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LEGAL FOCUS: Respecting Difference and Diversity

The Benefits of Employment Equality Law Protection for Talent Management and Retention
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Diversity

A non-legal definition: *“The basic concept of managing diversity accepts that the workforce consists of a diverse population of people. The diversity consists of visible and non-visible differences which include factors such as sex, age, background, race, disability, personality, and workstyle. It is founded on the premise that harnessing these differences will create a productive environment in which everybody feels valued, where their talents are fully utilised and in which organisational goals are met...differences come together to create the whole organisation in much the same way as single pieces of mosaic come together to form a pattern.”*

Kandola and Fullerton, *Managing the Mosaic* (1998)

Diversity Drivers

- Demographic factors
- Global market place – especially for the health professions
- Diversity as a competitive advantage
- HR Strategy
- TFEU, EU Directives and domestic equality legislation
- Case law

Moving past mere legal compliance

Organisations driving the diversity agenda:

“Equal employment opportunity starts externally and is enforced through legislation, whereas diversity management starts internally, through the efforts to create an atmosphere of equality and a fully inclusive organisational culture at work”.

Positive Action

No statutory definition

“activity designed to improve the position, in terms of the distribution of benefits or dis-benefits, of a given social group or sub-group...on the basis that its members suffer systematic disadvantage in that regard.”

Barnes, L., *“Equality Law and experimentation: the positive action challenge”* (2009) Cambridge Law Journal.

Goals of Positive Action

- Preventing or compensating for disadvantages and discrimination whether these arose in the past or are still ongoing
- Promoting substantive equality by taking into account the specific situation of members of disadvantaged groups and breaking the cycle of disadvantage
- Redressing under-representation and promoting diversity in participation of all groups in the social, economic cultural and political life
- Influencing the manner in which social goods such as employment are allocated

Particular onus on public bodies

Irish Human Rights and Equality Commission Act 2014

Section 42(1):

A **public body** shall, in the performance of its functions, have regard to the need to—

- a) eliminate discrimination
- b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services and
- c) protect the human rights of its members, staff and the persons to whom it provides services

Positive action v positive discrimination

- **Positive action:** - offering targeted assistance to people, so that they can take full and equal advantage of particular opportunities
- **Positive discrimination:** - explicitly treating people more favourably on grounds such as race, sex, religion or disability, e.g. appointing someone to a job just because they are male or just because they are female, irrespective of merit

There are limits...

Positive Action:

- For every person benefiting from such positive action, another party necessarily loses out

Positive Discrimination:

- Unconditional, or automatic preferment of a disadvantaged group not permitted by EU law
- Subject to strict limits of proportionality

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European legislative framework for positive action

EU Law: Positive Action and gender

Article 157 TFEU

*“With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for **specific advantages** in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”*

Positive Action and Gender: A derogation from the principle of Equal Treatment

- **Positive action** is understood by the Court as an “exception [...] specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life” (*Commission v. France*, C-312/86 of 25 October 1988, pt 15).

Positive Action and Gender: A derogation from the principle of Equal Treatment

- “It thus **permits national measures** relating to access to employment [...] **which give a specific advantage** to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men.” (Kalanke, C-450/93 of 17 October 1995, pt 19)

EU Law: Positive Action and non-gender grounds

Article 7: Positive action

“With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the [discriminatory] grounds...”

Framework Directive 2000/78

EU Law: The “Race Directive”

Article 5: Positive action

“With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.”

Council Directive 2000/43/EC

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Irish legislation
The Equality Acts 1998 to 2015
Positive Action provisions

Equality Acts 1998 to 2015

- Not just an “employment rights” statute prohibiting discrimination in relation to:
 - *Access to employment,*
 - *Conditions of employment,*
 - *Training or experience for or in relation to employment,*
 - *Promotion or regrading, or*
 - *Classification of posts.*
- Also a diversity enabler for employers - within limits

Enabling Provisions – Equality Acts 1998 to 2015

Gender

Section 24:

The Act is “without prejudice” to any measures—

- a) maintained or adopted with a view to ensuring **full equality in practice** between men and women in their employments, and
- b) providing for **specific advantages** so as—
 - i. to make it easier for an under-represented sex to pursue a vocational activity, or
 - ii. to prevent or compensate for disadvantages in professional careers

Equality Acts 1998 to 2015

Disability

Section 16(3) – “appropriate measures” in respect of persons with a disability to facilitate:

- Access to employment
- Participation and advancement in employment;
- Training

Section 35(2) – allows “special treatment or facilities” that enables:

- the undertaking of vocational training
- a training or a work environment suited to the disability
- otherwise assists vocational training at work

Reasonable accommodation

- *Humphries V Westwood Fitness Club* [2004] ELR 296
 - Remains the seminal Irish case on obligations of reasonable accommodation
 - But “nominal cost” replaced with “disproportionate burden”
- Assessment of the factual position
- Medical evidence:
 - Ergonomic
 - Occupational
- Reasonable Accommodation:
 - Extremely important to consult with employee
- *Nano Nagle School v Marie Daly* [2015] IEHC 785
 - Must give “full and proper consideration” to all the possible options

Equality Acts 1998 to 2015

All other discriminatory grounds (other than gender)

Section 33 - Nothing [in Part II] of the Act shall render unlawful measures maintained or adopted with a view to ensuring full equality in practice between employees, being measures–

- a) to prevent or compensate for disadvantages linked to any of the discriminatory grounds;
- b) To protect the health or safety at work of persons with a disability, or
- c) To create or maintain facilities for safeguarding or promoting the integration of such people into the working environment.

Equality Acts 1998 to 2015

Family, Age, Disability

Section 34: Lawful for an employer to provide:

- a) a benefit to an employee in respect of events related to members of the employee's family
- b) a benefit to or in respect of a person as a member of the employee's family
- c) a benefit to an employee on or by reference to an event occasioning a change in the civil status of an employee
- d) to an employee (who has family status) a benefit intended to provide caregiving during working hours.

Retirement Ages

Equality (Miscellaneous Provisions) 2005

- Still lawful to set compulsory retirement ages, but must be objectively justified, i.e.
 - By a legitimate aim; and
 - The means of achieving that aim must be “appropriate and necessary”
- Issuing fixed term contracts to over 65s must be objectively justified
- May be timely to consider reassessing retirement ages in certain professions where skills shortages exist

Religion / religious beliefs

Achbita v G4S Secure Solutions - Advocate General Kokott

- Ban on Islamic headscarf
- Not direct discrimination under Article 2(2)(b) if part of an employer's neutral-dress policy
- Policy not targeted at employees of a certain faith
- Adherence to dress code considered a "genuine and determining occupational requirement"
- Religious employee "may be expected to moderate exercise of his religion in the workplace"
- Requirement for neutral dress code considered both legitimate and proportionate for purposes of justification under Article 4(1) (b) of the Directive

(Judgment of Court of Justice awaited)

Religion / religious beliefs – a contrary view

Bougnaoui v Micropole SA – Opinion of Advocate General Sharpston

- Engineer dismissed for refusing to cease wearing Islamic headscarf which “embarrassed” clients during visit
- No grounds to consider “genuine occupational requirement” defence in religious discrimination cases, other than on health and safety grounds
- Dismissal constituted direct and indirect discrimination
- Prohibition on discrimination extends to “manifestations of religion” as well as the religion or belief itself.

(Judgment of Court of Justice awaited)

Conclusion

- Positive action and reasonable accommodation as enablers
- It is permissible to take measures that benefit one group to the disadvantage of another – e.g.
 - Gender: the minority may be favoured in “tiebreak situations” but no absolute discrimination (*Abrahamsson*)
 - Disability: permissible to redistribute work tasks amongst others to relieve disabled persons from tasks they are unable to perform (*Nano Nagle*)

Conclusion

- Age: while still permissible to set compulsory retirement age, revisions to the norm may require consideration in scarce professions (*Donnellan*)
- Family status: lawful to confer benefits on workers' family members (*McGrane*)
- Race/religion/nationality: accommodating customs, religious practices and attire (*Bougnaoui*)

Remember...

- A policy of absolute preference towards any “protected group” is not lawful under EU law

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THANK YOU

Any questions?