

A Guide to Equal Opportunities / Accommodating Diversity

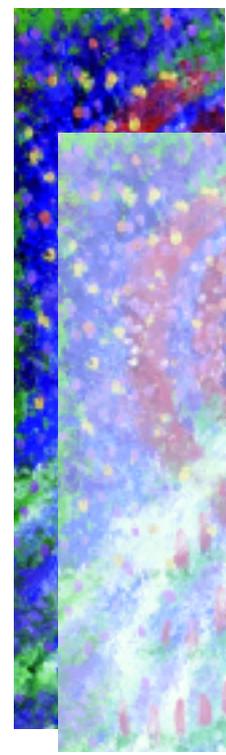


This project has been developed by the HSEA with support from the Equality Authority under the PPF Framework Agreement for the Development of Equal Opportunities at the Level of the Enterprise



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FOREWORD

By Niall Crowley,
Chief Executive Officer, Equality Authority

The Health Service Employers Agency are to be congratulated on the publication of this “Guide to Equal Opportunities/Accommodating Diversity”. It usefully forms part of a wider package that includes a training video and CD-ROM. The HSEA, through this work, are playing a vital role in supporting employers to gear up to the provisions and ambitions of the Employment Equality Act 1998. This is particularly important in a sector with such a large and diverse workforce. This initiative exemplifies the purpose of the framework committee, established by the social partners under the Programme for Prosperity and Fairness, which funded this work.

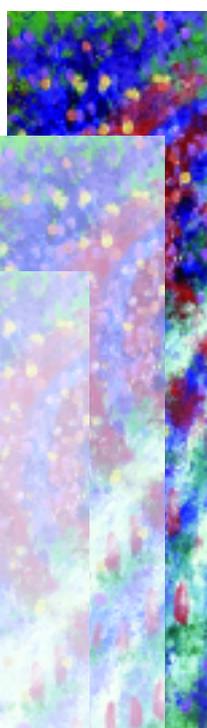
The dual focus of the HSEA on equal opportunities and accommodating diversity must also be acknowledged. This sends out an important signal that responses to the equality legislation can best involve strategies of compliance with obligations alongside more proactive strategies in pursuit of equality outcomes. Diversity is usefully defined in terms of the nine ground equality agenda. Taking steps to acknowledge and celebrate this diversity and to meet practical needs that arise from this diversity are key to effective equality strategies.

It will be important that the supports developed by the HSEA are incorporated into an equality infrastructure within organisations. Key elements in such an equality infrastructure are:

- Policies and practices to combat discrimination and to promote equality.
- Training to develop a knowledge of equality issues and competencies to address these issues.
- Review processes to examine policy, practice, procedure and perceptions for their impact on workplace equality and to improve them as necessary.
- Institutional responsibilities for guiding and bringing forward an equality agenda.

The Framework Committee has developed supports for this infrastructure in the form of guidelines for employment equality policies and for equality and diversity training. The Equality Authority has also developed a Code of Practice on sexual harassment and harassment in the workplace.

The HSEA has provided a valuable resource for health sector employers in this publication which will be well served by a wide dissemination and uptake.

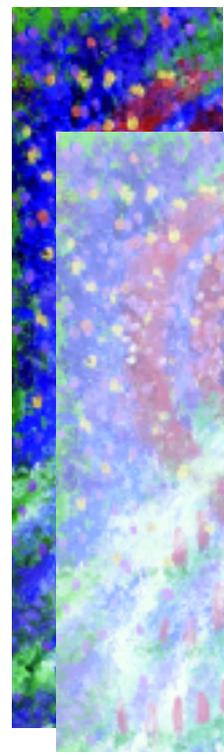


PREFACE

This guide is part of an equal opportunities / accommodating diversity training pack which has been developed by a Working Group of health service employers with support from the Equality Authority under the *Programme for Prosperity and Fairness (PPF) Framework Agreement for the Development of Equal Opportunities at the Level of the Enterprise*. The Working Group comprised representatives of the HSEA, IBEC, Health Boards, Voluntary Hospitals and the Intellectual Disability Sector, with support from Equality Consultants provided by the Framework Committee.

The health service is one of the largest employers in the state with an employment level approaching 93,000 employees. These employees are spread across a large number of individual employments in multiple locations and settings. The health service must ensure the highest possible standards of patient care by making the best possible use of all of our human resources and therefore must ensure a fair and inclusive accommodation of all staff. This document aims to provide guidance to managers to assist them in meeting their obligations under the equality legislation and also to give some practical examples of how diversity might best be accommodated in the workplace. It is intended as a guide in this context only and does not purport to be a definitive interpretation of the legislation.

The training pack also includes a video and powerpoint presentation which accompany these guidelines. Please contact the Employer Advisory Division of the HSEA for further details.



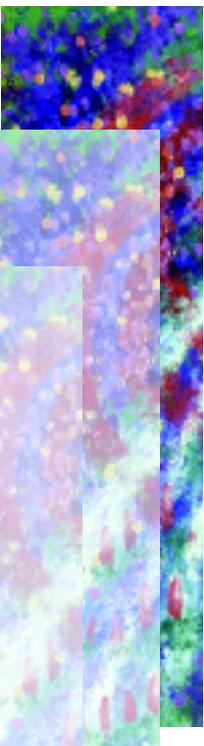
CHAPTER I

INTRODUCTION

The foundation for equality in the workplace is the Employment Equality Act 1998, which promotes equality and prohibits discrimination across the nine grounds of gender, marital status, family status, age, disability, sexual orientation, race, religion and membership of the Traveller community. It also prohibits harassment based on these discriminatory grounds.

Equal opportunities / accommodating diversity in the workplace recognises the talents and skills of all staff and provides access to employment and promotion to the widest possible pool of employees and potential employees. Equal opportunities and accommodating diversity is also about creating a culture that seeks, respects, values and harnesses difference.

In the health service today, as with the economy as a whole, we have a changing workforce. We have larger numbers of women working, we have migrant workers, older people, people with disabilities and people of various family status, marital status, ethnic origin, religion and sexual orientation. Accommodating diversity acknowledges differences and the different needs that employees have, depending on whether they are younger or older, male or female, have a disability, have family responsibilities, are of different ethnic backgrounds, etc. A positive, open and accommodating workplace generates an atmosphere which fosters high morale for a diverse range of employees and maximises their opportunity to reach their potential and contribute to high quality service delivery.



CHAPTER 2

DISCRIMINATION

The Act prohibits discrimination and harassment in the workplace on the following nine grounds:

- Gender
- Marital status
- Family status
- Sexual orientation
- Religion
- Age
- Disability
- Race
- Membership of the Traveller community

Discrimination occurs where, because of any one of these grounds, a person is treated less favourably than another person is, has been or would be treated.

Examples:

- a young person is appointed to a position in preference to an older person simply because of a preference for young people;
- domestic tasks are assigned more frequently to female employees than to male employees;
- a person of one religion is provided with time off to attend worship during working hours and a person of another religion is denied a similar benefit.

DISCRIMINATORY GROUNDS

The discriminatory grounds covered by the Act are defined as follows:

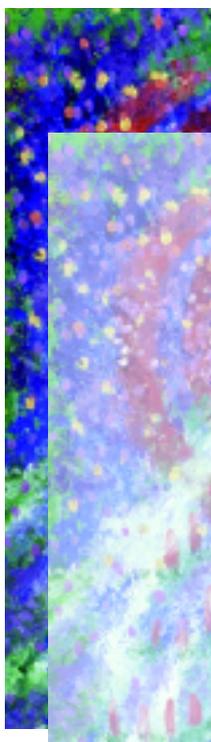
The **gender ground** - one is a woman and the other is a man.

The **marital status** ground - the individuals are of a different marital status, i.e. single, married, separated, divorced or widowed.

The **family status** ground - one has family status and the other has not.

Family status means responsibility -

- as a parent or as a person in *loco parentis* in relation to a person under the age of 18, or
- as a parent or the resident primary carer in relation to a person aged 18 years or over with a disability which requires care or support on a continuing, regular or frequent basis.



The **sexual orientation** ground - the persons have different sexual orientations, i.e. heterosexual, homosexual or bisexual orientation.

The **religion** ground - one has a different religious belief from the other, or one has a religious belief and the other has not.

Religious belief includes religious background or outlook.

The **age** ground - arises where two persons are of different ages.

Discrimination on the age ground is between people in the age range from 18 to 65. However, it is not unlawful to set maximum recruitment age limits which take account of the cost or period of time involved in training for the job and the need for a reasonable period prior to retirement age during which the employee will be effective in the job.

The **disability** ground - one is a person with a disability and the other either is not or is a person with a different disability.

The definition of disability is complex and is elaborated on in Chapter 8.

The **race** ground - the individuals are of different race, colour, nationality or ethnic or national origin.

The **Traveller community** ground - one is a member of the Traveller community and the other is not. The Equal Status Act 2000 defines the Traveller community as 'the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland'.

TYPES OF DISCRIMINATION

The Employment Equality Act prohibits both direct and indirect discrimination:

Direct discrimination arises where an employer treats a person less favourably than another person would be treated specifically because of membership of one of the nine grounds covered by the Act. Employers can directly discriminate in a number of ways, for example:

- Different rules or conditions may apply to employees because of one of the nine grounds;
 - e.g. a different dress code for men than for women, such as a rule that men may not wear earrings;

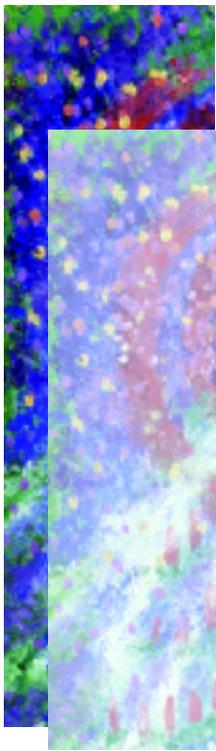
- Employers may be prejudiced against persons for reasons relating to one of the nine grounds;
 - e.g. not appointing a person to the job because of their race or membership of the Traveller community.

Indirect discrimination occurs where an employer imposes a provision or requirement which, on the face of it, applies equally to all persons but because of one of the nine grounds a person would have greater difficulty complying with it than other persons without that characteristic. In other words, the requirement or provision may appear neutral but has a *disproportionate impact*.

Examples:

- a requirement that applicants for a post must satisfy certain minimum height requirements would tend to exclude more women than men.
- a requirement to work full-time could disadvantage a substantially higher number of persons with a particular family status, e.g. a person who has responsibility in relation to caring for children or an older person.
- a requirement to be available to attend meetings late in the day could be found to discriminate on grounds of gender or family status.
- a requirement to have attained a particular standard of education or qualification which was less accessible in former times such as the Leaving Certificate could be found to discriminate on grounds of age.
- a requirement to have several years' experience of the particular work involved could discriminate on grounds of age.
- a requirement to have a current driving licence could be found to discriminate on grounds of disability if a driving licence is not an essential requirement of the job.

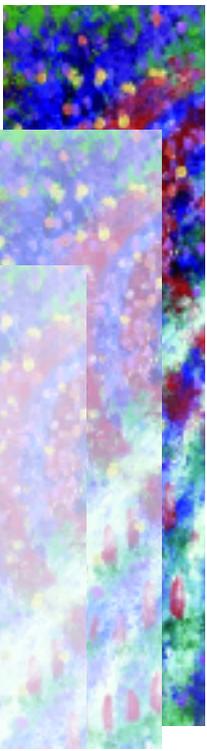
It is important to note that motive is irrelevant when deciding whether indirect discrimination has occurred. What matters is that the application of the requirement has a discriminatory effect on a person by reason of one of the nine grounds even though this was not the intention.



JUSTIFICATION OF A PARTICULAR REQUIREMENT

The Act permits indirect discrimination if the treatment can be justified. There are two tests for discrimination depending on whether the case involves gender or one of the eight non-gender grounds:

- a) In cases involving gender the requirement must be **objectively justifiable** e.g. the requirement for nurses to be rostered to work outside the hours of 9am - 5pm is objectively justifiable as hospital services must be provided on a 24 hour 7 day per week basis.
- b) In cases involving the eight non-gender grounds the requirement must be **reasonable in all the circumstances** and relate to an objective which the employer is required to pursue or is reasonably entitled to pursue. A requirement for attendants to wear a uniform may interfere with a person's wish to wear full traditional religious dress but is necessary for identification / health and safety reasons.

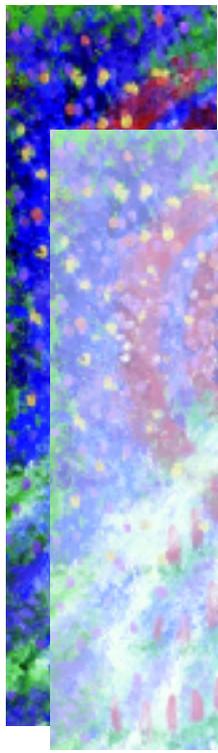


SPECIFIC AREAS OF EMPLOYMENT

Discrimination is prohibited by the Act in relation to employment, vocational training and membership of certain bodies. The following chapters deal with specific areas of employment covered by the Act :

- **Remuneration - Equal Pay**
- **Access to employment - Recruitment and Selection**
 - Job description and person specification
 - Advertisement stage
 - Application forms
 - Interview process
 - Pre-employment medicals
 - Records
 - Monitoring the selection process
- **Conditions of employment**
 - Accommodating special needs
 - Flexible / Part-time working
 - Grievance procedure
 - Discriminatory dismissal
- **Sexual Harassment and Harassment**
- **Training, Work Experience and Promotion**

The Act applies to all employees and to applicants for employment and training. Thus all health service staff and prospective employees are covered by its provisions except where an exemption applies under the relevant ground (see Appendix 1 Exemptions).



CHAPTER 3

REMUNERATION - EQUAL PAY

The equal pay provisions of the Act provide that employees doing like work for the same or an associated employer are entitled to the same rate of remuneration (i.e. pay). Like work is defined as same or similar work or work of an equal value.

Remuneration refers to any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment (excluding pension). Thus remuneration includes not only basic salary but also covers rates of overtime payments, travel allowances, luncheon vouchers, qualification and location allowances, sick pay, accommodation and any other elements of the remuneration package.

Discrimination in relation to remuneration occurs where one person is paid a different rate of remuneration than another person for a reason which can be specifically attributed to one of the nine grounds.

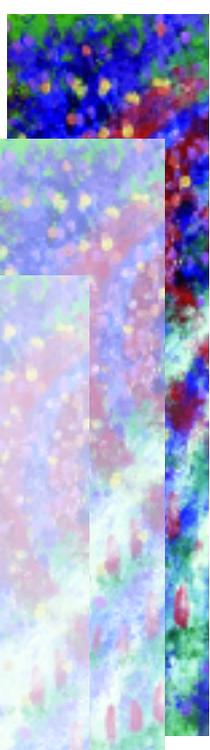
Examples include:

- Married employees receiving a higher salary than single employees.
- Non-national employees being paid a lower rate of pay than Irish employees.
- Accommodation being made available to female staff but not to male staff.

The employer may however pay different rates of remuneration provided that the basis for this payment is on grounds other than gender or any of the other eight grounds.

For example, it is permissible to pay different rates of remuneration to staff based on the following:

- An incremental scale based on relevant experience
- Allowances for certain qualifications or working in particular locations
- 'Red circling' whereby an employee is paid a different rate of pay because of personal circumstances
- Performance-related pay



CHAPTER 4

ACCESS TO EMPLOYMENT - RECRUITMENT AND SELECTION

The legislation provides that all persons should have equal access to job opportunities. Access covers all arrangements for filling a vacancy including placing the advertisement, shortlisting applicants and conducting interviews. Thus an employer must not discriminate in any arrangements made for selecting the employee or specify entry requirements that could discriminate against potential applicants because of any of the nine grounds.

Equality of opportunity with regard to access to employment can best be achieved by encouraging applications from the widest possible pool of candidates and assessing each person's suitability by reference to job related criteria without regard to their age, religion, family status or any of the other grounds covered by the Act. Best practice at each stage of the recruitment and selection process helps to avoid unlawful discrimination as well as ensuring that the most suitable candidate is appointed to the job. Equality of opportunity also requires the employer to accommodate, where possible, the special needs of individuals to facilitate their participation in the recruitment and selection process.

The following are the normal stages of the recruitment and selection process :

- Job description and person specification
- Advertisement
- Application forms/shortlisting
- Interview
- Pre-employment medical assessment

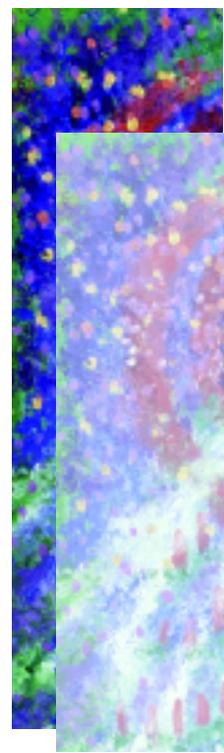
JOB DESCRIPTION AND PERSON SPECIFICATION

The job description sets out the main duties and responsibilities of the job.

For example: the main duties of a Telephonist / Receptionist post are: to operate a busy switchboard and forward calls appropriately; to undertake general receptionist duties, such as ensuring that all visitors sign the visitors book and are directed to the correct locations; to answer basic queries such as details regarding visiting hours and whether or not patients have been admitted.

The person specification sets out the qualifications, skills, experience and personal attributes necessary to carry out the job effectively.

For example: the person specification of a Telephonist / Receptionist post may list good interpersonal skills, experience of operating a busy switchboard, distinct speaking voice.



It is important that the criteria set out in the person specification clearly relate to the requirements of the job. Care should be taken to avoid including an arbitrary list of personality traits or unnecessary requirements which may lead to claims of discrimination.

For example, the inclusion of a requirement to possess the Leaving Certificate for the post of health care assistant could be found to be discriminatory because this is not an essential qualification and may exclude older people or members of the Traveller community.

Managers have a key role to play in updating the job description and person specification to ensure that they accurately reflect the requirements of the job. The terms and conditions that currently apply to the job should also be reviewed in order to identify the scope for greater flexibility.

For example, it may be timely to review traditional attendance arrangements and consider whether requests to work part-time or atypical hours can be facilitated. This may encourage applications from persons with family commitments or other persons who do not wish to work full-time.

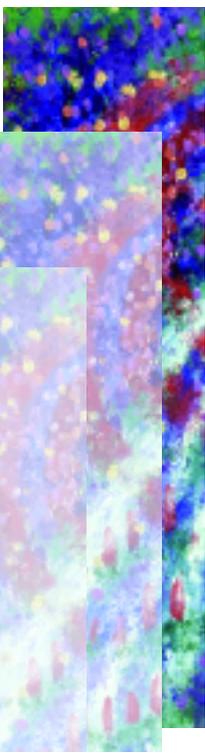
ADVERTISEMENT

Advertisements should appear in a wide range of media such as newspapers, specialist journals, staff notice boards or may be circulated by e-mail. The advertisement should be located where it can reach the widest possible pool of potential candidates.

For example, if the job is traditionally a male-dominated occupation every effort should be made to attract female applicants and vice versa. When filling vacancies for maintenance staff for example, advertisements should be placed in locations where they can be seen by both males and female employees.

Consideration should also be given to proactively seeking applications from women, people with disabilities, workers aged 50 years or more and the Traveller community. This is known as **positive action**. Advertisements can be placed with training placement officers, supported employment programme offices or specialist agencies where they are more likely to be seen or brought to the attention of these groups.

The job advertisement itself should only specify the qualifications, skills and personal attributes relevant to the job as identified in the person specification. Care should be taken to ensure that the wording of the advertisement does not deter any potential applicants, for example, stating that applicants should be 'mature' could deter younger persons from applying and leave the organisation open to a claim of discrimination. Advertisements accompanied by photographs or images may portray negative stereotypes and unwittingly suggest an intention to discriminate, e.g. female nurses, male doctors or porters. On the other hand, the creative use of photography and imaging can affirm diversity and attract a broader range of applicants.



APPLICATION FORMS

Applicants may be required to complete a standard application form which may be used to shortlist candidates for interview. Application forms should only seek information that is relevant to the ability of the person to do the job. Questions regarding a person's marital status, age or other characteristics should be avoided unless they can be shown to be relevant to the job.

For example, to request an employee's age may be relevant where an employer intends to appoint a number of persons from which internal expertise can be developed and which would take some time to gain. In certain circumstances the legislation allows an employer to apply reasonable age limits, for example where there will be long-term investment in the person's training and development.

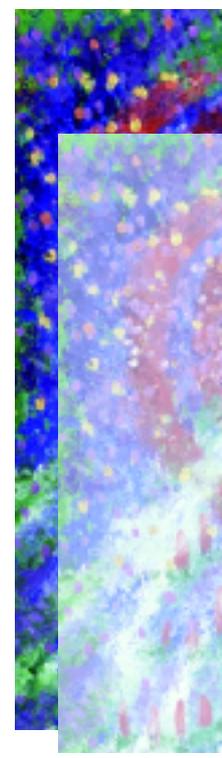
Where possible the application form and any documentation relating to the job should be available in different formats such as large print, tape, disk or e-mail so that they are accessible to persons with a disability. The application form should also invite applicants to specify whether any special provisions or facilities are required at the selection process, for example, use of a signer or interpreter or car parking within close proximity to the building.

INTERVIEW PROCESS

Claims of discriminatory treatment frequently arise in relation to the selection interview. The interview board should therefore be given clear guidance on how to conduct interviews in a non-discriminatory manner. It is also advisable to ensure gender balance on the interview board where reasonably practicable.

The interview board should review the job description and person specification and ensure that the criteria for assessing candidates reflect the requirements of the job. Interview topics should be planned in advance to ensure consistency of treatment. This will help to avoid questions related, for example, to ethnic background, family responsibilities or other subject areas that could result in discriminatory treatment.

The interview board should also be aware of the pitfalls of engaging in 'small talk' with candidates prior to the interview, e.g. commenting on a candidate's accent and asking them where they are from. While such remarks may be intended to put candidates at ease, an unsuccessful candidate may subsequently allege that they found such remarks off-putting and this affected their performance at interview.



In *Rodmell v. Trinity College, Dublin (DEC-E2001/015)* the claimant alleged that she was discriminated against when, prior to the interview, she was addressed as a “Lady Electrician” by a member of the interview board. The employer contended that the term was used simply to identify the candidate from among a crowd of people and the reason she did not get the position was because of her lack of technical knowledge. The Equality Officer concluded that the fact that a member of the interview board identified the claimant by her sex, in a manner which clearly demonstrated the interviewer’s perception that electricians were stereotypically male, constituted discrimination.

The interview board may wish to check the ability of candidates to fulfil certain job requirements such as attendance hours, on-call liability, travel, etc. This should be done without reference to a candidate’s marital status, family commitments, disability or other characteristics. It is useful to specify these requirements in the job description so that prospective applicants are clear from the outset about the conditions of employment. The interview board should outline these requirements to all candidates rather than directing questions at certain candidates because of their family status, disability or other characteristics.

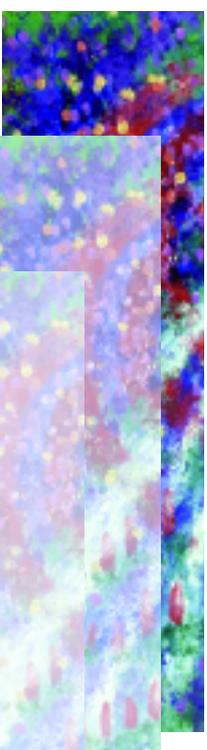
Asking female candidates at an interview about specific skills which have traditionally been associated with women but not asking the same question of male candidates could constitute direct discrimination. It is not the questions per se which are discriminatory but the fact that they are asked of women and not of men.

In *Dublin Corporation v. McCarthy (DEE986)* the claimant who was applying for promotion in the Law Department of Dublin Corporation was asked whether or not she had done typing in a previous position as law clerk in a private solicitor’s practice. Not one of the male candidates was asked about his typing skills. Whilst the employer attempted to justify the question as being relevant to the claimant’s computer skills, it was found to be discriminatory on grounds of gender.

There may however be legitimate reasons for asking a candidate questions that have not been asked of other applicants in order to determine their suitability for the job.

For example; asking candidates whose first language is not English certain questions to ascertain their ability to deal with technical language or jargon which is an essential component of the job.

Care should be taken to avoid ‘throw-away’ comments which could be construed as discriminatory.



In the United Kingdom in the case of *O'Driscoll v The Post Office* the Irish applicant was asked 'Do you have a problem with the drink over here?' The question was found to give an impression of racial stereotyping, i.e. the common stereotype of the 'drunken Irish', and the applicant was awarded compensation for injury to feelings¹.

It should be borne in mind that in order to prove that discrimination has occurred during the interview process, an applicant does not have to prove that s/he would have been successful in obtaining the job but for the fact that she/he had been asked the discriminatory question. Many complaints of discrimination have been upheld and compensation awarded as a result of the distress and injury suffered by reason of discriminatory questions asked or comments made by the interview board even though the claimant was not the best candidate for the job.

PRE-EMPLOYMENT MEDICALS

Medical assessments are often a feature of the selection process. The purpose of the pre-employment medical is to assess the capability of the person to perform the full range of duties of the job and not 'fitness' in general. The Occupational Health Department or medical practitioner engaged to carry out the medical should be given a copy of the job description and details of the working conditions. The assessment process may reveal medical conditions which do not necessarily have any implications for the capability of the person to carry out the job. Where the person has an impairment or disability which may impact on his/her ability to do the job, the onus is on the employer to make "reasonable accommodation" to facilitate that person. The employee must be able to render regular and efficient service and discharge the duties of the job albeit with 'reasonable accommodation' provided by the employer.

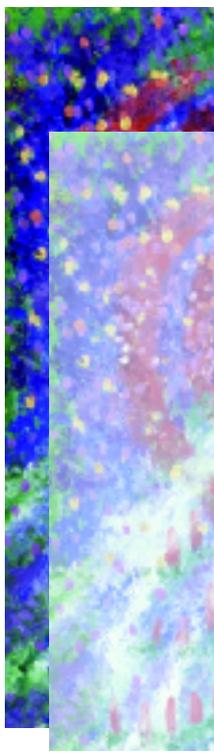
RECORDS

Application forms, interview notes, marking sheets and any other documentation pertaining to the competition should be kept on file for at least 3 years. The practice of shredding interview notes and only retaining details of candidates' overall marks can suggest a lack of transparency in the interview process. Equality Officers and the Labour Court may draw inferences from the fact that the original interview notes are not available and conclude that it was more likely that the alleged discriminatory questions were asked.

MONITORING THE SELECTION PROCESS

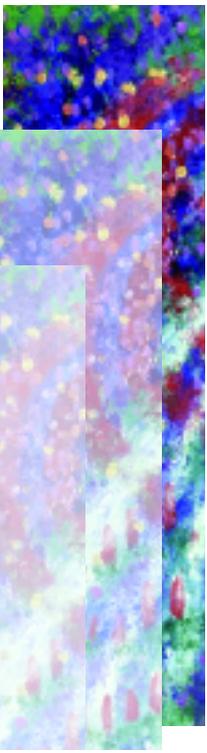
It is useful to develop mechanisms to assess the experience of candidates from within each of the nine grounds who participate in the selection process. Applying such mechanisms will test the accessibility of the interview process and the ability of the organisation to draw from the wider pool of candidates. It will also identify any barriers which may have inadvertently arisen.

¹ Cited in Meenan, Frances (1999) *Working Within the Law - A Practical Guide for Employers and Employees*; Oak Tree Press, Dublin 2, pg 23-24



KEY POINTS

- Be clear what the job entails and what the key duties are
- Identify the essential qualifications and skills
- Make sure that the advertisement is widely circulated and does not deter applicants from any of the nine groups
- Ask applicants for information which will tell you they can do the job
- Do not ask questions unrelated to the job
- Assess applicants on their merits
- Do not make assumptions about whether a person will 'fit in'
- Where a person has a disability establish whether or not special facilities can be provided to enable them to discharge the duties of the job
- Keep records for at least 3 years



CHAPTER 5

CONDITIONS OF EMPLOYMENT

The legislation prohibits discrimination on any of the nine grounds against an employee or prospective employee in relation to terms and conditions of employment. This means that all employees must be offered:

- the same terms of employment (including annual leave, dress code, hours of work, etc.),
- the same working conditions (duties, assignments, tasks, etc.), and
- the same treatment in relation to overtime, shift work, short time, transfer, lay-offs, redundancies, dismissal and disciplinary measures.

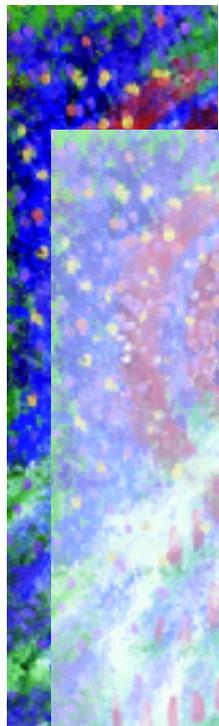
Examples of discrimination include:

- Overtime or shift work being offered in the first instance to male employees on the traditional assumption that they have greater financial liabilities.
- On-call not being offered to married women on the presumption that they are in a lesser position than their male colleagues to avail of this work.
- An unequal distribution of all tasks relating to the job - i.e. the younger staff being asked to carry out a lot of the more onerous tasks.
- Non-nationals being first in line for redundancy.
- Choice of Christmas leave being offered to married staff before single employees.
- Granting persons of a particular religion / denomination time off to attend religious services, while not allowing those employees of another religion the same benefit.

ACCOMMODATING SPECIAL NEEDS

Induction can be the ideal process for identifying measures which could be taken to accommodate any special needs arising from a person's disability, race, family status or any other characteristic covered by the nine grounds.

It can be used as an opportunity to discuss with new employees any special needs which they may have and to explore how these needs may be accommodated. The employees themselves may be able to suggest appropriate adjustments - such adjustments are usually straightforward and inexpensive to implement.



For example:

- Access to a private place to take medication
- Providing flexible attendance arrangements
- Rostering a person off on his/her birthday or other day of particular cultural or religious significance
- Providing different dietary options in the staff canteen
- Allocating accessible car parking spaces for disabled drivers

Employees recruited from abroad may also have special needs arising from cultural differences. For example they may be accustomed to different methods of working or may have linguistic difficulties.

PREPARING EXISTING STAFF

It is useful to create an awareness amongst existing staff of their role in helping the new employee to settle into the job and feel part of the team. Staff may also have to be informed about any relevant issues relating to a person's disability, race or other characteristics so that they are sensitive to their needs and misunderstandings are avoided.

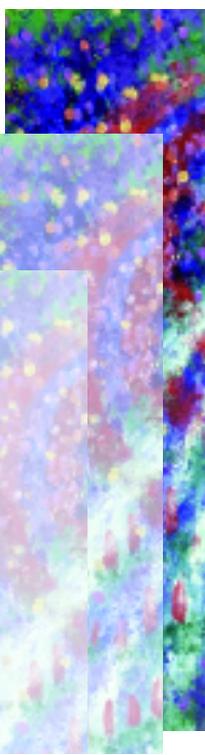
For example, when recruiting a person with a disability it may be appropriate to brief staff on issues such as 'disability awareness' e.g.

- If the new employee has a speech impairment, staff should be patient and attentive while the person is speaking and resist the temptation to finish his or her sentences
- If the new employee is a wheelchair user, staff should be aware of not leaning on the person's wheelchair as this would be considered an invasion of body space

When employing staff from abroad it may be appropriate to promote greater cultural awareness amongst existing staff to overcome any misconceptions they may have in relation to the cultural differences and to anticipate any potential difficulties that may arise in the workplace.

FLEXIBLE / PART-TIME WORKING

Flexible/part-time working arrangements should be made available to existing and prospective employees where practicable in order to accommodate persons who cannot work full-time. It is well established that a significantly higher proportion of women than men are unable to comply with a requirement to work full-time due to child-rearing responsibilities. A blanket policy of excluding certain categories or grades from flexible/part-time working could be found to indirectly discriminate against women. This does not mean however that employees have an unconditional right to work reduced hours. Requests for flexible/part-time working should be assessed in light of service requirements. While every effort should be made to facilitate the request, it may not always be possible due to service needs.



In the case, *The Minister for Justice, Equity and Law Reform and Others v Hand (DEE 5/1998)*, the employer refused to accede to a job-sharing request and defended this action on the basis that while it facilitated job-sharing in so far as possible, the particular post occupied by the claimant was not suitable for such an arrangement. The employer was able to demonstrate that it had seriously endeavoured to facilitate the request in that the claimant was offered the opportunity of job-sharing in another post, but the proposal was not accepted. The Labour Court concluded that the employer did not discriminate as it had objective reasons, i.e. the nature of the particular post, for not granting the request.

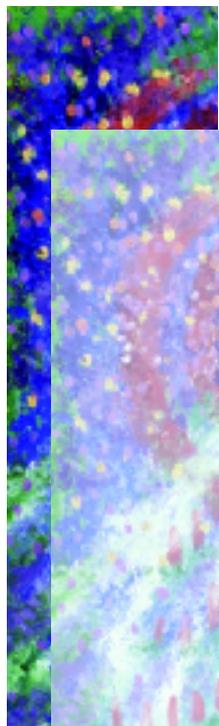
GRIEVANCE PROCEDURE

An employee who feels that s/he is being unfairly treated in relation to any aspect of his or her conditions of employment should be aware that the matter can be referred under the organisation's grievance procedure. While the grievance procedure should always be operated with due sensitivity, it is particularly important in the context of diversity that the supervisor/manager to whom the complaint is initially referred should not trivialise the complaint or compound the grievance. When responding to the complaint the manager must avoid judgemental comments that refer to the particular characteristic and could be construed as discriminatory, for example:

- 'I'm surprised that a young one like you finds that type of work difficult'
- 'It's typical of a woman to complain about having to work overtime'
- 'Do you not think that we have made enough allowances for you people in wheelchairs?'
- 'You have so many complaints why don't you go back to your own country'

KEY POINTS

- Do not discriminate in relation to terms and conditions of employment
- Requests for flexible working hours / atypical attendance regimes should be accommodated where practicable
- Employees should be informed of the grievance procedure



DISCRIMINATORY DISMISSAL

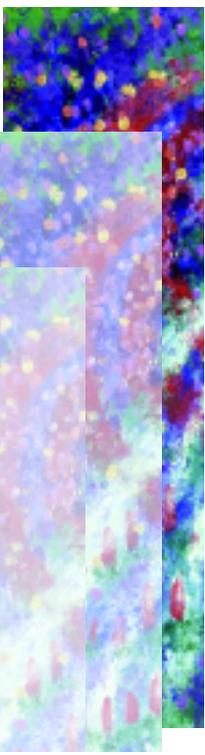
Discriminatory dismissal under the Employment Equality Act is different to unfair dismissal under the Unfair Dismissals Acts. In cases of unfair dismissal, the employer must be able to demonstrate that there were substantial grounds justifying the dismissal (e.g. poor attendance, unsatisfactory work performance) and that fair procedures were adhered to (i.e. the employer acted in accordance with the organisation's disciplinary procedure and due process was observed at all stages). The focus in a case of discriminatory dismissal is on whether membership of one of the nine categories covered by the Act was a significant contributory factor in the decision to terminate the person's employment. The employer must be able to demonstrate substantial reasons other than one of the discriminatory grounds in order to defend a claim of discriminatory dismissal e.g. persistent poor time-keeping as evidenced by the employee's attendance record.

In *A Firm of Solicitors v A Worker* (EED011) a female worker alleged that she was dismissed on grounds of age as the employer recruited a younger person in her place. The Labour Court concluded that the employer had decided to recruit a young person who could be trained to provide quasi-legal services together with secretarial services. The claimant was never considered for the post despite the fact that she had experience both as a legal secretary and in undertaking quasi legal functions. The claimant had written to a senior partner of the firm alleging that he had said to her that it was the firm's intention to train a young person to do her job and in his written response the senior partner did not contradict her claim. This led the Court to conclude that the claimant had been dismissed on grounds of age.

It is important to note that employees do not require 12 months' continuous service to bring a claim for discriminatory dismissal. This means that a person who is employed on a short-term temporary contract or whose employment is terminated during or at the end of his or her probationary period may take a case to the Labour Court under the Employment Equality Act.

In the case of *A Computer Component Company v A Worker* (EED013) an employee who had been working as a packer in a temporary capacity and was due to be made permanent was denied permanency on the basis that she suffered with epilepsy. The claimant's condition was well controlled by medication and she had not experienced a seizure in over two years. The Company contended that it was company policy that employees should be competent to undertake all tasks associated with the production function in which they are employed, which in the claimant's case would involve the operation of machinery. The Company believed that this working environment posed a danger to a person with epilepsy.

The Labour Court found that heavy machinery was used in only a minor part of the production system and that arrangements could have been put in place whereby she



would not be required to use this machinery. The respondent did not consider undertaking any form of safety assessment to identify the extent, if any, to which the working environment presented a danger to the complainant. Furthermore, the respondents did not discuss its concerns with the complainant. The Court thus found that the claimant was dismissed by reason of her disability and was awarded £15,000 in compensation.

While the focus in a discriminatory dismissal claim is on whether the decision to dismiss was motivated by the person's age, race, sexual orientation or other characteristics, it is nonetheless important to have followed fair procedures, i.e. the employee should have been given details of the specific complaints, allowed to explain his or her performance difficulties and afforded a reasonable opportunity to improve. While the procedural requirement is less onerous, failure to follow fair procedures may undermine the credibility of the employer's case. Vague complaints such as the following are not sufficient to counteract allegations of discrimination:

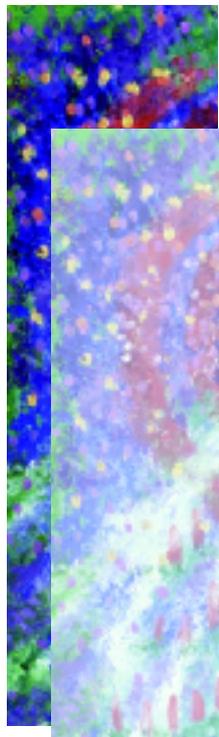
- 'His personality was not suited to our hospital'
- 'He never really fitted in'
- 'She always had an attitude problem'
- 'He had difficulty in making himself understood'

It may transpire that the employee's poor performance or attendance record may relate to one of the nine grounds e.g. problems due to family responsibilities may be affecting the employee's work. In such cases the manager should explore ways to accommodate the person.

For example, for an individual experiencing difficulty coping with eldercare responsibilities it may be appropriate to consider reducing working hours or adjusting starting and finishing times for a period.

KEY POINTS

- Decisions to terminate employment should not be motivated by one of the nine grounds.
- In cases of poor performance or conduct spell out the precise nature of the complaint to the employee.
- Provide the employee with appropriate training and support.
- Keep records of meetings.



CHAPTER 6

SEXUAL HARASSMENT AND HARASSMENT

Sexual harassment is a form of discrimination on the gender ground as defined by the Employment Equality Act 1998 in relation to conditions of employment and is defined as: *Any act of physical intimacy, request for sexual favours, other act or conduct including spoken words, gestures or the production, display or circulation of written words, pictures or other material that is unwelcome and could reasonably be regarded as sexually offensive, humiliating or intimidating.*

This would include inappropriate touching, lewd comments, sexual innuendoes, display of offensive posters or articles, and offensive e-mails or text messages.

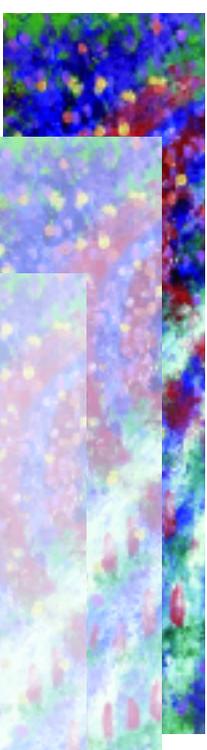
Harassment is similar to the definition of sexual harassment but without the sexual element. The harassment has to be based on the relevant characteristics of the employee such as the employee's marital status, family status, sexual orientation, religious belief (or none), age, disability, race, colour, nationality or ethnic or national origin or membership of the Traveller community.

Harassment is defined as:

Any act or conduct including spoken words, gestures or the production, display or circulation of written words, pictures or other material if the action or conduct is unwelcome to the employee and could reasonably be regarded as offensive, humiliating or intimidating.

This can take many forms such as: mimicking accents, making derogatory comments which allude to the particular characteristic e.g. 'the auld one', using offensive nicknames, displaying offensive posters or articles, and sending offensive e-mails or text messages.

The Act provides that an employer may be held liable for any sexual harassment and harassment perpetrated by employees regardless of whether or not the acts were done with the employer's knowledge or approval. For an employer to be held liable for acts of harassment or sexual harassment, it has to be established that the harassers were acting **in the course of employment**. The harassment does not need to take place in the physical environment of the workplace or during normal working hours for the employer to be liable. For example, liability would arise if the harassment occurred at a work-related event such as a staff Christmas Party or training course held in a hotel. The employer therefore has a duty to investigate complaints of harassment arising from incidents at work-related events. Liability would not arise where the harassment took place in a situation completely unrelated to the workplace, e.g. where a group of employees decide themselves to go to the pub after work.



An employer will not be held liable for harassment where it can prove it took such steps as were reasonably practicable to prevent the harassment occurring. The employer must have a policy in place for preventing harassment which includes an effective complaints procedure. An employer will not discharge this duty simply by showing that there is a Dignity at Work policy in place. It must also be able to demonstrate that all employees were made aware of the policy, for example, through briefing sessions or at induction, and understand how to utilise the complaints procedure. The employer must also investigate complaints of harassment without delay and take appropriate action where harassment is found to have occurred.

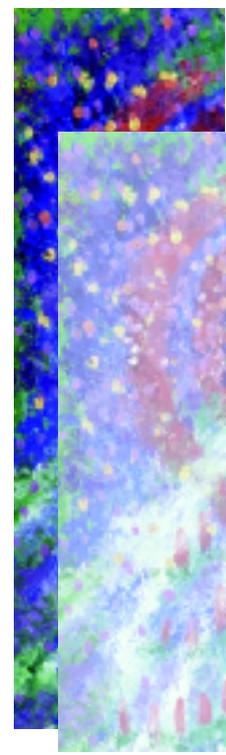
Managers have a key role to play in combating all forms of harassment in the workplace. It is important for managers to distinguish between acceptable workplace banter and harassment. If the manager suspects that employees' behaviour oversteps what may be considered normal workplace interaction and could cause offence, s/he should make the employees concerned aware that such behaviour may cause upset to the person concerned. Managers are obliged to intervene where they observe clearly inappropriate behaviour. This will also help to create a climate in the workplace where staff are willing to speak out against behaviour which they consider to be inappropriate and possibly discriminatory.

Managers and supervisors should treat complaints of sexual harassment and harassment with sensitivity and not attempt to trivialise the issue, e.g. by suggesting the behaviour was just harmless fun or that there was no malice intended. Managers should take the complaint seriously, avoid being judgmental and try to resolve the matter informally where possible.

Managers should also ensure that their own behaviour towards staff does not unintentionally discriminate against staff.

For example:

- They should avoid referring to a person's characteristic, such as race or ethnic background, in a non-complementary manner or in a way which may be construed as non-complementary.
- They should ensure that they are not unduly impatient with staff who may have linguistic difficulties.
- They should not presume that persons with a particular characteristic are less able to carry out particular tasks, for example, do not presume that older persons cannot adapt to new technology.

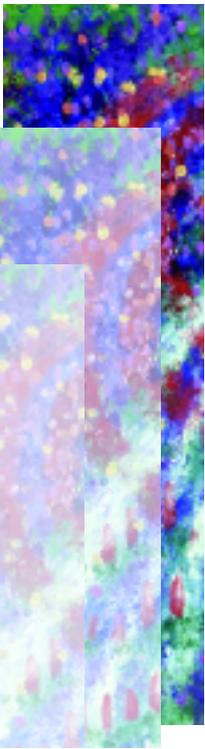


HARASSMENT BY NON-EMPLOYEES

The Act provides that an employer may be liable where an employee is subjected to sexual harassment or harassment by a 'client, customer or other business contact'. This provision covers persons with whom the employee would normally come into contact in the course of his or her work e.g. persons visiting patients/clients, sales representatives, suppliers etc. If an employee makes a complaint of sexual harassment or harassment concerning a non-employee, the relevant manager should establish the facts and take appropriate action to prevent any recurrence, e.g. speak to the person concerned or report the incident to the person's employer.

KEY POINTS

- An employer may be liable for sexual harassment or harassment perpetrated by employees in the course of their employment, both on or off the work premises.
- The organisation's Dignity at Work Policy must be communicated to all staff.
- Managers have a key role in eliminating unacceptable behaviour and resolving complaints informally.



CHAPTER 7

TRAINING, WORK EXPERIENCE & PROMOTION

All employees should be afforded the same opportunities to develop full and rewarding careers in the health service. They should therefore be provided with equality of opportunity to acquire the range of training, skills and experience necessary for their career development.

Discrimination is prohibited in relation to training or work experience. The employer should provide the same opportunities or facilities for employment counselling, training (whether on or off the job) and work experience equally to all employees.

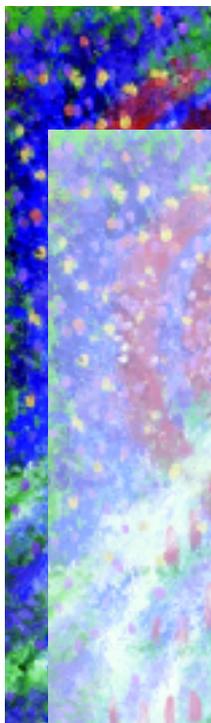
For example:

- Providing fewer training opportunities for people over a certain age, such as 50 years, on the basis that they are less likely to benefit from such training than younger workers could be found to discriminate on grounds of age.
- Not permitting an employee to participate on a training course because he/she had recently been absent on parental leave could be found to discriminate on grounds of family status.
- Rejecting an application from a non-national employee to undertake an approved part-time course based on the assumption that non-nationals are less likely to stay with the organisation could be found to discriminate on grounds of race.

Managers should monitor training, experience and development opportunities offered to employees to ensure that these are offered equally. If there is variation between the opportunities available to the different groups of employees, managers should encourage those from less represented groups to participate in training courses or must establish the reasons for this variation in participation.

Employees who have recently joined the paid and formal workforce for the first time such as people with disabilities or members of the Traveller community and those who have re-entered after an absence, for example, older people or women with children should be encouraged to take up training opportunities.

The timing and location of training can raise issues for different groups including working parents with child minding responsibilities. For example if the timing and location of training is different from the regular working hours and location of the employees concerned, this can pose problems of accessibility. Training opportunities should be available equally to full-time and part-time staff. The accessibility requirements of employees with disabilities must also be accommodated.



PROMOTION

All categories of staff should be encouraged to prepare, plan and consider themselves for promotion and to gain experience in other departments. An employer may be found to discriminate against an employee in relation to promotion if, because of any of the nine grounds:

- the employer refuses to promote an employee,
- deliberately omits to offer or provide the employee the same right to compete for promotion,
- the employer treats the employee unfairly at any stage of the promotion process itself.

Promotional opportunities can be enhanced by offering a broad range of experience in a variety of sections or job postings within the organisation. All employees should be made aware of, encouraged and facilitated to maximise their experience in the range of activities within their employment.

The stages within the promotional process are similar to those in the recruitment and selection process and the same pitfalls are to be avoided, such as making assumptions about a person's suitability because of gender, race, age or other characteristics.

For example:

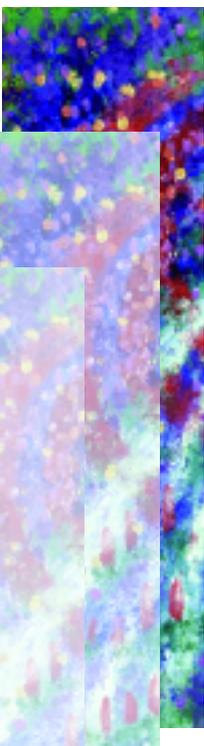
- 'They are a tough bunch of staff in that unit - a man would be better able to manage them than a woman'
- 'We need someone who has a great deal of experience working in this jurisdiction'
- 'We don't think a person that young could possibly be mature enough to take on management responsibilities'

The same principles also apply to internal competitions for filling acting-up positions.

MAINTAINING RECORDS

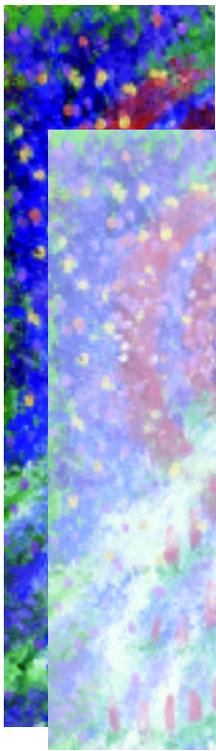
There are valid reasons for keeping a good record of applicants who put themselves forward for promotion and tracking their progress through the promotional process:

- Employers can spot categories of staff who are under represented in the promotions process over time
- Employers will have reliable data to hand if there is a complaint of discrimination in relation to the promotion process



Key Points

- Provide all employees with the same opportunities for training / work experience
- Do not make assumptions about the capability, aspirations or commitment of employees
- Be flexible regarding the timing / location of training where possible
- Encourage all staff to prepare, plan and consider themselves for promotion



CHAPTER 8

DISABILITY

DEFINITION OF DISABILITY

The Employment Equality Act, 1998 defines disability as:

- *“the total or partial absence of mental or bodily functions, including the absence of a part of a 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 part of a 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 judgment or which results in disturbed behaviour.*

It includes 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.”

EMPLOYMENT OF PERSONS WITH DISABILITIES²

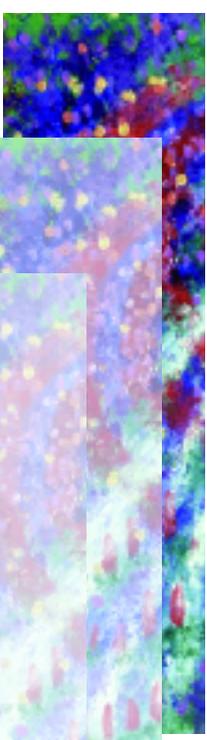
The Act imposes obligations on an employer with regard to the employment of people with disabilities.

- (a) A person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such a person would be fully competent to undertake, and be fully capable of undertaking, those duties.*
- (b) An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to which paragraph (a) relates.*
- (c) A refusal or failure to provide for special treatment or facilities to which paragraph (a) relates shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer.*

The Act obliges an employer to do all that is reasonably practicable to accommodate the needs of a person who has a disability by *“providing whatever special treatment or facilities which are deemed necessary to enable him/her to undertake the job”*. Experience has shown that most persons with a disability require very little, if any, special assistance.

In some cases an employer might have to make adjustments to premises: equipment;

² The HSEA has produced ‘Guidelines on the Development of a Code of Practice for the Employment of People with Disabilities in the Health Service’ which are available on www.hsea.ie



For example:

- Widening a doorway, providing a ramp or moving furniture for a wheelchair user
- Relocating light switches, door handles or shelves for someone who has difficulty in reaching
- Providing an adapted keyboard or telephone
- Allocating accessible car parking spaces

Some persons may need some minor adjustment to working arrangements such as:

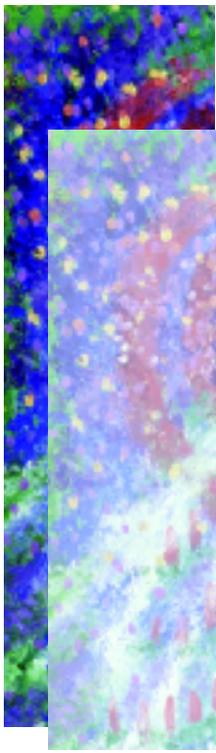
- Allowing absences during working hours for rehabilitation, assessment or treatment
- Making changes to working hours
- Making reasonable adjustments to the duties of the job
- Providing a reader or interpreter

Adjustments should be reasonable and should not give rise to more than a 'nominal cost'. What is considered a 'reasonable adjustment' is not defined in the Act but may be determined by factors such as:

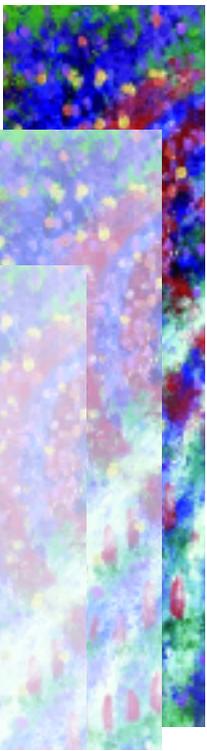
- The financial cost of the adjustment
- The employer's resources
- How easy the change is to make

The Act does not oblige an employer to recruit, retain, train or promote an individual who will not or is unavailable to carry out the duties of a position, or who will not accept the conditions under which the duties attached to a post are to be performed, or who is not fully competent to carry out the duties concerned. The Act stipulates that a person with a disability is to be considered fully competent and capable to undertake the duties attached to a job, if the person could do the duties with the assistance of special treatment and facilities. *The provision of special treatment or facilities must result in the person being fully competent and capable of performing the duties attached to the job, otherwise there is no obligation to recruit or retain the person in employment.*

In **An Employee v A Local Authority** (DEC-E 2002/004), the Equality Officer found that the employer discriminated against the complainant when it failed to provide him with appropriate special treatment and facilities (reasonable accommodation) during his employment as a clerical officer. It was submitted by the claimant's representative that the employer failed to examine the options available to it in respect of special treatment or facilities which it could have provided and that it effectively dismissed the assistance which was available to it from FÁS. This included the provision of a professional Job Coach and the use of the Employment Support Scheme.



In reaching her decision the Equality Officer took account of the findings of an independent vocational assessment carried out by a Senior Occupational Therapist which indicated that the complainant possessed the basic capacity to undertake the duties attached to the post of Clerical Officer. She stated that had a professional Job Coach been engaged to assist the complainant, he would have been able to carry out these duties in a capable competent manner.



CHAPTER 9

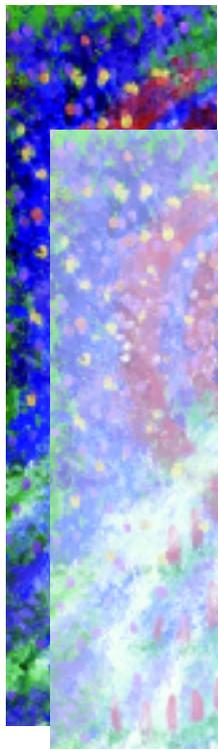
REDRESS

OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS (ODEI -EQUALITY TRIBUNAL)

Any person who believes that s/he has experienced discrimination which is contrary to the Employment Equality Act 1998 may seek redress by referring a complaint to the Office of the Director of Equality Investigations for investigation by an Equality Officer or for mediation by a Mediation Officer.

MEDIATION

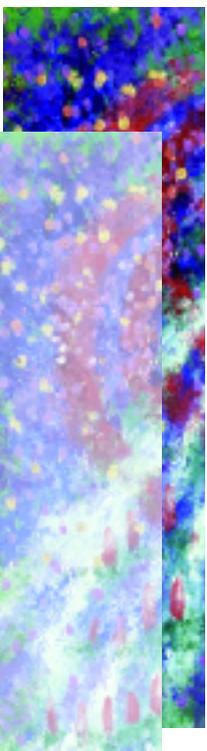
The Act provides for mediation as an alternative method for resolving complaints of discrimination. The Mediation Officer acts as an independent facilitator by seeking to arrive at a solution through agreement between the parties. Mediation is conducted in private and settlements are not published. Agreements reached by mediation are legally binding on both parties. However either party can withdraw from the mediation process at any stage or the Mediation Officer may decide that the issue will not be resolved by mediation. In such cases the complaint may be relodged with the Office of the Director of Equality Investigations for investigation by an Equality Officer.



EXEMPTIONS

The Employment Equality Act, 1998 contains a number of exemptions:

- The employer does not have to recruit, retain or promote an individual, if that person is unwilling, unsuitable or unable to perform the duties attached to that position.
- An employer may set a maximum age for recruitment which takes into account the cost or period of time involved in training for the job and the need for a reasonable period prior to retirement age during which the employee will be effective in the job.
- If the employer is aware of a criminal conviction relating to unlawful sexual behaviour against a person or other reliable information that the individual engages or may engage in any form of sexual behaviour which is unlawful, there is no obligation to recruit or retain that person. This provision is particularly relevant in areas where the employee or potential employee would have access to minors or to other clients who are vulnerable.
- It is not unlawful for an employer to confine a post to a man or woman where sex is a genuine occupational qualification. This would include where the job involves personal services and it is necessary to have persons of both sexes engaged in such duties (e.g. caring for elderly or incapacitated people in their homes).
- It is not unlawful to arrange for or provide special beneficial treatment for women in connection with pregnancy and maternity (including breastfeeding) or adoption. This exclusion means that special benefits conferred on women under maternity leave and adoptive leave schemes do not discriminate against male employees.
- Requirements as to residency, citizenship and proficiency in the Irish language for public service employment.
- Requirements as to educational qualifications which are generally accepted for particular jobs.
- Posts where the presence or absence of a particular characteristic related to discriminatory grounds is an occupational qualification.
- Discrimination by religious, educational and medical institutions run by religious bodies, or by bodies whose objectives include the provision of services in an environment which promoted certain religious values, where it gives more favourable treatment on the religion ground in order to maintain the religious ethos of the institution or it takes action to prevent an employee or prospective employee from undermining the religious ethos of the institution.



SPECIAL BENEFITS

Certain benefits made available by an employer to family members or based on family events are excluded from the scope of this Act. For example, it is permitted to grant extra annual leave during the year of an employee's marriage and time off to attend funerals of family members.

POSITIVE ACTION (GENDER)

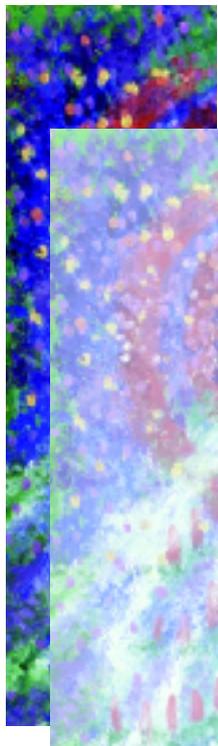
Residual effects of past discrimination continue to contribute to low levels of representation of women in the upper echelons of management. The objective of the positive action provision of the legislation is to redress this imbalance. While the legislation does not permit quotas, it does permit the setting of targets and measures which may assist in the achievement of these targets. Such measures would include targeting of women for promotion, mentoring, coaching, training and any other supports that might encourage or assist women in achieving higher level positions.

POSITIVE ACTION

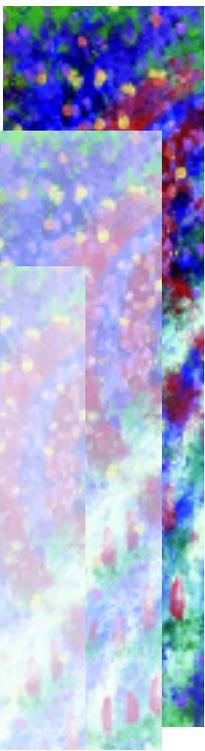
The Act also allows positive action specifically geared towards the integration into employment of:

- People over the age of 50
- People with disabilities
- Members of the Traveller community

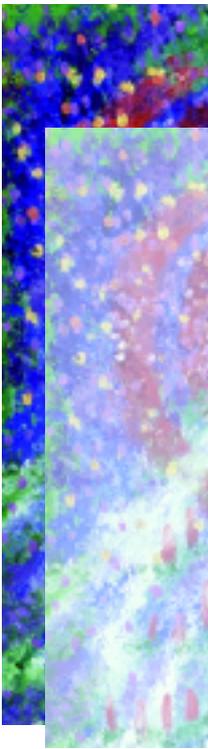
The employer may take all necessary steps to specifically attract persons from these three categories into their employment and to accommodate any special requirements which they may have in order to accommodate their integration into the workplace. For example the employer may grant extended rest periods to disabled employees; provide extra information technology training to those employees over 50, or give additional induction to members of the Traveller community.



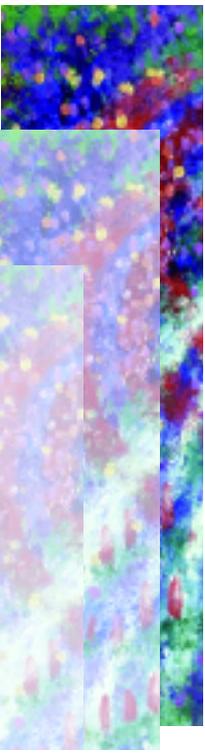
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Dublin 2

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email: info@hsea.ie
website: www.hsea.ie