

# EMPLOYMENT LAW: EMPLOYEE PROTECTION, EQUALITY AND INDUSTRIAL RELATIONS

*Written by Abha Patel*

*(2nd year L.L.B student, Symbiosis Law School)*

## INTRODUCTION

The law regarding employment equality concerning the sexual orientation ground is contained in the Employment Equality Act, 1998-2004.<sup>1</sup> Section 6 of the 1988 Act provides that it is unlawful to discriminate between people on the basis of their sexual orientation. Though the 2000/78 Directive<sup>2</sup> put in force to combat discrimination, does not define “sexual orientation”, the same is defined under section 2 of the 1988 Act.

Discrimination on the grounds of sexual orientation in the employment sector has formed the basis for various claims by number of employees and the judgment delivered in such cases has elucidated upon the scope, applicability and protection covered under this act.

The essay begins by outlining the European and Irish laws on employment equality law concerning sexual orientation ground and then examines various cases and assesses the interpretation of the court along with the various issues that arose and concludes with a personal analytical conclusion.

## EUROPEAN AND IRISH LAW

It is very common to note that in most work places, one comes across the principle of “heteronormativity”; which is the belief that almost all of the employees are heterosexual unless anyone explicitly states the contrary. Like classical conditioning as Freud would have called it, people are conditioned to assume that almost everyone is a heterosexual. Such an attitude or belief among masses leads for those of a different sexual orientation to experience emotions such

---

<sup>1</sup> *Employment Equality Act, 1998-2004, hereinafter, 1988 Act.*

<sup>2</sup> *Council Directive 2000/78/EC. Hereinafter, 2000/78 directive.*

as stress, disengagement, isolation/ social exclusion in the work environment and may also in some cases lead them to quit work. In the initial days, there were no redress mechanisms to combat such issues.<sup>3</sup>

However, in 1988, the Department of Finance Circular<sup>4</sup>, banned discrimination on the sexual orientation grounds which was the initial spark that caused the fire eventually. This was then followed by the amendment of the Unfair Dismissals Act, 1977<sup>5</sup>, which made it illegal for an employer to dismiss or terminate an employee from employment on the basis of their sexual orientation whether it was in the private sector or the public sector and therefore all the employers fell within the purview of this amended act. Further, the 1988 Act, banned both direct and indirect discrimination on the grounds of sexual orientation which included matters like promotion to a post, job offers, workload, or be it termination of an employee. Most importantly the ban also applied to job offer ads or workplace policies that led to discrimination based on the sexual orientation ground. This can be clearly seen in the case of *A Teacher v. A National School* in which during the interview for promotion to the post of a principal, a teacher was asked the question “what about the homos?” even though she was heterosexual but her orientation was unknown to the interview panel. ET Stephen Bonnländer decided the question and concluded that the question was asked in order to determine the applicant’s sexual orientation.<sup>6</sup> This was mandated by the Council Directive 2000/78/EC, which was adopted on November 27, 2000 which gave impetus to the enactment of the Employment Equality Act, 2004.

However, most importantly, it must be noted that while these acts did put a ban on discrimination on the grounds of sexual orientation, it is crucial and integral to note that when read carefully, the acts also provided that it is unlawful to treat a person more favorably because of their sexual orientation as opposed to another individual of a different orientation or even such treatment is based upon an orientation wrongly imputed to any such person.<sup>7</sup>

---

<sup>3</sup> Fergus Ryan, ‘Sexual Orientation and the Management of a Diverse Workplace: Law and Best Practice’ (2005/6)

<sup>5</sup> *Employment Law Review Ireland* 86 <http://ssrn.com/abstract=2398404>

<sup>4</sup> Department of Finance Circular, 21/88, June 22, 1988

<sup>5</sup> Section 5(a), Unfair Dismissals Act, 1993.

<sup>6</sup> *A Teacher v. A National school-Dec-E2014-097*.

Compensation of fifty four thousand euros was awarded as the management board discriminated against her on the grounds of religion, sexual orientation and religion.

<sup>7</sup> Section 6(1)-and after the amendment of 2004 the same is provided under section 4.

## TYPES OF DISCRIMINATION

The Employment Equality Directive prohibits kinds of discrimination which are as discussed below;

1. DIRECT DISCRIMINATION- article 2(2)(a) of the directive states that;

[...] direct discrimination shall be taken to occur where a person is treated less favorably than other is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 [...].

A comparator must be found if one wants to claim that they were treated in an unfavorable manner as compared to another person but to find such a comparator is rather difficult and the lack of obligation on the employer to provide relevant information for the same makes it even more difficult. A hypothetical situation to understand this type of direct discrimination would be an employer refusing to hire or promote a certain individual who is homosexual on account of the person's sexuality. This can be seen in the case of *Norris v. Ireland*<sup>8</sup> where a professor from UCD was discriminated against as he was gay. The professor lost in Supreme Court but won in EHRR.

Most EU nations have adopted legislations that reflects direct discrimination as reflected in the directive with common elements such as the need to demonstrate a less favorable treatment, need for a comparator, the possibility to use a comparator from the past or a hypothetical one and a statement that direct discrimination cannot be justified other than the basis of statutory exceptions. Some of the countries this is found in are; Croatia, Netherlands, U.K, Belgium etc... however in nations like that of Ireland, Poland, France and Spain the law does provide for a requirement of a comparator but fails to elucidate as to the procedure of the same.<sup>9</sup>

2. INDIRECT DISCRIMINATION- Article 2(2)(b) states that;

[...] indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular

---

<sup>8</sup> *Norris v. Ireland* (1988) 13 EHRR 186.

<sup>9</sup> *European Network of Legal Experts in the Non-Discrimination Field, Combating Sexual Orientation Discrimination in the European Union* (2014)

disability, a particular age, or a particular sexual orientation at a particular disadvantage compared to other persons unless [...] that provision, criterion or practice is objectively justified by a legitimate aim and means of achieving that aim are appropriate and necessary [...].

Such discrimination is not direct but 'indirect' in nature as the focus is not on the act but the repercussions of the act itself. The intentions of the perpetrator are immaterial here. However the fact that "particular disadvantage" has not been quantified, it makes it more difficult to prove indirect discrimination as compared to direct discrimination.

The clause of indirect discrimination will not be applicable in a case wherein it is objectively justified by a legitimate aim and the means for achieving the aim are appropriate of in proportion and it is mandatory for the employer to prove the same whether the justification pertains to the needs of the employer or employee.

Most EU nations have adopted legislations that reflect indirect discrimination as reflected in the directive which include nations like; Estonia, Ireland, Italy, Portugal, Romania, Sweden, Austria and the U.K.

However it is important to note that national laws all over differ in ways they regulate comparisons required to establish indirect discrimination. In U.K, evidence is required that the measure placed the complainant as well as the groups to which they belong are disadvantaged. Under Slovenian law, individuals must be in an 'equal or similar situation and conditions.' In Denmark, the national law is narrower in scope than that of the directive. Lithuanian law has an adequate definition but no judicial implementation is recorded.<sup>10</sup>

3. HARASSMENT-According to article 2(3) of the directive, there is harassment:

[...] when unwanted conduct related to any of the grounds referred to in article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with national laws and practice of member states.

---

<sup>10</sup> *Ibid*



The concept of harassment may within itself encompass expressions of homophobia, derogatory comments, innuendos, name calling be it in form of pictures, spoken words or gestures etc. which may be done by the employer, clients or coworkers or other staff members. Such behavior causes stress and humiliation to the victim which can be clearly seen in the case of *Piazza v. Clarion Hotel*<sup>11</sup> wherein, the plaintiff had been on the receiving end of discriminatory comments by words and emails between managers along with other derogatory comments but there was no policy in place at the time and was introduced much later. The plaintiff was awarded a compensation of ten thousand euros and the hotel was ordered to draft a policy on respect and dignity as well as an equality training seminar to take place for staff as well as management within a period of three months.

Most EU nations have adopted legislations that reflects harassment as reflected in the directive.

In terms of case law, a Danish court ruled in 2008 in a case of harassment of an apprentice at a bakery. When the apprentice announced that he was homosexual, his employer began to systematically harass him. He slandered the apprentice in front of staff and customers and said that gay people were the most disgusting people he knew. He also stated that gay people were mentally ill. The apprentice claimed that he had been discriminated against on grounds of sexual orientation and been harassed with reference to the Act on the Prohibition of Discrimination in the labor market. The western high court upheld the judgment appealed from the district court and the employer was ordered to thirteen thousand and four fifty euros to the injured party.<sup>12</sup>

4. INSTRUCTION TO DISCRIMINATE- article 2(2)(4) of the directive states that an instruction to discrimination will also amount to discrimination. The act consists of giving an instruction to another which will amount to discrimination and thus there is no direct involvement of the person who gives the instruction however no clear definition of the

---

<sup>11</sup> *Piazza v. Clarion Hotel* (2004) DEC-E2004-033. [www.workplacerelements.ie](http://www.workplacerelements.ie)

<sup>12</sup> Western high court [østre landret], 22 february 2008, weekly law journal (U.2008.1353V), Cited after: Justesen .P, (2013), report on measures to combat discrimination. Directives 2000/43/EC AND 2000/78/EC, Country report 2012, denmark, p.123, <http://www.migpougroup.com/portfolio/country-reorts-measures-combat-discrimination-2012/>.

same is given so only interpretation of future cases by courts will help throw light on the matter and provide clarity in this regard.

Most EU nations have adopted legislations that reflects instructions to discriminate as reflected in the directive with a very few exceptions from Bulgaria, Croatia and France.

5. ASSUMED SEXUAL ORIENTATION- The directive also offers protection to those who do not actually have a sexual orientation but are assumed by those at their workplace to have one and are discriminated on the basis of this assumption. A good example of this would be the case of *Asociata Accept v. Consiliul National pentru Combaterea Discriminarii*<sup>13</sup> which concerned homophobic speech with regard a professional footballer and the supposed sexual orientation of that player.

Legislations of the member states seldom tackle assumed sexual orientation as a ground of prohibited discrimination explicitly. In some cases, the law can be considered to cover assumed sexual orientation on the basis of the explanatory materials (Austria) or of preparatory works (Belgian federal law.) discrimination on grounds of assumed sexual orientation is explicitly prohibited in Bulgaria, Croatia, Czech Republic, Hungary, Ireland and Portugal.

The potentially negative effects of a legal requirement of causation between the discriminatory action and the prohibited ground is well displayed in the case of *English v. Thomas Sanderson Blinds Ltd.*<sup>14</sup> In the case, the U.K Employment Appeals Tribunal dismissed a claim of harassment brought by a man who was not gay, and who was known by his harassers not to be gay, but who was nevertheless subject to homophobic abuse. The Tribunal took the view that the claimant was not subject to harassment 'on the grounds of' his actual or assumed sexual orientation, as required by the Regulations, because firstly, he was not gay, secondly, he was not perceived or assumed to be gay by his fellow workers and thirdly, he accepted that they did not believe him to be gay. The court of Appeal subsequently overturned the decision.<sup>15</sup>

---

<sup>13</sup> *Asociata Accept v. Consiliul National pentru Combaterea Discriminarii* case C-81/12 (2013).

<sup>14</sup> *English v. Thomas Sanderson Blinds Ltd.* [2008]EWCA Civ 1421 [2009] IRLR 206, [2009] 2All ER 468, [2009] 2CMLR, 18, <http://www.bailii.org/ew/cases/EWCA/Civ/2008/1421.html>.

<sup>15</sup> *McColgan A.* (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, United Kingdom*, p.36, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

6. ASSOCIATED SEXUAL ORIENTATION- in relation to the *coleman case*<sup>16</sup> the courts stated that the directive must be interpreted in a way where;  
[...] the prohibition of harassment [...] is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down in Article 2(3).

The case of *Marron v. Board of Management of St. Paul's National School*<sup>17</sup> is a good example wherein the plaintiff was subjected to discrimination and rude comments by various people about her son being gay. The equality tribunal in this case found that there had been harassment, discrimination and discrimination by association and was awarded a compensation of three thousand euros and the school was ordered to undertake equality training.

Most of E.U member states have not expressly included the concept of discrimination by association in equality laws. Those who do include are; Austria, Bulgaria, Croatia, Ireland and Northern Ireland while Hungarian legislation prohibits discrimination by association implicitly. The Dutch, Lithuanian, Slovakian, Polish, Latvian and Portuguese legislations are problematic to the extent that it is impossible to tell if discrimination by association is covered because the terms of the statutes are imprecise, their meaning is underdetermined and no tangible case law seems to allow for a meaningful discussion.<sup>18</sup>

### LOOPHOLES AND EXCEPTIONS TO THE LAW

However it may be important to note that there are a few loopholes or exceptions to the protection awarded by these legislations.

Firstly, section 37(1) of the 1998 Act which in brief permits medical, educational and religious organizations that function in tandem with religious denominations, to discriminate on certain

---

*European Network of Legal Experts in the Non-Discrimination Field, Combating Sexual Orientation Discrimination in the European Union (2014)*

<sup>16</sup> CJEU, Case C-303/06 *S. Coleman v. Attridge Law and Steve Law* [2008] ECR I-5603.

<sup>17</sup> *Marron v. Board of Management of St. Paul's National School* DEC E2015-121.

<sup>18</sup> *European Network of Legal Experts in the Non-Discrimination Field, Combating Sexual Orientation Discrimination in the European Union (2014)*

grounds in order to uphold their religious ethos but however the burden of proof of such discrimination will lie on such organizations wherein they must establish and justify the necessity of their actions which must be in proportion and not more than that which would be required to protect their religious ethos. This in turn makes it difficult for individuals “to come out of the closet” and be open about their sexual orientation as it may cause fear of discrimination and loss of employment in such an organization and therefore the only means for them is to stay discreet about their orientation.<sup>19</sup>

Another issue would be pertaining to the benefits given to the family of an employee. In which ‘family’ would include blood related members, adopted members and spouses. This indirectly favors heterosexuals for the simple reason that gays cannot be married and therefore ones partner would not amount to spouse and thus is not entitled to such benefits.<sup>20</sup>

Thirdly, as per the Parental Leave Act, leave for emergencies are granted only to spouses or opposite sex partners but not same sex partners.<sup>21</sup>

Another issue that arose was that of the credibility of the claim of a person’s particular orientation. There is no express provision which states that a person must prove to the courts their sexual orientation as this would be violative of the right to privacy and dignity of such a person. This is confirmed by a CJEU case law in tandem with EU Asylum law in relation to a method devised by national authorities to assess the credibility of the claims of one’s sexual orientation. In the case of A, B and C,<sup>22</sup> the courts held that the methods used by the competent authorities must be consistent with EU law, and the courts even gave guidelines for the process without affecting the fundamental rights like that of privacy and dignity.

## CONCLUSION

After a thorough study and understanding of the various legislations in Ireland as well as the European Union along with case laws it can be said that there are a few areas that seemed of specific interest in employment equality law concerning the sexual orientation ground.

---

<sup>19</sup> *Implementing equality for lesbians, gays, and bisexuals* (Equality Authority Dublin, 2002) 60.

<sup>20</sup> Section 2 of the 1998 Act.

<sup>21</sup> Section 13, Parental Leave Act, 1998.

<sup>22</sup> CJEU, *Joined cases C-148/13 to C-150/13 A, B and C v. Staatssecretaris Van Veiligheid en Justitie*, Judgment of 2<sup>nd</sup> December, 2014, paras. 53 et seq.



Firstly, the sexual orientation ground coincides with that of religion and belief. The autonomous status of organizations with a religious ethos like church's etc. are a major challenge to courts at National as well as European union level. Thus courts should ensure that the 'exception' granted under section 37, must be used adequately along with formation of new legislations which would help draw a line between the two spheres thereby reducing ambiguity and overlapping.

Secondly, as discussed earlier when other nations were looked at, it must be noted that there is lack of obligation under E.U law to protect people from discrimination based on the sexual orientation ground and therefore only some member's nations have a real institutional protection as part of their domestic system of Human Rights.

In February, 2014, the European Parliament called on the commission to adopt an E.U roadmap against homophobia and discrimination on grounds of sexual orientation. Raising such awareness will help contribute to adequate implementation and execution of new legal measures.<sup>23</sup>

Thirdly, as mentioned above, the Parental Leave Act 1998 only allows for leaves to be granted to spouses and those of the opposite sex but not to same sex partners. This seems more favorable towards heterosexuals and does not take into account the needs of others apart from heterosexuals which inevitably discriminate with those of another sexual orientation on the basis of their sexual orientation and this amounts to indirect discrimination as defined under the 2000/78/EC directive. Also, if a number of companies adopt this method of operation it will deter people of other orientations to take up such jobs and this takes away from the people their fundamental right to practice any trade of their choice and thus there is a urgent requirement for the amendment of this legislation in order to make it compatible with the fundamental rights.

Another issue is section 2 of the 1998 act according to which every employee receives some 'benefits' which are awarded to the family of the employee. But within the purview of family, there are only three categories that are encompassed, which are; adopted members of the family, blood relatives and lastly, spouses. However this provision also seems more in favor of heterosexuals and amounts to indirect discrimination on the basis of sexual orientation and thus no benefits are awarded to same sex partners. This provision is one of the best examples to

---

<sup>23</sup> See; <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&refrence=A7-2014-0009&language=EN>

elucidate upon the principle of “heteronormativity” on account of which this provision considers only heterosexuals and this provision needs to be amended in order to recognize within its scope, people of other orientations as well. To do so, one may have to start off by combating the issue of “heteronormativity” which seems to be the root cause and this can be achieved only by a change in mind set and perspective of society as a whole.

Lastly, there is a requirement of a ‘comparator’ to prove direct discrimination on the grounds of sexual orientation. The law in Ireland and a few other nations explicitly state that there is a need for a ‘comparator’ but there is a lacuna in clarity as to the procedure to procure an adequate ‘comparator.’ It must also be noted that the law allows for a comparator to be a past employee as well as a hypothetical one but the lack of obligation on the employer to furnish the required information makes it rather difficult and deters people from litigations or trying to procure justice and thus it seems as though the provision of law is like a ‘mere window dressing.’