

Wexford Chamber of Commerce H R Forum

Equality Law

September 8th 2009



MJ O'Connor Solicitors

Equality Law

- **Legislation implementing EU Directives**
- **Employment Equality Acts 1998 to 2008**
 - Employment Equality Act 1998
 - Equality Act 2004
 - Equal Status Act 2000
 - Pensions Acts
 - Civil Law (Miscellaneous Provisions) Act 2008
 - Protection of Employees (Part-time Work) Act 2001
 - Protection of Employees (Fixed Term Worker) Act 2003
- **Case law and Equality Tribunal decisions**



Prohibition on discrimination in relation to:

- Access to employment
- Conditions of employment
- Training or experience for or in relation to employment
- Promotion or re-grading
- Classification of posts

Advertising



Discriminatory Grounds

- **Gender**
- **Marital status**
- **Family status**
- **Sexual orientation**
- **Religion**
- **Age**
- **Disability**
- **Race/colour/ethnic/national origins**
- **Member of travelling community**



New ground?

- **Economic background**



Definitions

- **Employee**
- **Discrimination**
- **Indirect discrimination**
- **Discrimination by association**
- **Positive action**
- **Victimisation**
- **Equal pay for like work**
- **Comparable employee**
- **Disability**



Discrimination

Where

- **A person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the discriminatory grounds which:-**
 - exists
 - existed but no longer exists
 - may exist in the future; or
 - is imputed to the person concerned
- **Less favourable treatment = direct discrimination**



Discrimination by association

Where

- **A person who is associated with another person**
 - is treated by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and
 - Similar treatment of that other person on any of the discriminatory grounds would constitute discrimination

Six complainants –v- a public house

Under Equal Status Act – only one of six was disabled



Indirect discrimination

- Various definitions
- Occurs where an apparently neutral provision puts a person of a particular category (e.g. gender) at a particular disadvantage, e.g. in respect of remuneration compared with other employees of their employment
- Unless the provision is objectively justified by a legitimate aim and
- The means of achieving the aim are appropriate and necessary

Airline cases

O'Donnell –v- HSE



Disability

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

And shall be taken to include a disability which exists at present, or which previously existed but no longer exists or which may exist in the future or which is imputed to a person



Discrimination

Includes:

- **Harassment**
 - Unwanted conduct related to the nine grounds
- **Sexual harassment**
 - Any form of unwanted verbal, non verbal or physical contact of a sexual nature
- **Has the effect or purpose of violating a persons dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person - subjective**
- **Code of Practice on Sexual Harassment and Harassment at Work**



Victimisation

- Cannot penalise employee for taking action under Equality Acts
- Occurs where there is dismissal or other adverse treatment
- Taking action includes:
 - Complaint to employer
 - Proceedings
 - Supporting another complainant
 - Witness in any proceedings
 - Lawful opposition to unlawful conduct
 - Giving notice of intention to do any of the above



Vicarious liability

- Anything done by a person in the course of their employment shall be treated as being done by the employer
- whether or not it was done with the employer's knowledge or approval
- Unless employer can prove that he or she took such steps as were reasonably practicable to prevent the employee from doing the act or from doing acts of that description in the course of employment



How a claim is made

- Employment Equality Acts/Equal Status Acts
- ES2 and EE2 request for information
 - Not obliged to respond but inference may be taken from refusal
- Equality Authority
- Equality Tribunal
- No length of service requirement for claim under EEA
- EE1 form
- 6 months from incident, extend in exceptional circumstances
- Burden of proof – prima facia case
 - then for employer to rebut discrimination



Redress

- **Claim to Director of Equality Tribunal**
 - Equality Officer will investigate
 - Voluntary mediation
- **Compensation**
- **Direction to take course of action**
- **Can include reinstatement/re-engagement**
- **Appeal to Labour Court**
- **Gender claim can go to Circuit Court also – Circuit Court jurisdiction**



Compensation

- **Can claim equal pay for three years prior to claim**
- **Equal pay from date of referral**
- **Compensation for effects of discrimination going back six years prior to referral**
- **Six years in case of gender to Circuit Court**
- **Cap of two years remuneration where person was in receipt of remuneration at date of dismissal or referral**
- **No cap on circuit court compensation**
- **€12,700 maximum where claimant not in receipt of remuneration e.g. interview**



Equality Tribunal Report 2008

• Referrals	2007	2008	+/-
• EEA	659	831	+26%
• Pensions Acts	7	2	-71%
• Equal Status Acts	185	154	-17%
• Overall referrals	852	996	+17%



Equality Tribunal Report 2008

• Outcomes	2007	2008	+/-
• Employment Equality Acts	351	507	+44%
• • Decisions	77	73	-5%
• • Mediated agreements	45	44	-2%
• • Otherwise closed	229	390	+70%
• Pensions Acts	8	6	+25%
• • Decisions	0	3	+300%
• • Mediated agreements	0	0	0%
• • Otherwise closed	8	3	-62%
• Equal Status Acts	248	345	+39%
• • Decisions	94	123	+31%
• • Mediated agreements	20	24	+15%
• • Otherwise closed	134	199	+49%
• Overall outcomes	607	858	+41%



Equality Tribunal Report 2008

• Breakdown By Ground	2007	2008	+/-
• Age	43	82	+91%
• Disability	89	97	+9%
• Family Status	10	6	-40%
• Gender	79	79	0%
• Marital Status	1	3	+200%
• Race	307	359	+17%
• Religion	5	2	-60%
• Sexual Orientation	4	5	+25%
• Traveller Community	3	1	-67%
• Multiple Grounds *	113	199	+76%
• No Grounds Listed	13	9	-62%
• Total	667	842	26%
• <i>* Where a claim is made under more than one ground it is not counted in each of the grounds on which the claim is based but only in the "Multiple Grounds" category..</i>			



What should concern you

- Race discrimination – Goode Concrete case
- Disability discrimination
- Age discrimination
- Gender
- Family status
- Indirect consequences of a provision
- Reasonable steps to prevent – policies and implementation
- Reasonable accommodation (A worker –v- an hotel)
 - Unless measures impose disproportionate burden



General Exemptions

Prohibition on Discrimination is subject to general and specific exemptions, namely:

- Capacity and Competence
- Compliance with statutory requirements
- Positive action for equal opportunities
- Gender specific employment
- Educational, technical or professional qualifications
- Benefits for employee's family allowed
- Age – can set minimum age not exceeding 18 years.
- Age - can set upper age (provided there is objective criteria)
- Age & Race – Vocational/Training Bodies fees & places, Universities and mature students
- Religion – maintain “religious ethos”
- Disability – reduced remuneration



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Contracts, policies and procedures

October 6th 2009



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Agenda

- **Why**
- **Applies to employees**
- **The law**
- **Good practice**
- **What is a contract**
- **The terms of a contract and where they come from**
- **Examples**



Why?

- **Because the law requires it**
- **Because it is good practice**
- **Because it work to your advantage**



Employee or contractor?

- **Control test**
- **Integration test**
- **Multiple test**



Is the person an employee

- Works for employer for regular wage
- Works under direction and control of employer
- Is not independent in carrying out his functions
- Is dependent of employer's directions, instructions control
- Is provided with necessary facilities, means to carry out functions
- Is integral to the business
- Does not take financial risk

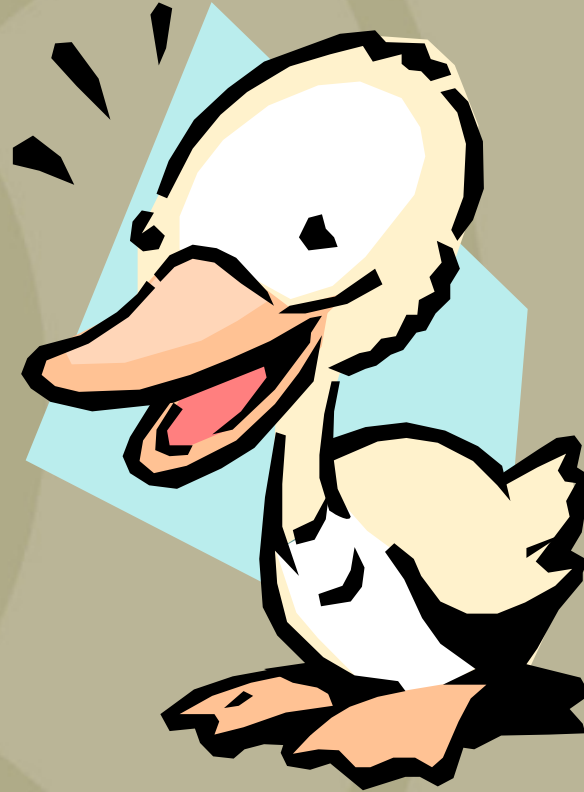


Contractor

- **In business on their own accord**
- **Their own boss**
- **Provides own gear, equipment to carry out duties**
- **Can profit or suffer loss**
- **In control of their own performance**
- **Generally not under full control of owner of business**
- **Can delegate work to others**
- **May be an employer themselves**



A Duck



Some tests for a contractor

- Owns own business
- Exposed to financial risk
- Has control over what is done, how it is done, when and whether he does it personally
- Free to hire others
- Provides own materials equipment
- Has place where materials are stored
- Costs and agrees price for job
- Is liable for negligence
- Registered for Vat
- Has insurance



The law says so

- **Terms of Employment (Information) Act 1994**
- **Unfair Dismissals Acts 1977 to 2007**
- **Protection of Employees (Fixed-term Work) Act 2003**
- **Safety Health and Welfare at Work Act 2005**



Terms of Employment (Information) Act

- Requirement to give written statement
- Signed by employer
- For all employees since April 1994 – within 2 months
- For existing employees – within 2 months of request
- Notify in writing of changes – one month
- Offence not to comply
- Claim to Rights Commissioner
- Appeal to EAT
- Up to 4 weeks compensation and recommendations
- Can you have a partial breach?



Terms of Employment (Information) Act

- Name & address of employer – take care with trading name
- Name of employee
- Place of work
- Title of job or nature of work
- Date of commencement
- Duration of temporary contract or expiry date of fixed term contract
- Rate of pay or method of calculation and when paid
- Hours of work including overtime
- Terms of paid leave
- Terms of any sick pay
- Notice period
- Reference to collective agreements
- Pension details



Unfair Dismissals Acts

- **Section 14 – obligation to give details of the procedure to be followed in case of dismissal to employee within 28 days of employment**
- **Obligation to notify changes in procedure within 28 days**
- **Procedure can be:**
 - **That agreed with employee**
 - **That agreed with union**
 - **Established by custom and practice**
- **Section includes obligation to give reasons for dismissal within 14 days of request**



Protection of Employees (Fixed-term Work) Act 2003

- Requirement to have contract in writing
- Signed by both employee and employer
- Otherwise it will not be a valid fixed term contract

- Refer to notes on Downsizing Work Force



Health Safety & Welfare at Work Act 2005

- Requirement to have health and safety statement (section 20)
- Requirement to bring statement to attention of employee
- Requirement to review and up date statement
- Offence with prosecution, fines and possible imprisonment
- Liability on directors and managers
- Acts provides for codes of practice



Good practice – to follow established codes of practice

- **Prevention of work place bullying**
- **Sexual Harassment and Harassment at work
SI/78/2002**
- **Disciplinary (Statutory requirement) SI/146/2000**
- **Grievance**
- **Part time working arrangements**



Other policies

- **Data protection**
- **Equality – Dignity and respect policy**
- **Smoking**
- **Electronic communication**
- **Use of technology**
- **Socialising**
- **Work place collections**
- **Sneezing**



What is a contract?

- Offer
- Acceptance
- Consideration
- Intention to create legal relations

- Written or oral
- Express and implied terms
- Simple or complex



Express terms

- **Written or openly discussed at time the contract is entered into**
- **Best practice is to record in writing**
- **Remember your statement of terms and conditions under TEIA is not a contract**
- **Written contract should cover all salient issues**



Typical contractual terms

- **TEIA details**
- **Probation**
- **Mobility clause**
- **Retirement age**
- **Rules on absence**
- **Termination and action on termination**
- **Restrictive covenants**
- **Confidentiality**
- **Detailed job specification**
- **Disciplinary and grievance**
- **Use of company property**
- **E mail and internet use**
- **Notice**
- **Variation clause**



How to formulate a contract

- In writing
- Signed?
- Letter of appointment
- Job specification
- Staff booklet
- Timing and conditions



The silent conditions

- **Implied by Statute – minimum wage JLC etc**
- **Implied by law – imposed by case law**
- **Implied by custom and practice**
- **Implied by conduct of the parties**



Implied terms

- **Good faith**
- **Honesty**
- **Trust and fidelity**
- **Reasonableness – case sample on mobility**
- **Confidentiality**
- **Employers' duties**
 - **Pay**
 - **Provide work**
 - **Provide safe place of work**
- **Employees' duties**
 - **To work**
 - **Carry out reasonable instructions**



The tests

- **Officious bystander test**
 - So obvious it goes without saying
- **The business efficacy test**
 - Necessary to make the contract work
 - To have qualification/licence



Works for you

- You set your standards
- You set your work practices – no room for doubt – “I did not know”
- Express terms remove uncertainty
- Detailed operations manual
- Assists in disciplinary matters, particularly incompetence
- Ensures compliance
- Opens other opportunities
 - Confidentiality
 - Restrictive covenants



Timing

- **Conditions precedent**
 - **References**
 - **Medical examination**
- **Offer and acceptance.....and great caution!**
- **Interview procedure and protocol**
- **Equality!!!!!!**



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