it does not take any steps against an employee who has brought an equality claim. It is unlawful for a company to punish an employee who brings a claim under the legislation and this is regarded as victimisation.

It is important for employers to realise that the numbers of these claims is rising year on year. The most recent statistics available in this area are contained in the 2004 Annual Report of the Equality Tribunal published on the 20th June 2005 and they show an increase in referrals in employment related claims of 21% on 2003. Of the 297 referrals under the Employment Equality legislation 53 were on the basis of gender, 51 on the basis of race, 38 on the basis of disability and 49 on the basis of age. Of the 77 decisions made in relation to employment equality referrals in the year 2004, 33% of these were successful which is an increase from the 15% of successful cases the year before. The Equality Tribunal is projecting a further 33% increase in the number of referrals in 2005, which would represent a 400% increase from the number of referrals in 2000.

Typical Awards

While the average award to successful Claimants was approximately €13,000.00, in one case the Claimant was awarded €127,362.00 following a successful claim that she had been discriminated against in a promotion competition.

Cases

Some examples of decisions published in 2004 illustrate the principles involved.

In one case an Equality Officer held that a teacher was discriminated against on the grounds of age when she was asked at interview “considering that you have been teaching for 27 years, why would you now be bothered with the hassle of the job of Deputy Principal”. The unsuccessful candidate was awarded €5,000.00 compensation.

In another case a company who advertised for an ideal candidate “with not more than 2 – 3 years experience in the commercial environment” was held to have discriminated against the Claimant on the grounds of age. The Equality Officer decided that the advertisement was prima facie evidence of discrimination and went on to hold that the company had failed to show that it had applied objective and transparent criteria in assessing the candidates. The Claimant was awarded €5,000.00. In addition, the company was ordered to refrain from specifying, as a requirement, a maximum limit in relation to commercial experience in all future competitions. It was also ordered to remove the requirement to specify date of birth on the job application forms and it was required to retain information on recruitment competitions for at least 12 months after the competition process was complete so as to be able to produce evidence in the event of an allegation of discrimination in the process. The company was also ordered to hold identifiable recruitment competitions and to maintain a clear record of any objective criteria applied in deciding not to call Applicants for interview so that in the event of an allegation of discrimination it would be possible to produce evidence as to how the competition was conducted.

In another case a teacher who was pregnant at the time she applied for a job in a school successfully brought a discrimination case even though the successful candidate was another woman. The Claimant’s case on the family status ground was based on the fact that she had been asked at interview about her maternity leave. The Equality Officer decided that not only can discrimination occur by treating people in the same position differently, but it can also occur by treating two people who are not in the same position in the same manner. The unsuccessful Claimant was awarded €10,000.00 compensation.

There has been some discussion in relation to the maximum limit of 2 years’ remuneration which in the case of low paid employees may not amount to a serious deterrent. In one case an Equality Officer awarded a Claimant two years’ remuneration of €21,000.00 and pointed out that she was limited by the level of compensation which she could order and had she not been so constrained she would have ordered a significantly higher awarded given the

severity of the treatment to which the Claimant was subjected which she described as a “most appalling attack on her personal dignity”.

Conclusion

In view of the fact that Irish Society has become more diverse and that family and social structures have altered over the last number of years, the potential for claims of discrimination on any of the stated grounds is increasing at a dramatic rate.

Employers need to protect themselves by ensuring in the first instance that they have detailed written equal opportunity and anti-discrimination policies and that they can prove that these policies have been brought to the attention of all employees. In addition, it is vitally important that the policies are strictly followed and where circumstances arise documentation needs to be kept in order to enable the company to adduce evidence at a hearing. The key word is transparency and employers will need to be able to justify any difference in treatment as being based on grounds other than the discriminatory grounds.

Employers need to be aware that once certain basic facts can be established by the Claimant, the onus will be on the company to establish that it did not discriminate and this may be a very difficult thing to do.

Another aspect which needs to be borne in mind is that in addition to the direct financial costs of these claims, they absorb a considerable amount of personnel time in collating information, preparing written submissions and attending hearings. There is a very real emotional aspect when employers are accused of discrimination and many employers chose to defend such cases on principle – which is not always the best commercial decision when the costs can be disproportionate to the risk involved. A further aspect is the potential publicity which such cases may generate. Decisions are published on the Equality Tribunal's website and these may attract the interest of the media.

Care taken in avoiding these claims is a worthwhile investment and should form part of any review of HR Policies.

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