



THE BAR
OF IRELAND

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Employment Bar Association

Submission by Council of The Bar of
Ireland and the Employment Bar
Association to The Irish Human Rights
and Equality Commission

25th July 2018

INTRODUCTION

1. By letter dated 3 July 2018, the Irish Human Rights and Equality Commission (“the Commission”) wrote to the Council of The Bar of Ireland and the Employment Bar Association (“the EBA”) seeking observations on the draft Code of Practice on Equal Pay prepared by the Commission pursuant to section 31 of the Irish Human Rights and Equality Commission Act 2014 by 10 August 2018. In particular, the Commission sought views on the following:
 - a) Is the draft Code of Practice sufficiently accessible for employers, employees, employers’ organisations and trade unions?
 - b) Are concepts such as “like work”, “comparator”, “pay differentials”, “remuneration”, “burden of proof”, “direct/indirect discrimination”, “objective justification” and “peer review” sufficiently explained in the draft Code of Practice?
 - c) Is there any aspect of discrimination in relation to equal pay which is not sufficiently covered in the draft Code of Practice?
 - d) Do you have any comments or suggestions in respect of the content of the draft Code of Practice?
 - e) Do you have any comments or suggestions in respect of the layout of the draft Code of Practice?

GENERAL OBSERVATIONS

2. The draft code provides at paragraph 3 that “[t]he code seeks to promote the development and implementation of procedures that establish workplaces where workers receive equal pay for like work.” It further provides at paragraph 5 that “[t]his code aims to give practical guidance to employers, employees organisations, trade unions and employees on: the right to equal pay; the elimination of pay inequality, and the resolution of pay disputes.” The draft code then goes on to provide, over the course of 24 pages, and in the following order,
 - a) a detailed account of the law on equal pay;
 - b) a guide to help employers identify pay inequality and to eliminate it;

- c) a description of the procedure for referral and determination of an individual claim for equal pay under the Employment Equality Act 1998 and
 - d) a guide to the implementation of equal pay following a pay review or a successful claim.
3. As is apparent from the above, the draft code is very wide in its scope and seeks to embrace a detailed description of the law together with two very different aspects of the solution to pay inequality: its resolution by individuals by means of individual claims under the EEA and its detection and resolution by employers at the level of the enterprise.

SPECIFIC OBSERVATIONS

4. Having regard to the above, the Bar of Ireland and the EBA now provide the following observations. It should be noted that these observations are directed to the draft Code of Practice supplied and to the questions posed and have been compiled having regard to the time available.

Is the draft Code of Practice sufficiently accessible to its intended audiences?

5. We suggest that the accessibility of the Code may be improved if,
- a) The draft code is split into two codes. One code should set out the items at (a) and (c) above, namely an account of the law on equal pay and a description of a description of the procedure for referral and determination of an individual claim for equal pay under the Employment Equality Act 1998. The other code should set out the items and (b) and (d) above, namely a guide to help employers identify pay inequality and to eliminate it and a guide to the implementation of equal pay following a pay review or a successful claim. Each code should refer readers to the other as appropriate.
 - b) The account of the law on equal pay is prefaced by a section setting out key definitions. Without such an explanation, there is a risk that a lay person would real risk that a lay person would read the beginning, fail to understand it, and give up. The definitions should therefore be given earlier or the reader should be referred to the paragraph where the definition may be found. The definitions should include *inter alia* the following:

- Employee;
- Employer;
- Direct Discrimination;
- Indirect Discrimination;
- Comparator;
- Positive Action;
- Objective justification;

While many of these definitions are provided in the document, it is suggested that if they were at the start of the document, even if there were thereby a degree of duplication, this would help the reader understand the content in the overall document. It would also be of assistance to provide short examples of the concepts in practice (this is already done in some parts of the document).

Are concepts such as “like work”, “comparator”, “pay differentials”, “remuneration”, “burden of proof”, “direct/indirect discrimination”, “objective justification” and “peer review” sufficiently explained in the draft Code of Practice?

6. We suggest that a number of the explanations contained in the document could be improved. We provide draft amendments as an appendix to this document.

Is there any aspect of discrimination in relation to equal pay which is not sufficiently covered in the draft Code of Practice? Do you have any comments or suggestions in respect of the content of the draft Code of Practice?

7. We suggest that the draft code be amended to cover the following matters.

- a) The obligation on the complainant to furnish the WRC with a written statement of the details of the grounds of discrimination.
- b) The power of the Director of General of the WRC to strike out a claim if it is not pursued within a period of one year. We suggest that, having regard to this power, a complainant should inform the WRC of any change of their address.

- c) There is no discussion of costs in the context of a complaint made to the WRC/Labour Court and the Circuit Court. This information may be of assistance so that the reader understands any cost exposure if unsuccessful in their claim. Linked to this, it may be of assistance to outline the fact that there is no civil legal aid scheme for employment matters but that applications can none the less be made to the legal aid board on a case by case basis.
8. Where the document refers to a decision of the Court of Justice of the European Union, the case number should be supplied together with the European Court Reports reference. At present, the document gives case number for some decisions of the CJEU but not for others, instead giving references to the Industrial Relations Law Reports and the Employment Law Reports. These reports are available to subscribers only, whereas the European Court Reports are available to the public on www.eur-lex.europa.eu. If the document is to be available on line, these could be given as live links to the report on the website.
9. We suggest that the following be included in the section entitled “Sources of further information/guidance”:
- a) The Law Reform Commission website as a source of the revised version of the Employment Equality Act 1998 and the Workplace Relations Act 2015: www.lawreform.ie
 - b) The WRC website as a source of case law relating to equal pay: www.workplacerelations.ie
 - c) The EU website, www.eur-lex.europa.eu
10. We suggest that the following be included as appendices:
- a) The Labour Court appeal form;
 - b) The Statutory District Court form (Form 40C.1) for enforcement of a WRC or Labour Court decision.

Do you have any comments or suggestions in respect of the layout of the draft Code of Practice?

11. As set out above, we suggest that the code be split into two separate codes.

12. As also set out above, we suggest that the section explaining the law on equal pay be prefaced by a section setting out relevant definitions.

13. The Code, before dealing with “Discrimination on prohibited grounds” at para. 12, should inform the reader as to who falls within the Employment Equality Act (this information is found in para. 29-30).

CONCLUSION

14. The Bar of Ireland and the EBA hope that the above submissions are of assistance in the preparation of the Code of Practice. Should the Commission require further assistance, we are happy to provide the same.

Appendix: Proposed amendments

The right to equal pay

8. The right to equal pay for like work means that a person covered by the legislation who is performing work that is the same or similar or of equal value to that of another employed by the same or an associated employer, who differs in respect of one of the protected grounds, has a right to be paid the same as that other; that person must not be paid less on any of the prohibited grounds.²

Pay differentials

28. In some cases pay differentials may have an an rational explanation which is not referable to a protected characteristic, such as length of service, working hours, atypical working patterns, key role differences, etc. but where the differential impacts adversely on an individual or a group with a protected characteristic (e.g. women, workers with a disability, older workers, persons of a particular religion or ethnicity) then an inference of discrimination may be appropriate.

Comparators

39. An equality claim starts with comparison. The right to be treated equally is the right to be treated the same as another who is performing like work, but is of a different protected characteristic. For example, a woman claiming sex discrimination will need to find a male comparator who is being paid more than she is even though both are doing like work. A person claiming age discrimination will need to find a person of a different age who is being paid more than she is even though both are doing like work.

40. A comparator is the person to whom a complainant compares him or herself for the purposes of an equal pay claim. The

comparator must differ from the claimant on one of the nine prohibited grounds. The comparator must be performing like work as described in the EEA. The comparator must receive greater remuneration than the complainant. A complainant must identify an actual comparator for an equal pay claim to be successful³²; a hypothetical or notional comparator will not suffice³³. ~~The comparator must be performing like work as described in the EEA and must differ from the claimant on one of the nine prohibited grounds.~~

40. An agency worker must identify another agency worker as a comparator; likewise, a non-agency worker must make a comparison with a non-agency worker³⁴.

4041. The comparator must be employed³⁵ by the same employer as the claimant, or by an associated employer³⁶. In circumstances where the claimant and comparator work for associated employers, they must have 'the same or reasonably comparable terms and conditions of employment'³⁷.

42. A complainant who seeks to establish indirect discrimination must identify a group of comparators who satisfy the criteria set out above. In addition, the comparator group must be predominantly composed of persons who differ from the claimant group with regard to the protected characteristic.

4143. A comparator is not required in order to establish discrimination ~~on the basis of referable to~~ pregnancy or maternity leave.

Burden of proof

43. The ~~onus of proof is on the~~ person making the complaint ~~to must~~ establish the basic facts in the first instance. In other words, the onus of proof is on the complainant initially. S/he must identify a comparator, or group of comparators if indirect discrimination is alleged, who differ from him or her with regard to one of the protected grounds, who receive greater remuneration than him or her and with whom s/he is performing like work, though this does not apply to the maternity leave or pregnancy situation. S/he must also establish the discriminatory ground, and the pay differential. In indirect discrimination claims, the indirectly discriminatory practice or system which results in the pay differential must be identified. Note that a comparator is not required to establish discrimination referable to pregnancy or maternity leave.

44. If ~~the complainant a worker~~ can establish these facts, then the onus of proof shifts to the employer. In other words, if the employer is to successfully defend the claim, he or she employer must establish a ground other than the prohibited ground for the pay differential or, in indirect discrimination claims, objective justification for the system or practice at issue.

45. If a complainant issues a questionnaire under the statutory procedure discussed at paragraph [insert] below, and the employer fails to answer, or gives answers which are false or misleading or otherwise not what the employee reasonably requires, inferences may be drawn from the same¹ and may operate to shift the onus of proof from the complainant to the employer.² Note that in addition to the procedure provided by the EEA, complainants may also seek information under under the Freedom of Information Act 2014 and the Data Protection Acts 1988 to 2018.

¹ Section 81.

² *Irish Ale Breweries v O'Sullivan EDA 0611*

Indirect discrimination and objective justification

64. An important distinction should be made between direct and indirect discrimination: whereas indirect discrimination, if justified, is not unlawful, direct discrimination cannot be objectively justified and is therefore unlawful unless a defence on other grounds is successful.

65. A claim of indirect discrimination may be defended by showing that there is objective justification for the negative impact on a particular group. A negative impact may be objectively justified by identifying a legitimate aim and showing that the means of achieving that aim are appropriate and necessary.

66. General assertions unsupported by objective criteria or simply seeking the avoidance of increased costs will not satisfy the rigorous standard for objective justification

67. Vague arguments, for example, that an (indirectly discriminatory) practice is justified by the need to reward staff commitment or inspire motivation are unlikely to succeed.

68. Furthermore, even if the employer has a legitimate aim, the measure will not be justified if it is not the least disadvantageous treatment required in order to achieve that aim.

Right to information

86. A complainant has a right to seek 'material information'¹⁰³ from an employer¹⁰⁴, for example about the remuneration of comparable employees, in order to decide whether or not to pursue a claim or to assist with the effective presentation of a claim¹⁰⁵. Questionnaire and Reply forms are prescribed in order to request this information¹⁰⁶ (sample forms are attached at **Appendix 2**). If the employer fails to answer the questionnaire, or gives answers which are false or misleading or otherwise not what the employee reasonably required to make the decision referred to above, inferences may be drawn from the same.³ A complainant has separate statutory rights to access the personal information held by his or her employer, as provided for under the Freedom of Information Act 2014 and the Data Protection Acts 1988 to 2018.

³ Section 81.



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