

Irish equality acts 1998-2011

Law



Critically evaluate the effectiveness of the relevant provisions of the Employment Equality Acts 1998-2011 (and their predecessors) in eliminating pay discrimination on the ground of gender within the workplace and thus reducing the gender pay gap. The European Union is founded upon core values including respect for human dignity, freedom and equality between men and women. This equality extends to the workplace where both men and women are entitled to equal conditions of employment and pay.

Articles 20 and 23 of the charter of fundamental rights similarly states that all persons are equal before the law and that equality between men and women must be ensured in all areas " including employment, work and pay. " Despite this the average hourly gender pay gap within the European Union stands at 17. 1% but varies from 6%- 34% depending on the member state[1]. In an attempt to close the gender pay gap in the European Union, various legislation has been drafted and implemented over the previous forty years.

The right to equal pay is set out in Article 157 TFEU (formerly Art 141, Art 119) which expressed that " each member state shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value shall be applied". The subsequent legislation for preventing discrimination in the workplace was incorporated into Irish law by means of the Anti-Discrimination (pay) act 1974 and the Employment Equality act 1977.

The jurisprudence for the right to equal pay is the landmark case of *Defrenne v Sabena*[2] which saw the European court of justice establish that the right to equal pay was legally binding in agreeing that the complainant's right to equal pay derived directly from Article 119 (now Art 157 TFEU). The law in <https://assignbuster.com/irish-equality-acts-1998-2011/>

Ireland is now governed exclusively by the Employment Equality acts 1998-2004 which replaced the acts of 1974 and 1977.

Article 8 of the Treaty on the functioning of the European Union states that in all its activities the Union “ shall aim to combat discrimination based on sex, racial or ethnic origins, religious belief, disability, age or sexual orientation. ” The issue of discrimination in relation to equal pay can arise both directly and indirectly as has been seen in the case law and legislation surrounding this area. The case of Gillespie vHealthand Social Services Board[3] defined discrimination as “ the application of different rules to comparable situations or the application of the same rule to different situations”. Article 2(1) of the Recast equal treatment directive has defined direct discrimination as occurring in a situation where “ one person is treated less favourably on the grounds of sex than another is, has been or would be in a comparable situation”. A necessary requirement of the test for direct discrimination is a suitable comparator that the complainant can compare themselves to in order to establish discrimination has occurred.

It is then the duty of the tribunal to consider the reasons for selecting that comparator and whether they are suitable as a relevant comparator in the given situation. Section 6(1) (a) of the Employment equality acts allows a person to select a hypothetical comparator as the scope extends to situations where a complainant “ would be” treated less favourably, but this is not the case when concerning issues relating to pay[4]. It is important to note that there are exemptions to the prohibition on discrimination.

Under section 25 of the Employment equality acts an employer may be permitted to treat employees differently based on gender. This is only non-
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discriminatory where the objective is legitimate and proportionate. The Employment equality acts also provide for the employer to promote equal opportunities for both male and female employees. This may come in the form of vocational training or improving working conditions which help create a higher skilled workforce and help to address imbalances evident in the workforce by the gender pay gap.

Section 24 of the Employment Equality Acts allows an employer to implement measures which initially make it easier for an under-represented sex to pursue a vocational activity but also to prevent or compensate for disadvantages in professional careers. Promotion or the advancement of one's career will be dependent on whether that employee is best suited to the position based on their skills and experience and this has been echoed by the European court of justice.

Section 24 should be viewed with the understanding that female employees are not automatically entitled to a promotion and thus a higher rate of pay, but that any measures introduced by the employer are to ensure that equal opportunities are available to both sexes. Section 19(4) of the Employment Equality Acts prohibit indirect discrimination on gender grounds in relation to pay where it states " indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender at a particular disadvantage in respect of remuneration compared with other employees of their employer".

It's clear from this that indirect discrimination concerns a provision which appears to affect all employees in a firm but really favours or disfavors a category of employees. In Nathan v Bailey Gibson[5] indirect discrimination

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on the grounds of gender was evident where the complainant had been employed as an assistant to a machine operator and subsequently applied for his job after he retired. The employer had a “closed shop” agreement in place with the trade union and hired an unemployed male member of the union after the vacancy became available.

The union itself was made up predominantly of male members. The Supreme Court held this amounted to indirect discrimination. Indirect discrimination allows for an employer to defend the imposition of an indirectly discriminatory provision as being objectively justifiable. This is enshrined in section 19(4) which states that indirect discrimination on the grounds of gender will not occur where the act or clause is “objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.

The landmark case of *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*[6] where differential treatment of part time and full time staff relating to pension rights was occurring and the employer attempted to justify the refusal to pay pensions to part time workers on the basis that it was necessary to discourage staff from working part time for economic reasons. The complainant argued that this breached Article 157 TFEU in relation to equal treatment relating to pay.

The European court of Justice rejected the argument of the employer but did state that an indirectly discriminatory measure may be justifiable if it is necessary to meet a real need on the part of the employer. The court went on to say that this would occur only if it is appropriate with a view to achieving the objective pursued. In order to understand how the legislation

implemented has aided the elimination of pay discrimination, it is first necessary to understand the meaning of pay and ultimately what constitutes pay.

Article 157 TFEU provides that both male and female workers are entitled to receive equal pay for equal work, or work which has an equal value and the right of community members to equal pay is provided for in the Employment Equality Acts. This provision has both vertical and horizontal effect owing to the decision in *Defrenne v Sabena*, which allows employees to take actions before their national court.

The Employment Equality Acts provide a clear and concise explanation of the right to equal pay in section 19(1) where it states that “ It shall be a term of the contract under which A is employed that, subject to the act, A shall at any time be entitled to the same rate of remuneration for the work which A 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”. However, both the European Court of Justice and the national courts have held there to be a broad scope as to what constitutes pay.

These courts have held that sick pay, travel concessions, grading systems, inconvenient hours supplement, redundancy pay, bonus pay and share allocations all fall within the scope of pay[7]. The European court of Justice defined pay in the case of *Arbeiterwohlfahrt der Stadt Berlin v Botel*[8] where it was said to be “ all consideration, cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer, whether under a contract of employment, by virtue of legislation or on voluntary basis”.

The European Court of Justice has also considered the less favourable treatment of part time workers which it considers to be indirect discrimination on the gender ground. The case of Bilka-Kaufhaus features again here as the ECJ held that where a part time employee earns less pay for doing an equal amount of work as an employee working full time then this may constitute indirect discrimination on gender grounds as a vast majority of part time employees are female which is certainly in line with the legislation under section 19(1) of the Employment Equality Acts.

Pay in relation to pregnancy and maternity leave has resulted in the European Court of Justice determining that any allowances paid will not constitute pay. Gillespie and ors. V Northern Health and Services board saw complainants fail in bringing a claim arguing that their employer was in breach of Article 141(now Article 157TFEU) by paying them less than their full salary during maternity leave. It was also the case in North Western Health board v McKenna[9] that the ECJ decided a female employee absent from work due a pregnancy related illness is not entitled to maintenance of full pay.

This is the case currently but it should be noted that an amendment to Directive 92/85 has been proposed and if passed, would allow for a female employee to obtain her entire salary while on maternity leave subject to a Member state possibly placing a maximum level at the level of national sick pay[10]. This has not yet come into force due to opposition from various member states primarily on the ground of cost but also “ limiting parental rights to mothers rather than to fathers and creating obstacles to the recruitment of women in the workforce”.

It has been necessary for the ECJ and national courts to determine whether the complainant is doing equal or “ like work” to their chosen comparator. Fortunately, the legislation clarifies the meaning of “ like work” in section 7(1) of the Employment Equality Acts as being: 1. The same work undertaken by another person under the same or similar conditions 2. Where the work is of a similar nature 3. The work is of equal value taking into consideration such matters as skill, physical or mental requirements, responsibility and working conditions.

From this it is clear that in order for the complainant to establish they are partaking in “ like work” they must show that they are interchangeable with the comparator at any given moment and without any notice. In the case of Department of posts and telegraphs v Kennefick[11], a complaint was made by a female post and telegraph clerk that she was being paid less than her comparator who was doing like work. The employer argued that the male telegraph clerk’s job description included additional duties which he was seldom asked to perform. The Labour Court in this case refused to be guided by job description and ordered that the female employee was entitled to equal pay. However, it has been held that higher qualifications will justify a party receiving a higher salary. This was evident in the “ Austrian psychotherapists’ case”[12] where a group made up primarily of female psychotherapists who had psychology degrees sought equal pay with medical doctors who were employed as psychotherapists. The ECJ agreed that both parties undertook “ seemingly identical activities” but found that the medical doctors were also qualified to undertake additional activities due to their qualifications.

Therefore, the ECJ held that the difference in training and qualifications meant that the two parties were not in a comparable situation. The courts have also been faced with determining situations where the work is similar in nature or equal in value. For example, the case of *Dowdall O'Mahony v 9 female employees*[13] saw equal pay awarded as the court held that the differences in the positions were found to be of little importance in the context of the work as a whole.

When dealing with issues where the work is deemed to be of equal value, it is the function of the court to look at the skill, physical effort and responsibility required to perform the work. In *24 women v Spring Grove Services*[14] the female employees were employed in the finishing area of the linen maintenance section. They sought to compare themselves with a group of male employees who were employed to work in the wash house.

The court subsequently compared the work undertaken by one male employee and one female employee and concluded that the male used more physical effort and skill than the female employee in the course of her work and therefore they were not doing equal work. Section 19(1) of the acts provides that the claimant and the comparator must be employed to do equal or like work by the same or associated employer at that or any other relevant time which under section 19(2 b) is defined as any time during the three years preceding or following the time at which the action is taken.

Despite the benefits of the legislative provisions provided in the Employment Equality Acts, there are numerous problems with their effectiveness and enforcement. Despite the legislation there is a scarcity of discrimination cases relating to pay being taken to national court level and there are a <https://assignbuster.com/irish-equality-acts-1998-2011/>

variety of reasons for this. In some situations it is difficult to ascertain the scope of comparison for the wording of certain provisions in the legislation as it is not defined in statutory law, such as the meaning of work of “ equal value”.

Another issue is that the concept of the “ hypothetical comparator” is not allowed in most countries and it’s also the case that the comparator must be employed by the same employer. The problem with this is that locating a real comparator can be difficult in segregated professions where comparators of the opposite sex are rare. In various European states it is the case that the citizens have no faith or trust in the judiciary to appropriately or effectively deal with a case of sex discrimination.

Having explored in detail where the relevant provisions of the Employment Equality Acts have been applied to eliminate pay discrimination on gender grounds, it is important to note that the employer is entitled to show that the difference of treatment in relation to pay is not indirectly discriminatory but valid on some other ground. This “ defence” is provided in section 19(5) of the Employment Equality Acts. Under this section employers may pay different rates of remuneration to both men and women but it must be justifiable on grounds other than gender.

The test for this stems from the *Bilka Kaufhaus*[15] case where the employer is required to show how and why the decision to discriminate was made at that point and it was subsequently decided that retrospective justification was unacceptable. The qualifications of the employee, worker flexibility and length of service may be objective grounds if they can be attributed to the

needs of the employer. The case of *NUI Cork v Ahern*[16] concerned a pay differential between male security guards and female phone operators'.

This was deemed to be justifiable as the female operators were paid more for doing less work. This was not due to gender as they had originally been doing an increased amount of work but due to family issues was now doing less. This thinking was continued in the case of *Dept of Justice, Equality and law reform v CPSU*[17] where the court held that the department had grounds other than gender for the payment of a higher rate to Gardai members performing clerical work compared with civilian clerical workers.

Certain posts within An Garda Síochána are reserved for Gardai. Here, the majority of the 761 clerical posts in An Garda Síochána were female. This was deemed to be justifiable for "genuine operational reasons" and to ensure the continuity of services at all times. Employers may also be able to rely on a defence of market forces where they establish that the payment of a lower wage for some employees is part of the business strategy on economic grounds which can be objectively justified.

This was developed in *Enderly v Frenchay Health Authority*[18] where a comparison was made between speech therapists who were predominantly women and pharmacists who were predominantly men being paid at a higher rate. The employer's argument was that differential pay was due to a shortage of pharmacist candidates and not due to sex discrimination found favour with the court. Despite the legislation, the European gender pay gap still stands at 17.1%, but there are a variety of innovative ways to help close the gender pay gap[19].

The Finnish government has coined the concept of an equality pot, which is a sum of money set aside for municipal governments to fund pay rises in low paid, highly educated female sectors as low wages are traditionally paid to female workers in highly feminised branches of the public sector[20]. This would help to reduce the pay gap and put in place a greater level of equality relating to pay between the two genders. Another method of closing the pay gap is to support the continuity of female employment as they often interrupt their employment in order to manage both their family and professional life.

This could be done by the reconciliation of both and could be achieved through the provision of child care facilities in the workplace ensuring female employees were able to bring their children to work[21]. It should also be noted that imposing an obligation on male workers to be involved in child rearing would allow for the continuation of women in employment and would help to close the gender pay gap. References • European Gender Equality Law Review-No. 1/2011 • Principles of Irish Employment Law: Brenda Daly, Michael Doherty 2010,

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